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34 CFR Parts 674, 682 and 685

Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 674, 682 and 685

[Docket ID ED–2007–OPE–0133]

RIN 1840–AC89

Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Federal Perkins Loan (Perkins Loan) Program, Federal Family Education Loan (FFEL) Program, and William D. Ford Federal Direct Loan (Direct Loan) Program regulations. The Secretary is amending these regulations to strengthen and improve the administration of the loan programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA).

DATES: *Effective Date:* These regulations are effective July 1, 2008.

Implementation Date: The Secretary has determined, in accordance with section 482(c)(2)(A) of the HEA (20 U.S.C. 1089(c)(2)(A)), that institutions, lenders, guaranty agencies, and loan servicers that administer Title IV, HEA programs may, at their discretion, choose to implement §§ 674.38, 674.45, 674.61, 682.202, 682.208, 682.210, 682.211, 682.401, 682.603, 682.604, 685.204, 685.212, 685.301, and 685.304 of these final regulations on or after November 1, 2007. For further information, see the section entitled Implementation Date of These Regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble.

FOR FURTHER INFORMATION CONTACT: For information related to Simplification of the Deferment Process, Loan Counseling for Graduate or Professional Student PLUS Loan Borrowers, Mandatory Assignment of Defaulted Perkins Loans, Reasonable Collection Costs, and Child or Family Service Cancellation, Brian Smith. Telephone: (202) 502–7551 or via Internet: *brian.smith@ed.gov.*

For information related to Accurate and Complete Copy of a Death Certificate, NSLDS Reporting Requirements, Maximum Loan Period, and Frequency of Capitalization, Nikki Harris. Telephone: (202) 219–7050 or via Internet: *nikki.harris@ed.gov.*

For information related to Total and Permanent Disability, Certification of Electronic Signatures on Master Promissory Notes (MPNs) Assigned to the Department, Record Retention Requirements on MPNs Assigned to the Department, Eligible Lender Trustees, and Loan Discharge for False Certification as a Result of Identity Theft, Gail McLarnon. Telephone: (202) 219–7048 or via Internet: *gail.mclarnon@ed.gov.*

For information related to Prohibited Inducements and Preferred Lender Lists, Pamela Moran. Telephone: (202) 502–7732 or via Internet: *pamela.moran@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

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SUPPLEMENTARY INFORMATION: On June 12, 2007, the Secretary published a notice of proposed rulemaking (NPRM) for the Perkins Loan, FFEL and Direct Loan Programs in the **Federal Register** (72 FR 32410).

In the preamble to the NPRM, the Secretary discussed on pages 32411 through 32427 the major changes proposed in that document to strengthen and improve the administration of the loan programs authorized under Title IV of the HEA. These include the following:

- Amending §§ 674.38, 682.210, and 685.204 to allow institutions that participate in the Perkins Loan Program, FFEL lenders, and the Secretary to grant a deferment under certain circumstances to a borrower if another FFEL lender or the Department has granted the borrower a deferment for the same reason and time period.
- Amending §§ 674.38, 682.210, and 685.204 to allow a Perkins, FFEL or Direct Loan borrower's representative to apply for an armed forces or military service deferment on behalf of the borrower.
- Amending §§ 674.61, 682.402, and 685.212 to allow the use of an accurate and complete photocopy of an original or certified copy of the death certificate, in addition to the original or a certified copy of the death certificate, to support the discharge of a Title IV loan due to death.
- Amending §§ 674.61, 682.402, and 685.213 to restructure the regulations governing the discharge of a Perkins, FFEL or Direct Loan based on the borrower's total and permanent disability to clarify and provide additional explanation of the eligibility requirements.
- Amending §§ 674.61, 682.402, and 685.213 to provide for a prospective conditional discharge period to establish eligibility for a total and permanent disability discharge that is up to three years in length and begins on the date that the Secretary makes the initial determination that the borrower is totally and permanently disabled.
- Amending §§ 674.16, 682.208, and 682.414 to require institutions, lenders, and guaranty agencies to report enrollment and loan status information, or any other Title IV-related data required by the Secretary, to the Secretary by the deadline established by the Secretary.
- Amending §§ 674.19, 674.50, and 682.414 to require an institution or lender to maintain the original electronic promissory note, plus a certification and other supporting information, regarding the creation and maintenance of any electronically-signed Perkins Loan or FFEL promissory note or Master Promissory Note (MPN) and provide this certification to the Department, upon request, should it be needed to enforce an assigned loan. Institutions and lenders are required to maintain the electronic promissory note and supporting documentation for at least three years after all loan obligations evidenced by the note are satisfied.
- Amending §§ 674.19 and 674.50 to require an institution that participates in the Perkins Loan Program to retain records showing the date and amount of each disbursement of each loan made under an MPN for at least three years from the date the loan is canceled, repaid or otherwise satisfied and require the institution to submit disbursement records on an assigned Perkins Loan, upon request, should the Secretary need the records to enforce the loan.
- Amending § 682.409 to require a guaranty agency to submit the record of the lender's disbursement of loan funds to the school for delivery to the borrower when assigning a FFEL loan to the Department
- Amending §§ 682.604 and 685.304 to require entrance counseling for graduate or professional student PLUS Loan borrowers and modify the exit counseling requirements for Stafford Loan borrowers who have also received PLUS Loans.
- Amending §§ 682.401, 682.603, and 685.301 to eliminate the maximum 12-month loan period for annual loan limits in the FFEL and Direct Loan programs.
- Amending §§ 674.8 to permit the Secretary to require assignment of a Perkins Loan if the outstanding principal balance on the loan is $100 or more, the loan has been in default for seven or more years, and a payment has

not been received on the loan in the preceding 12 months, unless payments were not due because the loan was in a period of authorized forbearance or deferment.

• Amending § 674.45 to limit the amount of collection costs a school may assess against a Perkins Loan borrower to 30 percent for first collection efforts; 40 percent for second collection efforts; and, in cases of litigation, 40 percent plus court costs.

• Amending § 674.56 to clarify the eligibility requirements for a Perkins Loan borrower to qualify for a child or family service cancellation.

• Amending §§ 682.200 and 682.401 to incorporate into the regulations specific rules for lenders and guaranty agencies on prohibited inducements and activities and permissible activities in accordance with the recommendations of the Department's Task Force on these issues.

• Amending §§ 682.200 and 682.602 to reflect the provisions of The Third Higher Education Extension Act of 2006, Public Law 109–202, that prohibit a FFEL lender from entering into a new eligible lender trustee (ELT) relationship with a school or a school-affiliated organization as of September 30, 2006, but allowing such relationships in existence prior to that date to continue with certain restrictions.

• Amending § 682.202 to provide that a lender may only capitalize unpaid interest on a Federal Consolidation Loan that accrues during an in-school deferment at the expiration of the deferment.

• Amending §§ 682.208, 682.211, 682.300, 682.302, and 682.411 regarding loan discharge for false certification as a result of identity theft.

• Amending §§ 682.212 and 682.401 to specify requirements that a school must meet if it chooses to provide a list of recommended or preferred FFEL lenders for use by the school's students and their parents, and prohibit the use of a preferred lender list to deny a borrower the right to use a FFEL lender not included on a school's list.

In addition to the changes that strengthen and improve the administration of the loan programs authorized under HEA, these final regulations also incorporate certain statutory changes made to the HEA by the College Cost Reduction and Access Act (CCRAA) (Pub. L. 110–84). These changes are:

• Amending §§ 674.34, 682.210, and 685.204 to extend the military deferment to all Title IV borrowers regardless of when their loans were made, eliminate the 3-year limit on the military deferment and add a 180-day period of deferment following the borrower's demobilization as of October 1, 2007.

• Amending §§ 674.34, 682.210, and 685.204 to authorize a 13-month deferment following conclusion of their military service for certain members of the Armed Forces who were enrolled in a program of instruction at an eligible institution at the time, or within 6 months prior to the time the borrower was called to active duty as of October 1, 2007.

• Amending §§ 674.34 and 682.210 to revise the definition of economic hardship to allow a borrower to earn 150 percent of the poverty line applicable to the borrower's family size as of October 1, 2007.

• Amending §§ 682.202 and 685.202 to reduce interest rates on subsidized Stafford loans made to undergraduate students as of July 1, 2008.

• Amending § 682.302 to reduce special allowance payments for loans first disbursed on or after October 1, 2007 and establish different rates for eligible not-for-profit lenders and other lenders.

• Amending § 682.305 to increase the loan fee a lender must pay to the Secretary from 0.50 to 1.0 percent of the principal amount of the loan for loans first disbursed on or after October 1, 2007.

• Amending § 682.404 to reduce the percentage of collections that a guaranty agency may retain from 23 to 16 percent and to decrease account maintenance fees paid to guaranty agencies from 0.10 to 0.06 percent as of October 1, 2007.

• Removing § 682.415 to eliminate the ''exceptional performer'' status as of October 1, 2007.

Because these amendments implement changes to the HEA made by the CCRAA, we do not discuss them in the *Analysis of Comments and Changes* section.

Waiver of Proposed Rulemaking—Regulations Implementing the CCRAA

Under the Administrative Procedure Act (5 U.S.C. 553), the Department is generally required to publish a notice of proposed rulemaking and provide the public with an opportunity to comment on proposed regulations prior to issuing final regulations. In addition, all Department regulations for programs authorized under Title IV of the HEA are subject to the negotiated rulemaking requirements of section 492 of the HEA. However, both the APA and HEA provide for exemptions from these rulemaking requirements. The APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency for good cause finds that notice and comment are impracticable, unnecessary or contrary to the public interest. Similarly, section 492 of the HEA provides that the Secretary is not required to conduct negotiated rulemaking for Title IV, HEA program regulations if the Secretary determines that applying that requirement is impracticable, unnecessary or contrary to the public interest within the meaning of the HEA.

Although the regulations implementing CCRAA are subject to the APA's notice-and-comment and the HEA's negotiated rulemaking requirements, the Secretary has determined that it is unnecessary to conduct negotiated rulemaking or notice-and-comment rulemaking on these regulations. These amendments simply modify the Department's regulations to reflect statutory changes made by the CCRAA, and these statutory changes are either already effective or will be effective within a short period of time. The Secretary does not have discretion in whether or how to implement these changes. Accordingly, negotiated rulemaking and notice-and-comment rulemaking are unnecessary.

There are no significant differences between the NPRM and these final regulations resulting from public comments.

Implementation Date of These Regulations

Section 482(c) of the HEA requires that regulations affecting programs under Title IV of the HEA be published in final form by November 1 prior to the start of the award year (July 1) to which they apply. However, that section also permits the Secretary to designate any regulation as one that an entity subject to the regulation may choose to implement earlier and the conditions under which the entity may implement the provisions early.

Consistent with the intent of this regulatory effort to strengthen and improve the administration of the loan programs authorized under Title IV of the HEA, the Secretary is using the authority granted her under section 482(c) to designate certain provisions of the regulations, identified in the following paragraph, for early implementation at the discretion of each institution, lender, guaranty agency, or servicer, as appropriate.

In accordance with the authority provided by section 482(c) of the HEA, the Secretary has determined that for some provisions there are conditions that must be met in order for an institution, lender, guaranty agency, or servicer, as appropriate, to implement

those provisions early. The provisions subject to early implementation and the conditions are—

Provision: Sections 674.38, 682.210, and 685.204 that simplify the deferment granting process and allow a borrower's representative to request a military service deferment or an Armed Forces deferment.

Condition: None.

Provision: Sections 674.61, 682.402, and 685.212 that allow the use of an accurate and complete photocopy of the original or certified copy of the borrower's death certificate to support the discharge of a Title IV loan due to death.

Condition: None.

Provision: Sections 682.603, 682.604, 685.301, and 685.304 that require entrance counseling requirements and modify exit counseling for graduate or professional student PLUS borrowers.

Condition: None.

Provision: Section 674.45 that limits the amount of collection costs a school may assess against a Perkins Loan borrower.

Condition: None.

Provision: Section 682.202 that limits the frequency of capitalization on Federal Consolidation loans to quarterly, except that a lender may only capitalize unpaid interest that accrues during an in-school deferment at the expiration of the deferment.

Condition: None.

Provision: Sections 682.208 and 682.211, which allow a lender to suspend credit bureau reporting for 120 days and grant borrowers a 120-day forbearance on a loan while the lender investigates a false certification as a result of an alleged identity theft.

Condition: None.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM published on June 12, 2007, 241 parties submitted comments on the proposed regulations. An analysis of the comments and the changes in the regulations since publication of the NPRM and as a result of public comment follows.

We group major issues according to subject, with appropriate sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes—and suggested changes the law does not authorize the Secretary to make. We also do not address comments pertaining to issues that were not within the scope of the NPRM.

Simplification of Deferment Process (§ 674.38, 682.210, and 685.204)

Comments: Commenters were generally supportive of our proposal to simplify the deferment process. Some commenters, however, had suggestions for modifications.

The proposed regulations would allow a borrower's representative to request a military service or Armed Forces deferment on behalf of the borrower. Some commenters recommended that we define ''borrower's representative'' for purposes of a military service or Armed Forces deferment. However, several other commenters did not think it was necessary to define ''borrower's representative.''

One commenter recommended that the Department revise the regulations to require (rather than just allow) lenders to grant military service deferments to eligible borrowers based upon a request from the borrower's representative.

With regard to the simplified deferment granting procedures, some commenters recommended that we require, rather than allow, lenders to grant deferments under the proposed procedures.

One commenter noted that interest does not accrue on subsidized FFEL or Direct Loans, or on Perkins Loans, during deferment periods and recommended that borrowers with these types of loans not be required to make an initial deferment request.

One commenter recommended that the notification of a deferment to a borrower of unsubsidized loans include information on the cost of the deferment.

One commenter recommended that we adopt a comparable simplified forbearance process for schools that participate in the Perkins Loan Program. This commenter felt that Perkins Loan schools should be able to grant forbearances based on a forbearance granted on a borrower's FFEL or Direct Loan. This commenter also requested that we allow borrowers in the Perkins Loan Program to verbally request a forbearance on their loans.

Several commenters recommended that we modify the regulations to permit a lender to grant a deferment ''during'' the same time period as a deferment granted by another lender. This would allow the deferment dates of a deferment granted by one lender to be part of the deferment period granted by another lender. The commenter noted that the dates of the deferment periods may not be exactly the same based on the status of the loans held by each of the lenders and the applicability of the deferments to the separate loans.

Discussion: The Department agrees with the commenters who recommended that we not define the term ''borrower's representative'' for purposes of a military service or Armed Forces deferment. A borrower's representative would be a member of the borrower's family, or another reliable source. We do not think it is necessary to regulate a specific definition of the term ''borrower's representative.'' We believe allowing flexibility in this regard will be especially helpful to borrowers called to active duty and stationed overseas in areas of conflict. Defining ''borrower's representative'' could unnecessarily limit access to this benefit for those most deserving of it. Commenters also overwhelmingly supported our decision not to define the term ''borrower's representative.''

We also agree with the recommendation that lenders should be required to accept a military service or Armed Forces deferment request from a borrower's representative. We believe that the proposed regulations would require lenders to accept such deferment requests and we have not changed that language.

However, we believe the simplified process that applies to other types of deferments should be optional for lenders. While many lenders may welcome the simplified deferment requirements as a convenience, other lenders may prefer to grant deferments based on their own review of a borrower's deferment documentation. We intend that these amended regulations will provide lenders with flexibility in structuring their processes for granting deferment requests; we do not want to unnecessarily limit their flexibility.

We disagree with the suggestion that lenders be allowed to grant deferments to borrowers with subsidized loans or Perkins Loans without a request from the borrower. We believe that the borrower who is ultimately liable for the loan should be responsible for deciding whether to request a deferment.

We disagree with the recommendation that schools participating in the Perkins Loan Program be allowed to grant forbearances based on forbearances granted on the borrower's FFEL Program loans. The mandatory forbearance requirements in the FFEL Program differ from the forbearance requirements in the Perkins Loan Program. Additionally, given that Perkins schools have wide flexibility in granting forbearances in the Perkins Loan Program, the Department sees no value in allowing schools to base Perkins forbearances on

forbearances granted in the FFEL Program.

We also disagree with the recommendation that we allow deferments to be granted ''during'' the same time period as another deferment under the simplified procedures. If the applicability of the deferment and the status of the separate loans is not the same, the simplified deferment process cannot be used because the loan holder would need to obtain separate documentation verifying the eligibility of the borrower based on different dates.

Changes: None.

Accurate and Complete Copy of a Death Certificate (§§ 674.61, 682.402 and 685.212)

Comments: Many commenters supported the proposed changes in §§ 674.61, 682.402, and 685.212 to allow loan holders to use an accurate and complete photocopy of a death certificate to discharge a Title IV loan due to the death of a borrower. The commenters agreed that this approach will reduce the cost of securing additional original or certified copies of a death certificate for the surviving family members and decrease burden for loan holders.

Several commenters suggested that the language in §§ 674.61, 682.402, and 685.212 be revised to allow a loan holder to use other data sources to grant a loan discharge based on the death of the borrower, such as official court documents, the National Student Loan Data System (NSLDS), or the Social Security Administration's (SSA's) Death Master File. Two commenters suggested that the Department allow loan holders to use NSLDS to ''look back'' and discharge loans for a deceased borrower that were not included in an original discharge due to the death of the borrower.

Discussion: During the negotiations concerning these regulations, some non-Federal negotiators asked the Department to expand the types of documentation that could be used to support a request for a discharge based on the death of the borrower. Specifically, these negotiators asked that they be allowed to base discharges on documentation from NSLDS, SSA's Master Death file or court documents. We declined to adopt these proposals in order to guard against fraud and abuse in the discharge process. The SSA has publicly acknowledged that its Master Death file contains inaccuracies. For that reason, we do not consider the file to be appropriate for use in granting a death discharge and continue to believe that we should not expand the types of documentation for program integrity reasons.

The Department agrees that using NSLDS to identify the loans of a deceased borrower that were not included in a discharge based on the death of the borrower is worth exploring; however, for program integrity reasons we do not agree that NSLDS information alone should be the basis for discharging loans that were not included in the original discharge. The Department will give further consideration to the commenters' suggestion but declines to adopt the suggestion in these final regulations.

Change: None.

Comments: While supporting the Department's efforts to decrease the burden on families applying for a discharge, one commenter expressed concern that fraudulent photocopies would be used to secure a discharge based on the death of the borrower, thus threatening the integrity of the Title IV loan programs. Another commenter recommended that the Secretary conduct a study of how the process for granting requests for discharges based on the death of the borrower will work before issuing final regulations allowing use of a photocopy.

Discussion: We appreciate the commenter's concern about the possible use of fraudulent photocopies of death certificates and will closely monitor the use of this documentation. We do not believe a study is necessary at this time. An official death certificate is very difficult to alter and we expect loan holders to be vigilant when using a photocopy as the basis for a death discharge. To ensure the integrity of the Title IV loan programs, the granting of a discharge of a Title IV loan based on the accurate and complete photocopy of an original or certified copy of the original death certificate is still at the discretion of lenders and the Secretary.

Change: None.

Total and Permanent Disability Discharge (§§ 674.61, 682.402, and 685.213)

Comment: Many commenters supported our proposals to restructure the regulations in §§ 674.61, 682.402, and 685.213 to clarify the eligibility requirements a borrower must meet to receive a total and permanent disability loan discharge and to provide for a similar process across the three loan programs. Several commenters also supported the requirement for a three-year conditional discharge period beginning on the date the Secretary makes an initial determination that the borrower is totally and permanently disabled.

Discussion: We appreciate the commenters' support. Upon further internal review, we believe that the Perkins Loan Program regulations could be clearer with respect to the information that an institution must provide to a borrower upon receipt of the borrower's discharge application.

Changes: The Department has made changes to § 674.61(b)(2) of the Perkins Loan Program regulations to provide a more detailed description of the information that must be provided to a borrower upon the institution's receipt of an application for a discharge.

Comment: Several commenters supported the proposal in §§ 674.61(b)(2)(i), 682.402(c)(2), and 685.213(b)(1) requiring a borrower seeking a total and permanent disability discharge to submit the completed application within 90 days of the date the physician certifies the application, thus ensuring that the loan holder has timely and accurate information on which to base a preliminary determination about the borrower's eligibility for the discharge. However, other commenters believed that the 90-day time limit would be insufficient for a borrower who may be incapable of managing his or her affairs or unable to put together the paperwork necessary to submit the application. The commenters also stated that the proposed time limit would not accommodate delays in the process that are out of the borrower's control. The commenters suggested that the Secretary make exceptions to the 90-day time limit to accommodate extenuating circumstances so that borrowers will not be required to obtain a new physician certification if the borrower misses the 90-day time limit. One commenter suggested that we adopt a 180-day time limit for submission of the discharge application.

Discussion: The Department continues to believe that the requirement in §§ 674.61(b)(2)(i), 682.402(c)(2), and 685.213(b)(1) that borrowers submit the completed application for a total and permanent disability discharge to the loan holder within 90 days of the date the physician certifies the application is appropriate and reasonable. Allowing exceptions based on extenuating circumstances or allowing a 180-day time limit would not ensure that the Secretary has accurate and timely information on which to base her determination on the borrower's application. Allowing exceptions or a longer time limit would also open up the possibility that a borrower might inadvertently take action that would disqualify the borrower for a final discharge.

Changes: None.

Comment: Several commenters noted that the proposed regulations do not provide for a 60-day administrative forbearance that is provided to a borrower under the current FFEL regulations for completion and submission of the discharge application form. The commenters were concerned that the omission of the forbearance would increase delinquency on borrower accounts and penalize the borrower. One commenter recommended that we require lenders to suspend collection activity and provide a forbearance to a borrower who is attempting to complete a discharge application as well as during any period while the application is pending.

Discussion: Section 682.402(c)(5) of the proposed regulations allows a lender to grant a borrower a forbearance of payment of both principal and interest if the lender does not receive the physician's certification of total and permanent disability within 60 days of the receipt of the physician's letter requesting additional time to complete and certify the borrower's discharge application. Under § 674.33(d)(5) of the Perkins Loan Program regulations, an institution is required to forbear payment on a loan for any acceptable reason. In the Direct Loan Program, § 685.205(b)(5) specifically allows the Secretary to grant a borrower an administrative forbearance for the period of time it takes the borrower to submit appropriate documentation indicating that the borrower has become totally and permanently disabled. Given that these provisions provide a borrower with significant access to forbearance while obtaining a physician's certification and completing the discharge application, the Department believes that requiring the cessation of collection activity is unnecessary until the loan holder actually receives the discharge application.

Changes: None.

Comment: Several commenters stated that we should continue our current practice of using the date the borrower became totally and permanently disabled instead of the date the physician certifies the borrower's disability on the application as we proposed in §§ 674.61(b)(3)(ii), 682.402(c)(3)(ii), and 685.213(c)(2) as the date to establish the borrower's eligibility for a discharge. The commenters claimed that using the date the physician certifies the application as the date the borrower became totally and permanently disabled is arbitrary and contradicts statutory intent that disabled borrowers receive immediate relief as of the date the borrower becomes totally and permanently disabled.

Several commenters stated that many borrowers do not realize they have the ability to obtain a discharge of their student loans and as a result do not apply for a total and permanent disability discharge until several years after becoming disabled. These commenters expressed concern that using the date the physician certifies the borrower's application as the disability date combined with a prospective conditional discharge period would subject these borrowers to a long delay in receiving the discharge.

One commenter stated that, in the FFEL Program, using a date identified by a physician as the borrower's disability date ensures that only one date of disability appears on all applications and forms received by the Secretary when the borrower has multiple loans. The commenter believes that under the proposed changes to the disability discharge process, the start date of the three-year conditional discharge period for a borrower who has multiple loans may vary for each loan because loans can be assigned to the Secretary at different times in the discharge process based on when the borrower submits documentation to each lender when the lender files the claim with the guarantor, and when the guarantor reviews and pays the claim.

Several commenters questioned the Department's contention that certifying physicians rely solely on a borrower's statements in determining the borrower's date of disability and that there may not be strong medical evidence for using a different date to establish eligibility for Federal benefits. The commenters did not believe that it was appropriate for the Department to assume that a physician's diagnostic methodology is flawed.

Discussion: Sections 437(a) and 464(c)(1)(F) of the HEA provide for the discharge of a borrower's Title IV loans if the borrower becomes totally and permanently disabled as determined in accordance with regulations of the Secretary. As discussed in the preamble to the NPRM, the Department proposed these regulatory changes to eliminate the possibility that a final discharge would be made immediately upon assignment of the account to the Department. We believe this result is inconsistent with the intent of these regulations, which is to conform the discharge requirements to those of other Federal programs that only provide for Federal benefits after appropriate monitoring of the applicant's condition.

The Department believes that borrowers are sufficiently informed about the availability of a total and permanent disability discharge. The promissory notes used in the Title IV loan programs notify borrowers of the possibility to have the loan discharged if the borrower becomes totally and permanently disabled. Information on the discharge is also available on the Department's Web site and in numerous Department publications as well as in information from other program participants. Although a borrower may experience a delay before receiving a total and permanent disability discharge under these regulations, we wish to emphasize again our belief that the provision of Federal benefits should be made only after there is sufficient monitoring of the applicant's condition.

We do not agree that using a date identified by a physician as the borrower's disability date instead of the date the physician certifies the borrower's disability on the discharge application means that a borrower with multiple loans assigned to the Department has only one date of disability. The Department addresses this and similar issues frequently under the current total and permanent disability discharge process and resolves discrepancies in disability dates on assigned loans by consulting with the physician that certified the borrower's application. The Department expects to continue this approach to resolve discrepancies under the new process and does not believe the regulations need to specifically address issues related to processing an application.

Lastly, the Department does not agree that the concern we expressed in the NPRM that there may not be strong medical evidence to support using the borrower's disability date assumes a flawed diagnostic methodology on the part of the certifying physician. As we stated in the preamble to the NPRM, we believe that the best date to use as the eligibility date is the date the physician certified the application because that process requires the physician to review the borrower's condition at that time, rather than speculate about the borrower's condition in the past.

Changes: None.

Comment: Several commenters disagreed with the Secretary's opinion that a three-year prospective conditional discharge period would help prevent fraud and abuse in the Title IV loan programs by allowing the Secretary to monitor a borrower's status before granting a discharge. The commenters stated that whether the conditional discharge period is prospective or retroactive is irrelevant as long as the Secretary has access to a physician's

certification confirming that the borrower meets the eligibility requirements for a disability discharge.

Several commenters also disagreed with the Department's statement in the preamble to the NPRM that there have been instances when borrowers have received otherwise disqualifying Title IV loans and earnings in excess of allowable levels after the date of the borrower's disability discharge application but also after the date of the borrower's retroactive final discharge. The commenters cited an analysis of a sample of total and permanent disability cases that they claimed did not support the Secretary's view.

Several commenters acknowledged the need to protect the integrity of the Title IV programs in regard to disability discharges and stated that reliance on a single physician's certification or determination of permanent disability may encourage fraud and abuse in the discharge process.

Discussion: In a Final Audit Report published in November 2005, the Department's Inspector General concluded that the current, three-year conditional discharge period was ineffective for ensuring that a borrower is totally and permanently disabled because it does not always allow the Department to examine the borrower's current earnings and loan information. As a result, a borrower who is not currently disabled could receive a disability discharge even though the borrower has received current disqualifying income or loans. The Inspector General's Audit Report noted that approximately 54 percent of the borrowers who received disability discharges applied for the discharge more than three years after the disability. As a result, for the discharges approved by the Department from July 1, 2002, through June 30, 2004, approximately 54 percent (2,593 borrowers) were based on a three-year period during which there was no examination of the borrower's current income. The Inspector General examined current income information that was available for a limited number of these borrowers who had submitted a Free Application for Federal Student Aid (FAFSA) and found that a number of borrowers who claimed to be totally and permanently disabled also reported current income over the limit for a disability discharge. As a result the Inspector General recommended that the Department revise the regulations to ensure that current income and Title IV loan information is considered when determining whether a borrower is totally and permanently disabled.

The proposed regulations address the Inspector General's concerns and we believe they will discourage fraud and abuse in the disability discharge process. To further ensure against the possibility of fraud and abuse, we have added a provision to the Perkins, FFEL and Direct Loan Program regulations specifically reflecting the Secretary's authority to require a borrower to submit additional medical evidence if the Secretary determines that the borrower's application does not conclusively prove that the borrower is disabled. As part of this review, the Secretary may arrange for an additional review of the borrower's condition by an independent physician at no expense to the applicant.

Changes: We have amended §§ 674.61(b)(4), 682.402(c)(4), and 685.213(d) to provide that the Secretary reserves the right to require additional medical evidence of a borrower's total and permanent and disability as well as an additional review of the borrower's condition by an independent physician at the Secretary's expense.

Comment: Many commenters disagreed with the Department's proposal in §§ 674.61(b)(5), 682.402(c)(4)(iii), and 685.213(d)(3)(ii) that only payments made on the loan after the date the physician certifies the borrower's total and permanent disability discharge application would be returned to the borrower. The commenters claimed this proposal would harm borrowers who do not obtain a timely certification of disability or who continue to make payments to keep from defaulting or becoming delinquent on their loans. One commenter recommended that repayments be refunded back to the date certified by the physician even if a prospective conditional discharge period is required.

One commenter recommended that no payments previously made on a loan be returned to a borrower if the borrower receives a final discharge based on a total and permanent disability.

One commenter requested that we clarify to whom the Secretary returns payments after a final determination of the borrower's total and permanent disability is made in § 674.61(b)(5)(iii).

Discussion: As stated in the preamble to the NPRM, the Department proposed this change to be consistent with the decision to rely on the date the physician certifies the borrower's disability on the application and to maintain program integrity in the administration of the discharge process. Under these regulations, the borrower's disability date is the date the physician certifies the borrower's discharge application. In this situation, there is no basis for returning payments made by the borrower, or on the borrower's behalf, before that date. However, it is appropriate to return any payments made by or on behalf of the borrower after that date.

Lastly, the Secretary returns any payments to the individual who made the payments after a final determination of the borrower's total and permanent disability is made. We agree that the regulations should reflect this fact.

Changes: Sections 674.61(b)(5)(iii), 682.402(c)(4)(iii), and 685.213(d)(3)(ii) have been changed to reflect that any payments made after the date that the physician certified the borrower's application for a disability discharge will be sent to the person who made the payment after the final discharge is issued.

Comment: Several commenters felt that the prospective three-year conditional discharge period should begin on the date the physician certifies the borrower's total and permanent disability discharge application rather than on the date the Secretary makes an initial determination that the borrower is totally and permanently disabled. The commenters stated that using the date the Secretary makes the initial determination would be unfair to borrowers. The commenters also believed that using the date the Secretary initially determines that a borrower is disabled weakens the Secretary's incentive to make expeditious decisions on disability discharge applications and increases the likelihood that a borrower might inadvertently take an action that would disqualify him or her for a final discharge. One commenter recommended that the final regulations set a time limit for the Department to make a determination of a borrower's initial eligibility for a disability discharge.

Discussion: The Department has considered the comments and has decided that beginning the prospective three-year conditional discharge period on the date the physician certifies the borrower's total and permanent disability discharge application rather than on the date the Secretary makes an initial determination that the borrower is totally and permanently disabled is appropriate and will not increase the opportunity for fraud in the disability discharge process.

Changes: We have revised §§ 674.61(b)(3)(i), 682.402(c)(3)(i), and 685.213(c)(2) to provide that the three-year conditional discharge period begins on the date the physician certifies the

borrower's total and permanent disability discharge application.

Comment: Several commenters requested that we apply the same eligibility standards that apply during the conditional discharge period (which prohibit the receipt of any additional Title IV loans and allow a borrower to earn no more than 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act) to the period between the date the borrower obtains a physician's certification and the date the Secretary makes her initial determination that the borrower is totally and permanently disabled. The commenters believed that applying different eligibility requirements at different stages in the process would confuse borrowers and jeopardize their ability to qualify for a discharge.

Discussion: The Department has considered the comments and agrees that applying the same eligibility standards beginning on the date the borrower obtains the physician's certification on the total and permanent disability discharge application and continuing those standards throughout the prospective three-year conditional discharge would reduce the complexity of the process without creating an opportunity for fraud.

Changes: We have revised §§ 674.61(b)(4)(i), 682.402(c)(4)(i), and 685.213(d)(1) to provide that a borrower may not receive any Title IV loans or earn more than 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act, beginning on the date the physician certifies the borrower's discharge application and throughout the prospective three-year conditional discharge period.

Comment: One commenter requested that the proposed regulations be clarified to define the term ''new Title IV loan'' to exclude subsequent disbursements of a prior loan.

Discussion: The Department does not believe that such a change is necessary. The regulations in §§ 674.61(b)(2)(iv)(C)(*2*) and (*3*), 682.402(c)(4)(i)(B) and (C), and 685.213(b)(2)(ii)(A) and (B) already differentiate between new loans and subsequent disbursements of prior loans.

Changes: None.

Comment: One commenter requested that the effective dates and trigger dates in the proposed regulations be carefully evaluated so that borrowers who are in the process of having discharge forms certified are not subject to the new requirements. Another commenter requested that the effective date of any new regulations governing the disability discharge process be based on the approval date of a new Federal form to eliminate processing confusion and inadvertent delays for applicants.

Discussion: The Department anticipates that both the new total and permanent disability discharge applications and the final regulations that govern the process will be effective on July 1, 2008, for borrowers who apply for a discharge on or after that date. Borrowers who are in the process of having discharge forms certified as of that date will not be subject to the new regulations.

Changes: None.

Comment: One commenter suggested the Secretary return Perkins Loan accounts to the school that assigned them if the Secretary determines that the borrower is not totally and permanently disabled. The commenter stated that if such accounts were returned to the school, the school's Perkins Loan revolving fund would benefit from any repayments made when the school resumes collection.

Discussion: The current assignment process in § 674.50 of the Perkins Loan Program regulations requires that, upon accepting assignment of a loan, the Secretary acquire all rights, title, and interest of the institution in that loan. Returning an assigned Perkins Loan account to the school if the Secretary determines that a borrower is not totally and permanently disabled would add administrative burden to the process and is inconsistent with current regulatory requirements in § 674.50(f)(1).

Changes: None.

Comment: One commenter suggested that if the Secretary makes an initial determination that the borrower's disability is not total and permanent, the borrower should not only resume repayment but should also be required to repay all amounts that would have been due during the cessation of collection on the loan while the application was being processed by the loan holder and the Secretary.

Discussion: The Department believes that to require a borrower to repay all amounts that would have been due during the cessation of collection on the loan while the application is being processed would unnecessarily discourage borrowers who might qualify for a discharge from applying.

Changes: None.

Comment: One commenter felt that the Department should consider disability determinations made by other Federal agencies such as the SSA or the Veteran's Administration (VA) in determining whether borrowers are eligible for a disability discharge on their Title IV loans.

Discussion: The Department has previously considered the idea of applying the disability standards used by other Federal agencies to borrowers seeking a discharge of their Title IV loans. However, the definition of total and permanent disability used in the Department's discharge process is appropriately more demanding than that used by SSA and the VA. Those agencies use regular medical reviews of applicants over a number of years to ensure that the applicants remain eligible for benefits. In those programs, an individual loses benefits if they are no longer disabled. In contrast, the Department is providing a significant benefit to an individual on a one-time basis without any opportunity to conduct future reviews to determine if the individual is actually disabled. The Secretary believes that the process established in these regulations provides an appropriate process that will ensure that only appropriate discharges are granted.

Changes: None.

NSLDS Reporting (§§ 674.16, 682.208, 682.401, and 682.414)

Comment: Many commenters did not agree with proposed § 682.401(b)(20), which would change the timeframe in which guarantors must report certain student enrollment data to the current loan holder from 60 days to 30 days. The commenters believed that this change would not accommodate timely reporting in months that have 31 days. Other commenters stated that guarantors currently report information to NSLDS at least monthly and that changing the requirement for guarantors to report enrollment information to lenders to 30 days would not improve the timeliness of information. One commenter believed that the Secretary did not appropriately consider all the other established reporting periods and deadlines when developing this proposal, and that new NSLDS reporting requirements will unnecessarily burden schools with additional reporting.

One commenter asked how the Department intends to categorize Perkins Loan data that are reported to NSLDS under the new regulations. The commenter noted that historically schools categorized and reported Perkins Loans based on the terms and conditions of the loan and reported disbursements made under these categories as one loan made over a period of years. A school would create a new category of Perkins Loan when

the terms and conditions of Perkins Loans were affected by statutory changes. The commenter believed that reporting Perkins Loans as separate loans each award year would dramatically increase the number of loans reported to NSLDS and increase burden and costs associated with NSLDS reporting. The commenter noted that new NSLDS reporting criteria would increase the number of Perkins Loan account records and associated costs of reporting with no benefit to the institution or borrowers.

Three commenters stated that the language in paragraph (j) of proposed § 674.16 fails to reflect the intent of Section 485B of the HEA which specifically provides that the development of NSLDS reporting timeframes be accomplished according to mutually agreeable solutions based on consultation with guaranty agencies, lenders and institutions. The commenters stated that the Department has not devoted sufficient effort to conducting a meaningful dialogue and information exchange with institutions about reporting needs for research and policy analysis purposes.

Several other commenters suggested that there should be weekly updates to NSLDS instead of the suggested 30 days and believed that guaranty agencies, servicers, students, and schools would benefit from having more accurate and timely information in NSLDS.

Discussion: The Secretary believes that the new NSLDS reporting timeframes will improve the timeliness and availability of information important to managing the student loan program. The Secretary also believes that the proposed regulatory changes, such as the simplification of the deferment granting process, will be easier and more efficiently implemented if timely and accurate information is more readily available in NSLDS.

The Department appreciates the commenters' concerns about the cost associated with increased reporting of Perkins Loans. Although the costs incurred by institutions to make the systems changes necessary to comply with new NSLDS reporting requirements are difficult to estimate, we believe that requiring institutions to report Perkins Loans on an award year basis, as FFEL and Direct Loan Program loans are reported, will increase the quality and integrity of Perkins Loan data and allow the Department to make meaningful comparisons between the Title IV loan programs for research and budgeting purposes. We also believe that reporting Perkins Loans on an award year basis will provide borrowers with a more accurate picture of their total indebtedness.

The Department regularly consults with program participants in setting NSLDS reporting requirements in established workgroups that meet several times a year. We believe the regulations reflect this consultative process.

With regard to the commenter who suggested that there should be weekly updates to NSLDS instead of the suggested 30-day timeframe, entities that wish to report to NSLDS on a weekly basis are able to so under current protocols. We decline to require weekly reporting requirements for all entities at this time, however, because we believe that small institutions would find such a standard difficult to manage.

The Secretary agrees with commenters that the 30-day reporting timeframe does not leave guarantors adequate time to report data to the current loan holder in months that have 31 days.

Changes: We have changed the reporting timeframe in § 682.401(b)(20) to 35 days.

Certification of Electronic Signatures on Master Promissory Notes (MPNs) Assigned to the Department (§§ 674.19, 674.50, 682.409, and 682.414)

Comment: One commenter agreed that proper execution and retention of electronic loan records is necessary for program integrity reasons. Several other commenters stated that the proposed changes in § 674.19(e)(2)(ii) requiring a school participating in the Perkins Loan Program to develop and maintain a certification of its electronic signature process were overly broad, would discourage schools from using electronic notes, and would impose burdensome new record-keeping requirements. Other commenters stated that institutional compliance with these new requirements would be difficult unless the Department clearly defines these new requirements and provides schools with a ''safe harbor'' of minimum compliance standards for Perkins Loans already signed electronically by borrowers. The commenters stated that the burden of complying with § 674.50(c)(12)(i) for institutions would be difficult to justify given the few borrowers who might dispute the validity of the electronic signature at some future date.

Several commenters stated that the requirement in § 674.50(c)(12)(ii)(B) that a school's certification include screen shots as they would have appeared to the borrower is impractical and unnecessary and asked that this requirement be eliminated.

Discussion: The Department believes that the requirements in § 674.19(e)(2) that an institution create and maintain a certification regarding the creation and maintenance of electronically signed Perkins Loan promissory notes or MPNs in accordance with § 674.50(c)(12) ensures that the school and the Department have the evidence to enforce an assigned loan if a challenge or factual dispute arises in connection with the validity of the borrower's electronic signature. Schools are required to take legal action to collect on a defaulted Perkins Loan in accordance with § 674.46 of the Perkins Loan Program regulations. If a legal challenge to the validity of an electronic signature should arise in the course of litigating a defaulted Perkins Loan, a school will be in a much stronger legal position to prove that the borrower signed the loan and benefited from the proceeds of the loan. The need to ensure the integrity of the Perkins Loan Program justifies establishing electronic signature safeguards. Perkins Loan schools should generally not be incurring new costs or burden related to the certification of electronic signatures on promissory notes. In July of 2001, the Department published its Standards for Electronic Signature in Electronic Student Loan Transactions (Standards) to facilitate the development of electronic processes under the Electronic Signatures in Global and National Commerce Act (E-Sign Act). These Standards provided guidance to FFEL Program lenders and guaranty agencies, and to schools in their role as lenders under the Perkins Loan Program, regarding the use of electronic signatures in conducting student loan transactions, including using electronic promissory notes. At that time, we informed loan holders and institutions in the FFEL or Perkins Loan Program that if their processes for electronic signature and related records did not satisfy the Standards and the loan was held by a court to be unenforceable based on those processes, the Secretary would determine on a case-by-case basis whether Federal benefits would be denied, in the case of the FFEL Program, or whether a school would be required to reimburse its Perkins Loan Fund, in the case of the Perkins Loan Program. If, as we assume, Perkins Loan holders are complying with the Standards, added burden or cost should not be an issue. The regulations in § 674.50(c)(12) that describe what the certification must include are already very specific and detailed and a ''safe harbor'' is unnecessary. The only provision of these regulations that is not specific is

§ 674.50(c)(12)(ii)(F), which requires the certification to include ''all other documentation and technical evidence requested by the Secretary to support the validity or the authenticity of the electronically signed promissory note.'' This provision is not intended to be overly burdensome on schools. This provision is intended to cover whatever documentation a school has that is not already listed in § 674.50(c)(12)(ii)(A) through (E).

Lastly, the Department does not agree with the commenters' suggestion that inclusion of screen shots as they would have appeared to the borrower is impractical or unnecessary. The inclusion of screen shots in the certification is a critical part of the process to ensure that the promissory note is a valid, legal document, that the terms and conditions of the loan were properly represented to the borrower, and that the borrower was fully aware of the fact he or she was receiving a loan.

Changes: None.

Comment: One commenter suggested that the Department require each institution that participates in the Perkins Loan Program to designate an ''E-Sign Contact Person'' on its FISAP submission to enable institutions to meet documentation requests from the Secretary in a timely manner.

Discussion: The Department believes this suggestion has merit and will consider implementing this proposal administratively. However, no change to the regulations is necessary.

Changes: None.

Comment: Many commenters stated that the 10-business day deadline required by §§ 674.50(c)(12)(iii) and 682.414(a)(6)(iii) within which Perkins Loan and FFEL loan holders must respond to a request for evidence that may be needed to resolve a dispute with a borrower on a loan assigned from the Secretary was too short. One commenter recommended a 10-business day standard only if the request relates to pending litigation and an alternative, 30-day standard if the request is not related to litigation. One commenter recommended delaying implementation of the 10-business day deadline by one year to give institutions the opportunity to put in place the systems, policies, and capability to comply and produce the requested documentation. One commenter suggested adopting a 15-business day deadline with an option to appeal if the institution faces a special situation. Another commenter suggested a 25-business day deadline. One commenter requested that the Secretary withdraw this proposal completely.

Discussion: The Department does not believe that a 10-business day deadline to respond to requests from the Secretary for evidence needed to resolve a dispute involving an electronically-signed loan that has been assigned to the Secretary is burdensome. The Department believes that 10 business days provides sufficient time for loan holders. The Secretary believes that a timely response to a request for information is essential to proper enforcement of a promissory note, especially when a borrower is contesting the validity of an electronic signature and that challenge involves court proceedings or court-imposed deadlines. Finally, we believe that delaying implementation of this deadline or not imposing any deadline would threaten the integrity of the FFEL and Perkins Loan Programs.

Changes: None.

Comment: Several commenters expressed concern regarding the provision in proposed § 674.50(c)(12)(i)(B), under which the Department would require a Perkins Loan holder to provide testimony to ensure the admission of electronic records in a legal proceeding. These commenters requested that the Department clarify that the institution will not be responsible for any expenses related to this requirement.

Discussion: Section 489 of the HEA and 34 CFR § 673.7 of the General Provisions regulations for the Federal Perkins Loan, Federal Work Study, and Federal Supplemental Educational Opportunity Grant Programs provide for an administrative cost allowance that an institution may use to offset its cost of administering the campus-based programs, including the costs related to the provision of testimony.

Changes: None.

Comment: One commenter requested that the Department revise § 682.409(c)(4)(viii), which would require a guaranty agency to provide the Secretary with the name and location of the entity in possession of an original, electronically signed MPN that has been assigned to the Department. The commenter asked that we change this provision to give guaranty agencies the option of providing the Secretary the name and location of the entity that created the original MPN or promissory note in response to the Secretary's request. The commenter believed this approach would provide flexibility for loan holders to continue to track the entity that created the original electronically signed MPN, while providing flexibility for new technological changes that may allow subsequent holders to obtain possession of an original electronic MPN record. This commenter also recommended a change in § 682.414(a)(6)(i) to allow the ''entity'' that created or the ''entity in possession'' of an original electronically signed promissory note respond to a request for information from the Secretary rather than the guaranty agency or lender that created the note for the same reason.

Discussion: We disagree with the commenter that allowing a guaranty agency the option of providing the Secretary with the name and location of the entity that created the original MPN or promissory note meets the Department's needs. We also disagree that the ''entity'' that created or that is in possession of the original electronically signed promissory note would be the more appropriate party to respond to a request for information from the Department. If the Department needs the original, electronically signed MPN, it should be a simple matter for a guaranty agency to provide the name and location of the entity that possesses the document. Moreover, the lender and guaranty agency are the program participants that have the legal obligation to maintain program records and cooperate with the Secretary to enforce loan obligations.

Changes: None.

Comment: One commenter supported the provisions in §§ 674.19(e)(4)(ii) and 682.414(a)(5)(iv) requiring loan holders to retain an original of an electronically-signed MPN for three years until all the loans on the MPN are satisfied but requested clarification in the regulations as to the meaning of the term ''satisfied.''

Discussion: The FFEL, Perkins and Direct Loan Program regulations already define when a loan is ''satisfied.'' In all three programs, a loan is ''satisfied'' if the loan has been canceled, repaid in full or discharged in full. In the Perkins Loan Program, a loan is also considered ''satisfied'' if the loan has been repaid in full in accordance with an institution's authority to compromise on the repayment of a defaulted loan in accordance with § 674.33(e) or the institution writes off the loan in accordance with § 674.47(h). Accordingly, we do not believe any further clarification in the regulations is needed.

Changes: None.

Comment: One commenter stated that the proposed regulations requiring a FFEL Program loan holder to retain an original of an electronically-signed MPN for three years after all the loans are satisfied is unmanageable. This commenter recommended that FFEL Program lenders be required to submit

electronic signature certifications and authentication records to the guarantor at the time a claim is submitted. The commenter believed that this approach would ensure that certification and authentication records are available and submitted consistently and promptly with each loan the guarantor assigns to the Department.

Discussion: The Department carefully considered this approach during negotiated rulemaking, but after considering comments made during that process, we determined that, at this time, it would not be necessary to require FFEL Program lenders to submit electronic signature certifications and authentication records to the guarantor at the time a claim is submitted. Instead, consistent with our understanding of how paper notes are being handled in the student loan industry, we have adopted the framework contained in these final regulations, which puts the responsibility for managing the electronic promissory notes and ensuring their continued enforceability on the lenders and guaranty agencies that created them.

Changes: None.

Comment: One commenter recommended that the Department adopt the accessibility standards of section 101(d) of the E-Sign Act, which requires that electronic records ''remain accessible to all persons who are entitled to access * * * in a form that is capable of being accurately reproduced for later reference'' rather than the standard in proposed § 682.414(a)(6)(iv), which requires a guaranty agency to provide the Secretary with ''full and complete access'' to electronic loan records. The commenter believed that the standard as currently proposed is burdensome and ambiguous. The commenter also requested a change in terminology in § 682.414(a)(6)(iv) that would require the ''entity in possession'' of the original electronically signed promissory note rather than the holder be responsible for ensuring access to electronic loan records.

Discussion: The Department disagrees that using the accessibility standards of section 101(d) of the E-Sign Act rather than the standard in proposed § 682.414(a)(6)(iv) is appropriate and believes that the term ''full and complete access'' is clear and straight forward. The Department also does not agree with the suggestion that we substitute the term ''entity in possession'' of the original electronically signed for ''holder'' in § 682.414(a)(6)(iv). We believe the term ''entity'' is too vague for the purposes of these regulations.

Changes: None.

Comment: Several commenters suggested that the Department modify the regulations to include a provision that would end the requirement for certification of electronic signatures on MPNs after five years to evaluate the impact of the provisions on schools that participate in the Perkins Loan Program.

Discussion: The Department does not believe it is necessary or advisable to ''sunset'' the provisions requiring the certification of electronic signature on MPNs after five years. These requirements are essential to the integrity of the Title IV loan programs and the Department's ability to enforce electronically-signed, assigned promissory notes. Additionally, the Department can evaluate the impact of these regulations without establishing a sunset date for these provisions.

Changes: None.

Comment: Several commenters requested that we establish a prospective effective date for the provisions requiring the certification of electronically-signed notes that includes only promissory notes signed on or after the effective date of the final regulations to allow program participants sufficient lead time to implement the changes.

Discussion: The Department does not agree that these requirements should only apply to electronically-signed promissory notes made on or after July 1, 2008. As stated above in response to another comment, in July of 2001, the Department published Standards to facilitate the development of electronic processes under the E-Sign Act. We assume that FFEL Loan and Perkins Loan holders are complying with those standards and, therefore, should be ready to comply with these new requirements on July 1, 2008.

Changes: None.

Record Retention Requirements on Master Promissory Notes (MPNs) Assigned to the Department (§§ 674.19, 674.50, 682.406, and 682.409)

Comment: One commenter suggested that the Department collect the Perkins Loan Program MPN and the records showing the date and amount of each disbursement of Perkins Loan Program funds at the time the loan is assigned to the Department and require an institution to respond to requests for information on an assigned loan for three years following assignment, rather than require the institution to retain the MPNs and disbursement records. The commenter believed that this approach would reduce burden and prevent data corruption or archiving problems for Perkins Loan Program institutions and would allow the Department immediate access to MPNs and disbursement records if the records were needed to enforce the loan.

Discussion: The current Perkins Loan Program assignment procedures outlined in Dear Colleague Letter CB–06–12 (August 1, 2006) require a school to submit the original or a certified true copy of the promissory note upon assignment of the loan to the Department. The requirement in § 674.19(e)(4)(ii) that an institution retain an original electronically signed MPN for three years after all the loans made on the MPN are satisfied applies to loans that have not been assigned to the Department. The regulations in § 674.50(c)(11) allow the Secretary to request a record of disbursements for each loan made to a borrower on an MPN that shows the date and amount of each disbursement on a Perkins Loan that has been assigned to the Department. If a school wishes to submit the disbursement records to the Department when assigning a Perkins Loan, the school may do so.

Changes: None.

Comment: Several commenters asked that the Department implement a process to notify a Perkins Loan Program school when an assigned loan has been satisfied so that the school does not incur additional cost and burden when determining when it can destroy documentation supporting its electronic authentication and signature process and disbursement records.

One commenter suggested that the Department provide schools the option to retain documentation supporting the school's electronic signature process and disbursement records for at least three years after the loan is assigned to the Secretary, rather than when the loan is satisfied, so that schools would know exactly when the three-year period begins and ends.

Discussion: The Department believes that implementing a process to notify a school participating in the Perkins Loan Program that an assigned loan has been satisfied has merit and will explore the possibility for implementing such a process. Such a process, however, does not need to be reflected in the regulations.

The Department continues to believe that it is vital for a school to retain disbursement records and documentation supporting its authentication and electronic signature process for at least three years from the date the loan is canceled, repaid or otherwise satisfied so that the Department has access to the documents if needed to enforce an assigned loan and to ensure the continued integrity of the Perkins Loan Program.

Changes: None.

Comment: Several commenters stated that the new record retention provisions requiring schools participating in the Perkins Loan Program to retain disbursement and electronic authentication and signature records for each loan made using an MPN for at least three years from the date the loan is canceled, repaid or otherwise satisfied were unduly burdensome.

The commenters requested that instead of retaining a copy of each screen shot as it would have appeared to the borrower, the Department should require institutions to retain a ''description'' of each screen shot. The commenter also stated that requiring schools to retain ''all other documentary and technical evidence supporting the validity and authenticity of an electronically-signed note'' was so open-ended that schools would be forced to retain all material on the chance that the Department might request it at some future date.

Discussion: As discussed earlier in this section, the Department believes that the retention of records will make it easier for the Department or the school to prove that a borrower benefited from the proceeds of a loan and will preserve program integrity. Moreover, we do not believe this requirement is overly burdensome or costly because it is consistent with the Department's current requirements and record storage experience. When the MPN was implemented in the Perkins Loan Program, schools were advised in Dear Colleague Letter CB–03–14 to retain documentation to support a borrower's loan transactions should the school need to enforce a loan made under a Perkins MPN. When the Perkins Loan Program MPN was updated and reissued in June of 2006, schools were specifically directed in Dear Colleague Letter CB–06–10 to retain disbursement records to support a borrower's loan transactions. This guidance, together with the record retention provisions in 34 CFR 668.24 that require a school to retain disbursement records for three years after the disbursement is made, ensures that schools should be in possession of the required records already. Further, existing Assignment Procedures in Dear Colleague Letter CB–06–12 specifically require schools to retain disbursement records on assigned loans made under an MPN until the loan is paid-in-full or otherwise satisfied and submit those records if requested to do so by the Department. As we stated in response to an earlier comment, screen shots are part of the loan making process and also provide evidence that a borrower who signed an MPN or promissory note electronically was aware that he or she was receiving a loan. It is the Department's experience that electronic storage of records supporting Title IV loans transactions are generally cost efficient.

Changes: None.

Comment: One commenter requested that the Department confirm that an institution is only required to retain the documentation and templates that apply to electronically-signed MPNs signed for a specified time period during which the institution's process remained unchanged, and that it will not be necessary for institutions to retain this documentation on a loan-by-loan basis.

Discussion: The commenter is correct that an institution is required to retain the documentation and templates that apply to all of an institution's electronically-signed MPNs for discrete periods of time. We wish to emphasize that should any aspect of an institution's electronic signature process change, the institution must document the new process in the affidavit or certification required by § 674.50(c)(12).

Changes: None.

Comment: One commenter requested that we clarify what would constitute an ''original'' electronically-signed MPN under the proposed Perkins Loan record retention requirements. The commenter stated that if an ''original'' electronically-signed MPN means that a school can print a copy of the signed MPN, the Department should not use the word ''original.'' However, if the Department's intent is to require a school to produce something more than a paper copy of the MPN, the commenter requested that the Secretary provide schools and servicers additional time to ensure their ability to meet the new requirements before the regulations take effect.

Discussion: An institution or its servicers should have a system designed so that the signed electronic record is designated as the ''authoritative'' copy of the promissory note and must be able to reproduce an electronically signed promissory note, when printed or viewed, as accurately as if it were a paper record. The institution or its servicer should enable the viewing or printing of electronic records using commonly available operating systems and hardware. Designation of the electronic note created by the institution as the ''original'' is a useful means for designating the electronic note that the institution must retain under these regulations.

Changes: None.

Comment: One commenter asked that we clarify whether the requirement to retain documentation of the ''date and amount of each disbursement'' of Perkins Loan Program funds referred to records reflecting the date the money was applied to a borrower's account or to records showing the date the funds were awarded. Another commenter requested clarification on the timeframe under which an institution would be required to submit Perkins Loan disbursement records.

Discussion: The requirement to retain documentation of the ''date and amount of each disbursement'' of loan funds refers to the amount and date that Perkins Loan Program funds were applied to a borrower's account. An institution may, but is not required to, submit disbursement records to the Department when it assigns a Perkins Loan. If an institution does not submit the disbursement records to the Secretary when assigning a Perkins Loan, it must retain the records for three years from the date the loan is canceled, repaid, or otherwise satisfied in case the Secretary needs the records to enforce the loan.

Changes: None.

Comment: Several commenters stated that guarantors are not currently required to collect the record of the lender's disbursement of Stafford and PLUS loan funds to a school for delivery to the borrower as part of the claims process nor are they required to submit loan disbursement data under the current process for assigning loans to the Secretary. For these reasons, the commenters stated that disbursement records may not be readily available for submission in the FFEL mandatory assignment process as required by proposed § 682.409(c)(4)(vii). The commenters requested that the Department implement any new guaranty agency reporting obligation prospectively for new Stafford and PLUS loans made under an MPN on and after July 1, 2008 to give sufficient lead time to guarantors and lenders to establish the processes to support this new requirement. Another commenter, again citing the lack of availability of disbursement records through the claims process, recommended that the Secretary require the submission of the record reflecting the date of guarantee instead and only for loans that are under investigation by the Secretary.

Discussion: The Department's longstanding regulations in § 682.414(a)(4)(ii)(D) have directed guaranty agencies to require a participating lender to maintain current, complete, and accurate records of each loan that it holds, including but not limited to, a copy of a record of each disbursement of loan proceeds. Although these records are not collected

as part of the claims process, these records must be retained in accordance with § 682.414(a)(4)(ii)(D). For this reason, the Department sees no reason to implement these new regulations prospectively and is confident that guaranty agencies and lenders can implement a process that provides for the submission of disbursement records as part of the mandatory assignment process before the regulations become effective on July 1, 2008.

Changes: None.

Comment: Several commenters suggested that we revise the provision in § 682.414(a)(5)(iv) requiring a lender to retain an original electronically signed Stafford or PLUS MPN for three years after all loans made under the MPN are satisfied to require the ''entity in possession'' of the original electronically signed MPN, rather than the ''holder,'' to retain the note for a period ending on the earlier of 20 years from the date of signature or the date all the loans on the MPN have been satisfied. The commenters stated that this change would address cases when a loan is assigned to another party, such as the guarantor or Secretary, and the lender has no way of knowing when all the loans under the MPN are satisfied. The commenter stated that this change would also address the fact that the life span of record retention technology has a practical limit.

Discussion: As stated in response to comments discussed earlier, the Department believes using the term ''entity'' in the context of § 682.414 is too vague. The intent of the regulations is to create a legal obligation on the lender and guaranty agency that created the promissory note to cooperate with the Secretary.

Changes: None.

Loan Counseling for Graduate or Professional Student PLUS Loan Borrowers (§§ 682.603, 682.604, 685.301, and 685.304)

Comments: Overall, commenters were supportive of the proposed changes to the loan counseling regulations, but some commenters had questions or concerns regarding the proposed changes.

One commenter asked if the notification requirements specified in § 682.603(d) would be met if the information listed were provided to borrowers through the school's financial aid award letter process.

Several commenters noted that the proposed regulations would require schools to provide one set of initial counseling materials to student PLUS borrowers who have received prior Stafford Loans and another set of initial counseling materials to student PLUS borrowers who have not received prior Stafford Loans. The commenters acknowledged that establishing less comprehensive initial counseling requirements for student PLUS borrowers who have already received Stafford Loan initial counseling was intended to minimize burden on schools. However, these commenters stated that separate initial counseling requirements would actually be more burdensome. For some schools, separating student PLUS borrowers into different categories for initial counseling purposes would be more cumbersome than providing the same initial counseling to all student PLUS borrowers.

Several commenters noted that proposed § 682.604(f) is disjointed and hard to follow. These commenters recommended restructuring § 682.604(f).

Discussion: The regulations do not specify a method a school must use to notify a student PLUS Loan borrower of the student's eligibility for a Stafford Loan, the different terms and conditions of PLUS and Stafford loans, and the opportunity to request a Stafford Loan instead of a PLUS Loan. The regulations only specify that this information must be provided to the student before the loan is certified, in the case of a FFEL Loan (see § 682.603(d)), or before the loan is originated, in the case of a Direct Loan (see § 685.301(a)(3)). If the financial aid award letter includes the required information, and is provided to the student before the loan is certified or originated, it would meet the requirements of § 682.603(d) or § 685.301(a)(3), as the case may be.

Many schools no longer provide in-person loan counseling, and instead use electronic, interactive counseling programs. Often these electronic, interactive counseling programs are developed by guaranty agencies and provided to schools. We believe that the benefits of a more informed borrower, particularly for graduate and professional PLUS borrowers who have access to significantly increased loan amounts, outweigh the costs of providing the additional loan counseling. In addition, schools are not required to provide separate counseling for student PLUS borrowers. Schools are not required to develop separate initial counseling materials for student PLUS borrowers with prior Stafford Loans and student PLUS borrowers without prior Stafford Loans. The regulations only specify minimum initial counseling requirements. Schools must provide certain information to PLUS borrowers who have received prior Stafford loans, and must provide certain information to PLUS borrowers who have not received prior Stafford Loans. The regulations do not prohibit schools from exceeding the minimum initial counseling requirements. If a school finds that providing comprehensive initial counseling to all student PLUS borrowers is more cost effective than providing the limited counseling required by the regulations, a school may provide the comprehensive counseling to all student PLUS borrowers.

We agree with the commenters' recommendations regarding the restructuring of § 682.604(f).

Changes: We have restructured § 682.604(f). Revised § 682.402(f) begins with a discussion of initial counseling requirements for Stafford Loan borrowers, then discusses initial counseling requirements for student PLUS Loan borrowers, and ends with a discussion of general initial counseling requirements.

Maximum Length of Loan Period (§§ 682.401, 682.603, and 685.301)

Comment: Commenters were in unanimous support of the Secretary's proposal to eliminate the maximum 12-month loan period for annual loan limits in the FFEL and Direct Loan programs and the 12-month period of loan guarantee in the FFEL Programs. One commenter noted that the regulatory change would require loan origination systems changes. Another commenter noted that the change would require the removal of a system edit used by some guaranty agencies to monitor school loan certification. This commenter asked the Secretary to confirm that this regulatory change would have no impact on a school's reporting to NSLDS.

One commenter asked the Secretary to further clarify in the preamble to these final regulations the relationship of the longer loan period to loan limits and the definition of *academic year.* Another commenter asked that we clarify in the preamble that the intent of the regulations is to avoid potential misunderstandings among schools that might lead to the application of a single Stafford annual loan limit for a period spanning multiple academic years.

Discussion: The Secretary appreciates the commenters' support. The Secretary understands that this regulatory change may require lenders and guaranty agencies to make changes in their loan origination systems. The Secretary believes that the effective date of the regulations under the master calendar provisions of the HEA provides sufficient time for these changes to be made.

The intent of the regulations generally is not to allow schools to certify a single Stafford annual loan limit for a period spanning multiple years, although borrowers attending non-term and certain nonstandard term programs on a less-than-full-time basis may have loan periods that span more than the period associated with an academic year for a full-time student. Schools are still expected to monitor annual loan limit progression by the school's academic year, which must meet at least the minimum standards defined in 34 CFR 668.3. Annual loan limits continue to apply to the academic year or the period of time necessary for a student to progress to the next grade level as referenced in § 682.401(b)(2)(ii). Unless a school uses standard terms and is authorized to certify loans by the term, most loan certifications will also continue to be for the academic year according to the school's defined Title IV academic year.

The proposed changes to §§ 682.401, 682.603, and 685.301 are intended to allow a school to certify a single loan for students in shorter, non-term or nonstandard term programs (for example, a 15 month program when the school's Title IV academic year encompasses 10 months). The change will also provide greater flexibility in rescheduling loan disbursements for students in non-term and certain nonstandard term programs who are progressing academically in their programs more slowly than anticipated, or who drop out and return within the permitted 180-day period to retain Title IV disbursements. The Secretary clarifies that this change has no impact on school reporting to the Department's NSLDS.

Change: None.

Mandatory Assignment of Defaulted Perkins Loans (§§ 674.8 and 674.50)

Justification for Mandatory Assignment

Comments: A large number of schools commented on this proposal, challenging the Department's justification for requiring mandatory assignment of defaulted Perkins Loans. These schools acknowledged that the Department has collection methods unavailable to the schools, but noted that schools have collection methods, such as withholding transcripts and placing administrative holds on services, that the Department does not have.

Many of these schools identified the amount of outstanding Perkins Loan balances they would lose upon implementation of these regulations. These schools argued that the loss of potential collections on these loans removes an income source for their Perkins Loan Fund, and reduces the number of Perkins Loans available to future borrowers. These commenters pointed out that there has been no Federal Capital Contribution (FCC) in the Perkins Loan Program in recent years, and asserted that the mandatory assignment proposal would further deplete a school's Perkins Loan Fund.

These schools also identified their recovery rates on Perkins Loans they hold that are in default for seven or more years. They based their calculations on the outstanding amounts on these loans, and the amounts collected in the preceding three years. Recovery rates reported by the commenters ranged from a low of seven percent to a high of 79 percent. The schools argued that the Department has not demonstrated that it has a higher recovery rate on defaulted Perkins Loans than the schools.

Discussion: The Department acknowledges that schools have collection tools that are unavailable to the Department. However, the low recovery rates reported by many schools indicate that these tools are not generally effective. The mandatory assignment requirements will have little impact on schools that do use these tools effectively to collect on defaulted loans. If even one payment is received on a defaulted loan in the year prior to the Department requiring assignment, the loan would not be eligible for mandatory assignment. In addition, it is our experience that many schools maintain holds on transcripts and other administrative services after they assign Perkins Loans to the Department. We expect that schools will continue this practice for mandatorily assigned loans. The Department's estimated savings resulting from mandatory assignment are provided in the *Accounting Statement* in Table 1 of the Regulatory Impact Analysis.

The Department is aware of the large amount of aged, defaulted Perkins Loans held by schools with little or no collection activity. As noted in the preamble to the NPRM, our records show that schools are holding more than $400,000,000 in such loans. The commenters' submissions identifying the amounts of Perkins Loan funds schools may lose under the regulations illustrate the magnitude of the problem. The data showing large amounts of old defaulted Perkins Loans which schools have been unable to collect supports requiring mandatory assignment.

With respect to the Department's recovery rates, defaulted Perkins Loans that are assigned to the Department under the current voluntary assignment procedures are assigned for such reasons as hardship, incarceration, refusal to pay, and the school's inability to locate the borrower. Schools are required to undertake first-year and second-year collection efforts before assigning Perkins Loans to the Department, although schools may dispense with the second-year collection efforts and assign a loan to the Department after the first year collection efforts have failed. Thus, the defaulted Perkins Loans that are assigned to the Department through voluntary assignment are loans that schools consider uncollectible.

The Department's analysis of its recovery rate on these defaulted Perkins Loans shows that, as of August 30, 2007, the Department's recovery rate is:

- 53.90 percent for loans assigned to us in 2002.
- 45.90 percent for loans assigned to us in 2003.
- 36.02 percent for loans assigned to us in 2004.

The recovery rates show increased collections on defaulted Perkins Loans the longer the Department holds the loans. We believe the Department's recovery rate on defaulted Perkins Loans compares favorably to the schools' self-reported recovery rates. Therefore, we strongly believe that requiring assignment of these loans to the Department, as described in these regulations, is in the best interests of the taxpayers and the government.

Changes: None.

Alternatives to Mandatory Assignment

Comments: Several commenters suggested alternatives to the mandatory assignment proposal. Some commenters suggested that the Secretary re-institute a version of the referral program that existed in the 1980s. Under a referral program, schools could voluntarily assign loans to the Department; the Department would collect on the loans, and would return a portion of the collections to the school that assigned the loan. Other commenters suggested a variation of the referral program under which the Department would return funds not to individual schools, but to the Perkins Loan Program generally. Under this proposal, the amounts the Department collects on assigned loans would be re-allocated to schools participating in the Perkins Loan Program, using the standard allocation formula.

Commenters recommended streamlining the voluntary assignment process, improving the Default Reduction Assistance Program (DRAP), and re-instituting the IRS Skiptracing

Service, as alternatives to mandatory assignment.

Discussion: As discussed in the preamble to the NPRM, the referral program the Department administered in the 1980s was not a success. We continue to believe, and the commenters did not provide us with any basis for modifying our position, that a revival of that program would not be in the Federal fiscal interest.

With regard to the proposals for a streamlined voluntary assignment process and for re-instituting the IRS Skiptracing Service, we note that the Department has already streamlined the voluntary assignment process significantly. We have reduced the supporting documentation required for assignment, simplified the assignment form, and implemented a process allowing for the submission of assignment packages in groups. However, these changes have not significantly increased the number of voluntarily assigned Perkins Loans.

The commenter requesting that we improve DRAP did not indicate what the perceived deficiencies of that program are, or make any specific recommendations for improvements. DRAP is intended as a final effort to prevent a loan that is about to go into default from going into default. Any improvements to DRAP would have little impact on loans that have been in default for seven or more years.

The Department is renewing its computer-matching agreement with the Internal Revenue Service to re-institute the IRS Skiptracing Service. Schools and guaranty agencies that have an approved Safeguard Report will be able to access the Student Aid Internet Gateway (SAIG) to request and receive data through their mailboxes. The Department is currently working to make this service available to guaranty agencies and schools. Announcements on the availability of the IRS Skiptracing Service will be posted to the Department's Information for Financial Aid Professionals (IFAP) Web site. To the extent that the IRS Skiptracing Service is helpful to schools in locating borrowers of defaulted Perkins Loans, it should reduce the number of loans that will meet the criteria for mandatory assignment. We will also consider improving the DRAP program in the future.

Changes: None.

Criteria for Mandatory Assignment

Comments: Many commenters suggested that if the Department requires mandatory assignment of Perkins Loans, it should modify the criteria for mandatory assignment. Generally, commenters recommended increasing the outstanding loan balance and the number of years in default that would trigger assignment from $100 to $1,000 and from seven years to ten years, respectively. Commenters argued that a ten-year period of default made sense, because the maximum repayment period for a Perkins Loan is ten years. One commenter claimed that many defaulted borrowers are willing and able to repay their defaulted loans after five to ten years in default. The commenter asserted that a borrower who has been in default for this length of time is often in a position to take out a mortgage on a home or to obtain a loan for some other large purchase. Such a borrower would seek to repay defaulted Perkins Loans to improve his or her credit report. Another commenter stated that this often occurs after 15 years in default.

Several commenters recommended that we exempt schools with low default rates from the mandatory assignment requirements. Commenters also recommended that accounts on which the schools have acquired a judgment against the borrower be exempted. The commenters noted that schools spend a significant amount of time and effort securing judgments on loans and stated that it was not fair to require schools to assign judgment accounts. One school noted that a judgment may include both private loans and Perkins Loans, making it difficult for the school to separate the Perkins Loan from the private debt for assignment purposes.

Finally, a large number of commenters noted that if the Department required assignment of all loans that meet the criteria for assignment in the proposed regulations, it would result in a huge inventory of assignments. The Department would have difficulty absorbing such a large influx of assigned loans. These commenters recommended that the Department begin mandatory assignment with loans that are 15 years past due, and gradually move towards loans that are seven years past due.

Discussion: In the preamble to the NPRM, we discussed in considerable detail different alternatives for requiring the assignment of defaulted Perkins Loans to the Department.

Rather than attempting to pinpoint a specific time when borrowers tend to be motivated to pay off their defaulted loans, the Department proposed to model the Perkins Loan mandatory assignment requirements on the mandatory assignment requirements in the FFEL Program. Under the mandatory assignment process in the FFEL Program, a FFEL Loan is in default for a little over six years before it is assigned to the Department. Based on that precedent, in these final regulations, the Department has adopted a standard of seven years for Perkins Loans.

Similarly, the standard of a balance of $100 or more on a loan before mandatory assignment will be required is consistent with the requirement for mandatory assignment of FFEL loans. We continue to believe that these standards are reasonable.

We do not agree with the proposal to exempt schools with low cohort default rates from the mandatory assignment requirement. Cohort default rates are based on collections in the first three years after a loan enters repayment status. Cohort default rates do not measure a school's success at collecting on loans that have been in default for several years and are not relevant to the loans that will be subject to mandatory assignment. While it may be correct that schools with low cohort default rates have fewer loans in default for seven years or more than schools with higher cohort default rates, this fact does not support a conclusion that the schools with low cohort default rates are successful at collecting on loans that have been default for seven years or more.

The Department also disagrees with the recommendation that loans on which the school has secured a judgment be exempted from mandatory assignment. Securing a judgment on an account is a helpful collection tool, but it does not ensure that the borrower will make payments on the debt. We acknowledge that Perkins Loans that have been merged into judgments may need to be handled differently than regular Perkins Loans for purposes of mandatory assignment. The Department will develop procedures for the assignment of judgment accounts as the Department operationalizes the mandatory assignment process.

We agree with the recommendation by many commenters that we phase-in mandatory assignment. The regulations establish the minimum criteria for mandatory assignment. The regulations do not preclude the Department from phasing-in mandatory assignment by starting the process with loans that have been in default for more than the seven-year minimum. Phasing-in mandatory assignment will ease disruption to both the schools and the Department.

Changes: None.

Legal Basis for Mandatory Assignment in the Perkins Loan Program

Comments: Some commenters questioned the Department's legal

authority to require the assignment of Perkins Loans, arguing that section 463(a)(4)(A) of the HEA provides for mandatory assignment in certain limited circumstances and precludes the Secretary from requiring mandatory assignment in other circumstances.

Discussion: Section 463(a)(9) of the HEA authorizes the Secretary to add provisions to the program participation agreement for schools where the Secretary has determined that the provision is necessary to protect the United States from unreasonable risk of loss. For the reasons discussed in the NPRM and these final regulations, the Secretary has determined that the mandatory assignment regulations as proposed, which will allow the Secretary to require participating schools to assign defaulted loans that meet the criteria in the regulations, are necessary to protect the United States from unreasonable risk of loss. The sections of the HEA cited by the commenters do not prevent the Secretary from exercising her authority under section 463(a)(9) of the HEA.

Changes: None.

Reasonable Collection Costs (§ 674.45)

Collection Cost Caps

Comments: Several commenters stated that the proposed caps on the collection costs that may be charged to borrowers in the Perkins Loan Program are too high, and should be reduced. Generally, these commenters recommended reducing the cap to 24 percent, which would be consistent with the cap on collection costs in the FFEL Program.

One commenter stated that the proposed regulations would not sufficiently limit collection costs. This commenter noted that the Perkins Loan Program is intended to benefit needy students. The commenter argued that it is reasonable to expect that a portion of low-income borrowers receiving Perkins Loans would have difficulty repaying these loans. These borrowers are often the ones least likely to be aware of their repayment options, and most likely to get caught in a spiral of increasing collection costs. As collection costs are added to the loan, the outstanding balance increases so rapidly that the ability to pay off the loan becomes further and further out of reach.

This commenter also challenged the fee-on-fee method of assessing collection costs. Under the fee-on-fee method, collection agencies that charge contingency fees charge a ''make whole rate'' to borrowers. The commenter asserted that many States prohibit or limit the use of make whole rates for other types of consumer debt, and the Department should do likewise for Perkins Loans.

Other commenters, who believed the collection cost caps are too low, supported the use of a make whole rate, and asked the Department not to abandon this approach for the Perkins Loan Program.

Several commenters recommended increasing the collection cost caps. Generally, these commenters recommended increasing the collection cost caps to:

- 33 percent for first collection efforts.
- 40 percent for second collection efforts.
- 50 percent for collection efforts arising out of litigation.
- 50 percent for collection efforts against borrowers living abroad.

Several commenters who recommended increasing or eliminating the collection cost caps argued that the proposed caps will make it financially difficult for schools to collect on defaulted Perkins Loans. These commenters said that schools will have to pay more for collections than they can charge to the students. As a result, schools would charge the difference to the Perkins Loan Fund, thus depleting the Fund. The amount of funds that could then be lent out to future students would be reduced. In response to these comments, other commenters noted that the purpose of assessing collection costs against a borrower is not to create an income stream for schools' Perkins Loan Funds.

Several commenters also argued that the quality of collection efforts will suffer under the proposed collection cost caps.

Discussion: The Department declines to adopt the commenters' recommendation to reduce the collection cost caps to the same level as those in the FFEL Program. Perkins Loans are low-balance loans compared to FFEL loans, but the cost of collection is about the same. Because the return on collecting Perkins Loans is smaller than the return on collecting FFEL loans, we believe that higher collection cost caps are warranted in the Perkins Loan Program. The Department also disagrees with the commenters' recommendations for increasing the collection cost caps. We believe that the caps as proposed strike a fair balance between the concerns of borrowers and the concerns of the Perkins Loan Program schools and collection agencies.

With regard to contingency fees, the Department is not abandoning the make whole rate for Perkins Loan collections. The Department does not regulate the establishment of fees in a contract between a Perkins Loan Program school and a collection agency. However, institutional contracts must provide for the recovery to the Perkins Loan Fund of the outstanding balance of the loan. Since a collection agency incurs additional expenses associated with collecting these amounts, the school may authorize the collection agency to also recover these expenses from the borrower.

Collection agencies frequently charge contingency fees to borrowers. The Department's rule on assessing collection costs on a contingency fee basis to an individual who owes a debt to the Department is in 34 CFR 30.60 and is commonly referred to as the fee-on-fee method. While this method of assessing collection costs is not required in the Perkins Loan Program, many schools and servicers use it because it makes the Fund whole. The make whole rate is the amount by which the borrower's debt is multiplied to determine the amount that the collection agency needs to collect to recover 100 percent of the outstanding balance.

Thus, a collection cost cap of 30 percent means that, for loans collected on a contingency fee basis, the actual collection costs charged to the borrower must be less than 30 percent.

We expect that when these regulations take effect, collection agencies that collect on Perkins Loans will adjust their contingency fees to comply with the new regulatory requirements. Collection agencies that charge a make whole rate to borrowers will have to take that into account when adjusting their contingency fees.

Some schools argue that they have little choice but to agree to high contingency fees when they negotiate contracts with collection agencies. Given the inability of many schools to secure favorable terms with collection agencies collecting on Perkins Loans, the Department believes that the most effective way to reduce these collection costs in the Perkins Loan Program is to mandate collection cost limits.

We agree with the commenters who argued that the purpose of assessing collection costs is not to create an income stream for a school's Perkins Loan Fund. Additionally, § 674.47(e)(3) and (4) limits the amount of unpaid collection costs that a school may charge to the Fund to 30 percent for first collection efforts, and 40 percent for second collection efforts. These limits match the limits on collection costs that may be charged to borrowers established in the final regulations.

Changes: None.

Additional Concerns

Comments: Several commenters raised additional concerns with regard to the proposed caps, or recommended modifications to the proposed regulations. One commenter recommended restricting the amount of collection charges that may be charged to a borrower from average costs to actual costs. This commenter stated that allowing agencies to assess average costs against a borrower is unfair, since the actual collection cost incurred with respect to a particular borrower may be lower than the average costs that the borrower is charged.

Some commenters recommended applying the caps only to collection costs incurred by collection agencies on a contingency fee basis, not on the costs incurred by schools for their own internal collection efforts. These commenters argued that the unreasonably high collection costs seen in the Perkins Loan Program are due to collection agency contingency fees, not collection activities carried out by Perkins Loan Program schools.

Other commenters recommended that the cap on litigated loans be removed, and be replaced by an amount defined by the court.

Another commenter argued that informing borrowers of the new collection cost caps would be administratively burdensome.

Another commenter said the regulations would be inconsistent with § 674.45(e), which requires schools to assess all reasonable collection costs to borrowers.

Discussion: Allowing schools to charge only actual costs to the borrower is unworkable and inconsistent with standard collection practices on student loans and other debts. Requiring lenders to identify specific actual costs for every borrower that the lender collects on would be administratively burdensome and not cost effective.

We do not see any justification for applying the caps only to collection costs incurred by collection agencies. From a borrower's perspective, collection costs are collection costs. It makes little difference whether the costs were incurred by a collection agency or by the school.

With regard to litigated loans, a court may remove all collection charges from a loan as part of a judgment. The regulations establishing collection cost caps on loans that are litigated do not preclude a court from lowering the collection charges or eliminating the collection charges altogether when the court issues a judgment.

The regulations do not impose a requirement that schools notify borrowers of the collection cost caps. Collection costs also are not among the items that a school must discuss during its exit interviews with borrowers.

Finally, the regulations do not conflict with the reasonable collection costs provisions in the existing regulations. As amended by these final regulations, § 674.45 defines ''reasonable collection costs'' chargeable to the borrower as costs within the proposed caps.

Changes: None.

Child or Family Service Cancellation (§ 674.56)

Comment: Commenters were overwhelmingly supportive of the proposed clarifications to § 674.56, regarding cancellation of loans for individuals working in the child or family service areas. However, two commenters had questions about this provision.

To qualify for a child or family service cancellation, among other requirements, an otherwise eligible borrower must be employed full-time by a child or family service agency. One commenter asked if employment by a child or family service agency would disqualify an attorney for the cancellation, because the agency, rather than the children the agency serves, is considered to be the attorney's client.

A second commenter noted that the child or family service cancellation would be one of the hardest cancellations in the Perkins Loan Program to qualify for, and asked if that was the intent of Congress when the law was passed.

Discussion: An attorney who is an employee of a child or family service agency must meet the same eligibility requirements as any other non-supervisory employee of a child or family service agency to qualify for the loan cancellation. The attorney must provide services directly and exclusively to high-risk children from low-income communities.

The determination of whether a borrower qualifies for a discharge is made on a case-by-case basis and would require consideration of the attorney's specific responsibilities. However, in general, if the attorney represents the agency in court, the attorney is not providing services directly to the child.

If the attorney represents children in court such as in the role of a guardian ad litem, the attorney would be considered to be providing services directly to the child. If the other eligibility criteria for the cancellation are met, the attorney would qualify for a child or family service cancellation.

With respect to the comment about the difficulty of qualifying for this cancellation, section 465(a)(2)(I) of the HEA, which establishes the child or family service cancellation, is very narrowly written. The statute requires employment at a certain type of agency and the provision of services to a specific population. The borrower must provide services to children who are both ''high-risk'' and come from ''low-income communities.'' Section 469(a) and (b) of the HEA defines both of these terms. The final regulations are consistent with the statutory language.

Changes: None.

Prohibited Inducements (§§ 682.200 and 682.401)

Comment: Many commenters endorsed the Secretary's efforts to clarify the regulations on improper inducements and improve enforcement of the law, but disagreed with various aspects of the proposed regulations. Several commenters thought the proposed regulations were not sufficiently strict. Several U.S. Senators commended the Secretary on the proposed regulations, particularly the use of the rebuttable presumption to more effectively enforce the anti-inducement requirements. Several commenters thought that the Department's lack of oversight and enforcement of current requirements was a bigger problem than the content of the regulations. One association representing school business officers cautioned against the unintended consequences of the proposed regulations and expressed concern that the regulations could affect the wide range of relationships between colleges and universities and financial institutions. That commenter also noted that financial institutions were very heavily engaged in philanthropic endeavors in higher education and expressed concern that any perceived risk to the lender could result in those needed dollars being invested elsewhere.

One commenter saw no basis for having different rules for lenders and guaranty agencies in regard to prohibited inducements.

Discussion: The Secretary thanks the commenters for their support and comments on this very complex and urgent issue affecting the FFEL Program. The Secretary believes that this regulatory effort will result in clearer regulatory guidelines for schools, lenders, and guaranty agencies participating in the FFEL program. The detailed provisions in the form of permissible and impermissible activities that govern the interaction between lenders, guaranty agencies, and schools will assist these parties in avoiding

violations of the law. The increased regulatory clarity and specificity will also improve the Secretary's ability to enforce the law in this area. Student and parents served by the program, and the taxpayers that support it, will have renewed trust in the integrity and transparency of the loan process. Students and parents will clearly understand that they have a choice of lender and can exercise that choice. Absent questionable payments and activities between schools and lenders, students and parents will view a school's financial aid office once again as an unbiased source of information on the FFEL loan process and on the factors a prospective borrower should consider in selecting a lender. Borrowers will be more likely to receive clear comparisons between the benefits offered under the Federal student loan programs and under private education loan programs without concern that prohibited payments or other forms of assistance by a lender to a school will influence a school's counseling such that a borrower receives a loan with less favorable terms and conditions.

The Secretary understands commenters' concerns about unintended consequences for other contractual services performed for schools by financial institutions and their affiliates, and on philanthropic giving to higher education. However, she believes that contracted services between financial institutions and schools in non-student aid related areas will not be affected by these regulations as long as the arrangements are negotiated in good faith and are not undertaken to secure FFEL loan applications or limit a borrower's choice of lender. Likewise, the Secretary believes that financial institutions will continue to provide philanthropic support to institutions. These philanthropic relationships need not change as long as they have not been undertaken to secure FFEL loan applications or limit a borrower's choice of lender. She feels confident that schools and financial institutions will take all the prudent steps necessary to ensure that there are no conflicts of interest between the financial institution's role as a FFEL lender and its philanthropic support of higher education.

Finally, the Department believes that the regulations properly treat guaranty agencies and lenders differently for purposes of improper inducements. Guaranty agencies are responsible for lender and school oversight and training, default prevention, outreach and financial literacy, and lender claim review and payment and the regulations need to recognize the important roles these agencies play in these areas. In contrast, under the HEA, the lender's roles are to provide loans for eligible borrowers and collect those loans in accordance with the Secretary's regulations.

Changes: None.

Comment: Some commenters recommended that the Department clarify in the final regulations that State laws relating to the inducement practices of lenders, schools and loan guarantors within the FFEL Program are preempted.

Discussion: The Department appreciates the commenters' concerns about potential State law conflicts with the Department's inducement-related regulations. It is well settled that any State law that conflicts with or ''stands as an obstacle to the accomplishment and execution of the full purposes and objectives'' of a Federal law is preempted. *Hillsborough County, Fla.* v. *Automated Med. Laboratories, Inc.,* 471 U.S. 707, 713 (1985). Moreover, ''[f]ederal regulations have no less pre-emptive effect than federal statutes.'' *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 153 (1982). Accordingly, State statutes, regulations, or rules that conflict with or hinder the accomplishment and execution of the Department's rulemaking relating to inducement practices are preempted. We anticipate future negotiated rulemaking to implement the CCRAA and expect to include this issue among those considered for rulemaking at that time.

Changes: None.

Use of a Rebuttable Presumption (§§ 682.413, 682.705(c), and 682.706(d))

Comment: A number of commenters representing students and other members of the public supported the proposal to strengthen the Secretary's enforcement of the prohibition on improper inducements in the FFEL Program.

Many commenters representing various FFEL Program participants objected to the Secretary's proposal to adopt a rebuttable presumption in administrative actions against lenders or guaranty agencies involving violations of the prohibited inducement provisions. One of these commenters argued that the use of a rebuttable presumption was inconsistent with the statutory requirement that the Secretary determine that an inducement was offered in order to secure loan applications. The commenter argued that the HEA includes a broad definition of a prohibited inducement and, as a result, a number of activities would automatically be presumed by the Department to be a violation under the rebuttable presumption approach.

Other loan industry commenters stated that the adoption of a rebuttable presumption was unnecessary given the Department's existing authority to gather information through reviews and audits conducted by the Office of Federal Student Aid and the Office of Inspector General. These commenters claimed that the use of a rebuttable presumption is inconsistent with procedural due process rights and urged that the proposal be withdrawn. These commenters argued that, if the presumption is retained, the regulations must require the Department to have a factual basis supporting the finding of an improper inducement before commencing any proceeding that could result in the lender's limitation, suspension, or termination from the FFEL Program. The commenters also urged that if retained in the regulations, the presumption be applied only with respect to activities occurring prospectively from the general effective date of the regulations.

Discussion: The Secretary thanks the commenters who supported the proposed regulations.

The Secretary has carefully considered the legal arguments presented by the lenders, guaranty agencies and their supporters. However, contrary to those arguments, it is well established that the Secretary has broad authority to establish appropriate regulations and procedures for resolving administrative cases under the HEA, including rules for consideration of evidence and determining the burden of proof. 20 U.S.C. 1082(a)(1); *USA Group Services* v. *Riley*, 82 F.3d 708 (7th Cir. 1996); *Career College Ass'n.* v. *Riley,* 74 F.3d 1265 (D.C. Cir. 1996). The establishment of a rebuttable presumption is within that legal authority. Moreover, the commenters have misinterpreted the effect of a rebuttable presumption. The rebuttable presumption does not eliminate the Secretary's obligation to make a finding that an inducement was provided in exchange for loan applications. Instead, under these procedures, once the Department establishes that a lender or guaranty agency engaged in one of the activities established in these regulations as creating an improper inducement, the lender or guaranty agency then has the opportunity and obligation to show that its purpose for engaging in the activity was unrelated to securing loan applications. The Secretary is still required to make the ultimate finding that the lender or guaranty agency offered an improper

inducement and that the inducement was provided to secure loan applications.

The Secretary's list of improper inducements included in § 682.401(d) that are presumed to be offered to secure loan applications is based on our experience in administering the FFEL Program since the publication of Dear Colleague Letter 89–L–129 in February 1989, which addressed improper inducements. Moreover, recent reviews, investigations and reports by the Department's Office of Inspector General, the Comptroller General, Congress and various State Attorneys General have consistently shown that lenders undertake the activities listed in the regulations to secure FFEL Program loan applications. For example, a recent Congressional report documented how a lender that wanted to make loans to students at schools where the lender had not previously made loans began providing services and benefits to the schools. The report quotes directly from internal lender and school documents clearly indicating that the lender performed these activities for the purpose of gaining more loan volume at the schools, and in fact, the lender was successful. In contrast, none of the recent public reports, investigations, testimony and settlement agreements or any of the comments on the proposed regulations suggest that lenders provided services and benefits to schools for any purpose other than to secure loan applicants.

With this background, it is appropriate for the Secretary to place the burden on the lender or guaranty agency to explain its purpose in providing benefits or services to schools. Moreover, in the great majority of cases, the evidence of intent will be directly and solely under the control of the lender or guaranty agency. Accordingly, the Secretary has determined that it is appropriate and consistent with due process to require the lender or guaranty to have the obligation to present that evidence and explain its purpose.

Some of the commenters asked the Secretary to exempt from the improper inducement provisions the situation in which a State guaranty agency or an affiliated lender is performing services for small institutions in accordance with its responsibilities under State law. The Secretary notes that, as described by these commenters, the provision of these services may have a purpose (compliance with State law) other than securing loan applications. This example shows the appropriateness of placing the burden of explanation on the party most likely to have evidence of that purpose.

The Secretary also notes that the rebuttable presumption will only be applied after the Department has previously gathered information from the lender and the lender has had an opportunity to provide an alternative explanation for its actions. The Secretary intends to apply the rebuttable presumption only in those situations where there is significant evidence that the lender or guaranty agency offered or provided the payments or activities to secure FFEL loan applications or FFEL loan volume. Since the rebuttable presumption is a rule of procedure and does not affect any substantive rights or obligations, there is no basis for the delayed effective date suggested by some commenters.

Changes: None.

Application of the Federal Trade Commission (FTC) Holder Rule (§ 682.209(k))

Comment: Several commenters representing FFEL Program loan industry participants opposed our proposal to apply the principles of the Federal Trade Commission's (FTC's) Holder Rule to all FFEL Program loans. These commenters argued that implementation of this proposal will result in significant costs and administrative burden to FFEL Program participants who will be required to defend meritless legal claims brought by borrowers challenging their student loan debts. The commenters urged the Secretary to withdraw the proposal and conduct further studies to identify a sufficient factual basis identifying harm to the FFEL Program that necessitates a regulatory solution of this nature. The commenters believe that any harm intended to be addressed by the proposal is far outweighed by the costs of the proposal. The commenters also believe that the proposal effectively creates a private right of action for borrowers in clear disregard of case law that holds that there is no private right of action under the HEA. The commenters noted that the application of this rule could leave a State court in a position to interpret the Federal inducement regulations to determine whether the Department's version of the FTC Holder Rule applies. The commenters indicated that if the Secretary adopts this proposal the regulations should provide that the claims and defenses that a borrower may assert against a lender are limited to claims or defenses that the borrower could assert against the school, and that the borrower's recovery may not exceed the amount paid on the loan. The commenters indicated that the Secretary should also clarify that the mere existence of a preferred or recommended lender relationship with a school does not trigger application of this Rule.

Other commenters representing consumer and student organizations, and the office of a State attorney general agreed with the Secretary's proposal to adopt and apply the principles of the FTC Holder Rule to the FFEL Program. The commenters argued, however, that our proposed regulations should mirror the FTC Holder Rule in two important areas. The commenters recommended that the regulations be modified to provide that all subsequent holders of a FFEL loan, not just the immediate holder of the loan, are subject to potential claims, and that the full range of FTC claims and defenses apply, not just those related to the loan.

Discussion: We thank those commenters who supported the proposal to incorporate the principles of the FTC Holder Rule into the regulations of the FFEL Program. However, we do not agree with the suggestion from many of those commenters that the Department adopt the specific language of the FTC's own rule. When the Department first incorporated the terms of the FTC Holder Rule into the FFEL Program promissory notes, we made necessary and appropriate modifications to the language of the FTC Holder Rule to correspond to the requirements and regulations of the FFEL Program. The Secretary is incorporating that existing language into these regulations to ensure that they apply to all borrowers in the FFEL Program, no matter what type of school the borrower attends. Accordingly, the Secretary does not believe that a direct incorporation of the FTC Holder Rule into the FFEL Program regulations is appropriate.

The Secretary does not agree with those commenters who generally opposed the inclusion of the principles of the FTC Holder Rule into the FFEL Program regulations. The Secretary believes that this change will eliminate the current difference in legal rights between borrowers attending for-profit institutions (who are covered by the FTC Holder Rule under the FTC's own authority and the FFEL Program promissory note) and those attending non-profit institutions. That distinction arose not because of any education-based policy distinction, but solely because the FTC Holder Rule governed only for-profit institutions with specified lender relationships. Moreover, this change is consistent with a long line of court decisions that found

that the HEA does not preempt State laws that allow borrowers to raise State law claims as a defense against collection of a FFEL Program loan unless particular State laws actually conflict with the objectives of the HEA. *Armstrong* v. *Accrediting Council for Continuing Educ. & Training, Inc.,* 168 F.3d 1362 (D.C. Cir. 1999), *cert. denied,* 528 U.S. 1173 (2000). Courts have also concluded that the lack of a private right of action does not preclude the use of violations of the HEA as evidence of the violation of State laws. *College Loan Corp.* v. *SLM Corp.,* 396 F.3d 588, 598–599 (4th Cir. 2005); *Cliff* v. *Payco American Credit, Inc.,* 365 F.3d 1113, 1127–1130 (11th Cir. 2004). Lastly, contrary to the commenters' claims, we do not anticipate a significant increase in risk or costs to lenders. The principles of the FTC Holder Rule have been in the FFEL Program promissory note and applied to loans for attendance at for-profit schools since 1994. The Secretary is not aware of any significant litigation based on this language since that time and the commenters did not present any facts supporting their claims.

Given that the FTC Holder Rule has applied to some student loan borrowers for more than a decade and that the commenters did not present any support based on that experience for their claim that including this provision will increase costs, we do not accept the recommendation for further studies.

We do not believe it is necessary to clarify the effect that a preferred or recommended lender relationship would have on application of the regulation. The regulation is consistent with the language that has been in the FFEL Program promissory notes and the FTC Holder Rule itself in providing that the borrower may assert the actions of the school as a defense against the lender if the school refers borrowers to the lender.

Changes: None.

Exhaustive List of Permissible Activities (§§ 682.200(b) and 682.401(e)(2))

Comment: Many loan industry commenters objected to the inclusion in the regulations of an ''exhaustive'' list of permissible inducement activities for lenders and guaranty agencies, while including a non-exhaustive, illustrative list of prohibited inducement activities. The commenters requested that both lists be illustrative in nature. The commenters stated that the exhaustive nature of the list of permissible activities fails to recognize the dynamic nature of the marketplace and the continual innovation in product delivery and services that result from private sector competition. The commenters believe that it is impossible to prescribe a finite list of permissible activities today that will provide effective guidance for activities developed in the future. The commenters noted that the Secretary declined for this same reason to provide a definitive list of types of assistance to schools that is comparable to the assistance that the Department provides to schools that participate in the Direct Loan Program and in which lenders and guaranty agencies may engage without providing an improper inducement. These commenters recommended that the Secretary follow that same approach with the proposed list of inducement-related permissible activities.

Discussion: The Secretary disagrees with the commenters. She believes that greater clarity is achieved for program participants if a clear and definitive list of permissible activities is provided. She also believes that this approach enhances the Department's ability to enforce the restrictions on improper inducements. The permissible activities listed represent the only ones the Secretary has approved at the current time. The Secretary understands, however, that both statutory changes and the evolution of business practices may require consideration of additional permissible activities in the future. Therefore, similar to the approach for notifying lenders and guaranty agencies of approved activities that are comparable to those provided by the Secretary under the Direct Loan Program, the Secretary will notify lenders and guaranty agencies, through a public announcement, such as a notice in the **Federal Register**, of any additional permissible activities that lenders and guaranty agencies may be authorized to undertake.

Changes: We have revised the definition of *lender* in § 682.200(b) and revised § 682.401(e)(2) to provide for the identification and approval by the Secretary of other permissible services through a public announcement, such as a notice published in the **Federal Register**.

Payments to Individuals and Lender Referral and Processing Fees (§ 682.200(b))

Comment: Several loan industry commenters claimed that the preamble of the NPRM was incorrect in stating that ''Compensation or fees based on the numbers of applications or the volume of loans made or disbursed are improper, regardless of label, under the Department's current and prior policy and would continue to be improper under these proposed regulations.'' The commenters stated that the Department had previously allowed lenders to pay marketing compensation based on the number of applications received, but not based on the number of applications that resulted in funded loans. The commenters asked that the Secretary clarify that this interpretation continues to apply until the effective date of the final regulations, and that any change in policy be applicable to activities occurring on or after July 1, 2008.

The commenters also requested that the reference in the regulation to prohibited payments to ''any individual'' in paragraph (5)(i)(A)(*2*) of the definition of *lender* in § 682.200(b) be removed and replaced with ''any employee of a school or school-affiliated organization'' to clarify the group to which the prohibitions apply. The commenters further requested that the reference to ''processing'' fees be removed in paragraph (5)(i)(A)(*5*) of the definition of *lender* in § 682.200(b) because use of this term could be interpreted as prohibiting longstanding commercial contractual relationships with third-party servicers and other parties that provide anti-money laundering and PATRIOT Act screening, electronic signature processing, loan origination services, loan disbursement services, and escrow agent services to lenders and guaranty agencies.

The loan industry commenters also argued that the regulations would effectively prevent some small non-participating lenders from meeting their Community Reinvestment Act requirements through the student loan program.

Discussion: The commenters did not correctly describe the Department's prior policy guidance regarding application referral programs between lenders and marketing arrangements between lenders and other parties. The Department's policy on marketing and referral fees was specified in Dear Colleague Letter 89–L–129 (February 1989). The Dear Colleague Letter stated that any fee paid for loan applications under a lender referral program or marketing arrangement would be considered a prohibited inducement if the amount exceeded reasonable compensation for the referring lender's or party's processing of loan applications and advertising. Under this policy, the Department approved or did not object if the compensation paid was reasonable compensation for processing of loan applications and advertising. The permitted reasonable compensation could be based on applications referred but not on loans funded or disbursed. This policy statement remains in effect

until the effective date of these regulations.

The Secretary disagrees that reference to ''individuals'' should be struck from paragraph (5)(i)(A)(*2*) of the definition of *lender* in § 682.200(b). Section 435(d)(5) of the HEA effectively defines an improper inducement as a payment or other inducements ''to any educational institution or individual'' to secure loan applications. The Secretary has never interpreted the reference to ''individuals'' as limited to employees of a school or a school-affiliated organization.

The Secretary notes that the reference to ''processing'' in paragraph (5)(i)(A)(*5*) of the definition of *lender* in § 682.200(b) was intended to convey, consistent with the Department's longstanding guidance, that the referring party was being compensated for some level of administrative work in processing the application, not just for forwarding the application to the originating lender. However, the Department understands that the term ''processing'' may be confusing and has clarified the language for purposes of the provision.

The Secretary believes that the payment of these referral fees should be treated as an improper inducement for several reasons. The growth of national lenders and banking means that the payment of referral fees paid to non-participating lenders is no longer necessary to ensure nationwide borrower access to the FFEL Program. Moreover, most referral fee arrangements identified by the Department do not involve small local lending institutions, but involve payments by large lenders to school-related organizations. Finally, we note that with the adoption of the MPN and expanded eligibility standards, there is no longer any distinction between applications received and loans made, so there is no reason for distinguishing between them based on these different standards.

The Secretary further believes that payment of referral fees has eroded the integrity of the FFEL Program. Many of these fees are being paid to school-affiliated organizations that have access to certain personal information of students and alumni and are held in a certain level of esteem by students, alumni, and their parents. We believe that these arrangements and payments represent a conflict of interest for the organization and the school with which it is affiliated because the arrangement is interpreted as an endorsement of the lender by the organization and the school. Additionally, these fees do not appear to be paid to compensate the referring party for any administrative work done in processing the application, thus making them a prohibited inducement under the Department's standing interpretive guidance. The Department is also aware that such fees are being paid to individuals and organizations that are not under contract to any lender or its affiliate in an eligible lender trustee arrangement, and that operate as independent brokers collecting FFEL applications and marketing them to various FFEL lenders for the highest fee per application.

Finally, in response to the comments about small lenders who have referred borrowers in exchange for fees to satisfy other legal obligations, we note that the purpose of the FFEL Program is to provide loans for student and parent borrowers, not to provide an opportunity for lenders who do not participate in the program to meet other legal requirements. We expect that these lenders will find other appropriate ways to meet those requirements.

Changes: Paragraph (5)(i)(A)(*5*) of the definition of *lender* in § 682.200(b) has been modified to clarify that prohibited ''processing'' fees do not include fees paid to meet the requirements of other Federal or State laws.

Definition of School-Affiliated Organization (§ 682.200)

Comment: Many commenters objected to the proposed definition of a *school-affiliated organization,* which applies to lender and guaranty agency prohibited inducement activities outlined in §§ 682.200(b) and 682.401(e). The commenters indicated that the definition was overly broad and unworkable. One commenter from a school was concerned that the regulatory changes would restrict these organizations from promoting special arrangements and that it will limit student services through these organizations. The commenters also indicated that the broad definition could include national membership organizations, school trade organizations and other associations that have no ability to establish and administer school policies or control school activities. The commenters also believe that the definition is so broad that it could be applied to cover school credit unions or bookstores that are privately owned but located on or near a campus, or that include a reference to the school in their name. The commenters recommended that the definition be limited to only include those organizations that are part of the school structure even if they are separate legal entities. The commenters believe that those organizations that have a *de minimus* or peripheral connection to the school, and whose activities are organized and conducted separate and distinct from the school, should not be covered by the definition.

Discussion: The Secretary believes that special FFEL student loan marketing or other student loan arrangements with organizations that are affiliated with a school undermine program integrity, and have been used to limit borrowers' choice of FFEL lenders. The Department believes that the definition of *school-affiliated organization* needs to be broad to protect borrowers and the program generally. The definition is intended to include both organizations that exist only by virtue of the school's existence, whether inside or outside of the school's structure and control, and other organizations not dependent upon the school's existence, which provide financial and vocational services to the school's students, employees, or alumni. However, we stress that payments or inducements provided to school-affiliated organizations are only improper if they are undertaken to secure loan applications or loan volume. This regulation does not affect contractual arrangements between the school-affiliated organizations and financial institutions to provide other non-student loan related services. The Secretary fails to see a basis for the organizations identified by the commenters to be engaged in the marketing or making of FFEL Program loans.

Changes: None.

Loan Forgiveness Benefits (§§ 682.200(b) and 682.401(e))

Comment: Many commenters from schools, lenders, guaranty agencies, and State-designated secondary markets objected to the proposal to treat a lender's or guaranty agency's loan forgiveness programs as an improper inducement unless loan forgiveness is provided under a repayment incentive program that requires satisfactory payment performance by the borrower to receive or retain the benefit. Some loan industry commenters stated that this limitation on guaranty agencies and private lenders was contrary to the HEA. They requested that the Department clarify that borrower benefit programs or other loan forgiveness or assistance programs for students for service, academic achievement, disaster assistance, or other targeted activities continue to be allowed. Several commenters representing not-for-profit State and State-affiliated guarantors and secondary markets noted that existing

State targeted and administered loan forgiveness programs for teachers, nurses, and members of the armed forces could be considered prohibited inducements. The commenters believe such a result impinges on State sovereignty and is contrary to the Department's regulatory view that guaranty agencies have responsibility for outreach to students and parents. The commenters noted that these public service loan forgiveness programs are not part of guaranty agency marketing campaigns for applications and request that they be considered a permissible activity by a guaranty agency or State secondary market.

Discussion: The Secretary acknowledges that FFEL Program lenders are authorized under statute to offer borrowers reduced fees and interest rates. The regulations specifically acknowledge that these benefits are not considered improper inducements under § 682.200(b)(5)(ii). The Secretary also acknowledges that the HEA specifically provides for loan discharges for certain targeted forms of employment and public service.

With this provision, however, the Secretary is attempting to distinguish appropriate forms of repayment assistance that may be provided to borrowers by lenders and guaranty agencies that would not be considered an improper inducement from those that are clearly provided in order for the lender to secure loan applications. The regulation incorporates the standard for incentive and reward programs for successful borrower repayment that the Secretary has previously applied. In this regard, the Secretary has previously found that repayment incentive programs do not provide an improper inducement if they provide up-front rebates that are applied to the borrower's account at or shortly after loan disbursement and that the borrower retains if he or she establishes a satisfactory repayment pattern, or provide a similar reduction in loan principal earned on the same basis after the borrower enters repayment. These programs do not involve cash payments to borrowers. These regulations are consistent with this standard.

The Secretary thanks the commenters for informing her of the many public service oriented loan forgiveness programs that have been initiated, some of which are State-mandated or State-approved. The Secretary is convinced that these programs are not used generally for marketing purposes and agrees that these programs should not be considered an improper inducement as long as they are not marketed to secure loan applications or loan guarantees.

Changes: We have revised the definition of *lender* in § 682.200(b) and revised § 682.401(e)(2) to include as *permissible* activities loan forgiveness programs for public service and other targeted purposes approved by the Secretary, provided the benefits are not marketed to secure loan applications or loan guarantees.

Service on Lender and Guaranty Agency Advisory Boards and Payment of Related Costs (§§ 682.200(b) and 682.401(e)(2)(v))

Comment: Several commenters objected to our proposal to treat as an improper inducement, arrangements in which employees of school and school-affiliated organizations serve on lender advisory committees, while allowing these employees to serve on a guaranty agency's governing board or official advisory board. The commenters stated that the lender advisory committee meetings provide meaningful opportunities for lenders and schools to exchange information that benefit borrowers. The commenters argued that uncompensated service of this nature should be permissible, but that reasonable travel costs should be covered to be consistent with the treatment of guaranty agencies. Another commenter representing a lender noted that the regulations did not contain any explicit prohibition on school employees serving on a lender advisory board, or of paid consulting arrangements between lenders and school employees, and that this represented a loophole in the regulations. This commenter also said the Department should not allow school-affiliated organization employees to serve on guaranty agency advisory boards, or allow agencies to pay for travel and lodging costs to facilitate school staff service on an advisory board, attendance at training sessions, or tours of the guaranty agency's service facility. The commenter believes this treatment creates an avenue for guaranty agencies to provide these benefits on behalf of their lender partners and that a guaranty agency's financial support should be limited to meals and refreshments at training conferences.

Discussion: The Secretary notes that the absence of a specific provision permitting school and school-affiliated organization employee service on lender advisory boards, comparable to what is provided for service on guaranty agency advisory boards, means that any compensation for this service is considered to be an improper inducement if provided to secure loan applications. The Secretary disagrees with the commenters who recommended that school and school-affiliated organization employees be permitted to continue service on lender advisory boards, on a paid or unpaid basis, and with travel and lodging expenses paid by the lender. Recent investigations have shown that many of these meetings have largely been designed as expense-paid vacations for the school employees in support of continued or increased loan volume for that FFEL lender from the school. The Secretary believes that these board meetings are not necessary to the proper administration of the FFEL Program.

Unlike lenders, guaranty agencies are responsible for lender and school oversight, school and lender training, default aversion services, lender claim review and approval, and outreach services to students, parents, and schools in their respective areas of service. The Secretary believes that school employee service on a guaranty agency's board, if used effectively, can be important for those aspects of FFEL program administration for which the agency is responsible. In addition, in its role in providing training on the Title IV student aid programs, the agency is in a good position to identify the training needs of staff at schools that may not have sufficient resources to provide or pay for needed training, regardless of whether the school participates in the FFEL Program. Moreover, under § 682.423, a guaranty agency is authorized to use its Operating Fund for school and lender training. The Secretary believes, therefore, that it is appropriate for a guaranty agency to cover the travel and lodging costs of school staff if the agency identifies, on a limited, case-by case basis, that those individuals would otherwise be unable to attend needed training, provide needed service on the agency's governing or advisory board, or on another of the agency's formal working committees.

Changes: For purposes of clarity, we have modified paragraph (5)(i)(A)(*6*) of the definition of *lender* to specifically prohibit a lender from soliciting school employees to serve on a lender's advisory board and paying costs related to this service.

Lender and Guaranty Agency Sponsored Meals, Refreshments, and Receptions at Meetings and Conferences (§§ 682.200(b) and 682.401(e)(2)(iii))

Comment: One commenter representing a lender objected to our proposal to allow lenders and guaranty agencies to continue to sponsor meals, refreshments, and receptions that are reasonable in cost for school officials or employees in connection with meetings

and conferences. The commenter believes that permitting these activities will allow abuses that have received negative media attention to continue because there are no defined parameters provided in the regulations about what is ''reasonable'' or what constitutes a ''reception.'' The commenter recommended that these activities be prohibited.

Discussion: The Secretary believes that sponsorship by a lender or guaranty agency of meals, refreshments, and receptions at conferences and other training meetings that are open to all attendees at a conference or meeting do not represent an inducement of the individual attendees or their schools to secure loan applications or loan guarantees for the sponsoring lender or guarantor. This form of sponsorship is a form of generalized marketing that is not prohibited under the law. These arrangements also assist in reducing the cost of needed training conferences and meetings for individual attendees. In using the term ''reception,'' the Secretary does not envision private parties of lender-selected groups of conference attendees, or of school or school-affiliated organization employees. Instead, the Secretary expects that the receptions permitted under the regulations will be general gatherings that are open to all conference or meeting attendees, are held in conjunction with the conference or meeting, and are generally held at the conference site. The Secretary believes this kind of reception provides attendees with an appropriate opportunity for information sharing on the training being conducted.

By ''reasonable cost,'' the Secretary anticipates that conference managers and sponsoring lenders and guaranty agencies will adhere to the ''prudent person test'' under which the cost per person for the sponsored event does not exceed the cost that would be incurred by a prudent person under the circumstances at the time the decision was made to incur the cost. The burden of proof will be on conference managers and sponsors to show that the costs are consistent with the normal per person cost of such events.

The Secretary also notes that she neglected to specify in § 682.401(e)(2)(v) that such meals, refreshments, and receptions sponsored by a guaranty agency must be ''reasonable in cost,'' and has added that condition to the regulations.

Changes: Section 682.401(e)(2)(iv) has been modified to require that guaranty agency-sponsored meals, refreshments, and receptions be ''reasonable in cost.''

Lender and Guaranty Agency Performance of School-Based Functions as a Contractual Third-Party Servicer, With Appropriate Compensation, and to Participating Foreign Schools (§§ 682.200(b) and 682.401(e)(1)(i)(F))

Comment: Many commenters representing lenders, lender servicers, and guaranty agencies objected to the provision in the proposed regulations that would prohibit a lender or guaranty agency from performing functions on behalf of a school except on a short-term, non-recurring, emergency basis. The commenters noted that this provision represents a change from longstanding Department policy that allowed a guaranty agency or lender to perform functions on behalf of a school as long as the services were performed with appropriate compensation. The commenters also note that regulations governing third-party servicers in 34 CFR § 668.2 do not include these same restrictions and permit any individual or organization to enter into a contract with a school to administer any aspect of the school's Title IV programs. The commenters indicated implementing this regulation would force FFEL Program participants to immediately cease performing certain activities that benefit schools and their borrowers. Several commenters from small schools claimed that if they could not contract with their State guaranty agency as a third-party servicer to administer certain aspects of the FFEL Program, they would be forced to procure services from less well-informed, less reliable, and more costly third-party servicers.

Some lender and guaranty agency commenters noted that the limitation on lenders and guaranty agencies providing staffing services to schools will result in the elimination of previously Department-sanctioned and directed eligibility determination services provided to eligible foreign schools at the school's request. The commenters recommended that the Secretary provide an exception in the regulations to allow these services to continue.

A national association stated that the proposed regulations did not explicitly allow lenders and guaranty agencies to perform student loan entrance and exit counseling activities, and expressed concern that the Department would be effectively prohibiting lenders, guaranty agencies, and secondary market lenders from supporting or participating in educational outreach and financial literacy efforts. Another national organization asked that the regulations explicitly permit lenders and guaranty agencies to provide staff training, computer support, and printing and distribution of financial aid-related information, and to perform other school functions with appropriate compensation.

A commenter representing a national consumer organization and national student associations recommended that the Department impose a blanket prohibition on lenders providing assistance to schools to perform school-based financial aid duties, noting that many schools had already agreed to this restriction under voluntary agreements with state attorney generals. Several U.S. Senators strongly urged the Secretary to prohibit all lender or guaranty agency performance of school financial aid-related functions, even on an emergency basis, because these activities promoted particular lenders and created a serious loophole in the regulations.

Discussion: The Secretary understands these regulations represent a change from prior Department policy. As the commenters noted, under the Department's prior policy guidance, lenders and guaranty agencies would not be considered to be providing an improper inducement if they performed or assisted a school with certain Title IV student aid functions, particularly FFEL Program loan functions, as long as they were appropriately compensated for their services or they performed them under contract as a school third-party servicer. Recent investigations have shown, however, that lenders and guaranty agencies generally provided staff or services to schools almost exclusively to maintain or increase loan volume from the schools. In some cases, staff paid by a lender essentially took over a school's responsibility for advising students and parents without disclosing to the students and parents that the staff members worked for the lender, not the school. The Secretary believes that lender and guaranty agency staffing for schools has created a serious conflict of interest for schools in their critical counseling role with students and parents, and has significantly contributed to limiting a borrower's choice of lender at some schools. The limitations imposed by the new regulations include restrictions on lender and guaranty agency conduct of or participation in required in-person, school-based initial and exit counseling with FFEL borrowers. It does not, however, limit a lender's support of or participation in a school's or a guaranty agency's student aid and financial literacy-related outreach activities, as that is permitted under paragraph (5)(ii)(B) of the definition of *lender* in § 682.200(b). Similarly, the final regulations are being modified to clarify

that a guaranty agency can continue its student aid and financial literacy-related outreach activities.

The Secretary agrees that, under the proposed regulations, a guaranty agency or lender would be unable to continue to provide loan eligibility and certification services for participating foreign schools at the school's request. The Secretary has previously directed guaranty agencies to provide these services to ensure that eligible borrowers can successfully secure FFEL loans to attend certain eligible foreign schools. The Secretary did not intend to interfere with this activity and has modified the regulations accordingly.

The Secretary disagrees with the suggestion that we define all forms of lender or guaranty agency staffing to perform school-based student loan functions as an improper inducement. The Secretary believes that these services should be allowed in limited situations as described in the regulations.

Changes: We have modified the definition of *lender* in § 682.200(b) and have modified § 682.401(e) to allow lenders and guaranty agencies to perform, as a Secretary-delegated function, eligibility and loan certification functions if requested by a participating foreign school. We have modified § 682.200 to exclude in-person, school-required initial and exit counseling from those student aid and financial-literacy related outreach activities that a lender can participate in and support. Section 682.401(e)(2) of the regulations has also been modified to clarify that a guaranty agency can continue its student aid and financial literacy-related outreach activities with schools, students, and parents, excluding in-person, school-required initial and exit counseling.

Services to Schools and Students Under Other State or Federal Education Programs or by a State Agency FFEL Lender (§§ 682.200(b) and 682.401(e))

Comment: One commenter from a non-profit agency that serves as a guaranty agency and lender in the FFEL Program, and also participates in and administers other Federal and State education programs, asked the Secretary to clearly state that guaranty agencies and lenders are not prohibited from continuing to meet their obligations under other Federal and State education laws as long as the activities under those programs are not tied to expectations regarding loan applications or loan volume. The commenter stated that many of these other Federal and State programs encourage or direct agencies or lenders to partner with students and schools. Another commenter from an agency that serves as a State lender expressed concern that the proposed regulations would adversely impact the agency's ability to provide the full array of services it is mandated to carry out under State law. The commenter believes that the agency will no longer be able to develop and produce publications that promote higher education in the State and provide financial literacy training or to be actively engaged with the State university in early outreach and awareness programs. The commenter predicts the regulations will have a chilling effect on school participation in State grant and loan programs by prohibiting the inclusion of State grants and loans in eligible students' financial aid packages. The commenter believes the rationale for the new regulations is not applicable to a State agency lender that is controlled by the State and governed by State ethics laws. The commenter asked that the regulations be modified to recognize differences between State programs that are funded and delivered within a branch of State government and other programs.

Discussion: The Secretary agrees with the first commenter. The Secretary is aware that some State agencies and higher education commissions act as guaranty agencies and secondary markets and also administer other Federal and State education programs that are not related to FFEL Program loans. Some of the other programs in which these agencies are involved include State grant, scholarship and loan forgiveness programs and the Federal GEAR–UP and Talent Search Programs. The Secretary strongly supports the work of these agencies in administering these other Federal and State programs and clarifies that such an agency may continue to meets its obligations under other Federal and State education laws provided the agency does not use its role in these programs to secure loan applications or loan volume for a lender or guaranty agency.

In response to the other commenter, the Secretary reiterates that section 435(d)(5) of the HEA governing prohibited inducements by lenders does not make any distinction between various types of FFEL lenders. Therefore we are unable to provide for the distinctions requested by the commenter in these regulations. The regulatory restrictions on improper inducements apply equally to for-profit and State-designated FFEL lenders. The Secretary notes, however, that the provisions in paragraph (5)(ii)(B) of the definition of *lender* in § 682.200(b) provide that a lender's support of and participation in a school's student aid and financial literacy-related outreach activities are permissible, as long as the name of the entity that developed and paid for the materials is provided to the participants and the lender does not promote its student loan or other products.

Changes: None.

Definition of "Emergency Basis" for Lender and Guaranty Agency Short-Term, Non-Recurring, Emergency Staffing Services to FFEL Schools (§§ 682.200(b) and 682.401(e)(3))

Comment: In response to the Secretary's specific solicitation of comments on whether an emergency should be limited to State- or Federally-declared national or natural disasters, some commenters agreed with this limitation. One commenter indicated that the emergency should be limited to a declared natural disaster because that was clearly a circumstance outside the school's control. The commenter believes that a school should be prepared to deal with worker absenteeism and seasonal application volume. Many other commenters believe that there may be more localized disasters creating emergencies for a specific school (for instance, a building on campus may burn or hazardous materials may be discovered, resulting in the closure of the financial aid office) than those that are declared by a state or federal official. The commenters also stated that an office or campus might be suddenly limited by illness, death, accidents, sudden employment changes, system conversions or technical failures, and other unforeseen circumstances that would result in a potential breakdown of financial aid services to students and their parents. The commenters recommended that broader, non-recurring unforeseen conditions or events be encompassed by an emergency, either in the regulations or in the preamble.

Discussion: The Secretary thanks the commenters for their suggestions. The Secretary agrees that defining emergency basis to include only a Federally-declared national disaster or a State- or Federally-declared natural disaster may not address more localized disasters or emergencies that may affect a specific school and interrupt the flow of FFEL loan services to students and parents on that campus. The Secretary does not agree, however, that an emergency should include staff absenteeism or employment changes, fluctuations in seasonal loan volume, planned systems conversions, or other similar circumstances. The Secretary

expects schools to be ready to handle such circumstances as part of being administratively capable of participating in the Federal student financial aid programs.

Change: Paragraph (b)(5)(iii) of the definition of *lender* in §§ 682.200 and the provisions in § 682.401(e)(3) have been modified to include a definition of emergency basis. For the purpose of a lender or guaranty agency providing short-term, non-recurring emergency staffing services to a school, this term means a State-or Federally-declared natural disaster, a Federally-declared national disaster, and other localized disasters and emergencies identified by the Secretary.

Definition of ''Other Benefits'' for Purposes of Prohibited Points, Premiums, Payments, and Other Inducements to Any School or Other Party (§§ 682.200(b) and 682.401(e)(3)(iii))

Comment: Several commenters objected to the proposal to define ''other benefits'' to include as an improper inducement ''preferential rates for or access to the lender's other financial products.'' The commenters claim that this will deter lenders from providing competitive rates and fees to borrowers on private education loans. The commenters note that under the preferred lender list provisions in § 682.212(h) of the proposed regulations, schools are not prohibited from negotiating with lenders to secure the best borrower benefits on FFEL loans in identifying lenders for the school's preferred lender list. The commenters believe that a school should also be able to negotiate for the most beneficial private education loan benefits for its students from a lender that offers both private education and FFEL loans without the lender risking sanctions by the Department.

Discussion: The Secretary disagrees with the commenters. In many cases, a lender's placement on a school's FFEL preferred lender list or its promotion as the school's recommended FFEL lender was based on an agreement to provide the school access to the lender's private education loan program or to provide more beneficial loan terms on those private education loans. A lender who provides private education loans to a school's students at competitive rates may do so as long as the lender does not offer or provide those benefits in exchange for FFEL loan applications, FFEL application referrals, a specified volume or dollar amount of FFEL loans, or placement on the school's list of recommended or suggested lenders.

Changes: None.

Benefits Based on Participation in a Guaranty Agency's Program (§ 682.401(e)(1)(i)(B), 682.401(e)(1)(ii), and 682.401(e)(1)(iii))

Comment: Some guaranty agency commenters expressed concern about the language in § 682.401(e)(1)(ii), which prohibits a guaranty agency from assessing additional costs or denying benefits to schools and lenders based on the school's or lender's decision not to participate in the agency's loan guaranty program or failure to provide a specified volume of FFEL Program loans to the agency, or a school's failure to place a lender that uses the agency's loan guarantee on the school's preferred lender list. The commenters believe this provision was intended to align with the requirements of § 682.401(e)(1)(i)(B), which prohibit a guaranty agency from making payments to a school based on the school's voluntary or coerced agreement to participate in the agency's program. The commenters believe, however, that the requirements of proposed § 682.401(e)(1)(ii) are overly broad and will prevent a guaranty agency from limiting its services to FFEL Program participants. The commenters stated that the regulations appear to require a guaranty agency to provide benefits, products, and services to all schools and lenders even if they do not participate in the agency's loan guaranty program. The commenters also asked the Secretary to clarify in the preamble to the regulations that § 682.401(e)(1)(iii) does not prohibit the continuation of cooperative arrangements between guaranty agencies, such as the Common Manual, Mapping Your Future, and the Common Review Initiative that create economies of scale or greater efficiencies for schools or lenders with which those guarantors participate.

Discussion: The commenters are correct that the requirements of § 682.401(e)(1)(i)(B) and 682.401(e)(1)(ii) were intended to complement each other. Section 682.401(e)(1)(i)(B) and 682.401(e)(1)(iii), addresses prohibited incentive payments by guaranty agencies to schools and lenders to secure loan volume. Section 682.401(e)(1)(ii) addresses the practice in which guaranty agencies denied schools and lenders benefits or assessed schools and lenders additional costs if they failed, among other things, to participate in the agency's program or provide a specified volume of loan applications or loan volume. The Department has become increasingly aware of these types of activities over the last several years, and the Secretary believes that if these activities were undertaken by a guaranty agency to secure loan volume, the activities would properly be considered a prohibited inducement. In one case, a guaranty agency that had previously provided certain funds to support student aid administration to all schools in its State, including non-FFEL participating schools, announced that it would stop paying those funds to schools that did not agree to participate in the agency's FFEL loan guaranty program. In another instance, a guaranty agency was directed to change its policy and charge costs related to the administration of a State program to those schools that did not participate with the guaranty agency and generate loan volume for that agency after previously not charging costs to any schools. In another case, scholarship funds from the guaranty agency's Operating Fund were to be provided only to schools that participated in the agency's FFEL Program and provided a certain FFEL loan volume to the guaranty agency. Finally, in another situation, a lender was notified by a guaranty agency that certain costs for guaranty agency-provided services to the agency's lenders would be based on the lender's success or failure in delivering a certain volume of loan guarantees to the guaranty agency. The Secretary believes that under certain circumstances, the denial of benefits or the assessment of additional costs based on participation in a guaranty agency's program, or loan volume provided to the agency, could represent a prohibited inducement. The Secretary believes that this provision accurately reflects the scope of possible guaranty agency activities that should be viewed as improper inducements.

The Secretary clarifies that § 682.401(e)(1)(iii) does not require guaranty agencies to discontinue the cited cooperative arrangements they have undertaken with each other, some with the express approval of the Secretary. Other cooperative activities that the guaranty agencies wish to undertake to achieve economies of scale or that they believe will generate cost efficiencies should be discussed with the Department before being undertaken.

Changes: None.

Prohibited Inducements and Lender Claim Payments (§ 682.406)

Comment: Several lender, lender servicer, and guaranty agency commenters indicated that proposed § 682.406(d), which would prohibit a guaranty agency from paying a lender's claim or receiving Federal reinsurance on a loan for which a lender offered or provided an improper inducement,

appeared to impose a duty on the guarantor to determine whether such improper activity took place as part of normal claim review and processing prior to claim payment. The commenters agree that if there was proof of this type of violation, the claim should not be honored, but believe the regulation, as proposed, would be unmanageable. The commenters believe that if a guarantor took such action, it would effectively be denying the lender payment of Federal benefits without procedural due process protections that would allow the lender to show that the challenged activity did not occur or was permissible. The commenters recommended that the regulations be revised to provide that the guaranty agency should deny claim payment only when it was notified by the Secretary of the lender's violation of the prohibited inducement provisions and of the population of affected loans.

Discussion: The Secretary agrees that, generally, a guaranty agency will not be expected to deny a claim payment to a lender unless the Secretary has notified the guaranty agency that the lender has provided improper inducements. However, the Secretary expects guaranty agencies 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.

Changes: The regulations in § 682.406(d) have been modified to reflect that a guaranty agency may not deny a claim payment unless the agency determines or is notified by the Secretary that the lender offered or provided an improper inducement.

Eligible Lender Trustees (ELTs) (§§ 682.200 and 682.602)

Comment: Several commenters supported the proposed changes implementing The Third Higher Education Extension Act of 2006 (HEA Extension Act) (Pub. L. 109–292) that: Prohibit new ELT relationships between lenders and schools or school-affiliated organizations; restrict existing ELT relationships; and define the term *school-affiliated organization*.

Discussion: The Secretary appreciates the commenters' support.

Changes: None.

Comment: Several commenters stated that the definition of *school-affiliated organization* in § 682.200, in particular the inclusion of the words ''directly or indirectly related to a school,'' was overly broad and would inappropriately include organizations that are not part of the school's organizational structure and over which the school has no control. The commenters urged the Secretary to revise the definition to exclude organizations such as foundations, membership associations, and financial institutions.

Discussion: We continue to believe that many organizations, such as foundations and alumni and social organizations, are clearly school-affiliated even if the organization is not under a school's ownership or control. The intent of the HEA Extension Act was to eliminate or significantly restrict ELT relationships between a lender and a school or a school-affiliated organization. The proposed definition of *school-affiliated organization* is consistent with this goal.

Changes: None.

Comment: One commenter stated that the effective date of the proposed regulations should be no earlier than July 1, 2008, the effective date of the final regulations, rather than the effective dates in the HEA Extension Act. The commenter indicated that holding schools accountable for their actions retroactive to the effective dates in the HEA Extension Act, when those dates were not yet reflected in the FFEL Program regulations, was unfair.

Discussion: The effective dates in the HEA Extension Act with respect to ELT relationships are statutory and the Secretary does not have the authority to change those dates.

Changes: None.

Comment: Several commenters believed the inclusion of the cross-reference to § 682.601(a)(3) in § 682.602(b)(1) was incorrect and asked the Secretary to remove it.

Discussion: The commenters are correct that the cross-reference to § 682.601(a)(3) in this section was included in error.

Changes: Section 682.602(b)(1) has been revised to remove the cross-reference to ''(a)(3).''

Frequency of Capitalization (§ 682.202)

Comments: All of the commenters agreed with the Secretary's proposal to allow capitalization of unpaid interest that accrues during an in-school deferment only at the expiration of the deferment. Several commenters stated that this regulation would level the playing field between the FFEL and Direct Loan programs. One commenter requested that the Department consider establishing a prospective effective date and a triggering date for deferments granted on or after July 1, 2008. The commenter believed that many servicers and loan holders might have difficulty implementing the systems changes necessary to implement the new capitalization rules in the middle of a deferment.

Discussion: The Secretary appreciates the commenters' support. The Secretary does not believe that a prospective effective date is needed to implement the capitalization rules. The Secretary recognizes that systems changes will be necessary to implement this change in the capitalization rules, but we believe that servicers and loan holders have ample time to make these changes before the effective date of July 1, 2008.

Changes: None.

Loan Discharge for False Certification as a Result of Identity Theft (§§ 682.208, 682.211, 682.300, 682.302 and 682.411)

Comment: Many commenters supported the proposed regulatory changes to allow a lender to suspend credit bureau reporting for 120 days and to grant a 120-day administrative forbearance to a borrower while investigating an alleged identity theft upon receipt of a valid identity theft report (as defined under the Fair Credit Reporting Act (15 U.S.C. 1681a)) from a borrower or notification from a credit bureau. However, many commenters did not believe that the proposed changes provided meaningful relief to the victims of identity theft or lenders because the Department did not propose changes to the requirement that an individual must obtain a local, State or Federal judicial determination that conclusively determines that the individual who is the named borrower of the loan was the victim of the ''crime'' of identity theft. Unless this requirement is met, a FFEL or Direct Loan Program loan cannot be discharged as falsely certified due to the crime of identity theft. The commenters suggested that we change the interpretation of section 437(c) of the HEA and allow a discharge of a loan falsely certified due to the crime of identity theft based on the requirements contained in the Fair and Accurate Credit Transactions Act (FACT Act). Other commenters believed that the Department is properly interpreting section 437(c) of the HEA and that the statutory language authorizing a loan discharge for a false certification arising from the crime of identity theft needs to be changed.

Discussion: During the negotiated rulemaking process, the Department carefully considered whether there was any basis for adopting a different standard on which to grant a discharge based on the crime of identity theft but we determined that current regulations properly reflect section 437(c) of the HEA by protecting both victims of the crime of identity theft and the Federal fiscal interest. Further, we believe that the changes to the regulations in

§§ 682.208 and 682.211 that will allow for the suspension of credit bureau reporting and collection activity provide relief to borrowers while allowing lenders to comply with the Fair Credit Reporting Act without violating the FFEL Program regulations. We wish to emphasize that the individual who is the named borrower on a FFEL or Direct Loan that was falsely certified as a result of the crime of identity theft is not liable for a loan that borrower did not execute or authorize another to execute on the borrower's behalf, whether or not the loan is discharged based on a crime of identity theft. An individual who can demonstrate that his or her signature was forged on a FFEL or Direct Loan note is relieved of the debt under common law and State laws against forgery.

Changes: None.

Comment: One commenter requested that the Department retroactively apply the proposed changes to §§ 682.208 and 682.211 that allow for the suspension of credit bureau reporting and collection activity to July 1, 2006, the effective date of the identity theft discharge authorized by the Higher Education Reconciliation Act of 2005 (Pub. L. 109–171). The commenter stated that lenders may have already ceased credit bureau reporting and due diligence on loans to meet FACT Act requirements prior to the publication of the regulations, and subsequently determined that the loan remains enforceable against the borrower. According to the commenter, a retroactive application of these provisions would provide a safe harbor for such lenders.

Discussion: While we do not believe retroactive implementation of the provisions allowing for the suspension of credit bureau reporting and collection activity is necessary, we will take into consideration any due diligence conflicts created by the different requirements in the HEA and the FACT Act in enforcement actions related to the treatment of borrowers who may have been victims of the crime of identity theft.

Changes: None.

Comment: Several commenters objected to the requirement in the current regulations in § 682.402(e)(3)(v)(C) that a person claiming a discharge must produce a judicial determination that conclusively determines that a FFEL or Direct Loan was falsely certified due to the crime of identity theft committed by a specific individual named in the determination. These commenters viewed this requirement as imposing an unnecessary burden for victims of identity theft. These commenters urged the Department to change the requirement that discharge relief be provided only if a judgment or verdict has been entered because, in their view, that requirement prevents individuals who have been victimized by identity theft from obtaining relief. Other commenters urged the Department to adopt the definition of identity theft in the FACT Act, and conform discharge relief to the procedures and standards adopted in that law.

Another commenter noted the difficulty in pursuing the perpetrator of the crime in instances in which the judicial determination does not identify that individual. The commenter cited a recently-filed claim based on a suit filed by the lender against a putative borrower, who denied executing the loan documents. The court issued a decision in which it found that the putative borrower had not applied for the loan and was not obligated to repay it. However, the court further opined that the putative borrower was the victim of the crime of identity theft, committed by unnamed individuals. The commenter noted that it was unable to comply with regulatory requirements to pursue collection action against the perpetrator if the judicial determination on which the claim rests does not identify the perpetrator. Some commenters suggested that we change the regulations to permit discharge relief in instances in which the court does not find that an identified individual was the perpetrator of the identity theft.

Discussion: FFEL Program regulations in §§ 682.206(d), 682.300(b)(2)(vii), 682.402(a)(4), and 682.406(a)(1) and (a)(10) provide that—with very limited exceptions—FFEL Program benefits are payable only if the holder has a legally-enforceable promissory note to evidence the loan. Because a forged promissory note is ordinarily not an enforceable obligation of the putative borrower, a party holding a forged note cannot claim FFEL Program benefits on that loan. The view that the discharge relief option should be extended to lenders for legally unenforceable loans ignores the basic requirement that the lender must hold a legally-enforceable loan. The supposition that victims of identity theft face continued enforcement by lenders assumes that lenders ignore credible proof that individuals did not obtain the debts in dispute. The Department does not consider that supposition to be well-founded, and the commenter's view that lowering the standards for discharge relief is needed to relieve victims of the burden of loans they did not receive is groundless.

As explained in the preamble to the interim final regulations issued by the Department on August 9, 2006, 71 FR 45666, 45676–45677, long before either the FACT Act or the identity theft discharge amendment to the HEA, common law that applied to all loan transactions made clear that individuals who neither executed loan agreements nor accepted the benefits of the loan were not liable for the loan. Putative borrowers therefore faced continued enforcement action only if the holders of the loans either disbelieved the individuals, or disregarded well-established law. Statutory relief was not needed to protect from liability those individuals who made persuasive claims that they neither signed the note nor accepted the loan benefits. Statutory relief was not appropriate for individuals who did not persuasively demonstrate that they had neither signed the loan agreement nor accepted benefits of the loan. The regulation rests on these premises.

The FACT Act addresses different concerns than does the discharge provision in these regulations. Specifically, the FACT Act seeks to provide protections for borrowers after the crime of identity theft has already been perpetrated. More specifically, although a victim of identity theft is not liable for the loan, an impersonator could attempt to obtain more credit from other lenders in the name of the victimized individual. Individuals whose identification credentials have been used by an impersonator face substantial difficulty in preventing the impersonator from continuing to obtain credit in the name of the individual. The FACT Act does not direct creditors to cease attempts to collect loans that the lenders determined to be unenforceable under generally applicable common law, as suggested by the commenter. Rather, the FACT Act allows the complaining individual to alert potential lenders—through the credit bureaus—to the identity theft, and requires lenders to investigate disputes raised by the consumer either directly with the creditor or through the credit bureau, to report the results of that investigation to the bureau in a timely manner, and to correct, if necessary, information the lender had previously furnished to the bureau. There is no reason for the Department to adopt in our discharge regulations FACT Act procedures that are designed not to determine whether the crime of identity theft occurred, but to prevent future thefts and restore a credit history damaged by recognized past thefts.

Section 682.402(e)(3)(v)(C) of the FFEL Program regulations requires the applicant for relief to base the claim on a judicial decision that ''conclusively

determines'' that the crime of identity theft caused the loan to be made. As stated in the preamble to the interim final regulations published on August 9, 2006, determining that a crime has been committed necessarily requires discerning the identity of the perpetrator and determining the state of mind of that person in the conduct at issue. (71 FR at 45685) Therefore, approval of an identity theft discharge claim must necessarily rest on a judicial determination that a named individual committed the crime of identity theft. (71 FR at 45676)

The comment is well taken that a judicial ruling specifying that a crime has been committed by an unnamed perpetrator makes this objective impossible. In the case cited by the commenter, a court concluded that the putative borrower did not in fact sign, and did not authorize any other person to sign, the promissory note. The court logically concluded that the putative borrower was not liable for the loan. However, the court then opined that this unauthorized signature constituted a crime of identity theft by an unidentified individual. This ruling cannot support a discharge claim because the ruling in fact did not conclusively determine that a crime occurred. To determine that a crime has been committed, a court must conclude that the elements of a crime have been proven—either beyond a reasonable doubt, in a criminal proceeding, or by a preponderance of the evidence, in a civil suit.[1] A ruling that an unidentified individual not only lacked authority to sign the note, but also did so with the state of mind required to commit a crime, is nothing more than speculation. The regulations require that the judicial ruling on which the claim rests be one that conclusively determines that a crime was committed in order to ensure that relief is provided to the lender only where the ruling identifies the perpetrator so that this individual can be held accountable and required to repay. A ruling that an unnamed individual perpetrated the crime gives the guarantor or the Department no basis on which to pursue the individual responsible for the identity theft.

Changes: The Department has modified § 682.402(e)(3)(iv)(C) to clarify that, for purposes of the discharge, a local, State or Federal judicial determination is one that conclusively determines that a FFEL or Direct Loan was falsely certified due to the crime of identity theft only if the decision identifies the perpetrator of the crime.

Comment: One commenter suggested that we change the regulations to require a lender to cease collection activity and refund interest and special allowance payments received on a loan determined to be unenforceable after the investigation of an alleged identity theft even in cases where the individual named as the borrower did not submit a valid identity theft report as defined under the Fair Credit Reporting Act (15 U.S.C. 1681a).

Discussion: If a lender determines that a loan is unenforceable after the investigation of an alleged identity theft, even in cases where the individual named as the borrower did not submit a valid identity theft report, a lender is already required to refund interest and special allowance payments received on a loan under § 682.406(a)(1).

Changes: None.

Comment: One commenter recommended that we modify the regulations to provide that, if a lender's investigation of the borrower's claim of a false certification of a loan due to the crime of identity theft yields evidence that the loan is enforceable and the borrower later defaults, the lender must provide the evidence upon which the lender relied to determine that the loan was the legal obligation of the named borrower.

Discussion: The Department believes that, in cases where a lender's investigation of an alleged identity theft yields evidence that a loan is enforceable against the named borrower who subsequently defaults, a lender is already required to provide the evidence used to make that enforceability determination under § 682.406(a)(3). This provision requires that a lender provide an accurate collection history and an accurate payment history to the guaranty agency with the default claim filed on the loan showing that the lender exercised due diligence in collecting the loan.

Changes: None.

Preferred Lender Lists (§§ 682.212 and 682.401)

General

Comment: Several commenters supported the Secretary's efforts to ensure the integrity of the student loan programs and the transparency in the loan process so that borrowers are assured of their choice of lender. Several U.S. Senators commended the Secretary for including clear and detailed provisions on prohibited inducements and preferred lender lists in the regulations. On the other hand, several commenters representing schools, lenders, guaranty agencies, student loan servicers, and associations urged the Secretary to withhold publication of final regulations governing preferred lender lists and prohibited inducements in light of the possibility that Congress may pass legislation in these areas. These commenters believe that, if the legislation is enacted, the final regulations might be out of date before they can become effective and, as a result, program participants may be confused.

Discussion: The Secretary takes the oversight of the Title IV student loan programs very seriously and continues to believe, as she did when she began the negotiated rulemaking process in 2006, that these are urgent issues that require aggressive action to expedite reform in advance of any Congressional action. Recent investigations and reports show that problems with preferred lender lists are serious and continuing and need to be addressed. These regulations will help end unethical or questionable practices in the student loan programs and help maintain trust and integrity in the process.

The Secretary understands that for schools that opt to continue to use preferred lender lists there will be some additional administrative burden associated with providing additional disclosures on the method and criteria used by the school to select its preferred lenders, compiling and disclosing comparative information on the lenders' borrower benefits, and updating the preferred lender list. She believes that the benefits to prospective borrowers in regulating the use of preferred lender lists to ensure that borrowers are aware they have a choice of lender and can exercise that choice, and that they are provided with adequate consumer information to make informed decisions on a choice of FFEL lender, outweigh the burden on schools associated with regulating this process.

The Secretary is committed to working closely with participants in the student financial aid programs to implement the regulations and provide any clarifying guidance that may be necessitated by future legislation in these areas.

Changes: None.

Preferred Lender Lists (§ 682.212)

Use of Preferred Lender Lists

Comment: One commenter representing a school stated that the use of preferred lender lists represented the wave of the future, but stated that lenders should be required to

[1] The Department recognized that the elements of the crime of identity theft might be proven in a civil proceeding, such as a divorce proceeding, but to a lesser standard of proof than required for a criminal conviction.

standardize the presentation of details of their loans to permit comparison of loans by borrowers and families. Another school commenter suggested that all schools should be required to have a lender list, including schools participating in the Direct Loan Program. One commenter representing a lender recommended that the use of preferred lender lists be banned because such lists are the foundation of the conflicts of interest in the student loan programs and undermine program integrity. This commenter stated that school influence over a student's choice of lender limits borrower choice and competition for more beneficial loan terms while creating a flow of easy loan volume for a lender. This commenter believes that as long as preferred lender lists exist, lenders will exploit every regulatory regime that the Department devises for placement on a school's list. Another commenter representing a lender stated that the Department should not formally authorize preferred lender lists in regulations when they are not authorized in statute and conflict with the statutory provision supporting a borrower's choice of lender.

Discussion: The Secretary continues to believe that a school's use of a preferred lender list that is based on the school's unbiased research to identify the lenders providing the best combination of services and benefits to borrowers at that school may help students and their parents in navigating the increasingly complex FFEL Program. There is no statutory prohibition against the use of such lists, as long as the school does not use the list to limit the borrower's choice of lender.

Many schools began using preferred lender lists because of their concern about student loan defaults and the negative consequences for the borrowers and the school. Many schools continue to use preferred lender lists to identify lenders that provide high-quality customer service and loan servicing to prevent delinquency and default. We also believe that students and parents increasingly rely upon financial aid offices for information and assistance in dealing with the number of FFEL lenders and the proliferation of marketing of student loan borrower benefits. Preferred lender lists and other consumer information on the student loan process can play a useful role in assisting financial aid officers in dealing with the large volume of requests for information and assistance, and in informing borrower choice. As long as preferred lender lists are properly researched and constructed in compliance with the regulations, we believe such lists can serve as a source of unbiased information that facilitates rather than limits informed borrower choice.

The Secretary does not agree that schools participating in the Direct Loan Program should be required to use preferred lender lists. A school participating in the Direct Loan Program is authorized under the HEA to participate exclusively in that program and is therefore not subject to the requirements of section 432(m) of the HEA that require a FFEL borrower be provided with his or her choice of FFEL lender.

Changes: None.

Number of Preferred Lenders (§ 682.212(h)(1))

Comment: Several commenters representing schools and associations objected to the proposed requirement that a preferred lender list include at least three lenders. Some of these commenters found the required minimum number of three arbitrary and capricious. These commenters argued that this requirement may prevent some schools with low FFEL volume, or tribally-controlled or historically black institutions and other schools with little choice in lenders for their students, from using a preferred lender list. One of these commenters stated that it would be better to simply establish preferred lender criteria and ensure that all lenders selected, regardless of number, met the established criteria. Another commenter recommended an exemption for a school if fewer than 150 borrowers entered repayment based on the school's most recent cohort default rate data. A few commenters argued that a school should be given a chance to justify its use of a list of one or two preferred or recommended FFEL lender(s). One large university requested an exemption from the three-lender requirement based on the use of an open-bid or similar process if the school demonstrates that the arrangement provides the best benefits for the school's students. This school argued that strict adherence to the three lender requirement should not result in the school being forced to include lenders on its list that offer mediocre benefits.

Commenters representing lenders stated that a minimum of three lenders was too few. One of these commenters stated that, with more than 3,000 lenders in the FFEL Program, three lenders did not offer adequate choices to borrowers and suggested that the Department should require 10 to 12 lenders. The commenter also suggested that all lenders meeting the school's established criteria, which must be developed and disclosed, should be included on the list. Another commenter recommended that any institution wishing to provide student loan information to its students should be required to provide an annual listing of all lenders willing to make loans to the school's students along with their loan terms. Another commenter requested that the regulations specify that the requirement for a minimum number of required lenders be applied to each preferred lender list maintained by a school because many schools maintain more than one preferred lender list (i.e., separate undergraduate, graduate/professional, medical school, law school, private loan listings).

Discussion: A school is not required to develop or use a list of preferred or recommended lenders. The regulations establish minimum standards to preserve borrower choice for those schools that choose to develop and use such a list. The Secretary continues to believe that three, unaffiliated lenders is the appropriate minimum number of lenders necessary to preserve borrower choice. We also encourage schools to consider including all lenders that meet the school's selection criteria on a preferred lender list. A school that chooses not to recommend lenders, or that has not been able to identify more than one lender to make loans to its students or parents, is not prohibited from providing, upon the student's or parent's request, the name of lenders that have made loans to the school's students and parents in the past as long as a lender has not provided prohibited inducements to the school to secure those loans. In providing this information, the school must make it clear that it is not endorsing that lender and that the borrower can choose to use any FFEL lender that will make loans to the borrower for attendance at that school.

Finally, the Secretary believes that it is sufficiently clear in the regulations that the requirements for use of a preferred lender list apply to any such list a school develops and maintains if the school uses multiple preferred lender lists of FFEL lenders.

Changes: None.

Updating Preferred Lender Lists

Comment: A couple of commenters noted that the proposed regulations did not include a requirement that a school update its preferred lender list and the required disclosure information with any particular frequency. One of the commenters recommended that the regulations specify that a school must update its list at least annually.

Discussion: The Secretary agrees with the commenters that the list and its

accompanying disclosures are only useful to borrowers if the information is current and that the regulations should require updates on a regular basis.

Changes: The regulations in § 682.212(h)(2) have been modified to require that a school must update its preferred lender list and the accompanying information at least annually.

Lenders Selected by Schools (§ 682.212(h)(1))

Borrower Benefits Offered

Comment: One commenter representing a lender noted that the proposed regulations would not require that the lenders selected by the school for its preferred lender list offer the best loan terms for the borrower and recommended that this requirement be explicit in the regulations. Another commenter representing a school noted that the regulations allow a school to negotiate with a lender for the best benefits for the school's borrowers, but expressed concern that the negotiated benefits will be unfair and inequitable from a national perspective because the best benefits will go to borrowers at large schools with large enrollments.

Discussion: Although the Secretary anticipates that financial benefits offered by a lender to the school's student and parent borrowers will be a key factor in a school's evaluation of lenders for its preferred lender list, she does not believe it should be the only factor that the school can consider. It is appropriate for a school to consider the quality of a lender's customer service in loan origination and loan servicing, its effectiveness in providing consumer information, counseling and debt management services, and its delinquency and default prevention efforts. Schools may face sanctions if their cohort default rates exceed certain levels, so a lender's effectiveness in working with borrowers to ensure that loans are repaid may be a legitimate consideration for some schools. The Secretary does not intend to dictate the method or criteria a school may use in selecting lenders for its list beyond the regulatory limits. She believes that the requirement that the school disclose the method and criteria used for lender selection will allow students and their families to evaluate the school's basis for recommending a lender and to make an informed decision as to the advisability of using one of the school's preferred lenders or choosing another FFEL lender.

The Secretary understands the commenter's concern about inequitable benefits in the FFEL Program. However, except with respect to loan origination fees, the HEA does not specify the manner in which lenders may offer lower costs and benefits to students provided the lenders do not discriminate on a legally prohibited basis. Additionally, the manner in which some State-designated and affiliated lenders provide borrower benefits is limited under State law.

Changes: None.

Affiliated Lenders (§ 682.212(h)(1)(ii) and (h)(3))

Comment: A commenter representing a lender stated that requiring lenders to simply certify to a school that they are not affiliated with other lenders on the school's list is meaningless unless there is a penalty for an incorrect certification. The commenter recommended that the regulations provide for a monetary penalty for a lender's misrepresentation of its affiliations. The same commenter stated that lenders, in addition to certifying their affiliations, should be required to disclose to borrowers whether they sell their loans. The commenter believes that this additional disclosure would more fully inform the borrower's choice of lender.

Several commenters representing lenders, guaranty agencies, and loan servicers indicated that the definition of ''affiliated lender'' should not include a reference to eligible lender trustees. The commenters argued that a lender's actions as an originating lender are unrelated to its actions as a lender trustee. They noted that the lender's own lending program and the lending program operated under the trust agreement are separately administered and controlled and generally involve different loan delivery services, pricing discounts, and borrower benefits. The commenters believe that the Department's goals of encouraging consumer choice and competition will be undercut if an originating lender is considered an affiliate of another originating lender or party on the basis of the third-party trust arrangement.

Many commenters representing schools, school-based associations, lenders, guaranty agencies, and loan servicers recommended that ''affiliated lenders'' for the purpose of preferred lender lists be defined as lenders that are under common ownership and control. Some of these commenters noted that this approach would be consistent with legislation pending in Congress. Many of these commenters also expressed concern about the scope of the Department's definition of an affiliated lender. The commenters wanted assurance that the Department would not define the term ''affiliate'' to include parties engaged in post-disbursement forward purchase agreements, loan portfolio sales, post-disbursement loan servicing, and secondary market activity. A consumer advocate argued that the definition should not include relationships that involve only post-disbursement servicing or secondary market activity because this would create a burden on schools because they could not be expected to know about or monitor arrangements like forward purchase agreements.

Discussion: The Secretary disagrees that it is necessary or appropriate to include specific monetary penalties in the regulations related to a lender's certification of its affiliates to schools. This section of the regulations governs school, not lender, activities, in the development of a school's preferred lender list. Further, the Secretary has sufficient existing statutory and regulatory authority to sanction a lender for any misrepresentations to the school.

The Secretary agrees with the commenters that a lender's function and responsibilities as a trustee in a third-party trustee relationship are separate and distinct from its function as an originating lender. We believe, therefore, that ensuring a borrower's choice among lenders will be protected if ''affiliation'' for purposes of a preferred lender list is limited to affiliates that are under common ownership and control. The Secretary also wishes to clarify that the Department does not interpret the lender affiliation provision to include entities that are involved in post-disbursement activities, which a school has no ability to monitor or control.

Changes: The regulations have been modified to delete § 682.212(h)(3)(iv) and the reference to lenders serving as trustees.

School Solicitations and Lender Status (§ 682.212(h)(1)(iii))

Comment: Some commenters representing lenders requested that the Secretary clarify in the regulations that a school's solicitation of an improper benefit from a lender that is not acted upon by the lender would not disqualify the lender for inclusion on the school's preferred lender list.

The commenters also requested that the regulations directly reference the prohibited inducements listed in § 682.200 to prevent a lender from being publicly accused of an impropriety when it is no more than an unsubstantiated accusation or perception.

Discussion: This provision of the regulations governs schools' actions in developing and using a preferred lender list. The focus is on a school's improper solicitation of certain benefits and a school's acceptance of a lender's improper offer and the relationship of those school actions to the school's preferred lender list. As a result, the Secretary does not believe it is necessary to include any specific reference to the prohibited inducement provisions that govern lender and guaranty agency activities in this section of the regulations. The Secretary reiterates that a lender that does not act upon a school's solicitation is not disqualified from being included on a school's preferred lender list and agrees that this should be more clearly stated in the regulations.

Changes: Section 682.212(h)(1)(iii) has been modified to clarify that a preferred lender list developed for use by a school must ''not include lenders that have offered, or have offered in response to a solicitation by the school'' financial and other benefits to the school in exchange for inclusion on the school's preferred lender list.

Financial and Other Benefits Offered for Preferred Lender Status (§ 682.212(h)(1)(iii))

Comment: One commenter representing a lender asked that we clarify the provision that prohibits a lender from being included on a school's preferred lender list if the lender has offered ''financial or other benefits'' to the school in exchange for placement on the school's preferred lender list or loan volume for the lender. The commenter suggested that we modify this provision to exempt those benefits to a school that would be permitted under paragraph (5)(ii) of the definition of *lender* in § 682.200(b) of the regulations. Another commenter representing a school-based association argued that the phrase ''other benefits'' was vague.

Discussion: The Secretary agrees that under paragraph (5)(ii) of the definition of *lender* in § 682.200(b) of the regulations, lenders will be permitted to engage in certain activities that will provide benefits to a school and its students without violating the prohibition on improper inducements. The Secretary believes, however, that those activities and benefits, though permissible, should never be a factor in a school's decision to place a lender on the school's preferred lender list. We believe that inserting the exemption clause recommended by the commenter into this provision would improperly suggest that these activities, rather than the best borrower benefits, can be a factor in the school's selection of its preferred lenders. We do not agree that the term ''other benefits'' is vague. The definition of this term in the regulations provides sufficient detail about the types of benefits that are covered by this regulation.

Changes: None.

List Requirements (§ 682.212(h)(2))

Method and Criteria (§ 682.212(h)(2)(i))

Comment: Many commenters agreed with the Secretary's proposal that schools electing to use a preferred lender list be required to disclose the method and criteria used to select the lenders on the list. The commenters believe that this information will result in a transparent process that prospective borrowers can trust and provide them with the necessary information to make an informed decision about which lender to use.

Discussion: The Secretary thanks the commenters for their support of the requirement that schools participating in the FFEL Program disclose the method and criteria for developing their preferred lender lists.

Changes: None.

Required Comparative Information (§ 682.212(h)(2)(ii))

Comment: Several commenters objected to the requirement that a school provide comparative information about the loans offered by lenders on the preferred lender list on the grounds that it would be too administratively burdensome, particularly if it included information on private education loans. Some commenters expressed concern that the requirements would be so burdensome and fraught with controversy that schools would stop providing such lists, which they believe are useful for borrowers. An association representing financial aid administrators expressed appreciation for the Department's plan to develop a model format to help schools collect information from lenders to help develop the school's lender list. They suggested that lenders be required to disclose the percentage of borrowers who actually receive lender-provided borrower benefits. One school commenter stated that the Secretary should develop and endorse tools to help institutions compare and evaluate education loan programs. Another school commenter recommended that the Secretary establish a clearinghouse of information on all lenders and their loan offerings. One commenter recommended that the school only be required to maintain lender contact information to enable borrowers to contact lenders directly for information. Another commenter stated that the regulations lacked specifics about what information must be provided, how it was to be made available, and whether it was to be provided to all applicants for admission, whether accepted or not, and recommended that the requirement be deleted or limited to a specific number of national or competitive lenders.

Discussion: The Secretary thanks those commenters who expressed support for the Secretary's plans to develop a suggested model format for schools to use to collect and distribute required comparative lender benefit information. She believes that the requirement that schools choosing to develop and maintain preferred lender lists provide comparative lender information coupled with the requirement that a school disclose its method and criteria for lender selection is the only way to restore trust and integrity to the process and to retain the use of preferred lender lists in the FFEL Program. If adopted by all schools using preferred lender lists, the model format will provide a standardized format for collecting and presenting lender information. The form will be subject to public comment under the Paperwork Reduction Act of 1995, and the Secretary will invite comments on the proposed contents, format, and use of the form as part of that public comment period.

Because schools are able to negotiate with lenders for the best loan terms for their students, and FFEL lenders are free to offer different benefits by school, and even by program of study, the Secretary believes it would be infeasible for the Department to develop the kind of clearinghouse one commenter suggested.

Changes: None.

Same Borrower Benefits for All Borrowers at the School (§ 682.212(h)(2)(iii))

Comment: Many commenters representing schools, school associations, lenders and State secondary markets, and guaranty agencies strongly recommended that the Secretary reconsider the proposed requirement that a school ensure than any lender included on its preferred lender list offer the same benefits to all borrowers at the school. Many of the commenters stated that benefit programs are often tailored to different groups of students in particular programs of study with different debt levels and believe that the flexibility to offer differing program benefits to assist borrowers in

managing debt levels should be preserved. Some of these commenters believe that this requirement conflicts with a lender's statutory authority to offer reduced interest rates and fees. They also believe that this provision goes beyond the statutory scope of the non-discrimination provisions in sections 421(a)(2) and 438(c) of the HEA. Several commenters representing guaranty agencies and State-designated and State-affiliated lenders, some using tax exempt financing, noted that they were restricted by law to providing benefits only to residents of the States they serve. These commenters believe that the implementation of a blanket requirement would result in increased costs to borrowers. The commenters requested that the Secretary consider, at a minimum, exempting non-profit, State-affiliated lenders from this requirement.

Discussion: The Secretary disagrees that the proposed requirement exceeds her statutory authority. She appreciates, however, that the unintended consequence of such a requirement could be a loss of borrower benefits for some borrowers. She agrees that this result would be inconsistent with allowing a school using a preferred lender list to negotiate with lenders to ensure the best borrower benefits for its students. The Secretary expects that a lender making loans at a school for which it provides different benefits by program, debt level, State restriction, etc., will provide this information to the school for the school's use in providing comparative information to borrowers.

Changes: The regulations have been modified to remove paragraph (iii) from § 682.212(h)(2).

School Loan Certification and Unnecessary Delays (§§ 682.212(h)(2)(vi) and 682.603(f))

Comment: Commenters strongly supported the requirement that a borrower's choice of lender not be effectively denied by a school's delay in completing the borrower's loan eligibility certification. One commenter representing a lender requested that the Secretary clarify the meaning of unnecessary delay by specifying that a refusal to process, or an intentional delay in processing, a certification because a lender does not participate in the electronic processing system that the school uses is impermissible. A school commenter asked that the regulations provide schools some flexibility without viewing it as a delay. The commenter asked the Secretary to recognize that a school's certification processing times may differ if the borrower chooses a lender that does not participate in the school's electronic processes without the school being considered to have purposely impeded a borrower's choice of lender.

Discussion: First, we believe it is necessary to clarify that the requirements of revised § 682.603(f) apply to all FFEL participating schools even if the school does not use a preferred lender list. The HEA provides for a borrower's choice of FFEL lender. A school cannot abridge that choice through its administrative processes or its designation of preferred lenders and guaranty agencies.

Second, a school may not decline to provide a loan certification, or significantly delay a loan certification, because the lender does not use the electronic process or platform the school uses. The Secretary understands however, that, under those circumstances, a school may have to complete a manual certification that may require more processing time than would an electronic certification. However, the borrower's request must be honored by the school as expeditiously as possible without imposing unnecessary administrative hurdles on the borrower or the lender. Schools are reminded that their administrative practices in loan certification are subject to review and audit. The Secretary encourages schools and lenders to work together on behalf of borrowers to expand their electronic capabilities and platforms to maximize borrower choice and minimize loan certification processing times. If a school is aware that the lender the borrower has selected has elected not to make loans to the school's students in the past, the school is free to advise the borrower of that fact and encourage the borrower to confirm with the lender whether it will make a loan to the borrower so that the borrower will not be delayed in securing loan funds.

Changes: None.

Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

Pursuant to the terms of the Executive order, it has been determined this final regulatory action will have an annual effect on the economy of more than $100 million. Therefore, this action is ''economically significant'' and subject to OMB review under section 3(f)(1) of Executive Order 12866. In accordance with the Executive order, the Secretary has assessed the potential costs and benefits of this regulatory action and has determined that the benefits justify the costs. (Absent the provisions required to implement the CCRAA, these regulations would not be considered ''economically significant.'')

Need for Federal Regulatory Action

These regulations address a broad range of issues affecting students, borrowers, schools, lenders, guaranty agencies, secondary markets and third-party servicers participating in the FFEL, Direct Loan, and Perkins Loan programs. Prior to the start of negotiated rulemaking, through a notice in the **Federal Register** and four regional hearings, the Department solicited testimony and written comments from interested parties to identify those areas of the Title IV regulations that they felt needed to be revised. Areas identified during this process that are addressed by these final regulations include:

- Duplication of effort for loan holders and borrowers in the deferment granting process. The final regulations allow Title IV loan holders to grant a deferment under a simplified process.
- Difficulty experienced by members of the armed forces when applying for a Title IV loan deferment. The final regulations allow a borrower's representative to apply for an armed forces or military service deferment on behalf of the borrower.
- Confusion regarding the eligibility requirements that a Title IV loan borrower must meet to qualify for a total and permanent disability loan discharge. The final regulations clarify these requirements.
- Lack of entrance and exit counseling for graduate and professional PLUS Loan borrowers. The final

regulations require entrance counseling and modified exit counseling.

• Costs associated with capitalization on Federal Consolidation Loans for borrowers who consolidated while in an in-school status. The final regulations limit the frequency of capitalization on such loans.

Based on its experience in administering the HEA, Title IV loan programs, staff with the Department also identified several issues for discussion and negotiation, including:

• Risk to the Federal fiscal interest associated with the total and permanent disability discharge on a Title IV loan. The final regulations require a prospective three-year conditional discharge so that the applicant's condition can be monitored before the borrower receives a Federal benefit.

• Enforcement issues and risk to the Federal fiscal interest associated with electronically-signed MPNs that have been assigned to the Department. The final regulations require loan holders to maintain a certification regarding the creation and maintenance of any electronically-signed promissory notes and require loan holders to provide disbursement records should the Secretary need the records to enforce an assigned Title IV loan.

• Excessive collection costs charged to defaulted Perkins Loan borrowers. The final regulations cap collection costs in the Perkins Loan Program.

• Unreasonable risk of loss to the United States associated with the more than $400 million in uncollected Perkins Loans that have been in default for a significant number of years. The final regulations provide for mandatory assignment of older, defaulted Perkins loans at the request of the Secretary.

• Program integrity issues associated with prohibited incentive payments and other inducements by lenders and guaranty agencies. The final regulations explicitly identify prohibited inducements and allowable activities.

• Abuse associated with the use of lists of preferred or recommended lenders. The final regulations ensure such lists are a source of useful, unbiased consumer information that can assist students and their parents in choosing a FFEL lender.

Lastly, regulations were required to implement The HEA Extension Act and the CCRAA.

Regulatory Alternatives Considered

A broad range of alternatives to the regulations was considered as part of the negotiated rulemaking process. These alternatives were reviewed in detail in the preamble to the NPRM under the *Reasons* sections accompanying the discussion of each proposed regulatory provision. To the extent they were addressed in response to comments received on the NPRM, alternatives are also considered elsewhere in the preamble to these final regulations under the *Discussion* sections related to each provision. No alternatives were considered for the provisions related to the implementation of the CCRAA, as these were limited to areas where the statute set out explicit parameters that are not subject to regulatory discretion.

Benefits

As discussed in more detail in the preamble to the NPRM, many of the regulations not related to the CCRAA codify existing sub-regulatory guidance or make relatively minor changes intended to establish consistent definitions or streamline program operations across the three Federal student loan programs. The Department believes the additional clarity and enhanced efficiency resulting from these changes represent benefits with little or no countervailing costs or additional burden.

Benefits provided in these non-CCRAA regulations include: the clarification of rules on preferred lender lists and prohibited inducements; simplification of the process for granting deferments; changes to the process of granting loan discharges that reduce burden for loan holders, and protection of borrowers from unnecessary collection activities. Other changes include simplification of the deferment application process; limits on the frequency with which FFEL lenders can capitalize interest on Consolidation Loans; limits on the amount of collection costs charged to defaulted Perkins Loan borrowers; and the mandatory assignment to the Department of longstanding defaulted Perkins Loans with limited recent collection activity.

Of the proposed provisions not related to the CCRAA, only the mandatory assignment of defaulted Perkins Loans has a substantial economic impact, although the single-year impact is less than the $100 million threshold. Two commenters questioned the assertion that the economic impact of this provision is below the threshold, noting ''the Department believes that there are $400 million in Perkins Loans that have been in default more than five years. Although the proposed regulation would impose mandatory assignment on loans in default more than seven years, not five, it seems clear that the $100 million threshold will be breached.'' The $400 million figure cited by the commenters was included in the NPRM to give a sense of the scale of the overall portfolio of defaulted Perkins Loans. As noted elsewhere in the NPRM, the Department estimated the amount of outstanding loans currently subject to the proposed provision, those in default for at least seven years and for which the outstanding balance has not decreased in at least 12 months, at $23 million, substantially below the $100 million threshold. 72 FR 32429. Department estimates for subsequent years indicate this amount would grow by approximately $1 million annually under current regulations, again well below the threshold.

Many of the regulatory provisions related to the implementation of the CCRAA result in significantly lower Federal costs through a reduction in net payments to lenders and guaranty agencies participating in the FFEL Program. The Department estimates that these provisions will reduce Federal costs by $23.3 billion over fiscal years 2007–2012. Student lenders compete vigorously for loan volume by offering borrowers reduced interest rates and fees while at the same time earning rates of return significantly above the consumer lending industry average. The CCRAA-related changes in these regulations may lead some lenders to reconfigure their marketing, servicing, and profit expectations to accommodate lower Federal subsidies. The Department's preliminary analysis indicates both large and small lenders will still be able to structure their operations to generate a reasonable rate of return.

The CCRAA reduced special allowance payments for loans first disbursed on or after October 1, 2007 and established different rates for eligible not-for-profit lenders and other lenders. The Department estimates these changes will reduce Federal costs by $14.7 billion over 2007–2012. Over this period, the Department estimates lenders will originate 83.7 million loans for a total of $625.6 billion. In general, the Department does not collect data on the for-profit status of participating lenders. Under current law, not-for-profit lenders qualify for a special allowance differential for loans financed through tax-exempt securities. The Department assumes the 39 lenders qualifying for tax-exempt special allowance reflect the universe of not-for-profit lenders in the FFEL program. The total outstanding portfolio for these lenders at the end of 2006 was $40 billion, or 12.41 percent of the total outstanding portfolio of $325 billion. This rate has been relatively constant over time and across loan types; it is

assumed to remain stable throughout the forecasted period. Recent analysis by Fitch Ratings, *An Education in Student Lending,* reports the student loan yield for three large lenders, representing 50 percent of the market in 2006, as between 7.16 percent and 7.99 percent, with a net student loan spread between 1.64 percent and 1.84 percent. This is significantly above the comparable spread for consumer loans. The reduced special allowance payments under the CCRAA will reduce these yields but are not anticipated to have a significant adverse effect on large or small lenders.

The CCRAA reduced the rate guaranty agencies may retain on most default collections from 23 percent to 16 percent on collections after October 1, 2007. The Department estimates this change will reduce Federal costs by $2.2 billion over 2007–2012, half of which is at the time of enactment as adjustments to loans currently outstanding. Guaranty agencies use different tools to collect defaulted loans; each approach has its own retention rate. The three main rates are: The new 16 percent rate reflected in this regulation for regular default collections; 10 percent on specialized collections, such as the pay-off of defaulted balances through the origination of a new consolidation loan; and 0 percent on loans collected through the offset of tax returns by the Internal Revenue Service and similar activities. The collection categories affected by the CCRAA represent less than a quarter of default collections by guaranty agencies. For 2008, the Department projects it will retain 94.82 percent of all default collections made by guaranty agencies, an increase from 92.17 percent in 2007.

The CCRAA decreases account maintenance fees paid to guaranty agencies from 0.10 percent to 0.06 percent of original principal balance outstanding on which guarantees were issued, effective October 1, 2007. The Department estimates that this change will reduce Federal costs by $2.6 billion over 2007–2012, $1 billion of which is at the time of enactment as adjustments to loans currently outstanding.

The CCRAA eliminated, effective October 1, 2007, the ''exceptional performer'' designation under which lenders and loan servicers qualified for higher than standard insurance against loan default. The Department estimates this change, which applies to any invoice the Department receives after October 1, 2007, will reduce Federal costs by $1.2 billion over 2007–2012. In 2007, 90 percent of loans were serviced by a servicer receiving the higher insurance rate. As with the other changes reducing payments to lenders, the Department expects some lenders may reconfigure their marketing, servicing, and profit expectations to accommodate lower Federal subsidies.

The CCRAA increased the loan fee a lender must pay to the Secretary from 0.50 to 1.0 percent of the principal amount of the loan for loans first disbursed on or after October 1, 2007. The Department estimates this change will reduce Federal costs by $2.6 billion over 2007–2012. The fee is payable on all new loan originations except PLUS loans originated through the auction mechanism created by the CCRAA. Student lenders compete vigorously for loan volume by offering borrowers reduced interest rates and fees while at the same time earning rates of return significantly above the consumer lending industry average. The increased fee, whether alone or in tandem with other changes in the CCRAA, may lead some lenders to reconfigure their marketing, servicing, and profit expectations to accommodate lower Federal subsidies. The Department's preliminary analysis indicates both large and small lenders will still be able to structure their operations to generate a reasonable rate of return.

Costs

Because entities affected by these regulations already participate in the Title IV, HEA programs, these lenders, guaranty agencies, and schools must already have systems and procedures in place to meet program eligibility requirements. The non-CCRAA regulations in this package generally would require discrete changes in specific parameters associated with existing guidance, such as the provision of entrance counseling, the retention of records, or the submission of data to NSLDS, rather than wholly new requirements. Accordingly, entities wishing to continue to participate in the student aid programs have already absorbed most of the administrative costs related to implementing these regulations. Marginal costs over this baseline are primarily related to one-time system changes, which in some cases could be significant. In assessing the potential impact of the proposed non-CCRAA regulations, the Department recognizes that certain provisions, primarily those requiring the assignment of Perkins Loans and entrance counseling for graduate and professional PLUS Loan borrowers, will result in additional workload for staff at some institutions of higher education. (This additional workload is discussed in more detail under the Paperwork Reduction Act of 1995 section of the NPRM.) Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. As noted in the NPRM, however, in this case, these costs would be offset by other provisions in the regulations, primarily those involving changes to the maximum length of loan period, which result in workload reductions that greatly outweigh the estimated additional burden.

In weighing the costs and benefits of these regulations, the Department considered a range of possible outcomes, many of which were raised during the negotiated rulemaking discussions. (The following summarizes these considerations for a number of provisions; a more complete discussion for all provisions is available in the *Reasons* sections of the NPRM.) For prohibited inducements, for example, several negotiators expressed concern that the proposed regulations might have a negative impact on the numerous business arrangements between schools and financial institutions or reduce philanthropic giving to institutions of higher education; others suggested the regulations could have a ''chilling effect'' on school and lender relationships. Conversely, other negotiators expressed the view that eliminating improper inducements would end the practice of schools actively ''steering'' borrowers to particular lenders and limit the appearance of ''redlining'' by lenders targeting benefits on certain classes of borrowers, greatly enhancing the credibility of the loan process.

On balance, the Department believes that these regulations adequately implement the statutory requirements in the HEA's prohibited inducement provisions and does not believe it will affect unrelated contracts or agreements between postsecondary institutions and financial institutions or general philanthropic giving by financial institutions. Some negotiators believed that borrowers are being inappropriately steered to various lenders through the use of inducements provided by lenders to schools and that these activities, if left unchecked, deny borrowers their choice of lender and undermine the credibility of the FFEL Program. The Secretary, through these regulations, is enhancing the borrower's choice of lender and providing for the disclosure of appropriate information.

In the area of preferred lender lists, some negotiators questioned the need to regulate in this area, fearing that the provisions would be administratively

burdensome and could result in schools discontinuing the use of such lists. The non-Federal negotiators expressed concern that if schools discontinued using a preferred lender list, students would be subject to increased direct marketing from student loan lenders, which they viewed as counterproductive to the goal of educating students and parents about the student loan process. At the same time, some raised the possibility that school workload would increase in the absence of preferred lender lists, as students and parents would seek more information directly from the school about choosing a lender. Non-Federal negotiators also objected to our proposal that schools choosing to continue use of preferred lender lists be required to not only disclose the method and criteria used by the school to choose the lenders on the school's preferred lender list, but also provide comparative information on the interest rates and other borrower benefits offered by those lenders. The non-Federal negotiators believed that this would represent a significant administrative burden and that schools could not ensure the accuracy of the information on borrower-benefit offerings.

The Department believes the disclosure of supporting information and data with the list of preferred lenders is the most efficient and effective method to ensure that borrowers make informed consumer decisions. The Department understands that providing comparative interest rate and benefit information, in addition to describing the method and criteria used to select lenders for the list, will involve additional efforts for schools in preparing and providing a preferred lender list. To assist schools with this effort, the Department is developing a model format that a school may use to present this information.

In general, the Department believes these provisions will produce the general benefits of greater borrower choice and information and enhanced faith in the integrity and transparency of the loan program. While it is possible that some institutions will incur significant costs, we believe we have provided opportunities, such as the model form, to minimize these costs and that, on balance, the costs are outweighed by the likely benefits.

The Department also agrees that schools should not be discouraged from negotiating with lenders for the best possible interest rates and borrower benefits for their borrowers. As a result, the regulations, while continuing to prohibit a school's solicitation of payments and other benefits from a lender for the school or its employees in exchange for the lender's placement on the school's list, do not prohibit a school from soliciting lenders for borrower benefits in exchange for placement on the school's list.

The regulatory provisions related to the CCRAA expand benefits to borrowers in a number of areas—primarily through the reduction of interest rates on Stafford Loans—that significantly increase Federal costs. The Department estimates that these provisions will increase Federal costs by $5.9 billion over fiscal years 2007–2012. These provisions will either reduce costs for student loan borrowers or offer new or extended benefits during periods of military service or economic hardship for over 25 million loans and as many as 22 million borrowers over fiscal years 2007–2012.

The CCRAA reduced interest rates on subsidized Stafford loans made to undergraduate students effective July 1, 2008. Rates are reduced from 6.8 percent to 6.0 percent for loans originated between July 1, 2008, and June 30, 2009; to 5.6 percent for the year beginning July 1, 2009; to 4.5 percent for the year beginning July 1, 2010; and to 3.4 percent for the year beginning July 1, 2011. (The rate returns to 6.8 percent for subsequent years.) The Department estimates that this change will increase Federal costs by $5.9 billion over 2007–2012. On the average Stafford Loan of $3,180, a borrower would repay $4,391 over a 10-year repayment period at a 6.8 percent annual rate. Under the CCRAA, borrowers will save $155 over 10 years ($1.29 per monthly payment) for loans originated in award year 2008–2009, rising to a $608 savings over 10 years ($5.07 per payment) for loans originated in award year 2011. Total savings for a borrower taking out an average loan in each year would be $1,393 over 10 years on borrowing of $12,733, or roughly 1 percent a year. The average student borrows roughly $9,000 in Stafford Loans over their time in school; their savings would be less.

The CCRAA revised the definition of economic hardship for the purpose of qualifying for a student loan deferment. The Department estimates that this change will have minimal effect on Federal costs. Previously, borrowers were eligible for a loan deferment if they earned 100 percent of the poverty line for a family of two or if their Federal educational debt burden exceeded 20 percent of adjusted gross income if the difference between the adjusted gross income minus the debt burden is less than 220 percent of the poverty line for a family of two. Effective October 1, 2007, the CCRAA eliminates the debt burden provision for all borrowers and ties the income criteria to 150 percent of the poverty line applicable to the borrower's family size. Removing the debt burden test restricts eligibility for the economic hardship deferment while relaxing the family income criteria increases eligibility. The Department only collects income data on borrowers choosing the income-contingent repayment option, who represent roughly 15 percent of the outstanding portfolio. Using this group as a proxy for the total population in repayment, the Department estimates the changes in the CCRAA counteract one another, resulting in roughly one-third of borrowers meeting the eligibility requirements before and after the statutory change. A substantial portion of borrowers who qualify for economic hardship never apply for the deferment.

The CCRAA extends the military deferment to all Title IV borrowers regardless of when their loans were made, eliminates the 3-year limit on the military deferment and adds a 180-day period of deferment following the borrower's demobilization effective October 1, 2007. The law also authorizes a 13-month deferment following conclusion of their military service for certain members of the Armed Forces who were enrolled in a program of instruction at an eligible institution at the time, or within 6 months prior to the time the borrower was called to active duty effective October 1, 2007. Using figures provided by the Congressional Budget Office, the Department of Defense, and the Department's National Postsecondary Student Aid Survey, the Department estimates there will be 12,000 active duty military personnel with outstanding loans out of a total of 216,000 deployed in 2007, decreasing to 3,100 out of 55,000 in 2011. These borrowers have outstanding debt of $49 million in 2007. Assuming 15 months of deployment and the appropriate new additional new post-deployment deferments, the Department estimates the interest subsidy provided to these borrowers would be $17 million over 2007–2012.

Assumptions, Limitations, and Data Sources

Estimates provided above reflect a baseline in which the changes implemented in these regulations do not exist. As part of the regulatory impact analysis included in the NPRM, the Department requested comments or information from the public for consideration in assessing its preliminary estimates. No such comments or information related to data used in the preliminary estimates were

received during the comment period. In the absence of such information, and given that internal reviews have revealed no problems or significant new information, the estimates included in the NPRM should be considered final.

In developing these estimates, a wide range of data sources were used, including NSLDS data, operational and financial data from Department of Education systems, and data from a range of surveys conducted by the National Center for Education Statistics, such as the 2004 National Postsecondary Student Aid Survey, the 1994 National Education Longitudinal Study, and the 1996 Beginning Postsecondary Student Survey.

Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading *Paperwork Reduction Act of 1995.*

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in Table 1 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these regulations. This table provides our best estimate of transfers related to changes in Federal student aid payments as a result of these final regulations. Estimated transfers of −$2,914 million reflect annualized savings, discounted at 7 percent, related to −$13,889 million in net savings as estimated using traditional credit reform scoring conventions. Alternatively, if transfers are discounted at 3 percent, annualized transfers would equal −$2,906 million in estimated net savings of −$15,743 million. Expenditures are classified as transfers to postsecondary students; savings are classified as transfers from program participants (lenders, guaranty agencies).

TABLE 1.—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED SAVINGS

[In millions]

Category	Transfers
Annualized Monetized Transfers	−$2,914
From Whom To Whom?	Federal Government To Postsecondary Students; Student Aid Program Participants to Federal Government.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. These regulations affect institutions of higher education, lenders, and guaranty agencies that participate in Title IV, HEA programs and individual students and loan borrowers. The U.S. Small Business Administration Size Standards define these institutions as ''small entities'' if they are for-profit or nonprofit institutions with total annual revenue below $5,000,000 or if they are institutions controlled by governmental entities with populations below 50,000. Guaranty agencies are State and private nonprofit entities that act as agents of the Federal government, and as such are not considered ''small entities'' under the Regulatory Flexibility Act. Individuals are also not defined as ''small entities'' under the Regulatory Flexibility Act.

A significant percentage of the lenders and schools participating in the Federal student loan programs meet the definition of ''small entities.'' While these lenders and schools fall within the SBA size guidelines, the non-CCRAA regulations do not impose significant new costs on these entities. The CCRAA-related provisions do not affect schools, but would have an impact on small lenders. As noted above in the Regulatory Impact Analysis, while these regulations may lead some small lenders to reconfigure their marketing, servicing, and profit expectations to accommodate lower Federal subsidies, the Department's preliminary analysis indicates these lenders will still be able to structure their operations to generate a reasonable rate of return.

In the NPRM the Secretary invited comments from small institutions and lenders as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requested evidence to support that belief. Other than the comments discussed in the *Analysis of Comments and Changes* section regarding the mandatory assignment of Perkins Loans, we did not receive comments or evidence on this subject.

In addition to the provisions contained in the NPRM, these regulations contain provisions implementing non-discretionary provisions of the CCRAA. As discussed elsewhere in the preamble under the section entitled Waiver of Proposed Rulemaking—Regulations Implementing the CCRAA, the Secretary has determined for good cause shown that it is unnecessary to conduct notice-and-comment rulemaking pursuant to the APA on the regulations implementing the changes to these regulations resulting from the CCRAA. Specifically, these amendments simply modify the Department's regulations to reflect statutory changes made by the CCRAA, and these statutory changes are either already effective or will be effective within a short period of time. The Secretary does not have the discretion in whether or how to implement these changes. Accordingly, given that notice-and-comment rulemaking under the APA is not necessary for the regulations implementing the CCRAA, the provisions of the Regulatory Flexibility Act do not apply to those regulations.

Paperwork Reduction Act of 1995

These regulations contain information collection requirements that were reviewed in connection with the NPRM. The Department received no comments on the Paperwork Reduction Act portion of the NPRM. However, we are requesting further comment on information collection, OMB Control Number 1845–0019, consistent with an increase in burden related to the provisions in § 674.16(j).

Section 674.16(j) requires institutions that participate in the Perkins Loan Program to report enrollment and loan status information, or any Title IV related information required by the Secretary, to the Secretary by the deadline date established by the Secretary. As we mentioned in the preamble to the NPRM, the Department regularly discusses issues relating to NSLDS reporting of Title IV, HEA program participants through established workgroups and conference calls with Title IV, HEA program participants. These workgroups provided advice on the changes that have been made to the form requiring schools to report Perkins Loan data to NSLDS in a manner that is consistent with the way data on FFEL Loans and

Direct Loans are reported. These reporting changes will increase burden for Perkins Loan Program schools and will be associated with § 674.16(j) in the resubmission of OMB Control Number 1845–0019.

Additionally, the Department has determined that consistent with the provisions of § 682.604(c)(1), the requirement that guaranty agencies provide the name and location of the entity in possession of the original electronic Master Promissory Note (MPN) will entail a one-time increase in burden to make the appropriate software changes that will collect these data. The guaranty agencies are affected by these changes and their estimated burden will increase by 1,260 hours as reflected in OMB Control Number 1845–0020.

The Department has determined that, consistent with the provisions of § 674.16(j), the reporting of the borrower's academic year level for each Perkins borrower will increase the total burden by 11,340 total hours. Of that total burden hour increase, the following affected entities are estimated to have: 4,309 additional hours attributable to public institutions; 6,010 additional hours attributable to private institutions; and 1,021 additional hours attributable to for-profit institutions.

In regard to other information collection requirements described in the NPRM, the Paperwork Reduction Act of 1995 does not require a response to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

These final regulations also incorporate statutory changes made to the HEA by the CCRAA (Pub. L. 110–84). As discussed below, final regulations in §§ 674.34, 682.210, 682.305, 682.404, 682.415, and 685.204 contain information collection requirements. Under the Paperwork Reduction Act of 1995, the Department is requesting further comment on information collections, OMB Control Number 1845–0019, 1845–0020, and 1845–0021 consistent with the burden associated with the addition of these provisions in the final regulations.

Collection of Information: Perkins Loan Program, FFEL Program, and Direct Loan Program.

Sections 674.34, 682.210, and 685.204 (Deferment)

The final regulations in §§ 674.34, 682.210, and 685.204 extend the military deferment to all Title IV borrowers regardless of when their loans were made, eliminate the 3-year limit on the military deferment and add a 180-day period of deferment following the borrower's demobilization effective October 1, 2007. The changes made by the final regulations will allow more borrowers to establish eligibility for a military deferment and therefore represents an increase in burden for loan holders and borrowers. We estimate the changes will increase burden for borrowers and loan holders (and their servicers) by 1,000 hours and 500 hours, respectively. Thus we estimate a total burden increase of 1,500 hours in OMB Control Number 1845–0080.

The final regulations in §§ 674.34, 682.210, and 685.204 also provide for a 13-month deferment following de-activation of certain members of the Armed Forces who were enrolled, or enrolled within 6 months of being called to active duty effective July 1, 2008. The changes authorize a new deferment and therefore an increase in burden. We estimate that the changes will increase burden for borrowers and loan holders (and their servicers) by 650 hours and 350 hours, respectively. Thus, we estimate a total burden increase of 1,000 hours, and which will be reflected in a new OMB Collection under a newly designated OMB Control Number. A revised Military Deferment Request Form associated with these OMB Control Numbers will be submitted for OMB review by January 30, 2008.

Lastly, the final regulations in § 674.34 and § 682.210 revise the definition of economic hardship to increase allowable income for a borrower to establish eligibility for the economic hardship to 150 percent of the poverty line applicable to the borrower's family size. This change in eligibility requirements will allow more borrowers to establish eligibility for an economic hardship deferment and represents an increase in burden. We estimate that the changes will increase burden for borrowers and loan holders (and their servicers) by 650 hours and 350 hours, respectively. Thus, we estimate a total burden increase of 1,000 hours in OMB Control Numbers 1845–0005 and 1845–0011. A revised Deferment Request Form associated with these OMB Control Numbers will be submitted for OMB review by December 10, 2007.

Section 682.305 (Procedures for Payment of Interest Benefits and Special Allowance and Collection of Origination and Loan Fees)

Final regulations in § 682.305 increase the loan fee a lender must pay to the Secretary from .50 to 1.0 percent of the principal amount of the loan for loans first disbursed on or after October 1, 2007. The changes do not represent a change in burden. Collection practices and procedures would not change; only the amount the lender must pay would change. Therefore, there is no additional burden associated with this provision.

Section 682.404 (Federal Reinsurance Agreement)

Final regulations in § 682.404 reduce the percentage of collections that a guaranty agency may retain from 23 to 16 percent and decrease account maintenance fees paid to guaranty agencies from 0.10 to 0.06 percent effective October 1, 2007. The changes do not represent a change in burden. Collection practices and fee payment procedures will not change; only the percentage of collections retained and the amount of fees paid would change. Therefore, there is no additional burden associated with this provision.

Section 682.415 (Special Insurance and Reinsurance Rules)

The final regulations eliminate the ''exceptional performer'' status and application procedures in § 682.415. This change represents a decrease in burden. We estimate that the changes will decrease burden for lenders (and their servicers) by 2,880 hours in OMB Control Number 1845–0020.

Assessment of Educational Impact

In the NPRM, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number: 84.032 Federal Family Education Loan Program; 84.037 Federal Perkins Loan Program; and 84.268 William D. Ford Federal Direct Loan Program)

List of Subjects in 34 CFR Parts 674, 682 and 685

Administrative practice and procedure, Colleges and universities, Education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, and Vocational education.

Dated: October 23, 2007.

Margaret Spellings,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends parts 674, 682, and 685 of title 34 of the Code of Federal Regulations as follows:

PART 674—FEDERAL PERKINS LOAN PROGRAM

■ 1. The authority citation for part 674 continues to read as follows:

Authority: 20 U.S.C. 1087aa–1087hh and 20 U.S.C. 421–429, unless otherwise noted.

■ 2. Section 674.8 is amended by:

■ A. In paragraph (d)(1), removing the words ''; or'' and adding in their place the punctuation ''.''.

■ B. Adding a new paragraph (d)(3).

The addition reads as follows:

§ 674.8 Program participation agreement.

* * * * *

(d) * * *

(3) The institution shall, at the request of the Secretary, assign its rights to a loan to the United States without recompense if—

(i) The amount of outstanding principal is $100.00 or more;

(ii) The loan has been in default, as defined in § 674.5(c)(1), for seven or more years; and

(iii) A payment has not been received on the loan in the preceding twelve months, unless payments were not due because the loan was in a period of authorized forbearance or deferment.

* * * * *

■ 3. Section 674.16 is amended by adding new paragraph (j) to read as follows:

§ 674.16 Making and disbursing loans.

* * * * *

(j) The institution must report enrollment and loan status information, or any Title IV loan-related information required by the Secretary, to the Secretary by the deadline date established by the Secretary.

* * * * *

■ 4. Section 674.19 is amended by:

■ A. Redesignating paragraph (e)(2)(i) as paragraph (e)(2)(iii).

■ B. Adding new paragraph (e)(2)(i).

■ C. Revising paragraph (e)(2)(ii).

■ D. Revising paragraph (e)(3).

■ E. In paragraph (e)(4)(i), removing the words ''Master Promissory Note (MPN)'' and adding, in their place, the word ''MPN''.

■ F. Revising paragraph (e)(4)(ii).

The addition and revisions read as follows:

§ 674.19 Fiscal procedures and records.

* * * * *

(e) * * *

(2) * * *

(i) An institution shall retain a record of disbursements for each loan made to a borrower on a Master Promissory Note (MPN). This record must show the date and amount of each disbursement.

(ii) For any loan signed electronically, an institution must maintain an affidavit or certification regarding the creation and maintenance of the institution's electronic MPN or promissory note, including the institution's authentication and signature process in accordance with the requirements of § 674.50(c)(12).

* * * * *

(3) *Period of retention of disbursement records, electronic authentication and signature records, and repayment records.*

(i) An institution shall retain disbursement and electronic authentication and signature records for each loan made using an MPN for at least three years from the date the loan is canceled, repaid, or otherwise satisfied.

(ii) An institution shall retain repayment records, including cancellation and deferment requests for at least three years from the date on which a loan is assigned to the Secretary, canceled or repaid.

(4) * * *

(ii) If a promissory note was signed electronically, the institution must store it electronically and the promissory note must be retrievable in a coherent format. An original electronically signed MPN must be retained by the institution for 3 years after all the loans made on the MPN are satisfied.

* * * * *

■ 5.Section 674.34 is amended by:

■ A. Revising paragraph (e)(3)(ii).

■ B. In paragraph (h)(1), adding the words '', an NDSL, or a Defense Loan'' after the words ''a Federal Perkins Loan'', removing the words ''made on or after July 1, 2001'', and removing the words ''not to exceed 3 years''.

■ C. Adding a new paragraph (h)(6).

■ D. Redesignating paragraphs (i) and (j) as paragraphs (j) and (k), respectively.

■ E. Adding a new paragraph (i).

■ F. In newly redesignated paragraph (j), removing the words ''and (h)'', and adding in their place, the words ''(h) and (i)''.

The additions and revision read as follows:

§ 674.34 Deferment of repayment—Federal Perkins loans, NDSLs and Defense loans.

(e) * * *

(3) * * *

(ii) An amount equal to 150 percent of the poverty line applicable to the borrower's family size, as determined in accordance with section 673(2) of the Community Service Block Grant Act.

* * * * *

(h) * * *

(6) The deferment period ends 180 days after the demobilization date for the service described in paragraphs (h)(1)(i) and (h)(1)(ii) of this section.

* * * * *

(i)(1) A borrower of a Federal Perkins loan, an NDSL, or a Defense loan who is called to active duty military service need not pay principal and interest does not accrue for up to 13 months following the conclusion of the borrower's active duty military service if—

(i) The borrower is a member of the National Guard or other reserve component of the Armed Forces of the United States or a member of such forces in retired status; and

(ii) The borrower was enrolled in a program of instruction at an eligible institution at the time, or within six months prior to the time, the borrower was called to active duty.

(2) As used in paragraph (i)(1) of this section, ''Active duty'' means active duty as defined in section 101(d)(1) of title 10, United States Code, except—

(i) Active duty includes active State duty for members of the National Guard; and

(ii) Active duty does not include active duty for training or attendance at a service school.

(3) If the borrower returns to enrolled student status during the 13-month deferment period, the deferment expires at the time the borrower returns to enrolled student status.

* * * * *

■ 6. Section 674.38 is amended by:

■ A. In paragraph (a)(1), removing the words ''(a)(2)'' and adding, in their place, the words ''(a)(5)''.

■ B. Redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(5) and (a)(7), respectively.

■ C. Adding new paragraphs (a)(2), (a)(3), (a)(4), and (a)(6).

The additions read as follows:

§ 674.38 Deferment procedures.

* * * * *

(a) * * *

(2) After receiving a borrower's written or verbal request, an institution may grant a deferment under §§ 674.34(b)(1)(ii), 674.34(b)(1)(iii), 674.34(b)(1)(iv), 674.34(d), 674.34(e), 674.34(h), and 674.34(i) if the institution is able to confirm that the borrower has received a deferment on another Perkins Loan, a FFEL Loan, or a Direct Loan for the same reason and the same time period. The institution may grant the deferment based on information from the other Perkins Loan holder, the FFEL Loan holder or the Secretary or from an authoritative electronic database maintained or authorized by the Secretary that supports eligibility for the deferment for the same reason and the same time period.

(3) An institution may rely in good faith on the information it receives under paragraph (a)(2) of this section when determining a borrower's eligibility for a deferment unless the institution, as of the date of the determination, has information indicating that the borrower does not qualify for the deferment. An institution must resolve any discrepant information before granting a deferment under paragraph (a)(2) of this section.

(4) An institution that grants a deferment under paragraph (a)(2) of this section must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan.

* * * * *

(6) In the case of a military service deferment under §§ 674.34(h) and 674.35(c)(1), a borrower's representative may request the deferment on behalf of the borrower. An institution that grants a military service deferment based on a request from a borrower's representative must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The institution may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

■ 7. Section 674.45 is amended by:

■ A. Redesignating paragraph (e)(3) as paragraph (e)(4).

■ B. Adding new paragraph (e)(3).

The addition reads as follows:

§ 674.45 Collection procedures.

* * * * *

(e) * * *

(3) For loans placed with a collection firm on or after July 1, 2008, reasonable collection costs charged to the borrower may not exceed—

(i) For first collection efforts, 30 percent of the amount of principal, interest, and late charges collected;

(ii) For second and subsequent collection efforts, 40 percent of the amount of principal, interest, and late charges collected; and

(iii) For collection efforts resulting from litigation, 40 percent of the amount of principal, interest, and late charges collected plus court costs.

* * * * *

■ 8. Section 674.50 is amended by:

■ A. Adding new paragraphs (c)(11) and (12).

■ B. In paragraph (e)(1), adding the words ‘‘, unless the loan is submitted for assignment under 674.8(d)(3)’’ immediately after the word ‘‘borrower’’.

The additions read as follows:

§ 674.50 Assignment of defaulted loans to the United States.

* * * * *

(c) * * *

(11) A record of disbursements for each loan made to a borrower on an MPN that shows the date and amount of each disbursement.

(12)(i) Upon the Secretary's request with respect to a particular loan or loans assigned to the Secretary and evidenced by an electronically signed promissory note, the institution that created the original electronically signed promissory note must cooperate with the Secretary in all activities necessary to enforce the loan or loans. Such institution must provide—

(A) An affidavit or certification regarding the creation and maintenance of the electronic records of the loan or loans in a form appropriate to ensure admissibility of the loan records in a legal proceeding. This affidavit or certification may be executed in a single record for multiple loans provided that this record is reliably associated with the specific loans to which it pertains; and

(B) Testimony by an authorized official or employee of the institution, if necessary, to ensure admission of the electronic records of the loan or loans in the litigation or legal proceeding to enforce the loan or loans.

(ii) The affidavit or certification in paragraph (c)(12)(i)(A) of this section must include, if requested by the Secretary—

(A) A description of the steps followed by a borrower to execute the promissory note (such as a flowchart);

(B) A copy of each screen as it would have appeared to the borrower of the loan or loans the Secretary is enforcing when the borrower signed the note electronically;

(C) A description of the field edits and other security measures used to ensure integrity of the data submitted to the originator electronically;

(D) A description of how the executed promissory note has been preserved to ensure that it has not been altered after it was executed;

(E) Documentation supporting the institution's authentication and electronic signature process; and

(F) All other documentary and technical evidence requested by the Secretary to support the validity or the authenticity of the electronically signed promissory note.

(iii) The Secretary may request a record, affidavit, certification or evidence under paragraph (a)(6) of this section as needed to resolve any factual dispute involving a loan that has been assigned to the Secretary including, but not limited to, a factual dispute raised in connection with litigation or any other legal proceeding, or as needed in connection with loans assigned to the Secretary that are included in a Title IV program audit sample, or for other similar purposes. The institution must respond to any request from the Secretary within 10 business days.

(iv) As long as any loan made to a borrower under a MPN created by an institution is not satisfied, the institution is responsible for ensuring that all parties entitled to access to the electronic loan record, including the Secretary, have full and complete access to the electronic loan record.

* * * * *

■ 9. Section 674.56 is amended by revising paragraph (b)(1) to read as follows:

§ 674.56 Employment cancellation—Federal Perkins loan, NDSL, and Defense loan.

* * * * *

(b) *Cancellation for full-time employment in a public or private nonprofit child or family service agency.* (1) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins loan or NDSL made on or after July 23, 1992, for service as a full-time employee in a

public or private nonprofit child or family service agency who is providing services directly and exclusively to high-risk children who are from low-income communities and the families of these children, or who is supervising the provision of services to high-risk children who are from low-income communities and the families of these children. To qualify for a child or family service cancellation, a non-supervisory employee of a child or family service agency must be providing services only to high-risk children from low-income communities and the families of these children. The employee must work directly with the high-risk children from low-income communities, and the services provided to the children's families must be secondary to the services provided to the children.

* * * * *

■ 10. Section 674.61 is amended by:

■ A. Revising the second sentence in paragraph (a).

■ B. Revising paragraphs (b), (c), and (d).

The revisions read as follows:

§ 674.61 Discharge for death or disability.

(a) * * * The institution must discharge the loan on the basis of an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate. * * *

(b) *Total and permanent disability*—(1) *General.* A borrower's Defense, NDSL, or Perkins loan is discharged if the borrower becomes totally and permanently disabled, as defined in § 674.51(s), and satisfies the additional eligibility requirements contained in this section.

(2) *Discharge application process.* (i) To qualify for discharge of a Defense, NDSL, or Perkins loan based on a total and permanent disability, a borrower must submit a discharge application approved by the Secretary to the institution that holds the loan.

(ii) The application must contain a certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as defined in § 674.51(s).

(iii) The borrower must submit the application to the institution within 90 days of the date the physician certifies the application.

(iv) Upon receiving the borrower's complete application, the institution must suspend collection activity on the loan and inform the borrower that—

(A) The institution will review the application and assign the loan to the Secretary for an eligibility determination if the institution determines that the certification supports the conclusion that the borrower is totally and permanently disabled, as defined in § 674.51(s);

(B) The institution will resume collection on the loan if the institution determines that the certification does not support the conclusion that the borrower is not totally and permanently disabled; and

(C) If the institution concludes that the certification and other evidence submitted by the borrower supports the borrower's eligibility for a total and permanent disability discharge, to remain eligible for the final discharge, the borrower must, from the date the physician completes and certifies the borrower's total and permanent disability on the application until the date the borrower receives a final disability discharge—

(*1*) Not receive annual earnings from employment that exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(*2*) Not receive a new loan under the Perkins, FFEL, or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans on which the borrower is seeking a discharge; and

(*3*) Must ensure that the full amount of any Title IV loan disbursement made to the borrower on or after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(v) If, after reviewing the borrower's application, the institution determines that the application is complete and supports the conclusion that the borrower is totally and permanently disabled, the institution must assign the loan to the Secretary.

(vi) At the time the loan is assigned to the Secretary, the institution must notify the borrower that the loan has been assigned to the Secretary for determination of eligibility for a total and permanent disability discharge and that no payments are due on the loan.

(3) *Secretary's initial eligibility determination.* (i) If the Secretary determines that the borrower is totally and permanently disabled as defined in § 674.51(s), the Secretary notifies the borrower that the loan will be in a conditional discharge status for a period of up to three years, beginning on the date the physician certified the borrower's total and permanent disability on the discharge application. The notification to the borrower identifies the conditions of the conditional discharge period specified in paragraph (b)(2)(iv)(C) of this section.

(ii) If the Secretary determines that the certification provided by the borrower does not support the conclusion that the borrower meets the criteria for a total and permanent disability discharge in paragraph (c)(4)(i) of this section, the Secretary notifies the borrower that the application for a disability discharge has been denied, and that the loan is due and payable to the Secretary under the terms of the promissory note.

(4) *Eligibility requirements for a total and permanent disability discharge.* (i) A borrower meets the eligibility criteria for a discharge of a loan based on a total and permanent disability if, from the date the physician certifies the borrower's discharge application, through the end of the three-year conditional discharge period—

(A) The borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(B) The borrower does not receive a new loan under the Perkins, FFEL or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans that are in a conditional discharge status; and

(C) The borrower ensures that the full amount of any title IV loan disbursement received after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(ii) During the conditional discharge period, the borrower or, if applicable, the borrower's representative—

(A) Is not required to make any payments on the loan;

(B) Is not considered past due or in default on the loan, unless the loan was past due or in default at the time the conditional discharge was granted;

(C) Must promptly notify the Secretary of any changes in address or phone number;

(D) Must promptly notify the Secretary if the borrower's annual earnings from employment exceed the amount specified in paragraph (b)(2)(ii)(C)(*1*) of this section; and

(E) Must provide the Secretary, upon request, with additional documentation or information related to the borrower's eligibility for a discharge under this section.

(iii) If, at any time during or at the end of the three-year conditional discharge period, the Secretary determines that the borrower does not continue to meet the eligibility criteria for a total and

permanent disability discharge, the Secretary ends the conditional discharge period and resumes collection activity on the loan. The Secretary does not require the borrower to pay any interest that accrued on the loan from the date of the Secretary's initial eligibility determination described in paragraph (b)(3) of this section through the end of the conditional discharge period.

(iv) The Secretary reserves the right to require the borrower to submit additional medical evidence if the Secretary determines that the borrower's application does not conclusively prove that the borrower is disabled. As part of this review, or at any time during the application process or during or at the end of the conditional discharge period, the Secretary may arrange for an additional review of the borrower's condition by an independent physician at no expense to the applicant.

(5) *Payments received after the physician's certification of total and permanent disability.* (i) If, after the date the physician completes and certifies the borrower's loan discharge application, the institution receives any payments from or on behalf of the borrower on or attributable to a loan that was assigned to the Secretary for determination of eligibility for a total and permanent disability discharge, the institution must forward those payments to the Secretary for crediting to the borrower's account.

(ii) At the same time that the institution forwards the payment, it must notify the borrower that there is no obligation to make payments on the loan while it is conditionally discharged prior to a final determination of eligibility for a total and permanent disability discharge, unless the Secretary directs the borrower otherwise.

(iii) When the Secretary makes a final determination to discharge the loan, the Secretary returns any payments received on the loan after the date the physician completed and certified the borrower's loan discharge application to the person who made the payments on the loan.

(c) *No Federal reimbursement.* No Federal reimbursement is made to an institution for cancellation of loans due to death or disability.

(d) *Retroactive.* Discharge for death applies retroactively to all Defense, NDSL, and Perkins loans.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

■ 11. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2 unless otherwise noted.

■ 12. Section 682.200(b) is amended by:
■ A. Revising paragraph (5) of the definition of *Lender*.
■ B. Adding new paragraphs (7) and (8) to the definition of *Lender*.
■ C. Adding a definition of *School-affiliated organization*.

The revisions and additions read as follows:

§ 682.200 Definitions.

(b) * * *

Lender. (1) * * *

(5)(i) The term *eligible lender* does not include any lender that the Secretary determines, after notice and opportunity for a hearing before a designated Department official, has, directly or through an agent or contractor—

(A) Except as provided in paragraph (5)(ii) of this definition, offered, directly or indirectly, points, premiums, payments, or other inducements to any school or other party to secure applications for FFEL loans or to secure FFEL loan volume. This includes but is not limited to—

(*1*) Payments or offerings of other benefits, including prizes or additional financial aid funds, to a prospective borrower in exchange for applying for or accepting a FFEL loan from the lender;

(*2*) Payments or other benefits to a school, any school-affiliated organization or to any individual in exchange for FFEL loan applications, application referrals, or a specified volume or dollar amount of loans made, or placement on a school's list of recommended or suggested lenders;

(*3*) Payments or other benefits provided to a student at a school who acts as the lender's representative to secure FFEL loan applications from individual prospective borrowers;

(*4*) Payments or other benefits to a loan solicitor or sales representative of a lender who visits schools to solicit individual prospective borrowers to apply for FFEL loans from the lender;

(*5*) Payment to another lender or any other party of referral fees or processing fees, except those processing fees necessary to comply with Federal or State law;

(*6*) Solicitation of an employee of a school or school-affiliated organization to serve on a lender's advisory board or committee and/or payment of costs incurred on behalf of an employee of a school or school-affiliated organization to serve on a lender's advisory board or committee;

(*7*) Payment of conference or training registration, transportation, and lodging costs for an employee of a school or school-affiliated organization;

(*8*) Payment of entertainment expenses, including expenses for private hospitality suites, tickets to shows or sporting events, meals, alcoholic beverages, and any lodging, rental, transportation, and other gratuities related to lender-sponsored activities for employees of a school or a school-affiliated organization;

(*9*) Philanthropic activities, including providing scholarships, grants, restricted gifts, or financial contributions in exchange for FFEL loan applications or application referrals, or a specified volume or dollar amount of FFEL loans made, or placement on a school's list of recommended or suggested lenders; and

(*10*) Staffing services to a school, except for services provided to participating foreign schools at the direction of the Secretary, as a third-party servicer or otherwise on more than a short-term, emergency basis, and which is non-recurring, to assist a school with financial aid-related functions.

(B) Conducted unsolicited mailings to a student or a student's parents of FFEL loan application forms, except to a student who previously has received a FFEL loan from the lender or to a student's parent who previously has received a FFEL loan from the lender;

(C) Offered, directly or indirectly, a FFEL loan to a prospective borrower to induce the purchase of a policy of insurance or other product or service by the borrower or other person; or

(D) Engaged in fraudulent or misleading advertising with respect to its FFEL loan activities.

(ii) Notwithstanding paragraph (5)(i) of this definition, a lender, in carrying out its role in the FFEL program and in attempting to provide better service, may provide—

(A) Assistance to a school that is comparable to the kinds of assistance provided to a school by the Secretary under the Direct Loan program, as identified by the Secretary in a public announcement, such as a notice in the **Federal Register**;

(B) Support of and participation in a school's or a guaranty agency's student aid and financial literacy-related outreach activities, excluding in-person school-required initial or exit counseling, as long as the name of the entity that developed and paid for any materials is provided to the participants and the lender does not promote its student loan or other products;

(C) Meals, refreshments, and receptions that are reasonable in cost and scheduled in conjunction with training, meeting, or conference events if those meals, refreshments, or

receptions are open to all training, meeting, or conference attendees;

(D) Toll-free telephone numbers for use by schools or others to obtain information about FFEL loans and free data transmission service for use by schools to electronically submit applicant loan processing information or student status confirmation data;

(E) A reduced origination fee in accordance with § 682.202(c);

(F) A reduced interest rate as provided under the Act;

(G) Payment of Federal default fees in accordance with the Act;

(H) Purchase of a loan made by another lender at a premium;

(I) Other benefits to a borrower under a repayment incentive program that requires, at a minimum, one or more scheduled payments to receive or retain the benefit or under a loan forgiveness program for public service or other targeted purposes approved by the Secretary, provided these benefits are not marketed to secure loan applications or loan guarantees;

(J) Items of nominal value to schools, school-affiliated organizations, and borrowers that are offered as a form of generalized marketing or advertising, or to create good will; and

(K) Other services as identified and approved by the Secretary through a public announcement, such as a notice in the **Federal Register**.

(iii) For the purposes of paragraph (5) of this definition—

(A) The term ''school-affiliated organization'' is defined in § 682.200.

(B) The term ''applications'' includes the Free Application for Federal Student Aid (FAFSA), FFEL loan master promissory notes, and FFEL consolidation loan application and promissory notes.

(C) The term ''other benefits'' includes, but is not limited to, preferential rates for or access to the lender's other financial products, computer hardware or non-loan processing or non-financial aid-related computer software at below market rental or purchase cost, and printing and distribution of college catalogs and other materials at reduced or no cost.

(D) The term ''emergency basis'' for the purpose of staffing services to a school under paragraph (i)(A)(10) of this section means a state- or Federally-declared natural disaster, a Federally-declared national disaster, and other localized disasters and emergencies identified by the Secretary.

* * * * *

(7) An eligible lender may not make or hold a loan as trustee for a school, or for a school-affiliated organization as defined in this section, unless on or before September 30, 2006—

(i) The eligible lender was serving as trustee for the school or school-affiliated organization under a contract entered into and continuing in effect as of that date; and

(ii) The eligible lender held at least one loan in trust on behalf of the school or school-affiliated organization on that date.

(8) As of January 1, 2007, and for loans first disbursed on or after that date under a trustee arrangement, an eligible lender operating as a trustee under a contract entered into on or before September 30, 2006, and which continues in effect with a school or a school-affiliated organization, must comply with the requirements of § 682.601(a)(3), (a)(5), and (a)(7).

* * * * *

School-affiliated organization. A school-affiliated organization is any organization that is directly or indirectly related to a school and includes, but is not limited to, alumni organizations, foundations, athletic organizations, and social, academic, and professional organizations.

* * * * *

■ 13. Section 682.202 is amended by:

■ A. Adding new paragraph (a)(1)(x).

■ B. In paragraph (b)(2), adding the words, ''and (b)(5)'' immediately after the words ''(b)(4)''.

■ C. Redesignating paragraph (b)(5) as paragraph (b)(6).

■ D. Adding a new paragraph (b)(5).

The addition reads as follows:

§ 682.202 Permissible charges by lenders to borrowers.

* * * * *

(a) * * *

(1) * * *

(x) For a subsidized Stafford loan made to an undergraduate student for which the first disbursement is made on or after:

(A) July 1, 2006 and before July 1, 2008, the interest rate is 6.8 percent on the unpaid principal balance of the loan.

(B) July 1, 2008 and before July 1, 2009, the interest rate is 6 percent on the unpaid principal balance of the loan.

(C) July 1, 2009 and before July 1, 2010, the interest rate is 5.6 percent on the unpaid principal balance of the loan.

(D) July 1, 2010 and before July 1, 2011, the interest rate is 4.5 percent on the unpaid principal balance of the loan.

(E) July 1, 2011 and before July 2012, the interest rate is 3.4 percent on the unpaid balance of the loan.

* * * * *

(b) * * *

(5) For Consolidation loans, the lender may capitalize interest as provided in paragraphs (b)(2) and (b)(3) of this section, except that the lender may capitalize the unpaid interest for a period of authorized in-school deferment only at the expiration of the deferment.

* * * * *

■ 14. Section 682.208 is amended by:

■ A. Revising paragraph (a).

■ B. Adding new paragraphs (b)(3) and (b)(4).

■ C. Adding a new paragraph (i).

The revisions and addition read as follows:

§ 682.208 Due diligence in servicing a loan.

(a) The loan servicing process includes reporting to national credit bureaus, responding to borrower inquiries, establishing the terms of repayment, and reporting a borrower's enrollment and loan status information.

(b) * * *

(3) Upon receipt of a valid identity theft report as defined in section 603(q)(4) of the Fair Credit Reporting Act (15 U.S.C. 1681a) or notification from a credit bureau that information furnished by the lender is a result of an alleged identity theft as defined in § 682.402(e)(14), an eligible lender shall suspend credit bureau reporting for a period not to exceed 120 days while the lender determines the enforceability of a loan.

(i) If the lender determines that a loan does not qualify for a discharge under § 682.402(e)(1)(i)(C), but is nonetheless unenforceable, the lender must—

(A) Notify the credit bureau of its determination; and

(B) Comply with §§ 682.300(b)(2)(ix) and 682.302(d)(1)(viii).

(ii) [Reserved]

(4) If, within 3 years of the lender's receipt of an identity theft report, the lender receives from the borrower evidence specified in § 682.402(e)(3)(v), the lender may submit a claim and receive interest subsidy and special allowance payments that would have accrued on the loan.

* * * * *

(i) A lender shall report enrollment and loan status information, or any Title IV loan-related data required by the Secretary, to the guaranty agency or to the Secretary, as applicable, by the

deadline date established by the Secretary.

* * * * *

■ 15. Section 682.209 is amended by adding new paragraph (k) to read as follows:

§ 682.209 Repayment of a loan.

* * * * *

(k) Any lender holding a loan is subject to all claims and defenses that the borrower could assert against the school with respect to that loan if—

(1) The loan was made by the school or a school-affiliated organization;

(2) The lender who made the loan provided an improper inducement, as described in paragraph (5)(i) of the definition of *Lender* in § 682.200(b), to the school or any other party in connection with the making of the loan;

(3) The school refers borrowers to the lender; or

(4) The school is affiliated with the lender by common control, contract, or business arrangement.

* * * * *

■ 16. Section 682.210 is amended by:

■ A. In paragraph (i)(1), adding the words, ''or a borrower's representative'' immediately following the words ''a borrower''.

■ B. Adding new paragraph (i)(5).

■ C. In paragraph (s), adding, immediately following the words ''(1) *General.*'', the paragraph designation ''(i)''.

■ D. Adding new paragraphs (s)(1)(ii), (s)(1)(iii), (s)(1)(iv), and (s)(1)(v).

■ E. Revising paragraph (s)(6)(iii)(B).

■ F. In paragraph (t), removing from the heading the words ''for loans for which the first disbursement is made on or after July 1, 2001''.

■ G. In paragraph (t)(1), removing the words ''first disbursed on or after July 1, 2001'', and removing the words ''not to exceed 3 years''.

■ H. Removing paragraph (t)(5).

■ I. Redesignating paragraphs (t)(2), (t)(3), and (t)(4), as paragraphs (t)(3), (t)(4), and (t)(5), respectively.

■ J. Adding new paragraphs (t)(2), (t)(7), and (t)(8).

■ K. Adding new paragraph (u).

■ L. Adding a new parenthetical phrase after new paragraph (u).

The additions read as follows:

§ 682.210 Deferment.

* * * * *

(i) * * *

(5) A lender that grants a military service deferment based on a request from a borrower's representative must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The lender may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

(s) * * *

(1) * * *

(ii) As a condition for receiving a deferment, except for purposes of paragraph (s)(2) of this section, the borrower must request the deferment and provide the lender with all information and documents required to establish eligibility for the deferment.

(iii) After receiving a borrower's written or verbal request, a lender may grant a deferment under paragraphs (s)(3) through (s)(6) of this section if the lender is able to confirm that the borrower has received a deferment on another FFEL loan or on a Direct Loan for the same reason and the same time period. The lender may grant the deferment based on information from the other FFEL loan holder or the Secretary or from an authoritative electronic database maintained or authorized by the Secretary that supports eligibility for the deferment for the same reason and the same time period.

(iv) 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 unless the lender, as of the date of the determination, has information indicating that the borrower does not qualify for the deferment. A lender must resolve any discrepant information before granting a deferment under paragraph (s)(1)(iii) of this section.

(v) A lender that grants a deferment under paragraph (s)(1)(iii) of this section must notify the borrower that the deferment has been granted and that the borrower has the option to pay interest that accrues on an unsubsidized FFEL loan or to cancel the deferment and continue to make payments on the loan.

* * * * *

(6) * * *

(iii) * * *

(B) An amount equal to 150 percent of the poverty line applicable to the borrower's family size, as determined in accordance with section 673(2) of the Community Service Block Grant Act.

(t) * * *

(2) The deferment period ends 180 days after the demobilization date for the service described in paragraph (t)(1)(i) and (t)(1)(ii) of this section.

* * * * *

(7) To receive a military service deferment, the borrower, or the borrower's representative, must request the deferment and provide the lender with all information and documents required to establish eligibility for the deferment, except that a lender may grant a borrower a military service deferment under the procedures specified in paragraphs (s)(1)(iii) through (s)(1)(v) of this section.

(8) A lender that grants a military service deferment based on a request from a borrower's representative must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The lender may also notify the borrower's representative of the outcome of the deferment request.

(u) *Military active duty student deferment.* (1) A borrower who receives an FFEL Program loan is entitled to receive a military active duty student deferment for 13 months following the conclusion of the borrower's active duty military service if—

(i) The borrower is a member of the National Guard or other reserve component of the Armed Forces of the United States or a member of such forces in retired status; and

(ii) The borrower was enrolled in a program of instruction at an eligible institution at the time, or within six months prior to the time, the borrower was called to active duty.

(2) As used in paragraph (u)(1) of this section, ''Active duty'' means active duty as defined in section 101(d)(1) of title 10, United States Code, except—

(i) Active duty includes active State duty for members of the National Guard; and

(ii) Active duty does not include active duty for training or attendance at a service school.

(3) If the borrower returns to enrolled student status during the 13-month deferment period, the deferment expires at the time the borrower returns to enrolled student status.

(4) To receive a military active duty student deferment, the borrower must request the deferment and provide the lender with all information and documents required to establish eligibility for the deferment, except that a lender may grant a borrower a military active duty student deferment under the procedures specified in paragraphs (s)(1)(iii) through (s)(1)(v) of this section. (Approved by the Office of Management and Budget under control number 1845–0020)

* * * * *

■ 17. Section 682.211 is amended by:

■ A. Redesignating paragraphs (f)(6), (f)(7), (f)(8), (f)(9), (f)(10), and (f)(11) as

paragraphs (f)(7), (f)(8), (f)(9), (f)(10), (f)(11), and (f)(12), respectively.

■ B. Adding new paragraph (f)(6).

The addition reads as follows:

§ 682.211 Forbearance.

* * * * *

(f) * * *

(6) Upon receipt of a valid identity theft report as defined in section 603(q)(4) of the Fair Credit Reporting Act (15 U.S.C. 1681a) or notification from a credit bureau that information furnished by the lender is a result of an alleged identity theft as defined in § 682.402(e)(14), for a period not to exceed 120 days necessary for the lender to determine the enforceability of the loan. If the lender determines that the loan does not qualify for discharge under § 682.402(e)(1)(i)(C), but is nonetheless unenforceable, the lender must comply with §§ 682.300(b)(2)(ix) and 682.302(d)(1)(viii).

* * * * *

■ 18. Section 682.212 is amended by:

■ A. In paragraph (c), removing the words ''the Student Loan Marketing Association,''.

■ B. In paragraph (d), removing the words ''the Student Loan Marketing Association or''.

■ C. Adding new paragraph (h).

■ D. Adding a parenthetical phrase after paragraph (h).

The addition reads as follows:

§ 682.212 Prohibited transactions.

* * * * *

(h)(1) A school may, at its option, make available a list of recommended or suggested lenders, in print or any other medium or form, for use by the school's students or their parents, provided such list—

(i) Is not used to deny or otherwise impede a borrower's choice of lender;

(ii) Does not contain fewer than three lenders that are not affiliated with each other and that will make loans to borrowers or students attending the school; and

(iii) Does not include lenders that have offered, or have offered in response to a solicitation by the school, financial or other benefits to the school in exchange for inclusion on the list or any promise that a certain number of loan applications will be sent to the lender by the school or its students.

(2) A school that provides or makes available a list of recommended or suggested lenders must—

(i) Disclose to prospective borrowers, as part of the list, the method and criteria used by the school in selecting any lender that it recommends or suggests;

(ii) Provide comparative information to prospective borrowers about interest rates and other benefits offered by the lenders;

(iii) Include a prominent statement in any information related to its list of lenders, advising prospective borrowers that they are not required to use one of the school's recommended or suggested lenders;

(iv) For first-time borrowers, not assign, through award packaging or other methods, a borrower's loan to a particular lender;

(v) Not cause unnecessary certification delays for borrowers who use a lender that has not been recommended or suggested by the school; and

(vi) Update any list of recommended or suggested lenders and any information accompanying such a list no less often than annually.

(3) For the purposes of paragraph (h) of this section, a lender is affiliated with another lender if—

(i) The lenders are under the ownership or control of the same entity or individuals;

(ii) The lenders are wholly or partly owned subsidiaries of the same parent company; or

(iii) The directors, trustees, or general partners (or individuals exercising similar functions) of one of the lenders constitute a majority of the persons holding similar positions with the other lender. (Approved by the Office of Management and Budget under control number 1845–0020)

* * * * *

■ 19. Section 682.300 is amended by:

■ A. In paragraph (b)(2)(vii), removing the word ''or'' at the end of the paragraph.

■ B. In paragraph (b)(2)(viii), removing the punctuation ''.'' at the end of the paragraph and adding, in its place, ''; or''.

■ C. Adding new paragraph (b)(2)(ix).

The addition reads as follows:

§ 682.300 Payment of interest benefits on Stafford and Consolidation loans.

* * * * *

(b) * * *

(2) * * *

(ix) The date on which the lender determines the loan is legally unenforceable based on the receipt of an identity theft report under § 682.208(b)(3).

* * * * *

■ 20. Section 682.302 is amended by:

■ A. In paragraph (d)(1)(vi)(B), removing the word ''or'' at the end of the paragraph.

■ B. In paragraph (d)(1)(vii), by removing the punctuation ''.'' and adding, in its place, ''; or''.

■ C. Adding new paragraph (d)(1)(viii).

■ D. Redesignating paragraph (f) as paragraph (g).

■ E. Adding new paragraph (f).

The addition reads as follows:

§ 682.302 Payment of special allowance on FFEL loans.

* * * * *

(d) * * *

(1) * * *

(viii) The date on which the lender determines the loan is legally unenforceable based on the receipt of an identity theft report under § 682.208(b)(3).

* * * * *

(f) *Special allowance rates for loans made on or after October 1, 2007.* With respect to any loan for which the first disbursement of principal is made on or after October 1, 2007, the special allowance rate for an eligible loan during a 3-month period is calculated according to the formulas described in paragraphs (f)(1) and (f)(2) of this section.

(1) Except as provided in paragraph (f)(2) of this section, the special allowance formula shall be computed by—

(i) Determining the average of the bond equivalent rates of the quotes of the 3-month commercial paper (financial) rates in effect for each of the days in such quarter as reported by the Federal Reserve in Publication H–15 (or its successor) for such 3-month period;

(ii) Subtracting the applicable interest rate for that loan;

(iii) Adding—

(A) 1.79 percent to the resulting percentage for a Federal Stafford loan;

(B) 1.19 percent to the resulting percentage for a Federal Stafford Loan during the borrower's in-school period, grace period and authorized period of deferment;

(C) 1.79 percent to the resulting percentage for a Federal PLUS loan; and

(D) 2.09 percent to the resulting percentage for a Federal Consolidation loan; and

(iv) Dividing the resulting percentage by 4.

(2) For loans held by an eligible not-for-profit holder as defined in paragraph (f)(3) of this section, the special allowance formula shall be computed by—

(i) Determining the average of the bond equivalent rates of the quotes of the 3-month commercial paper (financial) rates in effect for each of the days in such quarter as reported by the Federal Reserve in Publication H–15 (or its successor) for such 3-month period;

(ii) Subtracting the applicable interest rate for that loan;

(iii) Adding—

(A) 1.94 percent to the resulting percentage for a Federal Stafford loan;

(B) 1.34 percent to the resulting percentage for a Federal Stafford Loan during the borrower's in-school period, grace period and authorized period of deferment;

(C) 1.94 percent to the resulting percentage for a Federal PLUS loan; and

(D) 2.24 percent to the resulting percentage for a Federal Consolidation loan; and

(iv) Dividing the resulting percentage by 4.

(3)(i) For purposes of this section, the term ''eligible not-for-profit holder'' means an eligible lender under section 435(d) of the Act (except for a school) that is—

(A) A State, or a political subdivision, authority, agency, or other instrumentality thereof, including such entities that are eligible to issue bonds described in 26 CFR 1.103–1, or section 144(b) of the Internal Revenue Code of 1986;

(B) An entity described in section 150(d)(2) of the Internal Revenue Code of 1986 that has not made the election described in section 150(d)(3) of that Code;

(C) An entity described in section 501(c)(3) of the Internal Revenue Code of 1986; or

(D) A trustee acting as an eligible lender on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (f)(3)(i)(A), (B), or (C) of this section.

(ii) An entity that otherwise qualifies under paragraph (f)(3) of this section shall not be considered an eligible not-for-profit holder unless such lender—

(A) Was, on the date of the enactment of the College Cost Reduction and Access Act, acting as an eligible lender; or

(B) Is a trustee acting as an eligible lender on behalf of an entity described in paragraph (f)(3)(ii)(A) of this section.

(iii) No political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section shall be an eligible not-for-profit holder if the entity is owned or controlled, in whole or in part, by a for-profit entity.

(iv) No State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section shall be an eligible not-for-profit holder with respect to any loan, or income from any loan, unless the State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section is the sole owner of the beneficial interest in such loan and the income from such loan.

(v) A trustee described in paragraph (f)(3)(i)(D) of this section shall not receive compensation as consideration for acting as an eligible lender on behalf of an entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section in excess of reasonable and customary fees.

(vi) For purposes of this paragraph, an otherwise eligible not-for-profit holder shall not—

(A) Be deemed to be owned or controlled, in whole or in part, by a for-profit entity; or

(B) Lose its status as the sole owner of a beneficial interest in a loan and the income from a loan by granting a security interest in, or otherwise pledging as collateral, such loan, or the income from such loan, to secure a debt obligation in the operation of an arrangement described in paragraph (f)(3)(i)(D) of this section.

(4) In the case of a loan for which the special allowance payment is calculated under paragraph (f)(2) of this section and that is sold by the eligible not-for-profit holder holding the loan to an entity that is not an eligible not-for-profit holder, the special allowance payment for such loan shall, beginning on the date of the sale, no longer be calculated under paragraph (f)(2) and shall be calculated under paragraph (f)(1) of this section instead.

* * * * *

■ 21. Section 682.305 is amended by:

■ A. Redesignating paragraph (a)(3)(ii) as paragraph (a)(3)(ii)(A).

■ B. Adding new paragraph (a)(3)(ii)(B).

The addition reads as follows:

§ 682.305 Procedures for payment of interest benefits and special allowance and collection of origination and loan fees.

(a) * * *

(3) * * *

(ii) * * *

(B) For any FFEL loan made on or after October 1, 2007, a lender shall pay the Secretary a loan fee equal to 1.0 percent of the principal amount of the loan.

* * * * *

■ 22. Section 682.401 is amended by:

■ A. In paragraph (b)(2)(ii)(A), removing the punctuation ''\;'' at the end of the paragraph and adding, in its place, the words '', as defined in 34 CFR 668.3; or''.

■ B. Revising paragraph (b)(2)(ii)(B).

■ C. Removing paragraph (b)(2)(ii)(C).

■ D. In paragraph (b)(20), removing the number ''60'' and adding, in its place, the number ''35''.

■ E. Revising paragraph (e).

The revisions read as follows:

§ 682.401 Basic program agreement.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(B) A period attributable to the academic year that is not less than the period specified in paragraph (b)(2)(ii)(A) of this section, in which the student earns the amount of credit in the student's program of study required by the student's school as the amount necessary for the student to advance in academic standing as normally measured on an academic year basis (for example, from freshman to sophomore or, in the case of schools using clock hours, completion of at least 900 clock hours).

* * * * *

(e) *Prohibited activities.* (1) A guaranty agency may not, directly or through an agent or contractor—

(i) Except as provided in paragraph (e)(2) of this section, offer directly or indirectly from any fund or assets available to the guaranty agency, any premium, payment, or other inducement to any prospective borrower of an FFEL loan, or to a school or school-affiliated organization or an employee of a school or school-affiliated organization, to secure applications for FFEL loans. This includes, but is not limited to—

(A) Payments or offerings of other benefits, including prizes or additional financial aid funds, to a prospective borrower in exchange for processing a loan using the agency's loan guarantee;

(B) Payments or other benefits, including prizes or additional financial aid funds under any Title IV or State or private program, to a school or school-affiliated organization based on the school's or organization's voluntary or coerced agreement to use the guaranty agency for processing loans, or to provide a specified volume of loans using the agency's loan guarantee;

(C) Payments or other benefits to a school or any school-affiliated organization, or to any individual in exchange for FFEL loan applications or application referrals, a specified volume or dollar amount of FFEL loans using the agency's loan guarantee, or the placement of a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders;

(D) Payment of entertainment expenses, including expenses for private hospitality suites, tickets to shows or sporting events, meals, alcoholic beverages, and any lodging, rental, transportation or other gratuities related

to any activity sponsored by the guaranty agency or a lender participating in the agency's program, for school employees or employees of school-affiliated organizations;

(E) Philanthropic activities, including providing scholarships, grants, restricted gifts, or financial contributions in exchange for FFEL loan applications or application referrals, a specified volume or dollar amount of FFEL loans using the agency's loan guarantee, or the placement of a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders; and

(F) Staffing services to a school, except for services provided to participating foreign schools at the direction of the Secretary, as a third-party servicer or otherwise on more than a short-term, emergency basis, which is non-recurring, to assist the institution with financial aid-related functions.

(ii) Assess additional costs or deny benefits otherwise provided to schools and lenders participating in the agency's program on the basis of the lender's or school's failure to agree to participate in the agency's program, or to provide a specified volume of loan applications or loan volume to the agency's program or to place a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders.

(iii) Offer, directly or indirectly, any premium, incentive payment, or other inducement to any lender, or any person acting as an agent, employee, or independent contractor of any lender or other guaranty agency to administer or market FFEL loans, other than unsubsidized Stafford loans or subsidized Stafford loans made under a guaranty agency's lender-of-last-resort program, in an effort to secure the guaranty agency as an insurer of FFEL loans. Examples of prohibited inducements include, but are not limited to—

(A) Compensating lenders or their representatives for the purpose of securing loan applications for guarantee;

(B) Performing functions normally performed by lenders without appropriate compensation;

(C) Providing equipment or supplies to lenders at below market cost or rental; and

(D) Offering to pay a lender that does not hold loans guaranteed by the agency a fee for each application forwarded for the agency's guarantee.

(iv) Mail or otherwise distribute unsolicited loan applications to students enrolled in a secondary school or a postsecondary institution, or to parents of those students, unless the potential borrower has previously received loans insured by the guaranty agency.

(v) Conduct fraudulent or misleading advertising concerning loan availability.

(2) Notwithstanding paragraph (e)(1)(i), (ii), and (iii) of this section, a guaranty agency is not prohibited from providing—

(i) Assistance to a school that is comparable to that provided by the Secretary to a school under the Direct Loan Program, as identified by the Secretary in a public announcement, such as a notice in the **Federal Register**;

(ii) Default aversion activities approved by the Secretary under section 422(h)(4)(B) of the Act;

(iii) Student aid and financial-literacy related outreach activities, excluding in-person school-required initial and exit counseling, as long as the name of the entity that developed and paid for any materials is provided to participants and the guaranty agency does not promote its student loan or other products; but a guaranty agency may promote benefits provided under other Federal or State programs administered by the guaranty agency;

(iv) Meals and refreshments that are reasonable in cost and provided in connection with guaranty agency provided training of program participants and elementary, secondary, and postsecondary school personnel and with workshops and forums customarily used by the agency to fulfill its responsibilities under the Act;

(v) Meals, refreshments and receptions that are reasonable in cost and scheduled in conjunction with training, meeting, or conference events if those meals, refreshments, or receptions are open to all training, meeting, or conference attendees;

(vi) Travel and lodging costs that are reasonable as to cost, location, and duration to facilitate the attendance of school staff in training or service facility tours that they would otherwise not be able to undertake, or to participate in the activities of an agency's governing board, a standing official advisory committee, or in support of other official activities of the agency;

(vii) Toll-free telephone numbers for use by schools or others to obtain information about FFEL loans and free data transmission services for use by schools to electronically submit applicant loan processing information or student status confirmation data;

(viii) Payment of Federal default fees in accordance with the Act;

(ix) Items of nominal value to schools, school-affiliated organizations, and borrowers that are offered as a form of generalized marketing or advertising, or to create good will;

(x) Loan forgiveness programs for public service and other targeted purposes approved by the Secretary, provided the programs are not marketed to secure loan applications or loan guarantees; and

(xi) Other services as identified and approved by the Secretary through a public announcement, such as a notice in the **Federal Register**.

(3) For the purposes of this section—

(i) The term ''school-affiliated organization'' is defined in § 682.200.

(ii) The term ''applications'' includes the FAFSA, FFEL loan master promissory notes, and FFEL consolidation loan application and promissory notes.

(iii) The terms ''other benefits'' includes, but is not limited to, preferential rates for or access to a guaranty agency's products and services, computer hardware or non-loan processing or non-financial aid related computer software at below market rental or purchase cost, and the printing and distribution of college catalogs and other non-counseling or non-student financial aid-related materials at reduced or not costs.

(iv) The terms ''premium,'' ''incentive payment,'' and ''other inducement'' do not include services directly related to the enhancement of the administration of the FFEL Program that the guaranty agency generally provides to lenders that participate in its program. However, the terms ''premium,'' ''incentive payment,'' and ''inducement'' do apply to other activities specifically intended to secure a lender's participation in the agency's program.

(v) The term ''emergency basis'' for the purpose of staffing services to a school under paragraph (e)(1)(i)(F) of this section means a State- or Federally-declared natural disaster, a Federally-declared national disaster, and other localized disasters and emergencies identified by the Secretary.

* * * * *

■ 23. Section 682.402 is amended by:

■ A. Revising the first sentence in paragraph (b)(2).

■ B. Revising the third sentence in paragraph (b)(3).

■ C. Revising paragraph (c).

■ D. In paragraph (e)(2)(iv), adding the words ''or inaccurate'' immediately after the word ''adverse''.

■ E. In paragraph (e)(3)(v)(C), adding the words ''by a perpetrator named in the verdict or judgment'' at the end of the paragraph.

The revisions read as follows:

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(b) * * *

(2) A discharge of a loan based on the death of the borrower (or student in the case of a PLUS loan) must be based on an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate. * * *

(3) * * * If the lender is not able to obtain an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate or other documentation acceptable to the guaranty agency, under the provisions of paragraph (b)(2) of this section, during the period of suspension, the lender must resume collection activity from the point that it had been discontinued. * * *

(c)(1) *Total and permanent disability.* A borrower's loan is discharged if the borrower becomes totally and permanently disabled, as defined in § 682.200(b), and satisfies the additional eligibility requirements contained in this section.

(2) *Discharge application process.* After being notified by the borrower or the borrower's representative that the borrower claims to be totally and permanently disabled, the lender promptly requests that the borrower or the borrower's representative submit a discharge application to the lender, on a form approved by the Secretary. The application must contain a certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as defined in § 682.200(b). The borrower must submit the application to the lender within 90 days of the date the physician certifies the application. If the lender and guaranty agency approve the discharge claim, under the procedures in paragraph (c)(5) of this section, the guaranty agency must assign the loan to the Secretary.

(3) *Secretary's initial eligibility determination.* (i) If, after reviewing the borrower's application, the Secretary determines that the certification provided by the borrower supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as defined in § 682.200(b), the borrower is considered totally and permanently disabled as of the date the physician completes and certifies the borrower's application.

(ii) Upon making an initial determination that the borrower is totally and permanently disabled as defined in § 682.200(b), the Secretary notifies the borrower that the loan will be in a conditional discharge status for a period of up to three years and that no payments are due on the loan. The notification to the borrower identifies the conditions of the conditional discharge specified in paragraph (c)(4)(i) of this section. The conditional discharge period begins on the date the physician certified on the application that the borrower is totally and permanently disabled, as defined in § 682.200(b).

(iii) If the Secretary determines that the certification provided by the borrower does not support the conclusion that the borrower meets the criteria for a total and permanent disability discharge in paragraph (c)(4)(i) of this section, the Secretary notifies the borrower that the application for a disability discharge has been denied, and that the loan is due and payable to the Secretary under the terms of the promissory note.

(4) *Eligibility requirements for total and permanent disability discharge.* (i) A borrower meets the eligibility criteria for a discharge of a loan based on total and permanent disability if, from the date the physician certifies the borrower's application, through the end of the three-year conditional discharge period—

(A) The borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(B) The borrower does not receive a new loan under the Perkins, FFEL, or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans that are in a conditional discharge status; and

(C) The borrower ensures that the full amount of any title IV loan disbursement on any loan received prior to the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(ii) During the conditional discharge period, the borrower or, if applicable, the borrower's representative—

(A) Is not required to make any payments on the loan;

(B) Is not considered delinquent or in default on the loan, unless the loan was past due or in default at the time the conditional discharge was granted;

(C) Must promptly notify the Secretary of any changes in address or phone number;

(D) Must promptly notify the Secretary if the borrower's annual earnings from employment exceed the amount specified in paragraph (c)(4)(i)(A) of this section; and

(E) Must provide the Secretary, upon request, with additional documentation or information related to the borrower's eligibility for a discharge under this section.

(iii) If the borrower satisfies the criteria for a total and permanent disability discharge during and at the end of the conditional discharge period, the balance of the loan is discharged at the end of the conditional discharge period and any payments received after the physician completed and certified the borrower's loan discharge application are returned to the person who made the payments on the loan.

(iv) If, at any time during or at the end of the three-year conditional discharge period, the Secretary determines that the borrower does not continue to meet the eligibility criteria for a total and permanent disability discharge, the Secretary ends the conditional discharge period and resumes collection activity on the loan. The Secretary does not require the borrower to pay any interest that accrued on the loan from the date of the Secretary's initial eligibility determination described in paragraph (c)(3)(i) of this section through the end of the conditional discharge period.

(v) The Secretary reserves the right to require the borrower to submit additional medical evidence if the Secretary determines that the borrower's application does not conclusively prove that the borrower is disabled. As part of this review or at any time during the application process or during or at the end of the conditional discharge period, the Secretary may arrange for an additional review of the borrower's condition by an independent physician at no expense to the applicant.

(5) *Lender and guaranty agency responsibilities.* (i) After being notified by a borrower or a borrower's representative that the borrower claims to be totally and permanently disabled, the lender must continue collection activities until it receives either the certification of total and permanent disability from a physician or a letter from a physician stating that the certification has been requested and that additional time is needed to determine if the borrower is totally and permanently disabled, as defined in § 682.200(b). Except as provided in paragraph (c)(5)(iii) of this section, after receiving the physician's certification or letter the lender may not attempt to collect from the borrower or any endorser.

(ii) The lender must submit a disability claim to the guaranty agency if the borrower submits a certification

by a physician and the lender makes a determination that the certification supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as specified in paragraph (c)(4)(i) of this section.

(iii) If the lender determines that a borrower who claims to be totally and permanently disabled is not totally and permanently disabled, as defined in § 682.200(b), or if the lender does not receive the physician's certification of total and permanent disability within 60 days of the receipt of the physician's letter requesting additional time, as described in paragraph (c)(5)(i) of this section, the lender must resume collection and is deemed to have exercised forbearance of payment of both principal and interest from the date collection activity was suspended. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(iv) The guaranty agency must pay a claim submitted by the lender if the guaranty agency has reviewed the application and determined that it is complete and that it supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as specified in paragraph (c)(4)(i) of this section.

(v) If the guaranty agency does not pay the disability claim, the guaranty agency must return the claim to the lender with an explanation of the basis for the agency's denial of the claim. Upon receipt of the returned claim, the lender must notify the borrower that the application for a disability discharge has been denied, provide the basis for the denial, and inform the borrower that the lender will resume collection on the loan. The lender is deemed to have exercised forbearance of both principal and interest from the date collection activity was suspended until the first payment due date. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(vi) If the guaranty agency pays the disability claim, the lender must notify the borrower that—

(A) The loan will be assigned to the Secretary for determination of eligibility for a total and permanent disability discharge and that no payments are due on the loan; and

(B) To remain eligible for the discharge from the date the physician completes and certifies the borrower's total and permanent disability on the application until the borrower receives a final disability discharge, the borrower—

(*1*) Cannot have annual earnings from employment that exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Services Block Grant;

(*2*) Cannot receive any new Title IV loans except for a FFEL or Direct Consolidation Loan that does not include any loans on which the borrower is seeking a discharge; and

(*3*) Must ensure that the full amount of any Title IV loan disbursement made to the borrower on or after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(vii) After receiving a claim payment from the guaranty agency, the lender must forward to the guaranty agency any payments subsequently received from or on behalf of the borrower.

(viii) The Secretary reimburses the guaranty agency for a disability claim paid to the lender after the agency pays the claim to the lender.

(ix) The guaranty agency must assign the loan to the Secretary after the guaranty agency pays the disability claim.

* * * * *

■ 24. Section 682.404 is amended by:

■ A. Adding new paragraph (g)(1)(ii)(E).

■ B. Revising paragraph (i).

The addition and revision read as follows:

§ 682.404 Federal reinsurance agreement.

* * * * *

(g) * * *

(1) * * *

(ii) * * *

(E) 16 percent of borrower payments received on or after October 1, 2007.

* * * * *

(i) *Account Maintenance Fee.* A guaranty agency is paid an account maintenance fee based on the original principal amount of outstanding FFEL Program loans insured by the agency. For fiscal years 1999 and 2000, the fee is 0.12 percent of the original principal amount of outstanding loans. For fiscal years 2000 through 2007, the fee is 0.10 percent of the original principal amount of outstanding loans. After fiscal year 2007, the fee is 0.06 percent of the original principal amount of outstanding loans.

* * * * *

■ 25. Section 682.406 is amended by adding new paragraph (d) to read as follows:

§ 682.406 Conditions for claim payments from the Federal Fund and for reinsurance coverage.

* * * * *

(d) A guaranty agency may not make a claim payment from the Federal Fund or receive a reinsurance payment on a loan if the agency determines or is notified by the Secretary that the lender offered or provided an improper inducement as described in paragraph (5)(i) of the definition of lender in § 682.200(b).

* * * * *

■ 26. Section 682.409 is amended by adding new paragraphs (c)(4)(vii) and (c)(4)(viii) to read as follows:

§ 682.409 Mandatory assignment by guaranty agencies of defaulted loans to the Secretary.

* * * * *

(c)* * *

(4)* * *

(vii) The record of the lender's disbursement of Stafford and PLUS loan funds to the school for delivery to the borrower.

(viii) If the MPN or promissory note was signed electronically, the name and location of the entity in possession of the original electronic MPN or promissory note.

* * * * *

■ 27. Section 682.411 is amended by revising paragraph (o) as follows:

§ 682.411 Lender due diligence in collecting guaranty agency loans.

* * * * *

(o) *Preemption.* The provisions of this section—

(1) Preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements or frustrate the purposes of this section; and

(2) Do not preempt provisions of the Fair Credit Reporting Act that provide relief to a borrower while the lender determines the legal enforceability of a loan when the lender receives a valid identity theft report or notification from a credit bureau that information furnished is a result of an alleged identity theft as defined in § 682.402(e)(14).

* * * * *

■ 28. Section 682.413 is amended by:

■ A. Adding new paragraph (h).

■ B. In the Note at the end of the section, removing the word ''Note'' and adding, in its place, the words ''Note to Section 682.413''.

The addition reads as follows:

§ 682.413 Remedial actions.

* * * * *

(h) In any action to require repayment of funds or to withhold funds from a guaranty agency, or to limit, suspend, or

terminate a guaranty agency based on a violation of § 682.401(e), if the Secretary finds that the guaranty agency provided or offered the payments or activities listed in § 682.401(e)(1), the Secretary applies a rebuttable presumption that the payments or activities were offered or provided to secure applications for FFEL loans or to secure FFEL loan volume. To reverse the presumption, the guaranty agency must present evidence that the activities or payments were provided for a reason unrelated to securing applications for FFEL loans or securing FFEL loan volume.

* * * * *

■ 29. Section 682.414 is amended by:
■ A. Adding new paragraph (a)(5)(iv).
■ B. Adding new paragraph (a)(6).
■ C. Revising paragraph (b)(4).

The additions and revisions read as follows:

§ 682.414 Records, reports, and inspection requirements for guaranty agency programs.

(a)* * *

(5)* * *

(iv) If a lender made a loan based on an electronically signed MPN, the holder of the original electronically signed MPN must retain that original MPN for at least 3 years after all the loans made on the MPN have been satisfied.

(6)(i) Upon the Secretary's request with respect to a particular loan or loans assigned to the Secretary and evidenced by an electronically signed promissory note, the guaranty agency and the lender that created the original electronically signed promissory note must cooperate with the Secretary in all activities necessary to enforce the loan or loans. The guaranty agency or lender must provide—

(A) An affidavit or certification regarding the creation and maintenance of the electronic records of the loan or loans in a form appropriate to ensure admissibility of the loan records in a legal proceeding. This affidavit or certification may be executed in a single record for multiple loans provided that this record is reliably associated with the specific loans to which it pertains; and

(B) Testimony by an authorized official or employee of the guaranty agency or lender, if necessary to ensure admission of the electronic records of the loan or loans in the litigation or legal proceeding to enforce the loan or loans.

(ii) The affidavit or certification described in paragraph (a)(6)(i)(A) of this section must include, if requested by the Secretary—

(A) A description of the steps followed by a borrower to execute the promissory note (such as a flow chart);

(B) A copy of each screen as it would have appeared to the borrower of the loan or loans the Secretary is enforcing when the borrower signed the note electronically;

(C) A description of the field edits and other security measures used to ensure integrity of the data submitted to the originator electronically;

(D) A description of how the executed promissory note has been preserved to ensure that is has not been altered after it was executed;

(E) Documentation supporting the lender's authentication and electronic signature process; and

(F) All other documentary and technical evidence requested by the Secretary to support the validity or the authenticity of the electronically signed promissory note.

(iii) The Secretary may request a record, affidavit, certification or evidence under paragraph (a)(6) of this section as needed to resolve any factual dispute involving a loan that has been assigned to the Secretary including, but not limited to, a factual dispute raised in connection with litigation or any other legal proceeding, or as needed in connection with loans assigned to the Secretary that are included in a Title IV program audit sample, or for other similar purposes. The guaranty agency must respond to any request from the Secretary within 10 business days.

(iv) As long as any loan made to a borrower under a MPN created by the lender is not satisfied, the holder of the original electronically signed promissory note is responsible for ensuring that all parties entitled to access to the electronic loan record, including the guaranty agency and the Secretary, have full and complete access to the electronic record.

(b) * * *

(4) A report to the Secretary of the borrower's enrollment and loan status information, or any Title IV loan-related data required by the Secretary, by the deadline date established by the Secretary.

* * * * *

§ 682.415 [Removed and Reserved]

■ 30. Section 682.415 is removed and reserved.

■ 31. Section 682.602 is added to read as follows:

§ 682.602 Rules for a school or school-affiliated organization that makes or originates loans through an eligible lender trustee.

(a) A school or school-affiliated organization may not contract with an eligible lender to serve as trustee for the school or school-affiliated organization unless—

(1) The school or school-affiliated organization originated and continues or renews a contract made on or before September 30, 2006 with the eligible lender; and

(2) The eligible lender held at least one loan in trust on behalf of the school or school-affiliated organization on September 30, 2006.

(b) As of January 1, 2007, and for loans first disbursed on or after that date under a lender trustee arrangement that continues in effect after September 30, 2006—

(1) A school in a trustee arrangement or affiliated with an organization involved in a trustee arrangement to originate loans must comply with the requirements of § 682.601(a), except for paragraphs (a)(4), (a)(7), and (a)(9) of that section; and

(2) A school-affiliated organization involved in a trustee arrangement to make loans must comply with the requirements of § 682.601(a) except for paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (a)(6), (a)(7), and (a)(9) of that section.

(Approved by the Office of Management and Budget under control number 1845–0020)

(Authority: 20 U.S.C. 1082, 1085)

■ 32. Section 682.603 is amended by:
■ A. In paragraph (a), at the end of the last sentence, removing the words ''on the application by the student'' and adding, in their place, the words ''by the borrower and, in the case of a parent borrower of a PLUS loan, the student and the parent borrower''.
■ B. In paragraph (b), removing the words ''making application for the loan''.
■ C. Redesignating paragraphs (d), (e), (f), (g), (h), and (i) as paragraphs (e), (f), (g), (h), (i), and (j), respectively.
■ D. Adding a new paragraph (d).
■ E. In the introductory language in newly redesignated paragraph (e), removing the words ''application, or combination of loan applications,'' and adding, in their place, the words '', or a combination of loans,''.
■ F. In newly redesignated paragraph (e)(2), adding the words ''for the period of enrollment'' after the word ''attendance''.
■ G. In newly redesignated paragraph (e)(2)(ii), adding the word ''Subsidized'' immediately before the word ''Stafford'' and removing the words ''that is eligible

for interest benefits'' immediately after the word ''loan''.

■ H. Revising newly redesignated paragraph (f).

■ I. In newly redesignated paragraph (g)(2)(i), removing the words '',not to exceed 12 months,''.

The addition and revision read as follows:

§ 682.603 Certification by a participating school in connection with a loan application.

* * * * *

(d) Before certifying a PLUS loan application for a graduate or professional student borrower, the school must determine the borrower's eligibility for a Stafford loan. If the borrower is eligible for a Stafford loan but has not requested the maximum Stafford loan amount for which the borrower is eligible, the school must—

(1) Notify the graduate or professional student borrower of the maximum Stafford loan amount that he or she is eligible to receive and provide the borrower with a comparison of—

(i) The maximum interest rate for a Stafford loan and the maximum interest rate for a PLUS loan;

(ii) Periods when interest accrues on a Stafford loan and periods when interest accrues on a PLUS loan; and

(iii) The point at which a Stafford loan enters repayment and the point at which a PLUS loan enters repayment; and

(2) Give the graduate or professional student borrower the opportunity to request the maximum Stafford loan amount for which the borrower is eligible.

* * * * *

(f) In certifying loans, a school—

(1) May not refuse to certify, or delay certification, of a Stafford or PLUS loan based on the borrower's selection of a particular lender or guaranty agency;

(2) May not, for first-time borrowers, assign through award packaging or other methods, a borrower's loan to a particular lender;

(3) May refuse to certify a Stafford or PLUS loan or may reduce the borrower's determination of need for the loan if the reason for that action is documented and provided to the borrower in writing, provided that—

(i) The determination is made on a case-by-case basis; and

(ii) The documentation supporting the determination is retained in the student's file; and

(4) May not, under paragraph (f)(1), (2), and (3) of this section, engage in any pattern or practice that results in a denial of a borrower's access to FFEL loans because of the borrower's race, sex, color, religion, national origin, age, handicapped status, income, or selection of a particular lender or guaranty agency.

* * * * *

■ 33. Section 682.604 is amended by:

■ A. Revising paragraph (f)(1).

■ B. Redesignating paragraphs (f)(2), (f)(3), and (f)(4) as paragraphs (f)(5), (f)(6), and (f)(7), respectively.

■ C. Adding new paragraphs (f)(2), (f)(3), and (f)(4).

■ D. In newly redesignated paragraph (f)(5), removing the words ''The initial counseling must'' and adding, in their place, the words ''Initial counseling for Stafford Loan borrowers must''.

■ E. In newly redesignated paragraph (f)(5)(iv), removing the words, ''of a Stafford loan''.

■ F. In newly redesignated paragraph (f)(5)(v), adding the words '',or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained,'' immediately after the words ''Stafford loan borrowers''.

■ G. In paragraph (g)(2)(i), removing the words ''Stafford or SLS loans'' and adding, in their place, ''Stafford loans, or student borrowers who have obtained Stafford and PLUS loans, depending on the types of loans the student borrower has obtained,''.

The revision and additions read as follows:

§ 682.604 Processing the borrower's loan proceeds and counseling borrowers.

* * * * *

(f) *Initial counseling.* (1) A school must ensure that initial counseling is conducted with each Stafford loan borrower prior to its release of the first disbursement, unless the student borrower has received a prior Federal Stafford, Federal SLS, or Direct subsidized or unsubsidized loan. The initial counseling must—

(i) Explain the use of a Master Promissory Note;

(ii) Emphasize to the student borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, Federal offset, and litigation;

(iv) In the case of a student borrower (other than a borrower of a loan made or originated by the school), emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, is unable to obtain employment upon completion of the program, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school; and

(v) Inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness or on the average indebtedness of Stafford loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained at the same school or in the same program of study at the same school.

(2) A school must ensure that initial counseling is conducted with each graduate or professional student PLUS loan borrower prior to its release of the first disbursement, unless the student has received a prior Federal PLUS loan or Direct PLUS loan. The initial counseling must—

(i) Inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness or on the average indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained, at the same school or in the same program of study at the same school;

(ii) For a graduate or professional student who has received a prior Federal Stafford, or Direct subsidized or unsubsidized loan, provide the information specified in § 682.603(d)(1)(i) through § 682.603(d)(1)(iii); and

(iii) For a graduate or professional student who has not received a prior Federal Stafford, or Direct subsidized or unsubsidized loan, provide the information specified in paragraph (f)(1)(i) through (f)(1)(iv) of this section.

(3) Initial counseling must be conducted either in person, by audiovisual presentation, or by interactive electronic means. If initial counseling is conducted through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the initial counseling.

(4) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions regarding those programs. As an alternative, prior to releasing the proceeds of a loan in the case of a student borrower enrolled in a correspondence program or a student borrower enrolled in a study-abroad program that the home institution approves for credit, the counseling may be provided through written materials.

(5) A school must maintain documentation substantiating the

school's compliance with this section for each student borrower.

* * * * *

■ 34. Section 682.705 is amended by adding new paragraph (c) to read as follows:

§ 682.705 Suspension proceedings.

* * * * *

(c) In any action to suspend a lender based on a violation of the prohibitions in section 435(d)(5) of the Act, if the Secretary, the designated Department official, or hearing official finds that the lender provided or offered the payments or activities listed in paragraph (5)(i) of the definition of *lender* in § 682.200(b), the Secretary or the official applies a rebuttable presumption that the payments or activities were offered or provided to secure applications for FFEL loans or to secure FFEL loan volume. To reverse the presumption, the lender must present evidence that the activities or payments were provided for a reason unrelated to securing applications for FFEL loans or securing FFEL loan volume.

* * * * *

■ 35. Section 682.706 is amended by adding new paragraph (d) to read as follows:

§ 682.706 Limitation or termination proceedings.

* * * * *

(d) In any action to limit or terminate a lender's eligibility based on a violation of the prohibitions in section 435(d)(5) of the Act, if the Secretary, the designated Department official or hearing official finds that the lender provided or offered the payments or activities described in paragraph (5)(i) of the definition of *lender* in § 682.200(b), the Secretary or the official applies a rebuttable presumption that the payments or activities were offered or provided to secure applications for FFEL loans. To reverse the presumption, the lender must present evidence that the activities or payments were provided for a reason unrelated to securing applications for FFEL loans or securing FFEL loan volume.

* * * * *

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

■ 36. The authority citation for part 685 continues to read as follows:

Authority: 20 U.S.C. 1087a et seq., unless otherwise noted.

■ 37. Section 685.202 is amended by adding new paragraph (a)(1)(v) to read as follows:

§ 685.202 Charges for which Direct Loan Program borrowers are responsible.

(a) * * *

(1) * * *

(v) For a subsidized Stafford loan made to an undergraduate student for which the first disbursement is made on or after:

(A) July 1, 2006 and before July 1, 2008, the interest rate is 6.8 percent on the unpaid principal balance of the loan.

(B) July 1, 2008 and before July 1, 2009, the interest rate is 6 percent on the unpaid principal balance of the loan.

(C) July 1, 2009 and before July 1, 2010, the interest rate is 5.6 percent on the unpaid principal balance of the loan.

(D) July 1, 2010 and before July 1, 2011, the interest rate is 4.5 percent on the unpaid principal balance of the loan.

(E) July 1, 2011 and before July 2012, the interest rate is 3.4 percent on the unpaid balance of the loan.

* * * * *

■ 38. Section 685.204 is amended by:

■ A. In paragraph (b), removing the parenthetical ''(f)'', and adding in its place, the parenthetical ''(g)''.

■ B. In paragraph (b)(1)(iii)(A), removing the words ''(b)(1)(i)'' and adding, in their place, the words ''(b)(1)(i)(A)''.

■ C. In paragraph (d)(1), removing the word ''the'' and adding, in its place, the word ''The''.

■ D. In paragraph (d)(2), removing the word ''the'' and adding, in its place, the word ''The''.

■ E. In paragraph (e)(1), removing the words ''first disbursed on or after July 1, 2001'' and removing the words ''not to exceed 3 years''.

■ F. Removing paragraph (e)(5).

■ G. Redesignating paragraphs (e)(2), (e)(3), and (e)(4), as paragraphs (e)(3), (e)(4), and (e)(5), respectively.

■ H. Adding a new paragraph (e)(2).

■ I. Redesignating paragraph (f) as paragraph (g).

■ J. Adding new paragraph (f).

■ K. Adding new paragraph (h).

The additions read as follows:

§ 685.204 Deferments.

* * * * *

(e) * * *

(2) The deferment period ends 180 days after the demobilization date for the service described in paragraphs (e)(1)(i) and (e)(1)(ii) of this section.

* * * * *

(f)(1) A borrower who receives a Direct Loan Program loan is entitled to receive a military active duty student deferment for 13 months following the conclusion of the borrower's active duty military service if—

(i) The borrower is a member of the National Guard or other reserve component of the Armed Forces of the United States or a member of such forces in retired status; and

(ii) The borrower was enrolled in a program of instruction at an eligible institution at the time, or within six months prior to the time, the borrower was called to active duty.

(2) As used in paragraph (f)(1) of this section, ''Active duty'' means active duty as defined in section 101(d)(1) of title 10, United States Code, except—

(i) Active duty includes active State duty for members of the National Guard; and

(ii) Active duty does not include active duty for training or attendance at a service school.

(3) If the borrower returns to enrolled student status during the 13-month deferment period, the deferment expires at the time the borrower returns to enrolled student status.

* * * * *

(h)(1) To receive a deferment, except as provided under paragraph (b)(1)(i)(A) of this section, the borrower must request the deferment and provide the Secretary with all information and documents required to establish eligibility for the deferment. In the case of a deferment granted under paragraph (e)(1) of this section, a borrower's representative may request the deferment and provide the required information and documents on behalf of the borrower.

(2) After receiving a borrower's written or verbal request, the Secretary may grant a deferment under paragraphs (b)(1)(i)(B), (b)(1)(i)(C), (b)(2)(i), (b)(3)(i), (e)(1), and (f)(1) of this section if the Secretary confirms that the borrower has received a deferment on a Perkins or FFEL Loan for the same reason and the same time period.

(3) The Secretary relies in good faith on the information obtained under paragraph (h)(2) of this section when determining a borrower's eligibility for a deferment, unless the Secretary, as of the date of the determination, has information indicating that the borrower does not qualify for the deferment. The Secretary resolves any discrepant information before granting a deferment under paragraph (h)(2) of this section.

(4) If the Secretary grants a deferment under paragraph (h)(2) of this section, the Secretary notifies the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan.

(5) If the Secretary grants a military service deferment based on a request from a borrower's representative, the Secretary notifies the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The Secretary may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

■ 39. Section 685.212 is amended by revising paragraph (a)(1) and (2) to read as follows:

§ 685.212 Discharge of a loan obligation.

(a) *Death.* (1) If a borrower (or a student on whose behalf a parent borrowed a Direct PLUS Loan) dies, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan based on an original or certified copy of the borrower's (or student's in the case of a Direct PLUS loan obtained by a parent borrower) death certificate, or an accurate and complete photocopy of the original or certified copy of the borrower's (or student's in the case of a Direct PLUS loan obtained by a parent borrower) death certificate.

(2) If an original or certified copy of the death certificate or an accurate and complete photocopy of the original or certified copy of the death certificate is not available, the Secretary discharges the loan only if other reliable documentation establishes, to the Secretary's satisfaction, that the borrower (or student) has died. The Secretary discharges a loan based on documentation other than an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate only under exceptional circumstances and on a case-by-case basis.

* * * * *

■ 40. Section 685.213 is revised to read as follows:

§ 685.213 Total and permanent disability.

(a) *General.* A borrower's Direct Loan is discharged if the borrower becomes totally and permanently disabled, as defined in § 682.200(b), and satisfies the additional eligibility requirements contained in this section.

(b) *Discharge application process.* (1) To qualify for a discharge of a Direct Loan based on a total and permanent disability, a borrower must submit a discharge application to the Secretary on a form approved by the Secretary. The application must contain a certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as defined in § 682.200(b). The borrower must submit the application to the Secretary within 90 days of the date the physician certifies the application.

(2) Upon receipt of the borrower's application, the Secretary notifies the borrower that—

(i) No payments are due on the loan; and

(ii) The borrower, in order to remain eligible for the discharge from the date the physician completes and certifies the borrower's total and permanent disability on the application until the date the borrower receives a final disability discharge—

(*A*) Not receive annual earnings from employment that exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(*B*) Not receive a new loan under the Perkins, FFEL, or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans on which the borrower is seeking a discharge; and

(*C*) Must ensure that the full amount of any Title IV loan disbursement on any loan received prior to the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(c) *Initial determination of eligibility.* (1) If, after reviewing the borrower's application, the Secretary determines that the certification provided by the borrower supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as defined in § 682.200(b), the borrower is considered totally and permanently disabled as of the date the physician completes and certifies the borrower's application.

(2) Upon making an initial determination that the borrower is totally and permanently disabled, as defined in § 682.200(b), the Secretary notifies the borrower that the loan will be in a conditional discharge status for a period of up to three years and that no payments are due on the loan. The notification to the borrower identifies the conditions of the conditional discharge period specified in paragraph (d)(1) of this section. The conditional discharge period begins on the date the physician certifies on the application that the borrower is totally and permanently disabled, as defined in § 682.200(b).

(3) If the Secretary determines that the certification provided by the borrower does not support the conclusion that the borrower meets the criteria for a total and permanent disability discharge in paragraph (d)(1) of this section, the Secretary notifies the borrower that the application for a disability discharge has been denied, and that the loan is due and payable to the Secretary under the terms of the promissory note.

(d) *Eligibility requirements for a total and permanent disability discharge.* (1) A borrower meets the eligibility requirements for a discharge of a loan based on total and permanent disability if, from the date the physician certified the borrower's discharge application, through the end of the three-year conditional discharge period—

(i) The borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(ii) The borrower does not receive a new loan under the Perkins, FFEL or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans that are in a conditional discharge status; and

(iii) The borrower ensures that the full amount of any Title IV loan disbursement on any loan received prior to the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(2) During the conditional discharge period, the borrower or, if applicable, the borrower's representative—

(i) Is not required to make any payments on the loan;

(ii) Is not considered delinquent or in default on the loan, unless the loan was past due or in default at the time the conditional discharge was granted;

(iii) Must promptly notify the Secretary of any changes in address or phone number;

(iv) Must promptly notify the Secretary if the borrower's annual earnings from employment exceed the amount specified in paragraph (d)(1)(i) of this section; and

(v) Must provide the Secretary, upon request, with additional documentation or information related to the borrower's eligibility for a discharge under this section.

(3) If the borrower satisfies the criteria for a total and permanent disability discharge during and at the end of the three-year conditional discharge period, the Secretary—

(i) Discharges the obligation of the borrower and any endorser to make any further payments on the loan at the end of that period; and

(ii) Returns any payments received after the date the physician completed

and certified the borrower's loan discharge application to the person who made the payments on the loan.

(4) If, at any time during or at the end of the three-year conditional discharge period, the Secretary determines that the borrower does not continue to meet the eligibility criteria for a total and permanent disability discharge, the Secretary ends the conditional discharge period and resumes collection activity on the loan. The Secretary does not require the borrower to pay any interest that accrued on the loan from the date of the Secretary's initial eligibility determination described in paragraph (c)(2) of this section through the end of the conditional discharge period.

(5) The Secretary reserves the right to require the borrower to submit additional medical evidence if the Secretary determines that the borrower's application does not conclusively prove that the borrower is disabled. As part of this review or at any time during the application process or during or at the end of the conditional discharge period, the Secretary may arrange for an additional review of the borrower's condition by an independent physician at no expense to the applicant.

(Approved by the Office of Management and Budget under control number 1845–0021)

(Authority: 20 U.S.C. 1087a *et seq.*)

* * * * *

■ 41. Section 685.301 is amended by:

■ A. In paragraph (a)(1), removing the words ''in the application by the student'' and adding, in their place, the words, ''by the borrower and, in the case of a parent PLUS loan borrower, the student and the parent borrower.''

■ B. Redesignating paragraphs (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), and (a)(9) as (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9), and (a)(10), respectively.

■ C. Adding new paragraph (a)(3).

■ D. Revising newly redesignated paragraph (a)(10)(ii)(A).

The addition and revisions read as follows:

§ 685.301 Determining eligibility and loan amount.

(a) * * *

(3) Before originating a Direct PLUS Loan for a graduate or professional student borrower, the school must determine the borrower's eligibility for a Direct Subsidized and a Direct Unsubsidized Loan. If the borrower is eligible for a Direct Subsidized or Direct Unsubsidized Loan, but has not requested the maximum Direct Subsidized or Direct Unsubsidized Loan amount for which the borrower is eligible, the school must—

(i) Notify the graduate or professional student borrower of the maximum Direct Subsidized or Direct Unsubsidized Loan amount that he or she is eligible to receive and provide the borrower with a comparison of—

(A) The maximum interest rate for a Direct Subsidized Loan and a Direct Unsubsidized Loan and the maximum interest rate for a Direct PLUS Loan;

(B) Periods when interest accrues on a Direct Subsidized Loan and a Direct Unsubsidized Loan, and periods when interest accrues on a Direct PLUS Loan; and

(C) The point at which a Direct Subsidized Loan and a Direct Unsubsidized Loan enters repayment, and the point at which a Direct PLUS Loan enters repayment; and

(ii) Give the graduate or professional student borrower the opportunity to request the maximum Direct Subsidized or Direct Unsubsidized Loan amount for which the borrower is eligible.

* * * * *

(10) * * *

(ii) * * *

(A) Generally an academic year, as defined by the school in accordance with 34 CFR 668.3, except that the school may use a longer period of time corresponding to the period to which the school applies the annual loan limits under § 685.203; or

* * * * *

■ 42. Section 685.304 is amended by:

■ A. In paragraph (a)(1) removing the words ''(a)(4)'' and adding, in their place, the words ''(a)(5)''.

■ B. Redesignating paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (a)(6) as paragraphs (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7), respectively.

■ C. Adding a new paragraph (a)(2).

■ D. In newly redesignated paragraph (a)(4) removing the words ''The initial counseling must'' and adding, in their place, the words ''Initial counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must''.

■ E. In newly redesignated paragraph (a)(4)(iv) removing the words ''Direct Unsubsidized Loan borrowers'' and adding, in their place, the words ''Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the borrower has obtained,''.

■ F. In newly redesignated paragraph (a)(5), removing the words ''(a)(1)–(3)'' and adding, in their place, the words ''(a)(1)–(4)''.

■ G. In newly redesignated paragraph (a)(5)(i), removing the words ''(a)(1)'' and adding, in their place, the words ''(a)(1) or (a)(2)'', and removing the words ''(a)(3)'' and adding in their place the words ''(a)(4)''.

■ H. In paragraph (b)(4)(i), removing the words ''Direct Subsidized Loan and Direct Unsubsidized Loan borrowers'' and adding, in their place, the words ''student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for attendance''.

The addition reads as follows:

§ 685.304 Counseling borrowers.

(a) * * *

(2) Except as provided in paragraph (a)(5) of this section, a school must ensure that initial counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior Direct PLUS Loan or Federal PLUS Loan. The initial counseling must—

(i) Inform the student borrower of sample monthly repayment amounts based on a range of student levels or indebtedness or on the average indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained, at the same school or in the same program of study at the same school;

(ii) For a graduate or professional student who has received a prior Federal Stafford, or Direct Subsidized or Unsubsidized Loan provide the information specified in § 685.301(a)(3)(i)(A) through § 685.301(a)(3)(i)(C); and

(iii) For a graduate or professional student who has not received a prior Federal Stafford, or Direct Subsidized or Direct Unsubsidized Loan, provide the information specified in paragraph (a)(4)(i) through (a)(4)(iii) and paragraph (a)(4)(v) of this section.

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[FR Doc. 07–5332 Filed 10–31–07; 8:45 am]

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