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PREFERRED LENDER LISTS, CODES OF CONDUCT, AND RELATED ISSUES

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Presented by
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Preferred Lender Lists and Related Issues

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Federal Legislation: Higher Education Opportunity Act of 2008



Preferred Lender What is it?

“Preferred lender arrangement”:

- An arrangement or agreement between a lender and a covered institution or an institution-affiliated organization of a covered institution—
 - (i) under which a lender provides education loans to the students attending the covered institution or their families; and
 - (ii) that relates to the covered institution or institution-affiliated organization **recommending, promoting, or endorsing the education loan products of the lender;** and

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A lender arrangement does not include—

- (i) arrangements or agreements with respect to loans under part D of title IV (Federal Direct Loans); or
- (ii) arrangements or agreements with respect to loans that originate through the auction pilot program under HEOA section 499(b).

Authority: H.R. 4137, Section 151.

Federal Legislation: Higher Education Opportunity Act of 2008

- Each institution (or institution –affiliated organization) that has a preferred lender arrangement must provide the following information to students attending the institution (or their families):
 - minimum information as determined by ED no later than 18 months after enactment of HEOA (i.e., not currently required)
 - TILA information (private loans) (some information currently required, some to be developed)
- Information must be provided in time for student to use to select lender

Authority: H.R. 4137, Section 153(c).

Federal Legislation: Higher Education Opportunity Act of 2008

School's with preferred lender arrangements must at least annually compile, maintain, and make available for students and their families (effective immediately):

- a list of the specific lenders for loans made, insured, or guaranteed under Title IV or private education loans that the institution recommends, promotes, or endorses in accordance with such preferred lender arrangement.

Authority: H.R. 4137, Sections 152 and 493.

Federal Legislation: Higher Education Opportunity Act of 2008

- The following additional information:
 - Information determined by ED per section 153(a)
 - Disclosure by school of why it entered into a preferred lender arrangement with each lender particularly with respect to terms and conditions or provisions favorable to the borrower
 - Factors considered for inclusion can include loan terms, high-quality customer service, additional benefits (not prohibited benefits)
 - Student choice
 - At least 3 unaffiliated FFELP lenders (Secretary to maintain list of lenders);
 - For private loans, at least 2 unaffiliated lenders
 - Disclose affiliations (including detail of affiliations)

Authority: H.R. 4137, Sections 152 and 493.

Federal Legislation: Higher Education Opportunity Act of 2008

- Disclose method and criteria used in selecting lenders in order to ensure that lenders are selected on basis of best interests of borrowers including:
 - Payment of origination or other fees on behalf of the borrower
 - Highly competitive interest rates or other terms and conditions
 - High quality servicing
 - Additional benefits beyond standard terms and conditions

Authority: H.R. 4137, Sections 152 and 493.

Federal Legislation: Higher Education Opportunity Act of 2008

- Additional Obligations:
 - Exercise a Duty of care and a duty of loyalty to compile the list without prejudice and for the sole benefit of the students
 - Do not deny or impede choice of student
 - Comply with Secretary's regulations (to be developed)

Authority: H.R. 4137, Sections 152 and 493.

Federal Legislation: Higher Education Opportunity Act of 2008

■ ADDITIONAL DISCLOSURES:

- ED required to develop and provide a model disclosure form. (Due: 18 months after date of enactment.) The obligation to provide the information eventually required by the Secretary appears in at least three separate places in the HEOA.
- Must include, at a minimum, TILA provisions
- Consider merits of requiring schools to disclose following information:
 - Interest rate and terms and conditions of loan for next award year, including forgiveness and forbearance,

Authority: H.R. 4137, Section 153(a)(1)(A)&(B)

Federal Legislation: Higher Education Opportunity Act of 2008

- Information on any charges, such as origination and federal default fees that are payable
 - whether those charges are collected by the lender (deducted from proceeds or paid separately).
 - whether the charges are paid by the lender
- Annual and aggregate amounts that can be borrowed
- Average amounts borrowed by graduates
- Amount that may be paid in interest based on standard repayment plan

The Good News: Most of the Information to be disclosed will come from Lenders. See HEOA Section 153(b).

ED will prepare information for DL schools.

Federal Legislation: Higher Education Opportunity Act of 2008

- ANNUAL REPORT TO SECRETARY: Institution with preferred lender arrangements must disclose with respect to each arrangement:
 - Information that Secretary determines must be disclosed to students and parents
 - TILA disclosures (private loans)
 - Detailed explanation of why school entered into preferred lender arrangement
 - Detailed explanation of why the institution believes the terms and conditions of each type of educational loan is beneficial for the students or parents
- The report must be made available to the public and provided to students and prospective students before they apply for a loan.

Authority: H.R. 4137, Section 153(c)(2)

Federal Legislation: Higher Education Opportunity Act of 2008

- Additional Required Disclosures
 - On Website and Informational Materials that Describe Education Loans:
 - Provide the maximum amount of federal grant and loan aid under Title IV available to students in an easy to understand format
 - For each FFEL loan offered by a preferred lender, provide information to be determined by the Secretary
 - A statement that the institution is required to process a FFEL loan application from any eligible lender the student selects

Authority: H.R. 4137, Sections 152(a)(1)(A)(i) and 153(c)(1).

Federal Legislation: Higher Education Opportunity Act of 2008

- Additional Required Disclosures
 - On Website and Informational Materials that Describe Private Loans:
 - TILA Provisions (e.g., range of interest rates, whether rate is fixed or variable, requirements for co-borrowers, potential finance charges, etc.)
 - Generally:
 - Statement that borrower may qualify for Title IV assistance and that the terms and conditions of Title IV loans may be more favorable than private loan terms
 - Ensure that information regarding private loans is presented in a manner distinct from information regarding Title IV loans

What is New in the Higher Education Opportunity Act of 2008?

The Act contains a number of requirements not included in the earlier ED regulations on Preferred Lenders, including:

- Additional Required Disclosures
- Annual Report to the Secretary
- Specifies Selection Criteria
 - Payment of origination or other fees on behalf of borrower, interest rates, servicing, and additional benefits beyond standard terms

What is New in the Higher Education Opportunity Act of 2008?

- Describe Affiliations
 - The institution must provide a specific indication of whether a lender is an affiliate of another lender on its preferred lender list
- Private Lender Loan Arrangements
 - An institution may include on its preferred lender list two unaffiliated lenders for private loans.

Preferred Lender List: ED Regulations

Items not expressly contained in HEOA Preferred Lender List Provisions:

- Cannot include lenders that have offered inducements
- Cannot assign a first-time borrower's loan to a particular lender (but see HEOA Code of Conduct provisions)

Practical Issues

- Use something that approximates an RFP process
 - Maintain responses received from chosen lenders and lenders not chosen
- Avoid conflict of interest with lenders on lender list
- Document servicing issues – key given lack of other benefits currently provided by lenders
 - Staff/Student surveys
 - Document student complaints regarding lenders
- What if school cannot find 2 private lenders and 3 FFEL lenders for its list?
 - Can a school include itself as a private lender?
 - Is ED's outstanding DCL Gen 08-06 still valid?
- Determine all disclosures that need to be made and then best system for consistent distribution and updating.

New York SLATE – Select Provisions

- Preferred lender lists:
 - school must explain method and criteria for selection and *rank criteria*
 - must state (*in same font size*) that student can use another lender without penalty
 - inclusion and placement of lenders on the preferred lender list must be based solely on the best interests of the borrowers
 - school must seek assurances that advertised benefits upon repayment will continue upon sale of loan(s)
 - sale of loans shall be disclosed (same font)

New York SLATE

- NY defines "lender" to include guarantee agencies and any trade or professional association that receives money from a lender or guaranty agency for educational loan purposes.

State Bills/Codes of Conduct

- NJ, TN, CA and others have introduced but not yet passed related laws; several of these proposed laws have been dormant for 9-12 months.
- VA law applies to public institutions of higher education only.
- Other states have imposed or suggested codes of conduct: AZ, MD, OR for all schools
- MA, NJ, FL Codes of Conduct for public institutions only

Resources

HEOA

- http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h4137enr.txt.pdf

Federal Regulations effective July 1, 2008

- <http://www.ifap.ed.gov/fregisters/attachments/FR11012007.pdf>

ED Guidance on Preferred Lender Lists

- <http://www.ifap.ed.gov/dpcletters/GEN0806.html>
- <http://www.ifap.ed.gov/dpcletters/FP0704.html>

New York SLATE

- http://www.oag.state.ny.us/family/student_lending/SLATE.pdf

New York College Loan Code of Conduct

<http://www.oag.state.ny.us/press/2007/apr/College%20Code%20of%20Conduct.pdf>

Resources

New York Board of Regents Draft Regulations

<http://www.regents.nysed.gov/2008Meetings/March2008/0308hed1.doc>

Attorney General Webpages

- Florida -

<http://myfloridalegal.com/newsrel.nsf/newsreleases/D0BA9E3114EEE27C852573A8004EC482>

- Minnesota -

<http://www.ag.state.mn.us/Consumer/PressRelease/070515CapellaUniversity.asp>

- Oregon - <http://www.doj.state.or.us/>

- Illinois - http://www.ag.state.il.us/pressroom/2007_04/20070423.html

- Texas - <http://www.oag.state.tx.us/oagNews/release.php?id=2023>

- Arizona - <http://www.azag.gov/>

- California - <http://ag.ca.gov/>

Resources

- Kansas - <http://www.ksag.org/content/page/id/251>
- Ohio - http://www.ag.state.oh.us/press/07/04/070423_school.pdf
- New Jersey - <http://www.nj.gov/oag/newsreleases07/pr20070904a.html#code>

NASFAA Code of Conduct

<http://www.nasfaa.org/subhomes/mediacenter/nasfaacodeofconduct.pdf>

ACE Conflict of Interest Working Paper

http://www.acenet.edu/AM/Template.cfm?Section=Legal_Issues_and_Policy_Briefs2&CONTENTID=25284&TEMPLATE=/CM/ContentDisplay.cfm

School Codes of Conduct

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SCHOOL CODES OF CONDUCT

HIGHER EDUCATION OPPORTUNITY ACT

- Code of Conduct Requirements in Multiple Places-Effective when Act is signed.
- Title I, Part E
 - Applies to all educational institutions that receive federal funds and have preferred lender arrangements (but see Section 493(a)(25)).
 - Applies to Institution-affiliated organizations that have preferred lender arrangements.

Authority: H.R. 4137, Section 153(c)(3)

SCHOOL CODES OF CONDUCT

- Title IV, Program Participation Agreement
 - Requires institutions that participate in a loan program under Title IV to develop Code of Conduct with respect to loans with which its officers, employees and agents shall comply.
 - Code of Conduct must prohibit conflicts of interest and contain the following minimum requirements:
 - Ban solicitation of or acceptance of “gifts.”
 - Gifts broadly defined as gratuity, favor, discount, entertainment, hospitality, loan or other item worth more than *de minimus* amount
 - Exclusions from definition of “gift”
 - Prohibit certain contracting arrangements.
 - Prohibit “revenue sharing arrangements” (Title IV only).
 - Preclude covered employees from requesting or accepting call center or financial aid office services.
 - Ban acceptance of funds for private loans in exchange for concessions on Title IV loans.
 - May not assign lender to a first time borrower or delay certification of a loan.

Authority: H.R. 4137, Sections 493(a)(25) and 493(e)

SCHOOL CODES OF CONDUCT

- Schools must publish Code of Conduct on website.
- Schools must inform covered employees annually on Code of Conduct requirements.
- Title X: Private Student Loan Transparency and Improvement Act
 - Prohibitions on private educational lenders mirror Code of Conduct provisions that apply to schools.
 - Prohibits private education lenders from giving gifts to schools and school employees.
 - Prohibits revenue sharing with respect to private loans.
 - Requires schools to report reimbursement of expenses for service on lender advisory board.
 - Prohibits co-branding on private loans.

Authority: H.R. 4137, Section 1011

SCHOOL CODES OF CONDUCT

ISSUES UNDER HIGHER EDUCATION OPPORTUNITY ACT

- Gift ban applicability to family members.
- “School Affiliated Organizations” broadly defined.
- Applicability of code to “Agents” of schools.
- Lenders serving as trustees of a school.
- Recourse loans and Opportunity loans.
- Lenders who make FFEL and private loans to borrowers at your school.
 - Broad definition of “other benefits” in regulations.
 - “Rebuttable presumption” in regulations.
 - Obtaining reps and warranties from lenders.

SCHOOL CODES OF CONDUCT

Conflicts with Department of Education Regulations

- Advisory boards.
- Entrance and exit counseling.
- Staffing assistance.

Conflicts with State Codes of Conduct

- Advisory Boards.
- Opportunity Loans.
- Staffing Assistance.
- Training Requirements.
- Preemption issues.

Practical Considerations

- Drafting tips.
- Training.
- Enforcement.
- Reps and warranties from Lenders who provide FFEL and private loans at a school.

SCHOOL CODES OF CONDUCT

- HEOA requires lenders to disclose to ED via an annual report any reasonable expenses paid or given to an FA employee including
 - Amount of each instance in which lender provided reimbursement
 - Name of FA official or other employee to whom reimbursement was made
 - Dates of activity for which reimbursement was made
 - Brief description of the activity for which reimbursement was made

Authority: H.R. 4137, Section 152(b)(1)(B)

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Sherry Mastrostefano Gray is a principal and a member of the Education Group at Powers Pyles Sutter & Verville, P.C. During the last 17 years she has advised clients regarding federal regulatory, state and accrediting agency requirements applicable to postsecondary institutions, including approval requirements, federal student financial aid compliance issues, growth plans, mergers and acquisitions, student loan programs, and non student aid federal grant standards. Ms. Gray also assists institutions in the resolution of government and independent audits, investigations and other actions alleging failure to comply with regulatory requirements or accrediting agency standards. Ms. Gray graduated with honors from Boston University in 1986 and received her law degree, with honors, from George Washington University Law School in 1990. Prior to joining private practice, she served as law clerk in the United States District Court for the Western District of Virginia. Ms. Gray is a member of the bar of the District of Columbia and a member of the National Association of College and University Attorneys.

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Rob Lavet joined PPSV's Education Practice Group in 2008 as a Principal. Mr. Lavet counsels the firm's higher education clients on student loan matters and on transactional, corporate, securities, and litigation concerns, as well as the resolution of audits and government investigations. Prior to joining the firm, he was General Counsel to SLM Corporation (Sallie Mae). At Sallie Mae, Mr. Lavet managed legal affairs, corporate compliance and student loan servicing policy functions. He regularly advised board members and senior management on securities disclosures and corporate debt offerings, oversaw significant litigation and regulatory matters, led due diligence on numerous acquisitions and transactions, and integrated legal teams of acquired businesses in multiple locations. He and his team of attorneys took on leadership roles in postsecondary education as they developed strategies to address the emerging array of regulatory, legislative, corporate, and transactional challenges facing the nation's student loan programs. He successfully litigated the only federal court case involving the Department of Education's attempted application of the prohibited inducement section of the Higher Education Act to a lender.

Prior to joining Sallie Mae, Mr. Lavet served as a trial attorney at the U.S. Department of Justice, and as a partner with the law firm Cole, Corette & Abrutyn where he specialized in commercial litigation, and securities litigation. He is a member of the bar of the District of Columbia and served as a past president of the Washington Metropolitan Area Corporate Counsel Association.

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