CHAPTER 3

General FSA Participation Requirements

A school that participates in the Federal Student Aid (FSA) programs must meet certain requirements, including providing drug and alcohol abuse prevention programs, and must adhere to certain standards of conduct with respect to lenders and third-party servicers. In some cases, a participating school may be required to report information about funds paid for lobbying activities and gifts or contracts involving foreign sources.

CONTRACTS WITH THIRD-PARTY SERVICERS

Schools are permitted to contract with consultants for assistance in administering the FSA programs. However, the school ultimately is responsible for the use of FSA funds and will be held accountable if the consultant mismanages the programs or program funds.

The General Provisions regulations contain requirements for all participating institutions that contract with third-party servicers. As defined by regulation, a third-party servicer is an individual or organization that enters into a contract (written or otherwise) with a school to administer any aspect of the school's FSA participation.

Examples of functions that are covered by this definition are:

- processing student financial aid applications, performing need analysis, and determining student eligibility or related activities;
- certifying loans, servicing loans, or collecting loans;
- processing output documents for payment to students, and receiving, disbursing, or delivering FSA funds;
- conducting required student consumer information services;
- preparing and certifying requests for advance cash monitoring or reimbursement funding, preparing and submitting notices and applications required of eligible and participating schools, or preparing the Fiscal Operations Report and Application to Participate (FISAP); and
- processing enrollment verification for deferment forms or Student Status Confirmation Reports.

CHAPTER 3 HIGHLIGHTS

- Contracts with 3rd-party servicers
  - ➔ Excluded functions/individuals
  - ➔ Requirements for contracting
  - ➔ Notifying the Department of contracts
- Incentive compensation
  - ➔ 12 "safe harbors"
- FFEL School/Lender Relationships & Activities
  - ➔ Preferred lender lists
  - ➔ Prohibited activities in loan programs
  - ➔ Code of Conductr
- 90/10 rule
- School lender in FFEL program
- Tuition rates for military families at public institutions
- Program Participation Agreement

Related information

➔ Administrative Capability, Volume 2, Chapter 10

➔ Financial Standards, Volume 2, Chapter 11

Assessing your school's compliance

To assess your school's compliance with the provisions of this chapter see the FSA Assessment module for: "Institutional Eligibility" at:

ifap.ed.gov/qahome/fsaassessment.html

Third-party servicer cite

34 CFR 668.1, 668.2, 668.11, 668.14, 668.15, 668.16, 668.23, 668.25, 668.81, 668.82, 668.83, 668.84, 668.86, 668.87, 668.88, 668.89, and Subpart H.

Institutional liability

A school remains liable for any and all FSA-related actions taken by the servicer on its behalf.

Excluded functions

Examples of functions excluded from the definition of "third-party servicer" are:

- performing lockbox processing of loan payments;
- performing normal electronic fund transfers (EFTs) after being initiated by the school;
- publishing ability-to-benefit tests;
- acting as a Multiple Data Entry Processor (MDE);
- financial and compliance auditing;
- mailing documents prepared by a school or warehousing school records;
- participating in a written arrangement with other eligible schools to make eligibility determinations and FSA awards for certain students (see Chapter 7); and
- providing computer services or software.

A person or organization performing these functions is not considered to be a third-party servicer and is not subject to third-party servicer requirements.

Excluded individuals

An employee of a school is not a third-party servicer. For this purpose, an employee is one who:

- works on a full-time, part-time, or temporary basis,
- performs all duties on site at the school under the supervision of the school,
- is paid directly by the school,
- is not employed by or associated with a third-party servicer, and
- is not a third-party servicer for any other school.

Requirements for contracting with a third-party servicer

For purposes of administering FSA programs, a school may only contract with an eligible third-party servicer as specified by the regulatory criteria. Under such a contract, the servicer agrees to comply with all applicable requirements, to refer any suspicion of fraudulent or criminal conduct in relation to FSA program administration to the Department's Inspector General, and, if the servicer disburses funds, to confirm student eligibility and make the required Returns to Title IV funds when a student withdraws.

If the contract is terminated, or the servicer ceases to perform any functions prescribed under the contract, the servicer must return to the school all unexpended FSA funds and records related to the servicer's administration of the school's participation in the FSA programs.

Notifying the Department of contracts

Schools are required to notify the Department of all existing third-party servicer contracts. If a school has submitted information regarding its third-party servicers as part of applying for certification or recertification, no additional submission is required.

If a school has not notified the Department, the school immediately must do so by completing Section J of the **E-App**.

A school is required to notify the Department if:

- the school enters into a contract with a new third-party servicer,
- the school significantly modifies a contract with an existing third-party servicer,
- the school or one of its third-party servicers terminates a contract, or
- a third-party servicer ceases to provide contracted services, goes out of business, or files for bankruptcy.

Notification to the Department (which must include the name and address of the servicer and the nature of the change or action) must be made within 10 days of the date of the change or action.

A school must provide a copy of its contract with a third-party servicer only upon request. A school is not required to submit the contract as part of the recertification process.

Incentive compensation in the law & regulations

The prohibition of incentive compensation appears in Section 487(a)(20) of the HEA and in FSA regulations at 34 CFR 668.14(b)(2). In response to numerous requests from schools, and after engaging in negotiations with the financial aid community, the Department amended the regulations on November 1, 2002. ED developed the 12 permissible payment arrangements found in 34 CFR 668.14(b)(22)(ii) to provide an illustrative framework a school may use to make its own determination about compliance with the HEA. The list is not exhaustive, and schools that have additional questions should consult with their legal counsel when making this determination. The Department does not review or approve an individual school's payment arrangements.

INCENTIVE COMPENSATION

Schools may not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any individual or entity engaged in recruiting or admission activities or in making decisions regarding the award of FSA program funds.

However, ED has identified 12 types of payment and compensation plans that do not violate this statutory prohibition. If an incentive payment arrangement falls within any one of these "safe harbors," that payment arrangement is permissible.

Adjustments to employee compensation based on merit

Under this safe harbor, a school may make up to two adjustments (upward or downward) to a covered employee's annual salary or fixed hourly wage rate within any 12-month period without the adjustment being considered an incentive payment, provided that no adjustment is based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. One cost-of-living increase that is paid to all or substantially all of the school's full-time employees will not be considered an adjustment under this safe harbor. In addition, with regard to overtime, if the basic compensation of an employee is not an incentive payment, neither is overtime pay required under the Federal Fair Labor Standards Act.

The 12 "safe harbors"

The payment or compensation plans included in the safe harbors cover the following subjects:

1. adjustments to employee compensation—34 CFR 668.14(b)(22)(ii)(A),
2. recruitment into programs that are not eligible for FSA program funds—34 CFR 668.14(b)(22)(ii)(B)
3. payment for securing contracts with employers—34 CFR 668.14(b)(22)(ii)(C)
4. profit-sharing or bonus payments—34 CFR 668.14(b)(22)(ii)(D)
5. compensation based upon students completing their programs of study—34 CFR 668.14(b)(22)(ii)(E)
6. payments to employees for pre-enrollment activities—34 CFR 668.14(b)(22)(ii)(F)
7. compensation paid to managerial and supervisory employees not involved in admissions or financial aid—
   34 CFR 668.14(b)(22)(ii)(G)
8. token gifts—34 CFR 668.14(b)(22)(ii)(H)
9. profit distributions—34 CFR 668.14(b)(22)(ii)(I)
10. Internet-based recruiting activities—34 CFR 668.14(b)(22)(ii)(J)
11. payments to third parties for services to the school that do not include recruitment activities—34 CFR 668.14(b)(22)(ii)(K)
12. payments to third parties for services that include recruitment activities—34 CFR 668.14(b)(22)(ii)(L)

Enrollments in programs that are not eligible for FSA funds

A school may provide incentive compensation to recruiters based upon their recruitment of students who enroll only in programs that are not eligible for FSA funds.

Contracts with employers to provide training

In general, the business-to-business marketing of employer-provided education is not prohibited by the incentive compensation rules. Therefore, in some cases, a school may make payments to recruiters who arrange contracts between the school and an employer, where the employer pays the tuition and fees for its employees (either directly to the school or by reimbursement to the employee).

As long as there is no direct contact by the school's representative with prospective students, and as long as the employer is paying at least 50% of the training costs, incentive payments to recruiters who arrange for such contracts are not covered by the incentive payment prohibition, provided that the incentive payments are not based on the number of employees who enroll, or the amount of revenue generated by those employees.

Profit-sharing or bonus payments

Profit-sharing and bonus payments to all or substantially all of a school's full-time employees are not incentive payments based on success in securing enrollments or awarding financial aid. As long as the profit-sharing or bonus payments are substantially the same amount or the same percentage of salary or wages, and as long as the payments are made to all or substantially all of the school's full-time professional and administrative staff, compensation paid as part of a profit-sharing or bonus plan is not considered a violation of the incentive payment prohibition. In addition, such payments can be limited to all or substantially all of the full-time employees at one or more organizational levels at the school, except that an organizational level may not consist predominantly of recruiters, the admissions staff, or the financial aid staff.

Compensation based upon completion of program or academic year

Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter, does not violate the incentive compensation prohibition. This safe harbor recognizes that completing a program or the first academic year of a program is a reliable indicator that the students were qualified to enroll in the program.

Successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours, or has successfully completed at least 900 clock hours of instruction at the school . Completion of 26/30 weeks of instructional time is not required in this case, and time may not be substituted for credits earned. Therefore, this safe harbor applies when a student earns, for example, 24 semester credits, no matter how short or long a time that takes.

Covered employee

One who is involved in recruitment, admissions, enrollment, or financial aid activities

Compensation based on program completion: credits must be earned in residence

For this purpose, a school may not count transfer credits, credits awarded through successful completion of testing, credits for life experience, and any other credits not earned through attendance at that school toward the successful completion of an academic year.

Buying third-party leads

Although buying leads from third parties for a flat fee is not a clerical pre-enrollment activity under this safe harbor, the activity is not covered under the incentive compensation prohibition.

Pre-enrollment activities

Generally, clerical pre-enrollment activities are not considered recruitment or admission activities. Accordingly, a school may make incentive payments to individuals whose responsibilities are limited to pre-enrollment activities that are clerical in nature.

However, soliciting students for interviews is a recruitment activity, not a pre-enrollment activity, and individuals may not receive incentive compensation based on their success in soliciting students for interviews. In addition, since a recruiter's job description is to recruit, it would be very difficult for a school to document that it was paying a bonus to a recruiter solely for clerical pre-enrollment activities.

Managerial and supervisory employees

The incentive payment prohibition, does not extend to positions above the level of first-line supervisors or managers. The incentive payment prohibition applies only to individuals who perform activities related to recruitment, admissions, enrollment, or the financial aid awarding process and their immediate supervisors. Direct supervisors are included in the prohibition because their actions generally have a direct and immediate impact on the individuals who carry out these covered activities.

Token gifts

The maximum cost of a token, noncash gift that may be provided to an alumnus or student is $100, provided that:

- the gifts are not in the form of money, and
- no more than one gift is provided annually to an individual.

The cost basis of a token noncash gift is what the school paid for it. The value is the fair market value of the item. The fair market value of an item might be considerably greater than its cost. A high value item for which the school paid a minimal cost would not be considered a token gift.

Profit distributions

Profit distributions to owners are not payments based on success in securing enrollments or awarding financial aid. Therefore any owner, whether an employee or not, is entitled to a share of the organization's profits to the extent they represent a proportionate share of the profits based upon the employee's ownership interest.

Internet-based activities

A school may award incentive compensation for Internet-based recruitment and admission activities that—

- provide information about the school to prospective students,
- refer prospective students to the school, or
- permit prospective students to apply for admission online.

Payments to third parties for non-recruitment activities

The incentive payment prohibition applies only to activities dealing with recruiting, admissions, enrollment, and financial aid. Therefore, a school may make incentive payments to third parties for other types of services, including tuition-sharing arrangements, marketing, and advertising that are not related to recruitment, admissions, enrollement, and financial aid activities.

Payments to third parties for recruitment activities

If a school uses an outside entity to perform activities for it, including covered activities, the school may make incentive payments to the third party as long as the individuals performing the covered activities are not compensated in a way that is prohibited by the incentive payment compensation rule.

For example, if a school established a group of employees who provided the school with a series of services, and one of those services was recruiting, the incentive compensation prohibition would preclude only the individuals doing the recruiting from being paid on an incentive basis. If the same school hired a contractor to provide these services, the same rules would apply. The outside entity could not pay the individuals performing the recruiting services on an incentive basis, but it could pay the other employees performing non-recruiting activities on an incentive basis.

Prohibited & permissible activities

Schools 34 CFR 682.212

Detailed lists of prohibited activities for lenders and guarantors were published as part of the Loan Programs final regulations dated November 1, 2007. See 72 FR 62003

Preferred lender lists

Regulatory cite:
34 CFR 682.212 and 682.401

See DCL 08-06 for subsequent guidance and DCL 08-12 for new statutory provisions from the Higher Education Opportunity Act

FFEL SCHOOL/LENDER RELATIONSHIPS & ACTIVITIES

Preferred lender lists NEW

If a school chooses to provide prospective borrowers with a list of preferred lenders, the list must include at least three lenders that are not affiliated with each other. *Affiliation,* for purposes of a preferred lender list, is limited to affiliates that are under common ownership and control.

- The preferred list may 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.
- However, a school may include lenders on its preferred list who offer lower costs and benefits to students at the school, provided the lenders do not discriminate on any legally prohibited basis.

The preferred lender list must include—

- the method and criteria the school used to select any lender that it recommends or suggests.
- comparative information about interest rates and other benefits offered by the lenders.

In any information related to its list of lenders, the school must include a prominent statement advising prospective borrowers that they are not required to use one of the school's recommended or suggested lenders.

A school must update its preferred lender list and any accompanying information at least annually.

A school may not, through award packaging or other methods, assign a first-time borrower's loan to a particular lender, and may not delay certification of any borrower's loan because the lender is not on the school's preferred lender list.

Prohibited activities in the loan programs

A school is prohibited from paying points, premiums, payments, or additional interest of any kind to an eligible lender or other party in order to induce a lender to make loans to students at the school or to the parents of the students.

Lenders may not offer, directly or indirectly, points, premiums, payments, or other inducements, to a school or any other party to secure applicants for FFEL loans. In addition, lenders may not conduct unsolicited mailings of FFEL loan applications to students or parents who have not previously received an FFEL from that lender. Nor may a lender offer an FFEL loan to induce the borrower or other person to purchase other products or services. Similar restrictions apply to guaranty agencies. (See detailed list on next page.)

Preferred lender arrangements—new requirements NEW

In May of 2008, the Department provided additional guidance for schools that have been unable to find at least three lenders who are willing to make loans to its students AND meet the regulatory requirements. In addition, this letter clarified that a school's preferred lender list could include lenders that were affiliated, as long as at least three of the lenders on the list were unaffiliated. While not a requirement, schools are encouraged to identify, as part of its preferred lender list disclosures, any affiliations among the lenders on the institution's preferred lender list.
See DCL 08-12

The Higher Education Opportunity Act added several requirements relating to preferred lender lists:
• If a school enters into a preferred lender arrangement, it must annually compile a list of the specific lenders for FSA loans and for private education loans that the school recommends in accordance with its lender arrangement.
• The school must, make the list available in print or other medium to students and their families.
• The school must compile the list with care and without prejudice for the sole benefit of students and their families and not deny or impede the borrower's choice of a lender or unnecessarily delay certifying an FSA loan for a borrower who chooses a lender not on the list.

The HEOA requires that the preferred lender list:
• disclose detailed information about the terms and conditions of the loans offered by preferred lenders, as required under section 153(a)(2)(a) of the HEA;
• disclose why the school entered into an arrangement with each lender, particularly with respect to terms and conditions or provisions favorable to the borrower;
• ensure that the list contains at least three unaffiliated lenders for FSA loans and at least two unaffiliated lenders for private education loans
• specifically indicate whether a lender is or is not an affiliate of each other lender on the list. If a lender is an affiliate of another lender, the institution must describe that affiliation;
• prominently disclose the method and criteria used in selecting the lenders

In addition, a school or school-affiliated organization that participates in a preferred lender arrangement must disclose on the school's or organization's website and in all other informational materials that describe or discuss educational loans
• the information required above (for preferred lender lists),
• the maximum amount of federal grant and FSA loan assistance available to students who attend the school, in an easily understood format;
• for each type of FFEL loan, a statement that the school must certify an FFEL loan from any eligible FFEL lender the student or parent selects;
• for each type of private education loan by the school (or school-affiliated organization) to the school's students and their families, the information required to be disclosed under section 128(e)(11) of the The Truth in Lending Act, and
• for prospective borrowers of private education loans, in a manner that is distinct from information provided on FSA loans, a prominent statement that the prospective borrower may qualify for FSA grants and loans, and that the terms and conditions of FSA loans may be more favorable than the terms and conditions of private education loans, and
• for FFEL loans, any additional information identified by the Department as the "minimum information" that must be made available to prospective FFEL borrowers and their families.

HEOA section 493 HEA section 487
HEOA section 120
See DCL 08-12

Note that the Department will be developing a model disclosure form that may be used by schools, school-affiliated organizations, and lenders in FFEL preferred-lender arrangements to enable students and families to compare private education loans and FFEL loans.

Lender & guarantor: prohibited activities NEW

A guaranty agency or lender in the FFEL program may not offer, directly or indirectly, premiums, payments, stock or other securities, prizes, travel, entertainment expenses, tuition payment or reimbursement, or any other inducement to a school or its employees in order to secure applicants for FFEL loans. (There is a similar prohibition against guarantor inducements to a lender, or to the agent, employee, or independent contractor of any lender or guaranty agency.) In addition, a lender may not provide information technology equipment at below-market value, additional financial aid funds, or other inducements to any school or employee of a school.

Guaranty agencies and lenders may not
• conduct unsolicited mailings, by either postal or electronic means, of FFEL application forms to students in secondary or postsecondary schools, or the family members of such students, unless the agency has previously guaranteed (or the lender has made) an FFEL loan for the student or the student's parent;
• perform, or pay another individual to perform, any school-required function for a school participating in the FFEL Program, except student loan exit counseling; or
• engage in fraudulent or misleading advertisement.

A lender is not eligible if it
• enters into a consulting arrangement or other contract with an employee who is employed in an school's student financial aid office or who otherwise has responsibility for student loans to provide services to a lender;
• compensates a school employee who is employed in the student financial aid office or who otherwise has responsibility for student loans for serving on an advisory board, commission, or group established by a lender or a group of lenders, except that the lender may reimburse the school employee for reasonable expenses incurred by the employee in performing such service;
• provides payments or other benefits to a student at a school to act as the lender's representative to secure FFEL loan applications, unless the student is employed by the lender for other purposes and makes all the appropriate disclosures regarding his or her employment with the lender;
• offers, directly or indirectly, a FFEL loan as an inducement to a prospective borrower to purchase an insurance policy or other product.

Citation: HEOA sections 422 & 436 HEA sections 428(b)(3) and 435(d)(5)

Lender & guarantor: permissible activities

Lenders and guarantors, in carrying out their roles in the FFEL program and in attempting to provide better service, may provide—
• Assistance to a school that is comparable to the kinds of assistance provided to a school by the Department under the Direct Loan program, as identified in a public announcement, such as a notice in the Federal Register;
• 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 or guarantor does not promote its student loan or other products (except for benefits provided under other Federal or State programs administered by the guarantor);
• 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. (Guarantors may also provide reasonable meals and refreshments when training program participants and elementary, secondary, and postsecondary school personnel, and with workshops and forums customarily used by the agency to fulfill its statutory responsibilities.)
• [Guarantors only] 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;
• 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;
• A reduced origination fee in accordance with §682.202(c); reduced interest rate as provided under the Act;
• Payment of Federal default fees in accordance with HEA;
• Purchase of a loan made by another lender at a premium;
• 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;
• 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.

However, lenders, guaranty agencies, and other participants in the FFEL Program may assist schools in the same way that the Department assists schools under the Direct Loan Program. For example, a lender can also provide loan counseling for a school's students through the Web or other electronic media, and it can help a school develop, print, and distribute counseling materials.

Code of Conduct NEW

If a school participates in an FSA loan program, it must publish and enforce a code of conduct that includes bans on:

- revenue-sharing arrangements with any lender,
- steering borrowers to particular lenders or delaying loan certifications, and
- offers of funds for private loans to students in exchange for providing concessions or promises to the lender for a specific number of FSA loans, a specified loan volume, or a preferred lender arrangement.

The code of conduct applies to the officers, employees, and agents of the school and must also prohibit employees of the financial aid office from receiving gifts from a lender, guaranty agency or loan servicer.

The code must also prohibit financial aid office staff (or other employees or agents with responsibilities with respect to education loans) from accepting compensation for:

- any type of consulting arrangement or contract to provide services to or on behalf of a lender relating to education loans; and
- service on an advisory board, commission, or group established by lenders or guarantors, except for reimbursement for reasonable expenses.

When developing its code of conduct, the school should refer to DCL GEN-08-12 for further details.

Compensation for serving on an advisory board NEW

A person employed in a financial aid office who serves on an advisory board cannot receive anything of value from the lender but can receive reimbursement for reasonable expenses associated with participation. A school must report annually to ED, any such reasonable expenses paid or provided to any employee who is employed in the financial aid office, or who otherwise has responsibilities with respect to education loans or other financial aid of the institution.

The report must include
• the amount of each specific instance of reasonable expenses paid or provided;
• the name of the financial aid official, other employee, or agent to whom the expenses were paid or provided;
• the dates of the activity for which the expenses were paid or provided; and
• a brief description of the activity for which the expenses were paid or provided.

Advisory board compensation

HEOA Section 1011 Section 140 of the Truth in Lending Act
Disclosures of Reimbursements for Service on Advisory Boards
HEOA section 1011 HEA section 485(m)

Change to 90/10 rule NEW

The HEOA moves the 90/10 Rule to the Program Participation Agreement from Title I of the HEA.

As a result, a school that now violates the 90/10 Rule for one year would no longer lose its eligibility, but is placed in a "provisional" participation status.

The cash basis of accounting

A proprietary institution of higher education must use the cash basis of accounting in determining whether it satisfies the 90/10 Rule. Under the cash basis of accounting, revenue is recognized when received rather than when it is earned.

For the purpose of calculating the qualifying percentages under the 90/10 Rule, revenue is an inflow or other enhancement of assets to an entity, or a reduction of its liabilities resulting from the delivery or production of goods or services. A school may recognize revenue only when the school receives cash, i.e., when there is an inflow of cash. As a result, in order for a school to recognize revenue under the cash basis of accounting, that revenue must represent cash received from a source outside the institution.

THE 90/10 RULE

To be eligible for FSA participation, a proprietary institution may derive no more than 90% of its revenues from the FSA programs. A school must determine and certify its revenue percentages using the formula described in the chart on the following pages for its latest complete fiscal year.

A proprietary school is required to disclose the percentage of its revenues derived from the FSA programs (that the school received during the fiscal year covered by the audit) as a footnote to its audited financial statement. For information on audited financial statements, see Chapter 12.

Proprietary institutions have 90 days after their most recent fiscal year has ended to report to the Department if they did not satisfy the 90/10 Rule for that period. A school changing from for profit to nonprofit must continue to file this report for the first year of its nonprofit status.

If a school fails to satisfy the 90/10 Rule for one year, its participation status becomes provisional for two fiscal years. However, if the school does not satisfy the 90/10 Rule for 2 consecutive fiscal years, it loses its eligibility to participate in the FSA programs for at least 2 fiscal years. If the school loses eligibility, it must immediately stop awarding FSA funds and follow the closeout procedures described in Chapter 12. Schools have 90 days after their most recently completed fiscal year has ended to report to the Department if they did not satisfy the 90/10 Rule for the fiscal period.

Calculating revenues for the 90/10 rule

To be eligible for FSA participation, a proprietary institution may derive no more than 90% of its revenues from the FSA programs. A school must determine and certify its revenue percentages using the following regulatory formula for its latest complete fiscal year (34 CFR 600.5(d)).

$$\frac{\textit{FSA funds used for school charges to students}}{\textit{Total revenues generated by the school from: (1) school charges for students enrolled in eligible programs; (2) required educational activities conducted by the school (see below) .}}$$

Counting FSA funds used for school charges NEW

Any FSA funds that are disbursed or delivered to or on behalf of a student are presumed to pay the student's tuition, fees, or other school charges, unless the tuition, fees, or other charges are satisfied by

- grant funds from non-Federal public agencies or private sources independent of the institution;
- funds provided under a contractual arrangement with a federal, state, or local government agency for the purpose of providing job training to low-income individuals in need of that training;
- funds used by a student from savings plans for educational expenses established by or on behalf of the student that qualify for special tax treatment under the Internal Revenue Code; and
- institutional scholarships that count toward the 10% revenue requirement.

Other sources counted in "total revenues" NEW

Other sources that a school may count as part of its "total revenues" (after applying the presumption that FSA funds are used to pay the student's tuition, fees, and other institutional charges) include—

- institutional aid to students (see discussion of treatment of school loans on next page)
- revenue earned from a non-FSA program of study, as long as the program is approved by the state, accredited, or provides an industry-recognized credential or certificate,
- scholarships that are provided by the school in the form of monetary aid or tuition discounts based on the academic achievements or financial need of students, as long as the scholarships are disbursed during each fiscal year from an established restricted account, and only to the extent that funds in that account represent designated funds from an outside source or income earned on those funds; and
- the proceeds of Unsubsidized Stafford Loans that exceed the loan limits which were in effect on May 6, 2008 (pre-ECASLA). This provision applies to any Unsubsidized Stafford Loan received by a student on or after July 1, 2008, but before July 1, 2011.

Exclusions from fraction NEW

The following types or amounts of funds are excluded from both the numerator and denominator of the fraction under the 90/10 calculation:

- the amount of funds the school received under the FWS Program, unless it used those funds to pay for a student's institutional charges;
- the amount of funds the school received under LEAP (see below for additional guidance);
- the amount of funds provided by the school as matching funds under the FSA programs;
- the amount of funds provided by the school for an FSA program that are required to be refunded or returned; and
- the amount charged for books, supplies, and equipment, unless the school includes that amount as tuition, fees, or other institutional charges.

Revenues from required educational activities (including a clinic or service)

In figuring revenues generated by school activities, a school may include only revenue generated by the school from activities it conducts, that are necessary for its students' education or training. The activities must be—

- conducted on campus or at a facility under the control of the institution,
- performed under the supervision of a member of the institution's faculty, and
- required to be performed by all students in a specific educational program at the institution.

Revenues from auxiliary enterprises and activities that are not a necessary part of the students' education, such as revenues from the sale of equipment and supplies to students and revenues from vending machines, may not be included in the denominator of the 90/10 calculation.

If a clinic or service is operated by the school, offered at the school, performed by students under direct faculty supervision, and required of all students as part of their educational program, then revenues from the clinic or service may be included in the denominator of the 90/10 calculation.

Counting LEAP funds

If a state agency specifies the exact amount or percentage of LEAP funds included in an individual student's state grant, only the specified amount or percentage of the student's state grant up to $5,000 (the statutory maximum LEAP award) is considered LEAP funds.

If the state agency identifies a specific student's state grant as containing LEAP funds but does not provide an exact amount or percentage, the entire amount of the grant up to $5,000 is considered LEAP funds. State grant funds that are not LEAP/SLEAP are included in the denominator.

If the state agency does not specify the amount of LEAP funds included in a student's individual grant but does specify the percentage of LEAP funds in the entire amount of state grant funds provided to the school and the student meets the FSA student eligibility requirements, the school must apply this percentage to the individual student's total state grant to determine the amount of the grant up to $5,000 to be considered LEAP funds.

Tuition waivers

Institutional grants in the form of tuition waivers do not count as revenue because no new revenue is generated. Similarly, internal transfers of cash among accounts are not considered revenue because they do not represent an inflow of cash to the institution. Institutional scholarships are not revenues generated by the school (unless they are donated by an unrelated or outside third party). An exception is permitted for schools to use donations from a related party to create restricted accounts for institutional scholarships, but only the amount earned on the restricted account and used for scholarships would count as revenue in the denominator of the calculation.

Funds held as credit balances in institutional accounts cannot be counted in the 90/10 formula. However, once funds held as credit balances are used to satisfy institutional charges, they would be counted in both the numerator and the denominator of the formula.

Revenues from loans

When a school makes a loan to a student, it does not receive cash from an outside source. Accordingly, cash revenue from institutional loans is recognized only when those loans are repaid, because that is when there is an inflow of cash from an outside source. Loan proceeds from institutional loans that were disbursed to students may not be counted in the denominator of the fraction, because these proceeds neither generate nor represent actual inflows of cash. The school may include only loan repayments it received during the appropriate fiscal year for previously disbursed institutional loans.

Loans made by a private lender that are in any manner guaranteed by the school are known as recourse loans. The proceeds from recourse loans may be included in the denominator of an institution's 90/10 calculation for the fiscal year in which the revenues were received, provided that the institution's reported revenues are also reduced by the amount of recourse loan payments made to recourse loan holders during that fiscal year. Note that recourse loan payments may be for recourse loans that were made in a prior fiscal year. Under the cash basis of accounting the reductions to total revenues in the denominator of the 90/10 calculation are reported in the fiscal year when the payments are made.

The nonrecourse portion of a partial recourse loan may be included in a 90/10 calculation. In order to include a partial recourse loan in a 90/10 calculation, the contract must identify the percentage of the sale that is nonrecourse; only that percentage may be included. Furthermore, no after-the-fact adjustments may be provided for. Revenue generated from the sale of nonrecourse institutional loans to an unrelated third party may be counted as revenue in the denominator of the 90/10 calculation to the extent that the revenues represent actual proceeds from the sale.

The sale of institutional loan receivables is distinguishable from the sale of a school's other assets because receivables from institutional loans are produced by transactions that generate tuition revenue. Tuition revenue represents income from the major service provided by a school. That would not be true in the case of the sale of other school assets.

NEW

The HEOA of 2008 includes a subsequent provision that permits the inclusion of the following amounts for purposes of the 10% requirement: : For loans made to students by the institution from July 1, 2008, but before July 1, 2012, the net present value of the loans made during a fiscal year, if the loans are evidenced by promissory notes, issued at intervals related to the institution's enrollment periods, and are subject to regular loan repayments and collections. For loans made on or after July 1, 2012, only the amount of loan repayments the institution receives during a fiscal year, excluding repayment on any loans for which the institution previously used the net present value in its 90/10 calculation.

See DCL 08-12 for HEOA changes (section 493, amending HEA section 487) Effective date: August 14, 2008
Earlier guidance on 90/10 and institutional loans and scholarships can be found in Dear Partner Letter GEN-99-33 and Dear CPA Letters CPA-99-01 and CPA-99-02.

SCHOOL LENDER IN THE FFEL PROGRAM

A school lender may make only subsidized or unsubsidized Stafford Loans to graduate or professional students enrolled at the school. A home study school cannot be a school lender.

To be a school lender, a school must have made one or more FFEL program loans on or before April 1, 2006, and must have met program requirements as of February 7, 2006 (see box). To make or originate loans under the FFEL program, a school—

- Must employ at least one person whose full-time responsibilities are limited to the administration of programs of financial aid for students attending the school;
- Must award any contract for financing, servicing, or administration of FFEL loans on a competitive basis;
- Must offer loans that carry an origination fee or an interest rate, or both, that are less than the fee or rate authorized under the provisions of the Act;
- Must not have a cohort default rate greater than 10%.

Audit requirements for school lenders

A school acting as a lender is subject to certain audit requirements that apply to lenders, as described in §682.601(a)(7), and

- §682.305(c)(2)(v) for governmental entities and nonprofit organizations.
- §682.305(c)(2)(i) through (iii) for schools that are not governmental entities and nonprofit organizations.

School lender requirements on or before April 1, 2006

To be a school lender, a school must have met the requirements that were in effect as of February 7, 2006, which is the day prior to the enactment of the Higher Education Reconciliation Act of 2005 (HERA). On February 7, 2006, a school lender—

1. Had to employ at least one person whose full-time responsibilities were limited to the administration of programs of financial aid for students attending that school;
2. Could not be a home study school;
3. Could not make loans to more than 50% of the undergraduate students at the school;
4. Could not make a loan, other than a loan to a graduate or professional student, unless the borrower had previously received a loan from the school or had been denied a loan by another eligible lender;
5. Could not have a cohort default rate greater than 15%; and
6. Had to use the proceeds from any special allowance payments received from the Department and interest payments from borrowers for need-based grant programs, except for reasonable reimbursement for direct administrative expenses.

These requirements were modified by the enactment of HERA—the current provisions are described under "School lenders in the FFEL Program."

HEA §435(d)(2)
20 U.S.C. 1085
34 CFR 682.601
(Interim Final Regulations Aug. 9, 2006;
Final Regulations: Nov. 1, 2006)

Eligible Lender Trustee

For any continuing eligible lender trustee arrangements, note the requirements in 34 CFR 682.602.

A school lender must use any of the following proceeds for need-based grants:

- special allowance payments
- interest payments from borrowers
- interest subsidy payments,
- proceeds from the sale or other disposition of loans (exclusive of return of principal, any financing costs incurred by the school to acquire funds to make the loans, and the cost of charging origination fees or interest rates that are less than the statutory maximums)

An eligible school lender must ensure that the proceeds are used to supplement, and not to supplant, non-Federal funds that would otherwise be used for need-based grant programs.

An eligible school lender may use a portion of these proceeds for reasonable and direct administrative expenses that are incurred by the school and are directly related to the school's performance of actions required by statute and regulations. Reasonable and direct administrative expenses do not include financing and similar costs such as costs paid by the school to obtain funding to make FFEL loans, the cost of paying Federal default fees on behalf of borrowers, or the cost of charging origination fees or interest rates that are less than the statutory maximums.

Eligible lender trustee

A school or school-affiliated organization may not contract with an eligible lender to serve as its trustee, unless the organization is continuing or renewing a contract made on or before September 30, 2006 with the eligible lender. (The eligible lender must have held at least one loan in trust on behalf of the school or school-affiliated organization on September 30, 2006.)

TUITION RATES FOR MILITARY FAMILIES AT PUBLIC INSTITUTIONS NEW

A public institution of higher education may not charge a member of the armed forces who is on active duty for a period of more than 30 days, and whose domicile or permanent duty station is in a state that receives assistance under the Higher Education Act, his or her spouse, or his or her dependent children, tuition at a rate higher than the institution's in-state tuition rate for residents of the state.

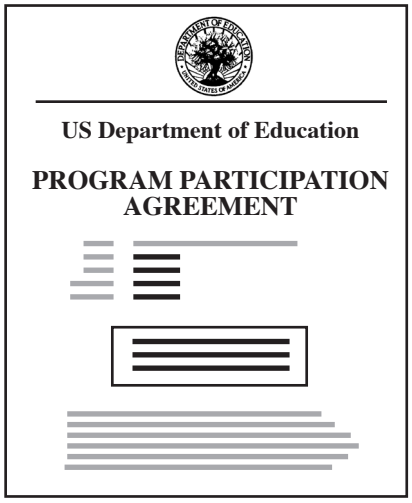
In addition, if a member of the armed forces who is on active duty, his or her spouse, or his or her dependent child pays such an in-state tuition rate, the public institution must allow the individual to continue to pay such a rate as long as the individual is continuously enrolled, even if there is a subsequent change in the permanent duty station of the member to a location outside of the state.

For the purpose of this provision—

- "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.
- "active duty" means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.
- "active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

Program Participation Agreement cites

Sec. 487 of the HEA
34 CFR 668.14


US Department of Education

PROGRAM PARTICIPATION AGREEMENT

Programs covered by the PPA

An eligible school must enter into a PPA with the Department to participate in the following programs:

- Federal Pell Grant, ACG,* National SMART*
- Federal Supplemental Educational Opportunity Grant (FSEOG)
- Federal Work-Study (FWS)
- Federal Perkins Loan (Perkins)
- Federal Direct Loan Program (DL)
- Federal Family Education Loan (FFEL)

*A school that is certified for Pell Grant purposes is considered to be certified for the ACG and National SMART Grant programs, if it has at least one academic program that is ACG/SMART-eligible.

THE PROGRAM PARTICIPATION AGREEMENT

To participate in the FSA programs, a school must have a current Program Participation Agreement (PPA), signed by the school's President or Chief Executive Officer and an authorized representative of the Secretary of Education.

Purpose and scope of the PPA

Under the PPA, the school agrees to comply with the laws, regulations, and policies governing the FSA programs. After being certified for FSA program participation, the school must administer FSA program funds in a prudent and responsible manner. A PPA contains critical information about a school's participation in the FSA programs. In addition to the effective date of a school's approval, the date by which the school must reapply for participation, and the date on which the approval expires, the PPA lists the FSA programs in which the school is eligible to participate.

Expiration or termination of the Agreement

Either the school or the Department may terminate the Program Participation Agreement. The Agreement automatically terminates if the school loses eligibility.

A school's Program Participation Agreement expires on the date that—

- the school changes ownership that results in a change in control (*see* Chapter 5),
- the school closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the school or its students;
- the school ceases to meet the eligibility requirements (*see* Chapter 1),
- the school's period of participation expires, or
- the school's provisional certification is revoked.

In the case of a location of the school, the school's program participation agreement no longer covers a location as of the date on which that location ceases to be a part of the participating institution.

Contents of the Program Participation Agreement

General Terms & Conditions

After enumerating the FSA programs in which a school is authorized to participate, a Program Participation Agreement states the General Terms and Conditions for institutional participation. By signing the Agreement a school certifies that it—

1. will comply with the program statutes, regulations, and policies governing the FSA programs;
2. has established a drug abuse prevention policy accessible to any officer, employee, or student at the school (see Chapter 3) and is in compliance with the disclosure requirements for Campus Security Policy and Crime Statistics (Chapter 6).
3. will comply with
   a. Title VI of the Civil Rights Act of 1964, as amended, barring discrimination on the basis of race, color, or national origin;
   b. Title IX of the Education Amendments of 1972, barring discrimination on the basis of sex;
   c.. the Family Rights and Privacy Act of 1974 (see Chapter 9)
   d. Section 504 of the Rehabilitation Act of 1973, barring discrimination on the basis of physical handicap (34 CFR Part 104); and
   e. The Age Discrimination Act of 1975 (34 CFR Part 110);
4. acknowledges that the Department, states, and accrediting agencies may share information about the school without limitation; and
5. acknowledges that the school must, prior to any other legal action, submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration.

Selected provisions from the General Provisions

In addition to the general statement that a school will comply with the program statutes, regulations, and policies governing the FSA programs, the Program Participation Agreement contains references to selected important provisions of the General Provisions Regulations (34 CFR Part 668). The Program Participation Agreement specifies that—

1. The school will use funds received under any FSA program as well as any interest and other earnings thereon ***solely for the purposes specified for that program.***
2. If the school is permitted to request FSA program funds under an advance payment method, the school will ***time its requests for funds to meet only the school's immediate FSA program needs*** (*see Volume 4 – Chapter 3*).
3. ***The school will not charge for processing or handling any application, form, or data used to determine a student's FSA eligibility*** (***see Chapter 3***).
4. The school will establish administrative/fiscal procedures and reports that are necessary for the proper and efficient management of FSA funds, and it will ***provide timely information*** on its administrative capability and financial responsibility to the Department and to the appropriate state, guaranty, and accrediting agencies (*see Chapters 10 and 11*).

5-6. The school will comply with the standards of ***financial responsibility and administrative capability*** (*see Chapters 10 and 11*).
7. The school will submit timely reports to the Department and to loan holders, as required.
8. A school must not certify or originate an FFEL or Direct Loan for an amount that exceeds the annual or aggregate loan limits. (see *Volume 3, Chapter 4 and Volume 4, Chapter 1)*.
9. The school will provide information concerning ***institutional and financial assistance information*** as required to students and prospective students (*see Chapter 6*).
10. If the school advertises ***job placement rates*** to attract students, it must make available to prospective students the most recent available data concerning employment statistics, graduation statistics, and other information to substantiate the truthfulness of the advertisements, as well as the state licensing requirements for the jobs for which the training will prepare the student (*see Chapter 6*).
11. If the school participates in the FFEL program, the school will provide borrowers with information about ***state grant assistance*** from the state in which the school is located, and will inform borrowers from other states of the sources of information about state grant assistance from those states (*see Chapter 6*).
12. The school will provide required certifications (see the certifications listed at the end of this numbered list).
13. If the school provides financial assistance to students under the ***ability to benefit*** provisions, the school will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma (*see Chapter 3*).

The law does not require a school to verify that a student is enrolled in a GED program or to monitor the student's progress in the program. A student admitted based on his or her ability to benefit who does not have a high school diploma or its recognized equivalent is not required by law to enroll in a GED program, but the school may choose to make this an admission requirement

14. The school cannot deny FSA funds on the grounds that a student is ***studying abroad*** if the student is studying in an approved-for-credit program (*see Chapters 1 and 7*).
15-16. To begin participation in the FFEL programs (or if a school ***changes ownership*** or changes its status as a parent or subordinate institution), the school must develop a ***default management plan*** for approval by the Department and must implement the plan for at least two years. (*see discussion & exceptions in Chapter 10*)
17. The school must ***acknowledge the authority of the*** Department and other entities to share information regarding fraud, abuse, or the school's eligibility for participation in the FSA programs (*see Chapter 12*).
18. The school ***may not knowingly employ or contract*** with any individual, agency, or organization that has been convicted of or pled guilty or nolo contendere to a crime or was judicially determined to have committed fraud involving the acquisition, use, or expenditure of federal, state, or local government funds or has been administratively or judicially determined to have committed fraud or any other material violation involving federal, state, or local government funds (*see Chapter 1*).
19. The school must, in a ***timely manner***, complete reports, surveys, and any other data collection effort of the Department including surveys under the Integrated Postsecondary Education Data System (IPEDS).
20. In the case of a school that offers athletically related student aid, it will ***disclose the***

completion and graduation rates of student athletes and the athletic program participation and financial support pursuant to 34 CFR 668.47 and 34 CFR 668.48 in conformance with the Student Right-to-Know Act (*see Chapter 6*).

21. The school ***cannot penalize*** in any way a student who is unable to pay school costs due to compliance with the FSA program requirements or due to a delay in an FSA loan disbursement caused by the school.
22. The school cannot pay or contract with any entity that pays commissions or other incentives based directly or indirectly on securing enrollment or financial aid (except when recruiting foreign students ineligible for FSA program funds) to persons engaged in recruiting, enrolling, admitting, or financial aid administration (*see Chapter 3*).
23. The school must comply with the program integrity requirements established by the Department, state authorizing bodies, and accrediting agencies (*see Chapter 12*).
24. The school must comply with the requirements for the ***Return of Title IV funds*** when a student withdraws (*see Volume 5, Chapter 2*).
25. The ***school is liable*** for all improperly administered funds received or returned under the FSA programs including any funds administered by a third-party servicer (*see Chapter 3*).
26. If the stated objectives of an educational program offered by the school are preparing students for ***gainful employment in a recognized occupation the school*** will
    a. demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation, and
    b. establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

The PPA also contains an unnumbered provision concerning the reporting requirements for schools that offer athletically-related student aid. See Chapter 6 for a discussion of this requirement.

Certifications

Three certifications are included in the PPA:

- Lobbying; Debarment, Suspension, and other responsibility matters; and Drug-Free Workplace Requirements
- Drug Prevention Certification
- Certification regarding Debarment, Suspension, Eligibility, and Voluntary Exclusion—lower tier covered transactions.

Additional provisions for Direct Loan schools

The school and its representatives shall comply with the statute, guidelines, and regulations governing the Title IV, Part D, William D. Ford Federal Direct Loan Program as required by Section 454 of Public Law 103-66.

The school will:

- Identify eligible FSA applicants and estimate their need, based on the law.
- Provide a certification statement of eligibility for students to receive loans that will not exceed the annual or aggregate limits
- Establish a schedule for disbursement of loan proceeds to meet the requirements of Section 428G of the HEA.
- Provide timely and accurate information to the Department on enrollment status and the status of student borrowers (if known) after the student leaves the institution, and the utilization of FSA funds.
- Comply with student loan information requirements for the Direct Loan Program.

- Provide that student and parents will be eligible to receive FFEL loans, at the discretion of the Department, except that a student or parent may not receive FFEL and Direct Loans for the same period of enrollment.
- Implement a quality assurance system
- Not charge any fees of any kind to student or parent borrowers for loan application, origination activities, or the provision and processing of any information needed to receive a Direct Loan.
- The school will originate loans to eligible students and parents in accordance with the requirements of Part D of the HEA and use funds advanced to it solely for that purpose (Option 2 only).
- The note or evidence of obligation of the loan shall be the property of the Secretary (Options 2 and 1 only).
- Implement such other provisions as the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of Part D of the HEA.
- Accept responsibility and financial liability stemming from its failure to perform its functions under this Program Participation Agreement.

The Institution's continued approval to participate in the Direct Loan Program will be based on the Department of Education's review and approval of the Institution's future applications for recertification to continue participating in the federal student aid programs.
Note that the PPA may list additional requirements that are school-specific; schools must carefully review *all* of the requirements listed on their PPA.
In addition to the requirements listed on the PPA, a school must meet any requirements for participation in the General Provisions (34 CFR Part 668), as well as those specific to an individual FSA program.

* FEDERAL PELL GRANT PROGRAM, 20 U.S.C. 1070a et seq; 34 CFR Part 690.
* FEDERAL FAMILY EDUCATION LOAN PROGRAM, 20 U.S.C. 1071 et seq; 34 CFR Part 682.
* FEDERAL DIRECT STUDENT LOAN PROGRAM, 20 U.S.C. 1087a et seq; 34 CFR Part 685.
* FEDERAL PERKINS LOAN PROGRAM, 20 U.S.C. 1087aa et seq; 34 CFR Part 674.
* FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM, 20 U.S.C. 1070b et seq; 34 CFR Part 676.
* FEDERAL WORK-STUDY PROGRAM, 42 U.S.C. 2751 et seq; 34 CFR Part 675.
* ACADEMIC COMPETITIVENESS GRANT, 1070a-1; 34 CFR Part 691
* NATIONAL SCIENCE AND MATHEMATICS ACCESS TO RETAIN TALENT GRANT GRANT, 1070a-1; 34 CFR Part 691

These requirements are discussed in the *Application and Verification Guide* and Volumes 1–6 of this *Federal Student Aid Handbook*.

NEW

PROVISIONS ADDED TO THE PPA BY THE HIGHER EDUCATION OPPORTUNITY ACT

Preferred lender list
Schools with preferred lender arrangements must compile and make available a list of the lenders that it promotes and recommends. See Chapter 3 for specific requirements.

Code of conduct
Schools that participate in the FSA loan programs must develop and enforce a code of conduct. See further discussion in Chapter 3.

Copyright protection
The school must certify that it has developed plans to effectively combat the unauthorized distribution of copyrighted material and will, to the extent practicable, offer alternatives to illegal downloading or peer-to-peer distribution of intellectual property.

Private education loan certification
Upon request from a student or parent who is applying for a private education loan, a school must provide the disclosure form required under The Truth in Lending Act and the information needed to complete the form (to the extent the school has that information). See Chapter 6.

Disciplinary proceedings
Schools are required to disclose, upon request, the results of disciplinary hearings to the victims of crimes of violence or sex offenses. See Chapter 6

90/10 Rule
The 90/10 rule for proprietary schools has been moved to the PPA. See Chapter 9 for discussion of the 90/10 calculation.

Effective date for Report on Results of Disciplinary Proceeding:
August 14, 2009
All other provisions are effective August 14, 2008

See GEN 08-12 for additional information on these new requirements