



DCL ID: FP-07-12

Date: December 28, 2007

Subject: Determination of Not-For-Profit Holder Status for SAP Billing

Summary: This letter provides guidance on the process that will be used to designate entities that meet the statutory definition of an eligible not-for-profit holder for purposes of special allowance payment (SAP) billings in the FFEL Program.

Dear Colleague:

In Dear Colleague Letter FP-07-11, posted on November 11, 2007, we advised lenders that because of changes made to the special allowance payment (SAP) rates in the Federal Family Education Loan (FFEL) Program by the College Cost Reduction and Access Act (CCRAA), new reporting codes must be used when submitting SAP billings for loans first disbursed on or after October 1, 2007. We also noted that since SAP rates are slightly higher for entities that meet the CCRAA definition of an eligible not-for-profit holder, SAP payments will be based on a code that we will set in the demographic profile of approved not-for-profit holders. The November letter stated that we would be providing information and guidance on the procedures that will be used for a loan holder to request designation as an eligible not-for-profit holder for purposes of receiving SAP at the rate set for such holders. Until final regulations are developed, the following guidance and instructions are provided.

Background

The CCRAA reduced SAP rates for most FFEL loans first disbursed on or after October 1, 2007. For entities that meet the new statutory definition of "eligible not-for-profit holder," the reduction in SAP is 15 basis points less than the reduction for other holders. The CCRAA added a definition of the term "eligible not-for-profit holder" to the Higher Education Act (HEA) at section 435(p), 20 U.S.C. § 1085(p). The CCRAA definition was modified by the Third Higher Education Extension Act of 2007. The final statutory definition is provided in Attachment A to this letter.

An entity that is an eligible lender under HEA § 435(d), other than a school lender, may qualify in its own right as an eligible not-for-profit holder. An entity that is not an eligible lender under HEA § 435(d) may qualify indirectly through an eligible lender trustee (ELT) agreement.

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Required Certifications and Documentation

We will make an initial determination of whether an entity qualifies as an eligible not-for-profit holder – either in its own right or through an ELT agreement – on the basis of two certifications that must be submitted to the Department. The first certification, with supporting documentation as discussed below, must be submitted and signed by the entity’s chief executive officer (CEO). The second certification, along with copies of the documents that were reviewed to support the certification, must be submitted and signed by external legal counsel. The certifications together must demonstrate that the entity meets the definition in HEA § 435(p) of an eligible not-for-profit holder either in its own right, or through an ELT. Both an entity that is an eligible lender and one that is not an eligible lender in its own right, but qualifies through an ELT agreement, must submit these two certifications directly to the Department in order to qualify for the higher SAP rate. The external counsel that submits the required certification must be an independent attorney, not in-house counsel. However, a public entity that claims that it is eligible under HEA § 435(p)(1)(A) or, through an ELT, under HEA § 435(p)(1)(D), may submit the certification from the Attorney General of its State.

Since the new SAP rates apply to loans first disbursed on or after October 1, 2007, we expect to receive the first SAP billings to which the new rates apply in January for the quarter ending December 31, 2007. Because some entities may not be able to secure the required external counsel certification in time to support those billings, we will pay SAP at the not-for-profit holder rate based solely on the entity’s CEO certification. However, if the required external counsel certification and supporting documentation is not received by February 29, 2008, any SAP payments made at the higher rate based on the CEO certification will be adjusted to the lower for-profit holder SAP rate. No payments for SAP at the higher rate will be made for subsequent quarters unless both the CEO certification and the external counsel certification, with documentation, have been received.

An entity wishing to receive SAP at the higher not-for-profit holder rate should not submit its first quarter FY '08 SAP billing until it has received an email acknowledgment of our receipt and acceptance of its CEO certification. Entities that use a servicing agent to submit SAP billings must advise the servicer of the procedures and requirements provided in this letter, including the admonition that first quarter SAP billings not be submitted until you have received our acknowledgment of receipt and acceptance of the CEO certification.

Details on what must be included in the certifications as well as certification submission instructions follow.

Certifications

The CEO and external counsel certifications must be submitted separately on their respective letterheads and must, with the one temporary exception noted on page 5 of this letter, have an original (pen and ink) signature of the CEO or external counsel, as appropriate. The certification should clearly identify the name and Lender Identification Number (Lender ID or LID) of the entity(s) for which designation as an eligible not-for-profit holder is being certified. If the entity’s SAP billings are submitted to the Department under more than one LID, the letter must include each LID to which the certification applies.

When preparing the certification letters, the CEO and external counsel must carefully review the definition of an eligible not-for-profit holder in HEA § 435(p), with particular attention to the limitations provided in paragraph 435(p)(2).

Legal Authority and Status

Certification of External Legal Counsel

The certification of external legal counsel of an entity seeking to qualify, directly or through an ELT, for higher SAP by virtue of its status as a state entity under HEA § 435(p)(1)(A), must certify that the entity is constituted by operation of specific State law.

The certification of external legal counsel of an entity seeking to qualify, directly or through an ELT, for higher SAP, under HEA § 435(p)(1)(B), by virtue of its status as an entity under section 150(d)(2) of the IRC under 435(p)(1)(B), must certify that the entity has been designated as such by the State or an instrumentality thereof, has not elected under section 150(d)(3) of the IRC to cease its status as a qualified scholarship funding corporation, and is incorporated under State law as a not-for-profit organization.

The certification of external legal counsel of an entity seeking to qualify, directly or through an ELT, for higher SAP, under HEA § 435(p)(1)(C), by virtue of its status as a not-for-profit organization 435(p)(1)(C) must certify that the entity is incorporated under State law as a not-for-profit organization.

The certification of external legal counsel of an entity seeking to qualify, directly or through an ELT, for higher SAP under HEA § 435(p)(1)(D) by virtue of its status as a trustee on behalf of a State, instrumentality thereof, or other eligible 435(p) entity, must certify the existence of such a trustee relationship.

The external counsel must submit with its certification copies of the documents that provide the basis for its certification.

Certification of CEO

The CEO certification must state the basis upon which the entity believes it qualifies as an eligible not-for-profit holder for purposes of SAP (e.g., as a state entity, a 150(d) entity, a 501(c)(3) entity, a trustee on behalf of a state entity).

The CEO certification of an entity that seeks to qualify, directly or through an ELT, as a state entity under HEA § 435(p)(1)(A) must include documentation establishing its status as such an entity.

The CEO certification of an entity that seeks to qualify, directly or through an ELT, as a not-for-profit entity, under HEA § 435(p)(1)(B), that is authorized under section 150(d) of the Internal Revenue Code (IRC) of 1986 to issue qualified scholarship funding bonds must include copies of the State requests or requirements described in section 150(d)(2)(B) of the IRC. The CEO must certify that the entity has not elected under section 150(d)(3) of the IRC to cease its status as a qualified scholarship funding corporation.

The CEO certification of an entity that seeks to qualify, under HEA § 435(p)(1)(C), as a not-for-profit entity described in section 501(c)(3) of the IRC, must include a copy of the IRS determination letter establishing its status as a section 501(c)(3) entity.

The CEO certification of an entity that seeks to qualify as a not-for-profit entity, under HEA § 435(p)(1)(D), by virtue of its status as a trustee on behalf of a State, instrumentality thereof, or other eligible entity under 435(p), must provide documentation establishing the existence of such a trustee relationship.

Additional Requirements for CEO Certification

HEA § 435(p) includes several other conditions that must be met in order for the entity to qualify for a higher SAP. Consequently, the CEO certification must attest that the entity also meets the following requirements.

Status on September 27, 2007

To qualify as an eligible not-for-profit holder, an entity, including an entity that seeks to qualify through an ELT, must have, on September 27, 2007, acted as an eligible lender under HEA § 435(d), other than a school lender, or was on that date the sole beneficial owner of a loan eligible for SAP under the HEA. HEA § 435(p)(2)(A). This condition must be addressed in the CEO's certification.

For-Profit Ownership or Control

To qualify as an eligible not-for-profit holder, no entity, including one that seeks to qualify through an ELT, can be owned or controlled, in whole or in part, by a for-profit entity. HEA § 435 (p)(2)(B).

The CEO of the not-for-profit entity must certify that if the entity is a membership or stock corporation, no for-profit entity is a member or shareholder of the entity with power by that status to control the entity. The CEO must also certify that no single for-profit entity employs, or appoints as trustees or directors of the entity, individuals that together constitute a majority of any of the following –

- The board of trustees or directors of the entity,
- The audit committee of such board,
- The executive committee of such board, or
- The compensation committee of such board.

If the entity has no board of trustees or directors, or has not constituted committees of such a board with these responsibilities, the CEO must certify that no single 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.

Ownership of Loans and Loan Income

No loan in which an eligible not-for-profit holder has a legal or beneficial interest qualifies for SAP at the eligible not-for-profit holder rate unless that entity is the sole beneficial owner of the loan and income from the loan. Similarly, if the loan is held by an ELT for a qualifying governmental or non-profit entity, that entity must be the sole beneficial owner of such loan and the income from such loan. HEA § 435(p)(2)(C). The CEO of a governmental or non-profit entity must certify that such entity is the sole beneficial owner of each loan, and income of each loan, for which either it or an ELT that holds the loan on its behalf makes claim or will make a claim for SAP at the “holder” rate.

Notification of Determination

Upon receipt and review of both the CEO and the external legal counsel certifications, we will notify the entity at its designated contact of our determination as to whether it has demonstrated, for purposes of SAP, that it qualifies as an eligible not-for-profit holder either in its own right or through an ELT. Any SAP payments made at the eligible not-for-profit holder rate on the basis of the submitted certifications will be adjusted if we later determine that the entity did not meet, or has subsequently ceased to meet, the statutory definition of an eligible not-for-profit holder. The pertinent audit guides will be updated to include a review of the entity’s claim that it met the definition of eligible not-for-profit holder.

Change of Status

Should any of the assertions attested to in either of the certifications change, or should specific plans that would impact any of these assertions arise, the entity must, within 10 business days of becoming aware of the change or planned change, provide the Department with details of the change at the address noted below. Loan holders must delay submission of SAP billings for the quarter during which the change occurs and any subsequent quarter pending the Department’s decision concerning the entity’s continued eligibility.

Submission Instructions

Originals of both the CEO and the external counsel certifications must be mailed or delivered to the Department of Education at the address below. The certifications must include an original (pen and ink) signature. However, to expedite payment of SAP for first quarter FY '08 billings, we will accept, as an initial submission, a PDF copy of the CEO certification if the certification is provided as an attachment to an email to the address below (faxed copies will not be accepted). However, no later than February 29, 2008, the same date that is required for the submission of the external counsel certification, we must have received the original CEO certification with an original (pen and ink) signature.

Both certification letters must include the name, phone number, and email address of a contact person who will receive the email receipt acknowledgement noted earlier.

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The signed and dated certifications must be submitted to:

Rosemary Beavers
Financial Partner Services
Federal Student Aid
830 First Street, NE, Room 11114
Washington, DC 20202 (if using USPS) or 20002 (if using a commercial carrier)

PDF copies of the initial CEO certification may be emailed to Rosemary.Beavers@ed.gov, with a cc to Jasmine.Welsh@ed.gov.

If you have any questions on the information provided in this letter, please contact Rosemary Beavers at Rosemary.beavers@ed.gov.

Sincerely,



Sue Szabo
Chief Business Operations Officer
Federal Student Aid

Attachment

ATTACHMENT A
DEFINITION OF “ELIGIBLE NOT-FOR-PROFIT HOLDER” FOR PURPOSES OF
DETERMINING THE SPECIAL ALLOWANCE PAYMENT RATE

Section 435(p) of the Higher Education Act as amended by the College Cost Reduction and Access Act and the Third Higher Education Extension Act of 2007.

435(p) ELIGIBLE NOT-FOR-PROFIT HOLDER.—

(1) **DEFINITION.**—Subject to the limitations in paragraph (2) and the prohibition in paragraph (3), the term ‘eligible not-for-profit holder’ means an eligible lender under subsection (d) (except for an eligible lender described in subsection (d)(1)(E)) that requests a special allowance payment under section 438(b)(2)(I)(vi)(II) or a payment under section 771 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 section 1.103-1 of title 26, Code of Federal Regulations, or section 144(b) of the Internal Revenue Code of 1986;

(B) an entity described in section 150(d)(2) of such Code that has not made the election described in section 150(d)(3) of such Code;

(C) an entity described in section 501(c)(3) of such Code; or

(D) acting as a trustee on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (A), (B), or (C), regardless of whether such State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under subsection (d).

(2) LIMITATIONS.—

(A) EXISTING ON DATE OF ENACTMENT.—

(i) **IN GENERAL.**—An eligible lender shall not be an eligible not-for-profit holder under this Act unless such lender—

(I) was a State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (1)(A), (B), or (C) that was, on the date of the enactment of the College Cost Reduction and Access Act, acting as an eligible lender under subsection (d) (other than an eligible lender described in subsection (d)(1)(E)); or

(II) is acting as a trustee on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (A), (B), or (C) or paragraph (1)), regardless of whether such State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under subsection (d), and such State, political subdivision, authority, agency, instrumentality, or other entity, on the date of enactment of the College Cost Reduction and Access Act, was the sole beneficial owner of a loan eligible for any special allowance payment under section 438.

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(ii) EXCEPTION.—Notwithstanding clause (i), a State may elect, in accordance with regulations of the Secretary, to waive the requirements of this subparagraph for a new not-for-profit holder determined by the State to be necessary to carry out a public purpose of such State, except that a State may not make such election with respect the requirements of clause (i)(II).

(B) NO FOR-PROFIT OWNERSHIP OR CONTROL.—(i) In General. --No State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (1)(A), (B), or (C) shall be an eligible not-for-profit holder under this Act if such State, political subdivision, authority, agency, instrumentality, or other entity is owned or controlled, in whole or in part, by a for-profit entity.

(ii) TRUSTEES. --A trustee described in paragraph (1)(D) shall not be an eligible not-for-profit holder under this Act with respect to a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (A), (B), or (C) of paragraph (1), regardless of whether such State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under subsection (d), if such State, political subdivision, authority, agency, instrumentality, or other entity is owned or controlled, in whole or in part, by a for-profit entity.

(C) SOLE OWNERSHIP OF LOANS AND INCOME.—No State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (1)(A), (B), (C) or (D) shall be an eligible not-for-profit holder under this Act with respect to any loan, or income from any loan, unless –

(i) such State, political subdivision, authority, agency, instrumentality, or other entity is the sole beneficial owner of such loan and the income from such loan, or

(ii) such trustee holds the loan on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (A), (B), or (C) of paragraph (1), regardless of whether such State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under subsection (d), and such State, political subdivision, authority, agency, instrumentality, or other entity is the sole beneficial owner of such loan and the income from such loan.

(D) TRUSTEE COMPENSATION LIMITATIONS.—A trustee described in paragraph (1)(D) shall not receive compensation as consideration for acting as an eligible lender on behalf of a State, political subdivision, authority, agency, instrumentality, or other entity described in subparagraph (A), (B), or (C) of paragraph (1), regardless of whether such State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under subsection (d), in excess of reasonable and customary fees.

(E) RULE OF CONSTRUCTION.—For purposes of subparagraphs (A), (B), (C), and (D) of this paragraph, a State, political subdivision, authority, agency, instrumentality, or other entity described in paragraph (1)(A), (B), or (C), regardless of whether such State, political subdivision, authority, agency, instrumentality, or other entity is an eligible lender under subsection (d), shall not—

(i) be deemed to be owned or controlled, in whole or in part, by a for-profit entity, or

(ii) lose its status as the sole owner of a beneficial interest in a loan and the income from a loan, by such State, political subdivision, authority, agency, instrumentality, or other entity described in (1)(D) granting a security interest in, or otherwise pledging as collateral, such loan, or the income from such loan, to secure a debt obligation for which such State, political subdivision, authority, agency, instrumentality, or other entity is the issuer of the debt obligation.

(3) PROHIBITION.—In the case of a loan for which the special allowance payment is calculated under section 438(b)(2)(I)(vi)(II) 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 under this Act, the special allowance payment for such loan shall, beginning on the date of the sale, no longer be calculated under section 438(b)(2)(I)(vi)(II) and shall be calculated under section 438(b)(2)(I)(vi)(I) instead.

(4) REGULATIONS.—Not later than 1 year after the date of enactment of the College Cost Reduction and Access Act, the Secretary shall promulgate regulations in accordance with the provisions of this subsection.