

**Proposed Regulatory Language
"Contextual Format"
Loans Committee**

Origin: ED

Issue: Definition of "Not-for Profit" Lender for the purpose of Differential Special Allowance Subsidy Payments to Lenders in the FFEL Program

Regulatory Cite: §682.302

Summary of Change: Amend (f)(3) of §682.302, which defines "not-for-profit" holder for the purpose of special allowance subsidy payments to FFEL lenders, to reflect the technical amendment made to the definition in the Higher Education Act of 1965 (HEA) by the Third Higher Education Extension Act of 2007, to include requirements for documenting a lender's eligibility for not-for-profit status, and to clarify other aspects of the definition.

Change:

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

- (1) Except as provided in paragraph (f)(2) of this section, the special allowance formula shall be computed by—
- (i) Determining the average of the bond equivalent rates of the quotes of the 3-month commercial paper (financial) rates in effect for each of the days in such quarter as reported by the Federal Reserve in Publication H-15 (or its successor) for such 3-month period;
 - (ii) Subtracting the applicable interest rate for that loan;
 - (iii) Adding—
 - (A) 1.79 percent to the resulting percentage for a Federal Stafford loan;
 - (B) 1.19 percent to the resulting percentage

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- for a Federal Stafford Loan during the borrower's in-school period, grace period and authorized period of deferment;
- (C) 1.79 percent to the resulting percentage for a Federal PLUS loan; and
- (D) 2.09 percent to the resulting percentage for a Federal Consolidation loan; and
- (iv) Dividing the resulting percentage by 4.
- (2) For loans held by an eligible not-for-profit holder as defined in paragraph (f)(3) of this section, the special allowance formula shall be computed by–
 - (i) Determining the average of the bond equivalent rates of the quotes of the 3-month commercial paper (financial) rates in effect for each of the days in such quarter as reported by the Federal Reserve in Publication H-15 (or its successor) for such 3-month period;
 - (ii) Subtracting the applicable interest rate for that loan;
 - (iii) Adding–
 - (A) 1.94 percent to the resulting percentage for a Federal Stafford loan;
 - (B) 1.34 percent to the resulting percentage for a Federal Stafford Loan during the borrower's in-school period, grace period and authorized period of deferment;
 - (C) 1.94 percent to the resulting percentage for a Federal PLUS loan; and
 - (D) 2.24 percent to the resulting percentage for a Federal Consolidation loan; and
 - (iv) Dividing the resulting percentage by 4.

(3) Eligible Not-for-Profit Holder (i) For purposes of this section, the term “eligible not-for-profit holder” means an eligible lender under section 435(d) of the Act (except for a school) that requests special allowance payments from the Secretary and that is–

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

- (B) An entity described in section 150(d)(2) of the Internal Revenue Code of 1986 that has not made the election described in section 150(d)(3) of that Code;
- (C) An entity described in section 501(c)(3) of the Internal Revenue Code of 1986; or
- (D) A trustee acting as an eligible lender on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (f)(3)(i)(A), (B), or (C) of this section, other than an eligible institution under section 435(a) of the Act, regardless of whether that State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under 435(d) of the Act.
- (E) For purposes of paragraph (f)(3), the term “State or non-profit entity” means an entity that is not a school and that is described in paragraph (f)(3)(i)(A), (B), or (C), regardless of whether such entity is an eligible lender under section 435(d) of the Act.

(ii) An entity that otherwise qualifies under paragraph (f)(3)(i) of this section shall not be considered an eligible not-for-profit holder unless such lender, on September 27, 2007–

- (A) Was a State or non-profit entity and, on the date of the enactment of the College Cost Reduction and Access Act, acting as an eligible lender under section 435(d) of the Act, other than a school lender, and had made or acquired on or before that date a FFELP loan, unless the State waives this requirement under (iii) of this section; or
- (B) Was acting as an eligible lender ~~Is a trustee acting as an eligible lender~~ on behalf of a State or non-profit an entity that was the sole beneficial owner of a loan eligible for special allowance payment on that date. described in paragraph (f)(3)(ii)(A) of this section.

(iii) Subject to the provisions of section 435(d)(1)(D) of the Act, a State may waive the requirement of subparagraph (f)(3)(ii)(A) to identify a new eligible not-for-profit holder pursuant to a written application filed with the Secretary in accordance with paragraph (f)(3)(x),

for the purposes of carrying out a public purpose of the State, except that a State may not designate a trustee for this purpose.

(iviii) A State or non-profit entity, and a trustee to the extent acting on behalf of such an entity~~No political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section~~ shall not be an eligible not-for-profit holder if the entity is owned or controlled, in whole or in part, by a for-profit entity. A for-profit entity has ownership and control of such an entity, for purposes of this paragraph if –

(A) A for-profit entity is a member or shareholder of an entity that is a membership or stock corporation with the for-profit entity’s resulting power sufficient to control the entity;

(B) A for-profit entity employs or appoints individuals that together constitute a majority of the entity’s board of trustees or directors, or a majority of such board’s audit committee, executive committee, or compensation committee;
or

(C) For an entity that has no board of trustees or directors and associated committees of such, a for-profit entity is authorized by law, agreement, or otherwise to approve decisions by the entity regarding its audits, investments, hiring, retention, and compensation of officials, unless the Secretary determines that the particular authority to approve such decisions is not likely to affect the integrity of those decisions.

(v) For purposes of paragraph (f)(3) of this section–

(A) “Control” (including the term “controlling” and “controlled by”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(B) An individual is deemed to be employed or appointed by a for-profit entity if the for-profit entity employs a family member, as defined in §600.21(f), of that individual.

(C) “Beneficial owner” (including “beneficial ownership” and “owner of a beneficial interest”) means the entity that has those rights with respect to the loan or income from the loan that are the normal incidents of ownership, including the right to receive, possess, use, and sell or otherwise exercise control over the loan and the income from the loan.

(D) “Sole owner” means the entity that has all the rights described in (C), to the exclusion of any other entity, with respect both to a loan and the income from a loan.

~~(iv)(vi)~~ No State or non-profit entity, and no trustee to the extent acting on behalf of such an entity, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section shall be an eligible not-for-profit holder with respect to any loan, or income from any loan on which payment is claimed at the rate established under paragraph (f)(2) of this section, unless such entity, unless the State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section is the sole owner of the beneficial interest in such loan and the income from such loan.

~~(v)(vii)~~ (A) A trustee described in paragraph (f)(3)(i)(D) of this section shall not receive compensation as consideration for acting as an eligible lender on behalf of an State or non-profit entity described in paragraph (f)(3)(i)(A), (B), or (C) of this section in excess of reasonable and customary fees paid for providing the particular service or services which the trustee undertakes to provide to such entity.

(B) Fees are reasonable and customary, for purposes of this paragraph, if they do not exceed the amounts paid by similar entities with regards to portfolios of similar size, as determined by survey by the entity or such other method as the Secretary considers reliable.

(C) Loans owned by a State or non-profit entity for which fees are paid to or at the direction of a trustee for any service for such loans in excess of

reasonable and customary rates cease to qualify for special allowance payment at the rate prescribed under paragraph (f)(2) of this section.

~~(vi)(viii)~~ For purposes of this paragraph, an State or non-profit entity that grants a security interest in, or otherwise pledges as collateral, a loan, or the income from a loan, to secure a debt obligation in the operation of an arrangement described in paragraph (f)(3)(i)(D) of this section, shall not, by such action ~~-otherwise eligible not-for-profit holder shall not-~~

- (A) Be deemed to be owned or controlled, in whole or in part, by a for-profit entity; or
- (B) Lose its status as the sole owner of a beneficial interest in a loan and the income from a loan. ~~by granting a security interest in, or otherwise pledging as collateral, such loan, or the income from such loan, to secure a debt obligation in the operation of an arrangement described in paragraph (f)(3)(i)(D) of this section.~~

(ix) A State or non-profit entity shall be deemed to be controlled by a for-profit entity if the State or non-profit entity, after September 27, 2007 -

- (A) Agrees to payment of fees to any party in any form in excess of those fees reasonable and customary for a service or services performed with respect to any loans owned by such entity, including loans on which special allowance is claimed at the rate set in paragraph (f)(1) of this section;
- (B) Acquires any loans in consideration of payments to a for-profit entity that have a present value that exceeds the acquisition price paid by other entities to acquire similar loans, as determined by survey by the entity or by such other method as the Secretary considers reliable; or
- (C) Acquires loans on which payment is claimed under (f)(2) that are subject to conditions on its full exercise of all rights and the income

from such loans except as those rights may be foreclosed by exercise of rights upon default under the terms of the debt obligation used to finance acquisition of such loans.

(x) Not-for-Profit Holder Eligibility Determination

A State or non-profit entity that seeks to qualify as an eligible not-for-profit holder, either in its own right or through a trustee agreement, must provide to the Secretary-

- (A) A certification on the entity’s letterhead signed by the entity’s Chief Executive Officer (CEO) which -
- (1) States the basis upon which the entity qualifies as a State or non-profit entity;
 - (2) Includes documentation establishing its status as State or non-profit entity;
 - (3) Includes the name and lender identification number(s) of the entities for which designation is being certified; and
 - (4) For an entity establishing status under section 150(d) of the Internal Revenue Code of 1986, includes copies of the State requests or requirements described in section 150(d)(2) of the Code and the CEO’s additional certification that the entity has not elected under section 150(d)(3) of the Code to cease its status as a qualified scholarship funding corporation.
- (B) A separately submitted certification by the entity’s external legal counsel with supporting documentation that shows that the entity -
- (1) Is a constituted state entity by operation of specific State law;
 - (2) Has been designated by the State or an instrumentality of a State to serve as a qualified scholarship funding corporation under section 150(d)(2) of the Code, has not elected to cease its status under 150(d)(3) of the Code, and is incorporated under State law as a not-for-profit organization
 - (3) Is a not-for-profit organization incorporated as such under State law; or

(4) Has in effect a relationship with an eligible lender under which the lender as trustee holds title to loans to which the entity has sole beneficial ownership rights, including right to income from the loan.

(xi) Not-For-Profit Holder Change of Status - Within 10 business days of becoming aware of a change or planned change that will affect whether a State or non-profit entity that has been designated an eligible not-for-profit holder, either directly or through an eligible lender trustee, retains that eligibility, the entity must -

- (A) Submit details of the change to the Secretary; and
- (B) Cease billing for special allowance at the rate established under (f)(2) for the quarter in which the change occurs and any subsequent quarters pending the Secretary’s determination whether such entity retains that eligibility.

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