

DRAFT Amendatory Language—Eligible Not-for-Profit Holder Definition
Pre-decisional discussion draft for April 14-15, 2008

April 9, 2008

For the reasons discussed in the preamble, the Secretary amends part 682 of title 34 of the Code of Federal Regulations as follows:

Part 682--FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

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

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

x. Section 682.302 is amended by:

A. In the introductory text of paragraph (f)(3)(i), adding the title "Eligible Not-for-Profit Holder" after the numeral "(3)" and before the "(i)", and adding the words "that requests special allowance payments from the Secretary" after the words "(except for a school)".

B. In paragraph (f)(3)(i)(D), removing the punctuation "." after the word "section" and adding, in its place, the words ", other than an eligible institution under 435(a) of the Act, regardless of whether that State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under section 435(d) of the Act."

C. Redesignating paragraph (f)(3)(ii) as (f)(3)(iii).

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D. Redesignating paragraph (f)(3)(iii) as paragraph (f)(3)(v).

E. Adding new paragraph (f)(3)(ii).

F. Revising redesignated paragraph (f)(3)(iii).

G. Redesignating paragraphs (f)(3)(iv), (f)(3)(v), and (f)(3)(vi) as paragraphs (f)(3)(vii), (f)(3)(viii), and (f)(3)(ix), respectively.

H. Adding new paragraph (f)(3)(iv).

I. Revising redesignated paragraph (f)(3)(v).

J. Adding new paragraph (f)(3)(vi).

K. Revising redesignated paragraph (f)(3)(vii).

L. Revising redesignated paragraph (f)(3)(viii).

M. Revising redesignated paragraph (f)(3)(ix).

N. Adding new paragraphs (f)(3)(x), (f)(3)(xi), and (f)(3)(xii).

O. Redesignating paragraph (f)(4) as (f)(3)(xiii).

The revisions and additions read as follows:

§682.302 Payment of special allowance on FFEL Loans.

* * * * *

(f) * * *

(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

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(except for a school) that requests special allowance payments from the Secretary and that is--

* * * * *(D) A trustee acting as an eligible lender on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (f)(3)(i)(A), (f)(3)(i)(B), or (f)(3)(i)(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 section 435(d) of the Act.

* * * * *

(ii) For purposes of paragraph (f)(3) of this section, 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), (f)(3)(i)(B), or (f)(3)(i)(C) of this section, regardless of whether such entity is an eligible lender under section 435(d) of the Act.

(iii) 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--

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(A) Was a State or non-profit entity and an eligible lender under section 435(d) of the Act, other than a school lender, and had made or acquired on or before September 27, 2007, a FFELP Loan, unless the State waives this requirement under paragraph (f)(3)(iv) of this section; or

(B) Is acting as an eligible lender trustee on behalf of a State or non-profit entity that was the sole beneficial owner of a loan eligible for a special allowance payment on September 27, 2007.

(iv) Subject to the provisions of section 435(d)(1)(D) of the Act, a State may waive the requirement of paragraph (f)(3)(iii)(A) of this section to identify a new eligible not-for-profit holder pursuant to a written application filed in accordance with paragraph (f)(3)(x) of this section, for the purposes of carrying out a public purpose of the State, except that a State may not designate a trustee for this purpose.

(v) A State or non-profit entity, and a trustee to the extent acting on behalf of such an entity, shall not be an eligible not-for-profit holder if the State or non-profit entity is owned or controlled, in whole or in part, by a for-profit entity. A for-profit entity has ownership

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and control of a State or non-profit entity, for purposes of this paragraph if--

(A) The for-profit entity is a member or shareholder of a State or non-profit entity that is a membership or stock corporation, and the for-profit entity has sufficient power to control the State or non-profit entity;

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

(C) For a State or non-profit entity that has no board of trustees or directors and associated committees of such, the for-profit entity is authorized by law, agreement, or otherwise to approve decisions by the entity regarding its audits, investments, hiring, retention, or 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.

(vi) For purposes of paragraph (f)(3) of this section--

(A) A for-profit entity has sufficient power to control a State or non-profit entity if it possesses

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directly, or represents, either alone or together with other persons, under a voting trust, power of attorney, proxy, or similar agreement, one or more persons who hold, individually or in combination with the other person represented or the persons representing them, a sufficient voting percentage of the membership interests or voting securities to direct or cause the direction of the management and policies of the State or non-profit entity.

(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, unless the Secretary determines that the particular nature of the family member's employment is not likely to affect the integrity of decisions made by the board or committee member.

(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, subject to any rights granted and limitations imposed in connection with or related to the

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granting of a security interest described in paragraph (f)(3)(ix) of this section, and subject to any limitations on such rights under the Act as a result of such entity not qualifying as an eligible lender or holder under the Act.

(D) "Sole owner" means the entity that has all the rights described in paragraph (f)(3)(vi)(C) of this section, which may be subject to the rights and limitations described in paragraph (f)(3)(vi)(C), to the exclusion of any other entity, with respect both to a loan and the income from a loan.

(vii) No State or non-profit entity, and no trustee to the extent acting on behalf of such a State or non-profit entity, 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 State or non-profit entity is the sole owner of the beneficial interest in such loan and the income from such loan.

(viii) (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 a State or non-profit entity in excess of reasonable and customary fees paid for providing the particular service or

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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 received by the trustee for similar services with regard to similar portfolios of loans of that State or non-profit entity that are not eligible to receive special allowance at the rate established under paragraph (f)(2) of this section, or if they do not exceed an amount as determined by such other method requested by the State or non-profit entity that the Secretary considers reliable.

(C) Loans owned by the State or non-profit entity for which the trustee receives fees in excess of the amount permitted by paragraph (f)(3)(viii) of this section cease to qualify for a special allowance payment at the rate prescribed under paragraph (f)(2) of this section.

(ix) For purposes of paragraph (f)(3) of this section, if a State or non-profit entity, or a trustee acting on its behalf, grants a security interest in, or otherwise pledges as collateral, a loan, or the income from a loan, to secure a debt obligation for which such State or non-profit entity is the issuer of that debt obligation, the State or non-profit entity shall not, by such action--

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(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.

(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 trust agreement with an eligible lender trustee, must provide to the Secretary--

(A) A certification on the State or non-profit entity's letterhead signed by the State or non-profit 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 a 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 requests of the State or political subdivision or subdivisions thereof or requirements

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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 or opinion by the State or non-profit entity's external legal counsel or the office of the attorney general of the State, with supporting documentation that shows that the State or non-profit entity--

(1) Is a constituted State entity by operation of specific State law;

(2) Has been designated by the State or one or more political subdivisions of the State to serve as a qualified scholarship funding corporation under section 150(d) of the Code, has not made the election described under section 150(d)(3) of the Code, and is incorporated under State law as a not-for-profit organization.

(3) Is incorporated under State law as a not-for-profit organization or is an entity described in Section 503(c)(3) of the Code; or

(4) Has in effect a relationship with an eligible lender under which the lender is acting as trustee on behalf of the State or non-profit entity.

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(xi) Annual Certification by Eligible Not-for-Profit Holder. A State or non-profit entity that seeks to retain its eligibility as an eligible not-for-profit holder, either in its own right or through a trust agreement with an eligible lender trustee, must annually provide to the Secretary—

(A) A certification on the State or non-profit entity's letterhead signed by the State or non-profit entity's Chief Executive Office (CEO) which--

(1) Includes the name and lender identification number(s) of the entities for which designation is being recertified;

(2) States that the State or non-profit entity has not altered its status as a State or non-profit entity since its prior certification to the Secretary, or, if it has altered its status, describes any such alterations; and

(3) States that the State or non-profit entity continues to satisfy the requirements of an eligible not-for-profit holder, either in its own right or through a trust agreement with an eligible lender trustee;

(B) A copy of its IRS Form 990, if applicable, at the same time it files that return with the Internal Revenue Service.

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(xii) Not-For-Profit Holder Change of Status--Within 10 business days of becoming aware of a change that may result in a State or non-profit entity that has been designated an eligible not-for-profit holder, either directly or through an eligible lender trustee, losing that eligibility, the State or non-profit entity must--

(A) Submit details of the change to the Secretary;

and

(B) Cease billing for special allowance at the rate established under paragraph (f)(2) of this section for the period from the date of the change that may result in it no longer being eligible for the rate established under paragraph (f)(2) of this section to the date of the Secretary's determination that such entity has not lost its eligibility as a result of such change; provided, however, that in the quarter following the Secretary's determination that such eligible not-for-profit holder has not lost its eligibility, the eligible not-for-profit holder may submit a billing for special allowance during the period from the date of the change to the date of the Secretary's determination equal to the difference between special allowance at the rate established under paragraph (f)(2) of

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this section and the amount it actually billed at the rate established under paragraph (f)(1) of this section.

(xiii) In the case of a loan for which 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.