DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AC52

Student Assistance General Provisions

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

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

EFFECTIVE DATE: These regulations take effect on July 1, 1999.

FOR FURTHER INFORMATION CONTACT: Kenneth Smith, U.S. Department of Education, 600 Independence Avenue, SW., ROB–3, Room 3045, Washington, DC 20202–5447. Telephone: (202) 708–8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

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

SUPPLEMENTARY INFORMATION: On July 13, 1998, the Secretary published a notice of proposed rulemaking (NPRM) for the Student Assistance General Provisions regulations in the **Federal Register** (63 FR 37714).

The NPRM included a discussion of the major issues surrounding the proposed changes that will not be repeated here. The following list provides summaries of the changes and identifies the pages of the preamble to the NPRM on which a discussion of the issues can be found:

Section 668.17(h) Loan Servicing Appeals

The Secretary proposed to allow a school to challenge its Direct Loan Program cohort rate or weighted average cohort rate on the basis of the improper servicing or collection of the Direct Loans included in the calculation of the rate. (63 FR 37714)

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

The Secretary proposed that once the Secretary initiates a proposed limitation, suspension, or termination (LS&T) action under § 668.17(a)(2), based on the school's rate, the school may not challenge that rate.

The Higher Education Amendments of 1998 (Pub. L. 105–244, enacted October 7, 1998) (the Amendments) make changes that affect the calculation of Direct Loan Program and weighted average cohort rates. Regulations implementing the requirements contained in the Amendments will be drafted through the process provided in that statute. The Secretary has determined that these final regulations are not subject to the implementation process provided in the Amendments.

These final regulations contain changes from the NPRM. These changes are fully explained in the Analysis of Comments and Changes that follows.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, eight parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

Major issues are grouped according to subject, with appropriate sections of the regulations referenced in parentheses. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—generally are not addressed.

General

Comments: All of the commenters supported the Secretary's proposal of a process for schools to challenge their Direct Loan Program cohort rates or weighted average cohort rates on the basis of allegations of the improper servicing or collection of the Direct Loans included in the rates. The commenters said they appreciated the Secretary's effort to make provisions of the Federal Family Education Loan (FFEL) Program and the Direct Loan Program more equal in this area. Two commenters also specifically noted their support of the Secretary's clarification of when a rate is considered final, at § 668.17(i), agreeing that the provision would assist in addressing unnecessary delays.

Discussion: The Secretary appreciates the commenters' support.

Changes: None.

Effective Dates for FY 1996 Appeals (Preamble)

Comments: The preamble to the NPRM (63 FR 37715) stated that the Secretary intends to allow a school to appeal its official Direct Loan Program cohort rate or weighted average cohort rate for fiscal year (FY) 1996 on the basis of the improper servicing or collection of the Direct Loans included in the rate as defaulted loans. Two commenters asked for clarification of this statement and requested information about the effective date, the ending date, and whether the provision is retroactive. One commenter reasoned that this information is needed because schools participating in the Direct Loan Program were not given the opportunity to respond to draft cohort rate data.

Discussion: The Secretary will allow schools to appeal rates based on the improper servicing or collection of Direct Loans when the schools are notified of their FY 1996 official rates, later this year. Appeals on this basis will be made using the timelines and requirements published in these regulations. The provisions in these regulations also apply to a school's ability to appeal previous rates on this basis. A school may only appeal its FY 1994 or FY 1995 rate based on the improper servicing or collection of Direct Loans if the school is subject to loss of participation due in part to its FY 1994 or FY 1995 rate.

One commenter argued that ''effective'' and ''ending'' dates should be provided because schools participating in the Direct Loan Program have not been given the opportunity to respond to draft data. This comment, however, is based on a misunderstanding of the draft data review process. The draft data review process allows schools to review the data on which the rate is based; it does not apply to allegations of improper servicing or collection. Those allegations can only be raised during the appeal after the final rates are issued. The draft data review process is essentially the same for a Direct Loan Program loan as it is for an FFEL Program loan.

Changes: None.

Use of ''Shall'' and ''Must'' (§ 668.17(h)(3)(iii)(B))

Comments: Two commenters noted that the use of the words ''shall'' and ''must'' appears to be inconsistent when provisions for the FFEL Program (§ 668.17(h)(3)(ii)(B)) are compared with those for the Direct Loan Program (§ 668.17(h)(3)(iii)(B)). For example, regulations governing the FFEL Program state that ''the guaranty agency shall provide'' or ''the guaranty agency must provide,'' while regulations for the Direct Loan Program state only that ''the Secretary provides.'' The commenters asked that the language be identical in order to eliminate misinterpretations and to promote parity.

Discussion: The difference in regulatory language is a necessary reflection of the difference in the purpose of the regulations, and it is consistent with language used in other regulations. In the FFEL Program regulations, the Secretary is regulating the activities of guaranty agencies; in the Direct Loan requirements, the Secretary is providing notice of departmental procedures.

Changes: No change is made in response to the commenters' request. However, to correct an inconsistency in the regulatory language, the last sentence of § 668.17(h)(3)(iii)(B)(*6*) was changed from ''the Secretary shall notify'' to ''the Secretary notifies.''

Selection of Representative Sample (§ 668.17(h)(3)(iii)(B))

Comments: One commenter on behalf of a school stated that a school is capable of identifying students who have experienced loan servicing problems, and the commenter wanted to ensure that those students would be included in a school's representative sample. The commenter asked that a school be allowed to supply a list of those students for inclusion in the representative sample.

Discussion: The manner in which a representative sample is determined is described in § 668.17(h)(3)(ii)(B) for FFEL Program loans and in § 668.17(h)(3)(iii)(B) for Direct Loan Program loans. A representative sample is not intended to identify each individual improperly serviced loan included in the calculation of the school's rate. Instead, it is used to calculate a reliable estimate of the number of improperly serviced loans included in the school's rate. This estimate cannot be valid if it includes pre-selected loans.

Changes: None.

Documentation of Criteria (§§ 668.17(h)(3)(iii)(B) and 668.17(h)(3)(viii))

Comments: One commenter stated that, since the Secretary does not regulate the Department's procedures for servicing Direct Loans, a school cannot know whether it has received complete loan servicing and collection records. The commenter recommended that the requirements for loan servicing records in the Direct Loan Program be the same as those for a guaranty agency's records in the FFEL Program at § 682.414(a)(1)(ii). Further, the commenter believed that procedures outlined in the FY 1995 Official Cohort Default Rate Guide (Guide) require a proportional reduction of a rate if records are incomplete, illegible, or missing, and that a school cannot know whether this reduction is appropriate if it is not able to determine whether complete records have been provided. Another commenter asked the Secretary to clarify that a loan servicing error is considered to have occurred when the Direct Loan Servicer is unable to provide complete and legible loan servicing records.

Discussion: The first commenter is correct that the Secretary generally does not regulate the Department's own procedures for servicing Direct Loans. As explained in the preamble for final regulations for the Direct Loan Program published in the **Federal Register** on December 1, 1994 (59 FR 61664), the Secretary is not required to issue regulations that control internal agency processes but do not affect the substantive or procedural rights of program participants (59 FR 61667). For this reason, the Secretary does not agree that it is appropriate to issue regulations to govern the loan servicing and collection procedures of the Direct Loan Program. The Secretary further notes that § 668.17(h), rather than § 682.414(a)(1)(ii), determines what constitutes a complete loan servicing and collection record for purposes of an appeal under § 668.17(h).

As noted in the ''Direct Loan School Guide,'' the Direct Loan Servicer performs collection activities similar to those performed by lenders in the FFEL Program. Insofar as those activities relate to the servicing and collection criteria included in § 668.17(h)(3)(viii), the procedures of the Direct Loan Servicer are generally equivalent to the corresponding procedures for an FFEL lender. Therefore, the same type of record information needed to determine whether an FFEL Program loan is considered to be improperly serviced or collected under § 668.17(h)(3)(viii) is needed to determine whether a Direct Loan Program loan is considered to be improperly serviced or collected. In order to further clarify these requirements for the Direct Loan Program, the criteria for determining whether a loan has been improperly serviced or collected have been revised to separate the requirements for the FFEL Program from those for the Direct Loan Program and to include additional guidance.

Also, the commenters are not correct in stating that missing or illegible records are automatically considered to be loan servicing errors. The Guide only outlines a procedure for schools to use when documenting a guaranty agency's failure to comply with a request to supply a required missing record or to replace an illegible record. The same procedure is appropriate for a school's documentation of a similar request to the Direct Loan Servicer.

Changes: Section 668.17(h)(3)(viii) is revised to clarify the criteria used to determine whether a Direct Loan has been improperly serviced or collected.

Comments: One commenter asked for clarification of the requirements for documenting skip tracing in the Direct Loan Program, because the Department's procedures for servicing Direct Loans are not provided in regulations. The commenter asserted that, without this clarification, a school cannot verify that there is adequate documentation to determine whether skip tracing, if required, was performed in accordance with the Direct Loan Servicer's contract. The commenter recommended that the requirements for documenting skip tracing in the Direct Loan Program be the same as those for the FFEL Program, at § 682.411(g).

Discussion: Section 668.17(h)(3)(viii) has been revised to clarify the criterion for skip tracing that is used in determining whether a Direct Loan was improperly serviced or collected. Additional information about the skip tracing criterion for the Direct Loan Program will be provided in the same part of the Guide that provides similar information for the FFEL Program. Although the FY 1996 Guide contains instructions for the FFEL Program only, these instructions may be used for the Direct Loan Program as well. The references to a ''lender'' in that part of the Guide should be understood to refer to the Direct Loan Servicer.

The guidance included in these regulations and the Guide provides schools with the information needed to determine if the skip tracing requirement was met. Under the regulations, the skip tracing criterion looks only at whether skip tracing has been performed and does not evaluate timing or other procedural requirements related to skip tracing, and it is not governed by § 682.411(g).

Changes: Section 668.17(h)(3)(viii) is revised to clarify the criteria used to determine whether a Direct Loan has been improperly serviced or collected.

Additional Criteria (§ 668.17(h)(3)(viii))

Comments: One commenter provided examples of loan servicing problems that the commenter believes should be considered improper loan servicing or collection under § 668.17(h)(3)(viii): (1) Maintaining inaccurate addresses and telephone numbers; (2) failing to apply deferments and forbearances to accounts accurately; (3) failing to provide accurate, comprehensive information

about a borrower's delinquency status on multiple accounts to a school; and (4) failing to maintain the most recent information on accounts supplied by the school.

Discussion: In proposing these regulations, it was not the Secretary's intent to expand the criteria used to determine whether a loan is considered to have been improperly serviced or collected. None of the examples listed by the commenter are considered improper loan servicing or collection of an FFEL Program loan under § 668.17(h)(3)(viii) of the previous regulations, and none of these circumstances would be considered improper loan servicing under these regulations. The only criteria used to determine whether an FFEL or Direct Loan program loan has been improperly serviced or collected for purposes of an appeal of a rate under § 668.17(h) are those listed at § 668.17(h)(3)(viii).

Changes: None.

Comments: Two commenters asked that the criteria for improper loan servicing or collection be expanded to include an additional criterion for a Direct Loan Program loan. The proposed new criterion would correspond to the criterion for an FFEL Program cohort default rate appeal concerning a lender's submission of a request for preclaims assistance to the guaranty agency, at § 668.17(h)(3)(viii)(A)(*2*) of these regulations. Both commenters recommended that the timely notification to schools of a borrower's delinquency be used as this additional criterion for Direct Loans, reasoning that this notification would be extremely useful to schools in working with borrowers to avoid default. One commenter argued that adding this criterion would provide an appropriate parallel to the preclaims notification process for the FFEL Program. The other commenter, noting that there was no equivalent for the FFEL Program's preclaims process in the Direct Loan Program, asked that the criterion be added in order to maintain an equivalent number of criteria in the two programs, and thus a more equivalent level of assurance that loan servicing and collection have been conducted properly.

Discussion: The purpose of preclaims assistance in the FFEL Program is to require a guaranty agency to assist a lender in collecting on a loan before the loan goes into default. There is no parallel for this activity in the Direct Loan Program because the Department's Direct Loan Servicer performs all of the collection activities on a Direct Loan.

In the FFEL Program, a guaranty agency is required to notify schools of preclaims requests when the schools request that notification (§ 682.404(a)(5)), but there is no requirement that *all* schools be notified at the time that a preclaims request is filed. The Direct Loan Servicer currently makes monthly reports available to a school concerning the delinquency of borrowers who attended the school. These reports may be used by schools to contact borrowers and to assist in reducing the schools' rates, but schools are not *required* to receive or use the reports. Accepting the commenters' recommended criterion and requiring receipt of these reports by Direct Loan schools would place an additional burden on Direct Loan schools and would create dissimilar requirements in the FFEL and Direct Loan programs.

Changes: None.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary as necessary for administering these programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, were identified and explained in the preamble to the NPRM.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

The potential costs and benefits of these final regulations were discussed in the preamble to the NPRM (63 FR 37714).

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number assigned to the collection of information in these final regulations is displayed at the end of the affected section of the regulations.

Intergovernmental Review

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

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

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

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the responses to the NPRM and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

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List of Subjects in 34 CFR Part 668

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

Dated: October 19, 1998.

Richard W. Riley,

Secretary of Education.

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

The Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

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

2. Section 668.17 is amended by revising the heading, paragraph (h), and paragraph (i) and by republishing the OMB control number following the section to read as follows:

§ 668.17 Default reduction and prevention measures.

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) *Appeals for Direct Loan Program loans.* (A) To initiate an appeal under this paragraph for Direct Loans included in the institution's rate, the institution must notify the Secretary, in writing, that it is appealing the calculation of its Direct Loan Program cohort rate or weighted average cohort rate. The notification must be received by the Secretary within 10 working days of the date the institution received the Secretary's notification.

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

(*1*) The Secretary identifies in social security number order all Direct Loans included as defaulted loans in the calculation of the Direct Loan Program cohort rate or weighted average cohort rate that is being challenged by the institution.

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

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

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

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

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

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

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

(B) Copies of all of the loan servicing or collection records and any other evidence relating to a loan that the institution believes has been subject to improper servicing or collection. The records must be in hard copy or microfiche format.

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

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

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

(*1*) For FFEL Program cohort default rates, the number of loans insured by each guaranty agency that were included as defaulted loans in the

calculation of the institution's rate and the number of loans that would be excluded from the calculation of that rate by application of the results of the review of the sample of loans provided to the institution to the population of loans for each guaranty agency.

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

(*3*) For weighted average cohort rates—

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

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

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

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

(A) In making a decision under this paragraph, the Secretary presumes that the information provided to the institution by the guaranty agency or Secretary under paragraphs (h)(3)(ii)(B) and (iii)(B) of this section is correct unless the institution provides substantial evidence showing that the information is not correct.

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

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

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

(viii) *Improper loan servicing or collection criteria.* For purposes of this paragraph, a default is considered to have been due to improper servicing or collection only if the borrower did not make a payment on the loan and—

(A) For an FFEL Program loan, the institution proves that the lender failed to perform one or more of the following activities, if that activity was required:

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

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

(*3*) Submit a request for preclaims assistance to the guaranty agency.

(*4*) Send a final demand letter to the borrower.

(*5*) Submit a certification (or other evidence) that skip tracing was performed.

(B) For a Direct Loan Program loan, the institution proves that the Direct Loan Servicer failed to perform one or more of the following activities, if that activity is applicable to the loan:

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

(*2*) Attempt at least one phone call to the borrower or endorser unless the borrower or endorser is incarcerated or is residing outside a State, Mexico, or Canada.

(*3*) Send a final demand letter to the borrower.

(*4*) Document that skip tracing was performed if the Direct Loan Servicer determined it did not have the borrower's current address.

(i) *Effect of decision.* (1) An institution may challenge the calculation of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate under this section no more than once. The Secretary's determination of an institution's appeal of the calculation of such a rate is binding on any future appeal by the institution.

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

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

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(Approved by the Office of Management and Budget under control number 1840–0537)

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