

**U.S. Department of Education
Title IV Negotiated Rulemaking
Loans Committee
February 5-7, 2007**

Welcome

Dan Madzelan, Director of Forecasting and Policy Analysis Staff, welcomed negotiators to this round of negotiated rulemaking

Petitions for Membership

Three Committee members petitioned for the inclusion of their colleagues as negotiators or alternates.

- Robert Collins petitioned for the inclusion of Sarah Bauder (currently an alternate) as primary negotiator representing Institutions of Higher Education that participate in the FFEL Program. There was dissent from the petition.
- Shari Crittendon's request that William "Buddy" Blakey replace Dr. Joyce Payne as an alternate was accepted.
- Elizabeth Hicks' nomination of Terra Jones to act as alternate in the absence of alternate Ellen Frishberg was accepted.

Agenda Review

Dan Madzelan explained that the General Provisions Committee had identified an issue that relates to the Loans Committee (cash management/active confirmation of loans). The issue will be discussed in the Loans Committee but remain in the General Provisions Committee. It was suggested that the Federal negotiator for the General Provisions Committee address the Loans Committee and hear their interests and concerns. The Loans Committee agreed with this suggestion.

Discussion of Agenda Items

The Federal negotiator provided the negotiators with an overview of the Department's work on the loans committee issues since the December session, pointing out that six issues that were initially on the agenda would not be discussed in this round of negotiated rulemaking because these issues have program cost considerations, other available remedies, no statutory basis for a regulatory change, or potential for a counterproductive regulatory result.

Issues to be removed from consideration:

1. Reasonable and affordable Title IV loan rehabilitation payments (FFEL/DL 3)
2. Additional disclosures to borrowers in repayment (FFEL/DL 5)
3. Align repayment start date for Stafford and Grad/PLUS (FFEL/DL 6)
4. Standardize hardship appeal policies/practices for AWG and Federal benefit offset programs (FFEL/DL 8)
5. Modify economic hardship deferment, income contingent repayment, etc. (FFEL/DL/Perkins 3)
6. Cease collection activity during loan rehabilitation (FFEL/DL/Perkins 5)

Discussion of Issues: Proposed Regulatory Language

The following list of issues was discussed at length. On certain issues, some nonfederal negotiators expressed general agreement with the policy positions contained in the Department's draft regulatory language. Conversely, some nonfederal negotiators expressed their disagreement with the Department's positions and offered alternative views.

1. Loan Discharge for the Crime of Identity Theft (FFEL/DL 1)

The Department explained the reasons it had not provided draft regulatory language on this topic to the Committee at this time, and then shared its understanding of typical policies established by banks governing potential identity theft cases. The Department indicated it would have further discussions with its Office of Inspector General to learn about their experiences with identity theft cases. A nonfederal negotiator further explained specifics of a bank's usual process for confirming identity theft.

A nonfederal negotiator provided an overview of the "holistic" customer approach used by a lender and appealed to the Department to allow FFEL loans to be treated similarly to all other forms of consumer loans. A nonfederal negotiator stated that the adjudication requirement too stringent and requested adoption of the FACT Act approach to handling identity theft, which would rely on a police report to evidence a crime.

2. Entrance Counseling for Grad/PLUS Borrowers (FFEL/DL 2)

The Department discussed the need for schools to provide information to Grad/PLUS borrowers about all of their loans prior to certifying (FFEL) or originating (Direct Loans) new loans, and to advise eligible students of the availability of Stafford loans. Negotiators discussed changes to further clarify language in cases where borrowers have different loans in different years (e.g. Stafford in first year and Grad/PLUS in second year).

3. Maximum Length of Loan Period (FFEL/DL 4)

The Department described the proposed regulatory language.

4. Frequency of Capitalization (FFEL/DL 7)

A nonfederal negotiator expressed concern that the Department's draft language represented a position that would expand this provision beyond the limits previously discussed when the Committee agreed to include this issue on the negotiating agenda.

5. Simplification of Deferment Granting Process (FFEL/DL 9)

The Department indicated that while it supported the idea of not requiring borrowers to make multiple applications to several lenders for the same deferment, it indicated its belief that students should not receive a deferment that they did not request. There was agreement that lenders should communicate with one another regarding past deferments and that any new information should be taken into account during

decision making. A nonfederal negotiator asked about extending this provision to the Perkins loan programs, and the Department agreed to consider it.

6. Eligible Lender Trustee Relationships (FFEL 1)

The relationship between eligible lender trustees and schools was discussed. Several nonfederal negotiators raised technical issues with the draft language regarding certain dates and cross references to other regulatory provisions. Several other negotiators raised issues with defining "school-affiliated organization" more broadly than a common ownership or control test.

7. Institutional Preferred Lenders (FFEL 2)

The Department indicated its intention to have the regulations reflect its subregulatory policy on preferred lenders. The Department stated its rationale for this approach is to ensure that borrowers and prospective borrowers are not denied their statutory right to choose a lender. Nonfederal negotiators raised concerns regarding the manner in which a lender gets placed on and institution's preferred lender list. Nonfederal negotiators also pointed out that although it appears that students are informed that they have a choice of lenders, this information might not be readily available.

A nonfederal negotiator stated that healthy competition in the FFEL is yielding high service levels and favorable benefits to borrowers. A nonfederal negotiator stated that FFEL loan terms have statutory caps and therefore students are at no risk of receiving a loan from a single loan provider. A nonfederal negotiator stated that any regulation should be limited to 682.212(h)(1)(i) to address lists that impede borrower choice of lender to reiterate and reinforce current regulation and statutory intent in 432(m)(1)(B)(ii) of the HEA. A nonfederal negotiator stated that 682.212(h)(1)(ii) regarding minimum list size is completely arbitrary, and that in his view there is no statutory basis for regulating a minimum list number. A nonfederal negotiator stated that 682.212(h)(1)(iii) regarding benefits is already addressed in regulations. Inclusion creates ambiguity and risk of interpretive problems. A nonfederal negotiator recommended that the proposed disclosure under (h)(2) could be addressed in the federal form if necessary. A nonfederal negotiator questioned why there is no corresponding regulation being considered for schools in the Direct Loan program.

8. Prohibited Inducements (FFEL 3)

The Department stated its preference to include in the regulation the guidance it has provided in past "Dear Colleague" letters and other subregulatory guidance. Many nonfederal negotiators requested that the list of permissible and impermissible activities be explicitly tied to the statutory quid pro quo requirement. In one example, nonfederal negotiators pointed out that banks have a variety of different relationships with institutions (general business relationships, on-campus ATMs, sponsorship agreements for sporting and other on-campus events, etc.) and were concerned that the new regulations might have unintended consequences if prohibitions based on quid pro quo arrangements are not explicitly described. A nonfederal negotiator questioned what "nondiscriminatory manner" means in this context. The Department

responded that it refers to usual protected groups, i.e., gender, race, etc. A nonfederal negotiator suggested that the Department include certain specific language from past “Dear Colleague” letters in the regulation. A nonfederal negotiator felt the Department was proposing an “exhaustive list of prohibited inducements” when it would be better policy to list those acceptable relationships between lenders and institutions. Other nonfederal negotiators suggested that many situations exist where abuse could and does occur, whether purposefully or not, and that it is difficult to produce a concise list of all permissible activities.

A nonfederal negotiator stated that the statutory intent of HEA 1986 intent was to prevent students from borrowing a loan that the student would otherwise not obtain if not for an incentive. The negotiator stated that given current loan limits and cost of education, borrowers are borrowing due to high levels of unmet need as opposed to incentives. The negotiator stated that benefits are providing favorable loan terms for students. A nonfederal negotiator expressed concern that the proposed regulation is too restrictive and could cause result in marketing efforts that bypass schools, today provide counseling protections, and result in an increase of direct to consumer marketing consequences. A nonfederal negotiator stated that current rules are sufficient and could be better communicated by education efforts, and better enforced via the current program review process. A nonfederal negotiator expressed concern that the draft language will impact the ability for schools and lenders can sustain a healthy business environment.

9. True and Exact Copy of Death Certificates (FFEL/DL/Perkins 1)

The Department explained the simple language changes to allow the use of a “true and exact copy,” in addition to an original or certified copy, of a death certificate for the purpose of discharging a student loan. A Preamble discussion was suggested as a means to describe what is meant by a “true and exact” copy, as well as the appropriate manner to deliver these copies to the entity responsible for discharging the loan.

A nonfederal negotiator requested clarification that "true and exact" includes a photo copy. The Department explained its view that a lender may rely on the receipt of a photo copy of the original for claim documentation purposes, and that the intent is not to force a party to provide an original to the lender for the lender to make a copy of it, but rather to allow a lender to accept the receipt of a photocopy as a true and exact copy of the original, unless there is any evidence that it is not a true copy. A nonfederal negotiator requested consideration to the use of other reliable data sources such as NSLDS, Social Security Administration (SSA) Death Master File, and documents such as a police report and court documents.

10. “Retroactive” Total and Permanent Disability Discharges (FFEL/DL/Perkins 2)

The Department proposed that the total and permanent disability start date be changed to the date when a physician certifies a person to be totally and permanently disabled. The Department emphasized that its draft language did not include changing the existing definition of total and permanent disability. In general, the nonfederal

negotiators agreed with the Department's approach, but did express concerns regarding the time period between physician certification data and the beginning of the three-year conditional period and whether a subsequent disbursement of a prior loan would constitute a "new" loan and therefore potentially affect eligibility for the discharge. In particular, however, a nonfederal negotiator expressed concern that under the Department's proposal the start date for refunds of any loan payments made by an affected borrower would move from the current date (onset of the disability) to a later date (date the physician certified the total and permanent disability).

11. NSLDS Reporting Timeframes (FFEL/Perkins 1)

The Department restated its goal to improve information quality and timeliness of information important to managing the student loan program. Several nonfederal negotiators noted that the Department's proposed reduction of the reporting time frame to 30 days might not reflect the ways in which the various student loan program participants conduct business among themselves.

A nonfederal negotiator requested that the draft language provided for community consultation and involvement. A nonfederal negotiator requested a longer time frame of at least 45 days.

12. Retention of Records Supporting Disbursements to Students Under MPNs (FFEL/Perkins 2) and Lender Certification of e-Signatures on MPNs (FFEL/Perkins 3)

The Department noted that these two issues overlap in the regulations and then opened the discussion by expressing the need to ensure that it has sufficient documentation regarding disbursement amounts to enforce loans made under master promissory notes. A nonfederal negotiator pointed out that schools are not set up to report information directly to NSLDS. Nonfederal negotiators also pointed out that the Department could minimize burden if it requested the information it needed on a case-by-case basis because the vast majority of students loans are never subject to litigation. With respect to e-signature verification, a nonfederal negotiator pointed out that while an e-signed note is the same as a paper note by law, enforcement of electronically signed promissory notes is a new phenomenon.

A nonfederal negotiator stated that disbursement delivery reporting will present a huge burden and that most loans will never be an issue. A nonfederal negotiator stated that disputes typically occur within the current three year school retention period required by regulation and that there is a high success rate in resolving disputes through use of school billing records. A nonfederal negotiator requested an approach that would focus on obtaining E-sign certification at the back-end when necessary. A nonfederal negotiator stated that lenders have a high incentive to partner with ED and stand ready to assist ED in defending processes. A nonfederal negotiator stated that the E-sign Act provides equal status to electronic signatures and that a new regulation is unnecessary, particularly given the role that schools play as a trusted third party, which mitigates perceived risk of new technology. A nonfederal negotiator expressed concern about the elimination of clause in .406(c) that provides

insurance protection regarding MPN confirmation, which is unrelated to the issue scope.

13. Reasonable Collection Costs (Perkins 2)

The Department indicated its belief that 24% represented a reasonable collection cost in the Perkins program because this figure represents a blended rate of what the Department pays its collections contractors. A nonfederal negotiator said that currently collection cost percentages are set so that collections are sufficient to reimburse campus's Perkins Loans funds for defaulted loans. A nonfederal negotiator questioned the use of percentages in the Perkins program because the typical debts are so small that economies of scale do not exist. A nonfederal negotiator, noting the nature of the Perkins Loan program, felt a cap would force collection agencies to change the way they do business and the amount of staff they dedicate to recovering Perkins loans.

14. Mandatory Assignment of Defaulted Loans (Perkins 3)

The Department reiterated its intention to require assignment of defaulted Perkins loans that were sufficiently old, sufficiently large, and had no recent repayment activity, and welcomed input on setting these parameters. A nonfederal negotiator asked whether the Department would agree to implement a loan collection referral program. The Department responded negatively, saying it had discussed the matter and was not interested in such a program. A nonfederal negotiator asked what statutory authority the Department was following to require assignments. The Department responded that it was relying on Section 463(a)(9) of the Higher Education Act of 1965 relating to program participation agreements. Objections were raised to this by nonfederal negotiators and further action on this issue was delayed.

Remarks on General Provisions: Active Confirmation of a Loan

The Department introduced the topic explaining that the General Provisions Committee thought the discussion of this issue in that venue would be better informed if the Loans Committee provided its input, even though this is a cash management issue relating to an institution's participation in the loan programs. A summary of the issue citing the cash management regulation was provided, and nonfederal negotiators expressed their interests and concerns.

Next Meeting

The Department will provide draft regulatory language for issues at least seven days prior to the next meeting to be held March 12 – 14. At that time the Committee will continue discussions, seek to reach tentative agreement on each individual issue, and ultimately reach consensus on the entire package of regulatory language.