



Monday
July 13, 1998

Part IV

**Department of
Education**

**34 CFR Part 668
Student Assistance General Provisions;
Proposed Rule**

DEPARTMENT OF EDUCATION**34 CFR Part 668**

RIN 1840-AC52

Student Assistance General Provisions

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Student Assistance General Provisions regulations, 34 CFR part 668, to permit a school to appeal its Direct Loan Program cohort rate or weighted average cohort rate on the basis of improper servicing or collection of the Direct Loans included in that rate. The Secretary also proposes to clarify when a school's rate is considered final.

DATES: Comments must be received by the Department on or before September 11, 1998.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Kenneth Smith, U.S. Department of Education, P.O. Box 23272, Washington, DC 20026-3272. Comments may also be sent through the Internet to: cohort_rates@ed.gov.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in this section.

FOR FURTHER INFORMATION CONTACT: Kenneth Smith, U.S. Department of Education, 600 Independence Avenue, SW., ROB-3, Room 3045, Washington, DC 20202. Telephone: (202) 708-8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:**Invitation to Comment**

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges commenters to identify clearly the specific section or sections of the proposed regulations that each comment

addresses and to arrange comments in the same order as the proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3045, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

On request the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking docket for these proposed regulations. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205-8113 or (202) 260-9895. An individual who uses a TDD may call the Federal Information Relay Service at 1-800-877-8339, between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

To assist the Department in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden, the Secretary invites comments on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

General

On December 1, 1995, the Secretary published final regulations (60 FR 61760) that modified the regulations relating to the default reduction initiative in the Federal Family Education Loan (FFEL) Program and implemented default reduction measures in the William D. Ford Federal Direct Loan (Direct Loan) Program. Those regulations established the formula for the calculation of rates for schools that participate in the Direct Loan Program and revised the appeal procedures and criteria for schools that were subject to a loss of eligibility to participate in the FFEL Program or the Direct Loan Program due to high FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates.

The Secretary is proposing to amend the appeal procedures and criteria in these regulations. A discussion of each proposed change is provided below.

Section 668.17(h) Loan Servicing Appeals

Under the Department's regulations, a school may challenge its FFEL Program cohort default rate or weighted average

cohort rate on the basis of the improper servicing or collection of the FFEL loans included in the calculation of that rate. However, a school may not challenge a Direct Loan Program cohort rate or a weighted average cohort rate on the basis of the improper servicing or collection of the Direct Loans included in the calculation of the rate. The procedures and criteria for loan servicing appeals were made different for the two programs because the historical and structural problems of the FFEL Program did not exist in the new Direct Loan Program.

As discussed in the preamble to the final regulations published on December 1, 1995, Congress' decision to provide schools with an FFEL Program loan servicing appeal was based, in large measure, on a number of incidents in which large FFEL Program lenders had failed to comply with the Department's loan servicing requirements. The lenders' failure to satisfy FFEL Program loan servicing requirements had a demonstrable effect on cohort default rates (see 60 FR 61769). However, the detailed loan servicing regulations in the FFEL Program do not exist in the Direct Loan Program. Instead, loan servicing in the Direct Loan Program is controlled by contracts between the Department and its Direct Loan Servicers.

Nevertheless, to promote parity between the FFEL Program and the Direct Loan Program, the Secretary is proposing to permit a school to appeal its Direct Loan Program cohort rate or weighted average cohort rate on the basis of the improper servicing or collection of defaulted Direct Loans included in that rate. Just as for an FFEL Program loan servicing appeal, this type of appeal would only be available to a school—

- With a Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 20 percent for the most recent year in which data are available; or
- That becomes subject to a loss of eligibility due to rates that equal or exceed 25 percent for 3 consecutive years.

While the Secretary continues to believe that the structure and controls inherent in the Direct Loan Program should ensure that Direct Loans are properly serviced and collected, establishing appeal provisions for the Direct Loan Program that are similar to those available in the FFEL Program will address concerns that some schools have raised about this difference between the two programs.

The procedures for a school's loan servicing challenge in the Direct Loan

Program would correspond to those for a school challenging its FFEL Program cohort default rate on a similar basis. A summary of the proposed appeals process follows:

- Within 10 working days of receiving notification from the Secretary that its Direct Loan Program cohort rate or weighted average cohort rate equals or exceeds 20 percent for the most recent year or that it is subject to loss of participation in the loan programs based on its rate, the school notifies the Secretary, in writing, that it is appealing the calculation of its rate based on allegations of improper loan servicing or collection.

- Within 15 working days of receiving the school's notice, the Secretary determines the size of the representative sample of loan servicing and collection records to be reviewed and notifies the school of the amount of the fee that it must pay to the Secretary for copying and providing the documents. Under the proposed regulations, the Secretary may charge a fee of up to \$10 per borrower file in the sample. The Secretary intends to charge a fee of \$10 per borrower file.

- Within 15 working days of receiving the notice of the fee, the school must pay the fee to the Secretary. If payment is not received from the school within the required timeframe, the records will not be provided and the school will have waived its right to challenge the rate.

- Upon timely receipt of the fee, and within the timelines provided in the proposed regulations, the Secretary provides the school with a representative sample of the loan servicing and collection records relating to borrowers whose Direct Loans were included in the school's rate.

- After receiving the relevant loan servicing and collection records from the Secretary (for Direct Loan Program loans included in a rate) and from the appropriate guaranty agency (for FFEL Program loans included in a rate), the school has 30 calendar days to file its appeal with the Secretary.

- If the school is also filing an appeal based upon allegations that inaccurate data were used to calculate the rate, under § 668.17(c)(1)(i)(A), the school may delay submitting its loan servicing appeal until the appeal under § 668.17(c)(1)(i)(A) is submitted to the Secretary.

Due to fundamental differences between the FFEL and Direct Loan programs, the proposed regulations for appeals based on loan servicing and collection in the Direct Loan Program are not exactly the same as the FFEL Program regulations. One of the most

significant differences is in the scope of an appeal. For both FFEL and Direct Loans, under § 668.17(h)(3)(v)(B), if the Secretary finds that evidence presented by the school shows that some loans included in the sample reviewed by the school should be excluded from the calculation of the rate, the Secretary reduces the rate to reflect the percentage of defaulted loans in the sample that should be excluded.

In the FFEL Program, the proportional reduction applies to all of the FFEL loans included in the school's rate, because an FFEL Program cohort default rate is a percentage rate of the students whose loans are in default. However, for some schools, the Direct Loan Program cohort rate is not limited to the percentage rate of students whose loans are in default. For proprietary non-degree-granting institutions, it may also include the percentage rate of borrowers repaying Direct Loans under the income-contingent repayment (ICR) plan who have scheduled payments of less than \$15 per month, when those amounts result in negative amortization for a period of 270 days or more (see §§ 668.17(e)(1)(ii) and 668.17(f)(1)(ii)).

If borrowers are included in a school's Direct Loan Program cohort rate because they are repaying under the ICR plan, rather than because their loans are in default, the improper loan servicing and collection criteria do not apply. For example, the Direct Loan Servicer would not mail a final demand letter to a borrower who is making payments under the ICR plan and is not in default. Therefore, as reflected in the proposed § 668.17(h)(2)(iii), the proportional reduction of the rate would apply only to borrowers with defaulted loans who were included in a school's rate, not to any borrowers who have been included because they made certain payments under the ICR plan.

The most significant remaining differences between the requirements for a loan servicing appeal in the FFEL Program and those proposed for the Direct Loan Program are the following:

- For FFEL, the regulations in § 668.17(h)(3)(ii) require a school to include in its notice of appeal to the guaranty agency a list of the students included in its rate. No similar requirement is provided for Direct Loans because the Department already has that information.

- When sending the school a list of the loans and a description of how the sample of loans was chosen, a guaranty agency is required, in § 668.17(h)(3)(ii)(B)(5), to send a copy of the list to the Secretary. No corresponding action is provided for the

Direct Loan Program because it would be redundant.

- In § 668.17(h)(3)(ii)(B)(6), a guaranty agency is required to notify a school that has failed to pay a fee that the school has apparently waived its right to challenge the calculation of its rate with regard to the loans guaranteed by that agency. The guaranty agency also notifies the Secretary. The Secretary then determines whether the guaranty agency's conclusion was correct. No similar provision is needed for Direct Loans because the Secretary issues the original notification of the waiver determination.

- For FFEL, a school is required in § 668.17(h)(3)(iv)(C) to send the Secretary a copy of the lists provided to it by the guaranty agencies when it is filing an appeal. No similar list is required for Direct Loans because the Department will have the information that it provided to the institution.

- Section § 668.17(h)(3)(viii)(C) provides that a lender's failure to submit a request for preclaims assistance to the guaranty agency, if required, is a factor in determining whether a default on an FFEL Program loan may be considered to have been due to improper servicing or collection. No similar factor is included for Direct Loans because no similar process exists for the Direct Loan Servicer. The Direct Loan Servicer services the loan until its transfer to the Department's Debt Collection Service at 271 days of delinquency, the date on which the loan is considered, under § 668.17(e)(3), to be in default for rate calculations purposes.

The revisions in this NPRM would provide the regulatory changes needed to properly reflect the proposed changes to the appeal process for Direct Loans. The proposed regulations would not revise the current regulations for an FFEL Program appeal on the basis of improper servicing or collection.

Official rates for fiscal year (FY) 1996 are scheduled to be issued later this year. The Secretary intends to allow a school to appeal its official Direct Loan Program cohort rate or weighted average cohort rate for FY 1996 on the basis of the improper servicing or collection of the Direct Loans included in the rate as defaulted loans. This type of appeal would be available only to schools with rates of 20 percent or greater and to schools that are subject to loss of participation in the loan programs based on their rates.

Section 668.17(i) Finality of a School's Rate

Under § 668.17(a)(2), a school with an FFEL Program cohort default rate, Direct Loan Program cohort rate, or a weighted

average cohort rate that is over 40 percent for the most recent fiscal year for which rates have been calculated may be subject to an action to limit, suspend, or terminate its participation in all of the Federal student financial aid programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA). If the Secretary initiates such an action, the school may appeal under 34 CFR part 668, Subpart G.

The Secretary has found, however, that some schools with a rate over 40 percent do not challenge the rate when they are notified. Rather, these schools wait to challenge the calculation of that rate until they have 3 consecutive years of rates over 25 percent. As a result, the administrative review process provided under Subpart G is delayed while the school's new appeal is evaluated. The Secretary believes that some schools wait to appeal in these circumstances solely to delay a final determination of the limitation, suspension, or termination action. Because a school may continue to make loans while the appeal process is pending, any unnecessary delay increases the likelihood of program abuse.

It was not the intent of the Secretary to permit this type of delay—which may last a year or more—between the date a school is notified of its rate and the resolution of the school's appeal of a sanction resulting from the rate. The Secretary proposes to address the problem of unnecessary delays in Subpart G proceedings by providing that once the Secretary initiates a proposed limitation, suspension, or termination action under § 668.17(a)(2), based on the school's rate, the school may not challenge that rate.

A school that initiates an appeal of a rate over 40 percent in a timely manner, within 10 working days of the date that the school is notified of the rate, would not be affected by this revision. The Secretary does not initiate an action under § 668.17(a)(2) during the period in which a school may file a timely appeal of its rate. Also, if a school does file a timely appeal, the Secretary does not initiate an action under § 668.17(a)(2) until a determination has been made on the appeal. Note that current provisions in § 668.17(i) are not changed other than to number paragraphs and to update references to types of rates; the only substantive change to the current § 668.17(i) is in the proposed § 668.17(i)(3).

The proposed revision would help the Department, guaranty agencies, and institutions to research appeals more efficiently and to resolve appeals and limitation, suspension, and termination

actions promptly. Ensuring timely appeals and resolutions is particularly important because schools remain eligible to participate in the FFEL and Direct Loan programs until the appeal process is complete.

Executive Order 12866

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed regulations clearly stated? (2) Do the proposed regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the proposed regulations be easier to understand if they were divided into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 668.17 *Default reduction and prevention measures*.) (4) Is the description of the proposed regulations in the "Supplementary Information" section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the proposed regulations easier to understand?

A copy of any comments that concern how the Department could make these proposed regulations easier to understand should be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW. (room 5121, FB-10), Washington, DC 20202-2241.

Regulatory Flexibility Act Certification

The Secretary has determined that these proposed regulations would not have a significant adverse economic impact on a substantial number of small entities. A Preliminary Regulatory Flexibility Analysis (PRFA) was performed. The provision that extends the appeals of improper loan servicing to Direct Loans will provide a positive benefit to schools. The provision on the finality of appeals was analyzed in more detail. The PRFA determined that the number of small and large entities experiencing adverse economic impacts from the appeal finality provisions is expected to be between one and eight

per year, which is not a substantial number.

Estimate of the Number of Entities Experiencing Adverse Economic Impacts From Finality of Appeal Provision

Although no school has successfully used the delaying tactic these regulations would prohibit, 2 schools could have used this tactic for fiscal year 1994 rates, and it is possible that up to 16 schools could use this tactic for fiscal year 1995 rates. There is no reason to believe that this will apply to more schools in the future. Thus, the estimate of the number of small and large entities to which these regulations would apply is between 2 and 16 each year. In the year when two schools could have used this delaying tactic, one school unsuccessfully attempted to employ it or half of the eligible schools. The PRFA estimates that about half of the schools to which these regulations would apply will attempt to employ this delaying tactic, or between one and eight per year. Thus, the number of small and large entities to which these regulations would impose adverse economic impacts is small and not considered a substantial number.

Estimate of the Adverse Economic Impacts of Finality of Appeal Provision

One school attempted to use this delaying tactic, but that appeal was denied on technical grounds. Had that school been successful, the economic impact would have been to delay the school's removal from the Title IV programs for an estimated six months. During those six months, the school was estimated to have potentially earned an additional \$135,000 in Title IV revenue. Using a 5 percent profit rate, which is typical for proprietary schools participating in Title IV programs, the adverse economic impact on this school would have been to lose about \$6,750 in profit. The PRFA did not address whether this was a significant economic impact, since it was previously determined that a full Regulatory Flexibility analysis was not required because of the small number of entities to which these regulations would apply.

The Secretary particularly invites comments on the impact of these proposed regulations on small entities.

Paperwork Reduction Act of 1995

Section 668.17 contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Student Assistance General Provisions—668.17—Default reduction and prevention measures.

The Secretary proposes to provide schools the opportunity to challenge Direct Loan Program cohort rates or weighted average cohort rates on the basis of allegations of improper loan servicing or collection of the Direct Loans included in that rate as defaulted loans. Annual public reporting burden for the portion of this collection of information that is attributable to § 668.17(h) remains unchanged and is estimated to average 128 hours per response for 160 non-degree-granting school respondents, 96 hours per response for 20 degree-granting school respondents, and 16 hours per response for 20 low borrower school respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The collection's total estimated annual recordkeeping and reporting burden hours for this section equals 22,720 hours.

There is no change to the current burden for this collection because neither the estimated number of respondents nor the amount of time needed to respond is expected to change. At the time that previous regulations were published, no rates had been issued that included Direct Loans; all schools received rates that included only FFEL loans. A school appealing its rate due to improper loan servicing or collection, under these proposed regulations, would have been subject to the same requirements for the appeal of its FFEL Program cohort default rate.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on this proposed collection of information in—

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical use;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Intergovernmental Review

The Federal Supplemental Educational Opportunity Grant Program and the State Student Incentive Grant Program are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with this order, this document is intended to provide early notification of the Department's specific plans and actions for these programs.

The Federal Family Education Loan, Federal Supplemental Loans for Students, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Income Contingent Loan, and William D. Ford Federal Direct Loan programs are not subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Electronic Access to This Document

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The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Dated: July 7, 1998.

Richard W. Riley,
Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.007: Federal Supplemental Educational Opportunity Grant Program; 84.032: Federal Family Education Loan Program; 84.032: Federal PLUS Program; 84.032: Federal Supplemental Loans for Students Program; 84.033: Federal Work-Study Program; 84.038: Federal Perkins Loan Program; 84.063: Federal Pell Grant Program; 84.069: State Student Incentive Grant Program; 84.226: Income Contingent Loan Program; and 84.268: William D. Ford Federal Direct Loan Program)

The Secretary proposes to amend Part 668 of Title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c, and 1141, unless otherwise noted.

2. Section 668.17 is amended by revising the heading, and paragraphs (h) and (i) to read as follows:

§ 668.17 Default reduction and prevention measures.

* * * * *

(h) *Appeal based on allegations of improper loan servicing or collection—*

(1) *General.* An institution that is subject to loss of participation in the FFEL Program or the Direct Loan Program under paragraph (a)(3), (b)(1), or (b)(2) of this section or that has been notified by the Secretary that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate equals or exceeds 20 percent for the most recent year for which data are available may include in its appeal of that loss or rate a challenge based on allegations of improper loan servicing or collection. This challenge may be raised in addition to other challenges permitted under this section.

(2) *Standard of review.* (i) An appeal based on allegations of improper loan servicing or collection must be submitted to the Secretary in accordance with the requirements of this paragraph.

(ii) The Secretary excludes any loans from the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate calculation that, due to improper servicing or collection, would, as demonstrated by the evidence submitted in support of the institution's timely appeal to the Secretary, result in an inaccurate or incomplete calculation of that rate.

(iii) For the purposes of this paragraph, a Direct Loan that has been included in a Direct Loan Program cohort rate, under paragraph (e)(1)(ii) of this section, or a weighted average cohort rate, under paragraph (f)(1)(ii) of this section, because it has been in repayment under the income-contingent repayment plan for 270 days, with scheduled payments that are less than \$15 per month and with those payments resulting in negative amortization, is not considered to have been included in that rate as a defaulted loan. An institution's appeal under this paragraph does not affect the inclusion of these loans in an institution's rate.

(3) *Procedures.* The following procedures apply to appeals from FFEL Program cohort default rates, Direct Loan Program cohort rates, and weighted average cohort rates issued by the Secretary:

(i) *Notice of rate.* Upon receiving notice from the Secretary that the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate exceeds the thresholds specified in paragraph (a)(3), (b)(1), or (b)(2) of this section or that its most recent rate equals or exceeds 20 percent, the institution may appeal the calculation of that rate based on allegations of improper loan servicing or collection. The Secretary's notice includes a list of

all borrowers included in the calculation of the institution's rate.

(ii) *Appeals for FFEL Program loans.*

(A) To initiate an appeal under this paragraph for FFEL Program loans included in the institution's rate, the institution must notify, in writing, the Secretary and each guaranty agency that guaranteed loans included in the institution's FFEL Program cohort default rate or weighted average cohort rate that it is appealing the calculation of that rate. The notification must be received by the guaranty agency and the Secretary within 10 working days of the date the institution received the Secretary's notification. The institution's notification to the guaranty agency must include a copy of the list of students provided by the Secretary to the institution.

(B) Within 15 working days of receiving the notification from an institution subject to loss of participation in the FFEL or Direct Loan programs under paragraph (a)(3), (b)(1), or (b)(2) of this section, or within 30 calendar days of receiving that notification from any other institution that may file a challenge to its FFEL Program cohort default rate or weighted average cohort rate under this paragraph, the guaranty agency shall provide the institution with a representative sample of the loan servicing and collection records relating to borrowers whose loans were guaranteed by the guaranty agency and that were included as defaulted loans in the calculation of the institution's rate. For purposes of this section, the term *loan servicing and collection records* refers only to the records submitted by the lender to the guaranty agency to support the lender's submission of a default claim and included in the claim file. In selecting the representative sample of records, the guaranty agency shall use the following procedures:

(1) The guaranty agency shall list in social security number order all loans made to borrowers for attendance at the institution and guaranteed by the guaranty agency and included as defaulted loans in the calculation of the FFEL Program cohort default rate or weighted average cohort rate that is being challenged by the institution.

(2) From the population of loans identified by the guaranty agency, the guaranty agency shall identify a sample of the loans. The sample must be of a size such that the universe estimate derived from the sample is acceptable at a 95 percent confidence level with a plus or minus 5 percent confidence interval. The sampling procedure must result in a determination of the number of FFEL Program loans that should be

excluded from the calculation of the FFEL Program cohort default rate or weighted average cohort rate under this paragraph.

(3) The guaranty agency shall provide a copy of all servicing and collection records relating to each loan in the sample to the institution in hard copy format unless the guaranty agency and institution agree that all or some of the records may be provided in another format.

(4) The guaranty agency may charge the institution a reasonable fee for copying and providing the documents, not to exceed \$10 per borrower file.

(5) After compiling the servicing and collection records for the loans in the sample, the guaranty agency shall send the records, a list of the loans included in the sample, and a description of how the sample was chosen to the institution. The guaranty agency shall also send a copy of the list of the loans included in the sample, listed in order by social security number, and the description of how the sample was chosen to the Secretary at the same time the material is sent to the institution.

(6) If the guaranty agency charges the institution a fee for copying and providing the documents under paragraph (h)(3)(ii)(B)(4) of this section, the guaranty agency is not required to provide the documents to the institution until payment is received by the agency. If payment of a fee is required, the guaranty agency shall notify the institution, in writing, within 15 working days of receipt of the institution's request, of the amount of the fee. If the guaranty agency does not receive payment of the fee from the institution within 15 working days of the date the institution receives notice of the fee, the institution shall be considered to have waived its right to challenge the calculation of its FFEL Program cohort default rate or weighted average cohort rate based on allegations of improper loan servicing or collection in regard to the loans guaranteed by that guaranty agency. The guaranty agency shall notify the institution and the Secretary, in writing, that the institution has failed to pay the fee and has apparently waived its right to challenge the calculation of its rate for this purpose. The Secretary determines that an institution that does not pay the required fee to the guaranty agency has not met its burden of proof in regard to the loans insured by that guaranty agency unless the institution proves that the agency's conclusion that the institution waived its appeal is incorrect.

(iii) *Appeals for Direct Loan Program loans.* (A) To initiate an appeal under

this paragraph for Direct Loans included in the institution's rate, the institution must notify the Secretary, in writing, that it is appealing the calculation of its Direct Loan Program cohort rate or weighted average cohort rate. The notification must be received by the Secretary within 10 working days of the date the institution received the Secretary's notification.

(B) Within 15 working days of receiving the notification from an institution subject to loss of participation in the FFEL or Direct Loan Program under paragraph (a)(3), (b)(1), or (b)(2) of this section, or within 30 calendar days of receiving that notification from any other institution that may file a challenge to its Direct Loan Program cohort rate or weighted average cohort rate under this paragraph, the Secretary provides the institution with a representative sample of the loan servicing and collection records relating to borrowers whose Direct Loans were included as defaulted loans in the calculation of the institution's rate. For purposes of this section, the term "loan servicing and collection records" refers only to the records maintained by the Department's Direct Loan Servicer with respect to the servicing and collecting of delinquent loans prior to the default. In selecting the representative sample of records, the Secretary uses the following procedures:

(1) The Secretary lists in social security number order all Direct Loans made to borrowers for attendance at the institution and included as defaulted loans in the calculation of the Direct Loan Program cohort rate or weighted average cohort rate that is being challenged by the institution.

(2) From the population of loans identified by the Secretary, the Secretary identifies a sample of the loans. The sample is of a size such that the universe estimate derived from the sample is acceptable at a 95 percent confidence level with a plus or minus 5 percent confidence interval. The sampling procedure must result in a determination of the number of Direct Loans included in the rate as defaulted loans that should be excluded from the calculation of the Direct Loan Program cohort rate or weighted average cohort rate under this paragraph.

(3) The Secretary provides a copy of all servicing and collection records relating to each loan in the sample to the institution in hard copy format unless the Secretary and institution agree that all or some of the records may be provided in another format.

(4) The Secretary may charge the institution a reasonable fee for copying

and providing the documents, not to exceed \$10 per borrower file.

(5) After compiling the servicing and collection records for the loans in the sample, the Secretary sends the records, a list of the loans included in the sample, and a description of how the sample was chosen to the institution.

(6) If the Secretary charges the institution a fee for copying and providing the documents under paragraph (h)(3)(iii)(B)(4) of this section, the Secretary does not provide the documents to the institution until payment is received by the Secretary. If payment of a fee is required, the Secretary notifies the institution, in writing, within 15 working days of receipt of the institution's request, of the amount of the fee. If the Secretary does not receive payment of the fee from the institution within 15 working days of the date the institution receives notice of the fee, the institution shall be considered to have waived its right to challenge the calculation of its Direct Loan Program cohort rate or weighted average cohort rate based on allegations of improper loan servicing or collection in regard to the Direct Loans included in that rate. The Secretary shall notify the institution, in writing, that the institution has failed to pay the fee and has waived its right to challenge the calculation of its rate on the basis of those allegations.

(iv) *Procedures for filing an appeal.* After receiving the relevant loan servicing and collection records from the Secretary (for defaulted Direct Loan Program loans included in a Direct Loan Program cohort rate or weighted average cohort rate) and from all of the guaranty agencies that insured loans included in the institution's FFEL Program cohort default rate or weighted average cohort rate calculation (for defaulted FFEL Program loans included in a rate), the institution has 30 calendar days to file its appeal with the Secretary. An appeal is considered filed when it is received by the Secretary. If the institution is also filing an appeal under paragraph (c)(1)(i) of this section, the institution may delay submitting its appeal under this paragraph until the appeal under paragraph (c)(1)(i) of this section is submitted to the Secretary. As part of the appeal, the institution shall submit the following information to the Secretary:

(A) A list of the loans that the institution alleges would, due to improper loan servicing or collection, result in an inaccurate or incomplete calculation of the rate.

(B) Copies of all of the loan servicing or collection records and any other evidence relating to a loan that the

institution believes has been subject to improper servicing or collection. The records must be in hard copy or microfiche format.

(C) For FFEL Program loans, a copy of the lists provided by the guaranty agencies under paragraph (h)(3)(ii)(B) of this section.

(D) An explanation of how the alleged improper servicing or collection resulted in an inaccurate or incomplete calculation of the institution's rate.

(E) A summary of the institution's appeal listing the following:

(1) For FFEL Program cohort default rates, the number of loans insured by each guaranty agency that were included as defaulted loans in the calculation of the institution's rate and the number of loans that would be excluded from the calculation of that rate by application of the results of the review of the sample of loans provided to the institution to the population of loans for each guaranty agency.

(2) For Direct Loan Program cohort rates, the number of Direct Loans that were included as defaulted loans in the calculation of the institution's rate and the number of loans that would be excluded from the calculation of that rate by application of the results of the review of the sample of loans provided to the institution to the population of loans serviced by the Secretary.

(3) For weighted average cohort rates—

(i) The number of FFEL Program loans insured by each guaranty agency that were included as defaulted loans in the calculation of the institution's rate and the number of loans that would be excluded from the calculation of that rate by application of the results of the review of the sample of loans provided to the institution to the population of loans for each guaranty agency; and

(ii) The number of Direct Loans that were included as defaulted loans in the calculation of the institution's rate and the number of loans that would be excluded from the calculation of that rate by application of the results of the review of the sample of loans provided to the institution to the population of loans serviced by the Secretary.

(F) A certification by an authorized official of the institution that all information provided by the institution in the appeal is true and correct.

(v) *Decision.* The Secretary or the Secretary's designee reviews the information submitted by the institution and issues a decision.

(A) In making a decision under this paragraph, the Secretary presumes that the information provided to the institution by the guaranty agency or Secretary under paragraphs (h)(3)(ii)(B)

and (iii)(B) of this section is correct unless the institution provides substantial evidence showing that the information is not correct.

(B) If the Secretary finds that the evidence presented by the institution shows that some of the loans included in the sample of loan records reviewed by the institution should be excluded from calculation of the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate under paragraph (h)(2) of this section, the Secretary reduces the institution's rate, in accordance with a statistically valid methodology, to reflect the percentage of defaulted loans in the sample that should be excluded.

(vi) *Notification.* The Secretary notifies the institution, in writing, of the decision.

(vii) *Seeking judicial review.* An institution may not seek judicial review of the Secretary's determination of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate until the Secretary or the Secretary's designee issues the decision under paragraph (h)(3)(v) of this section.

(viii) *Improper loan servicing or collection criteria.* For purposes of this paragraph, a default is considered to have been due to improper servicing or collection only if the borrower did not make a payment on the loan and the institution proves that the lender (for an FFEL Program loan) or the Direct Loan Servicer (for a Direct Loan Program loan) failed to perform one or more of the following activities, if that activity was required:

(A) Send at least one letter (other than the final demand letter) urging the borrower or endorser to make payments on the loan.

(B) Attempt at least one phone call to the borrower or endorser.

(C) For an FFEL Program loan, submit a request for preclaims assistance to the guaranty agency.

(D) Send a final demand letter to the borrower.

(E)(1) For an FFEL Program loan, submit a certification (or other evidence) that skip tracing was performed; or

(2) For a Direct Loan Program loan, document that skip tracing was performed.

(i) *Effect of decision.* (1) An institution may challenge the

calculation of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate under this section no more than once. The Secretary's determination of an institution's appeal of the calculation of such a rate is binding on any future appeal by the institution.

(2) An institution that fails to challenge the calculation of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate under this section within 10 working days of receiving notice of the determination of that rate is prohibited from challenging that rate in any other proceeding before the Department.

(3) If the Secretary has initiated an action under paragraph (a)(2) of this section, the institution may not challenge the calculation of the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate on which the action is based.

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