

FINAL RULES GOVERNING PRIVATE EDUCATION LOANS ISSUED

August 17, 2009

Most student loans provided by colleges and universities will be subject to new consumer protections under the Truth in Lending Act (TILA), under [final rules](#) issued August 14. Tuition payment plans that do not charge interest and short-term emergency loans are exempt, but institutions will have to comply with notice, disbursement delay, and self-certification requirements for all other non-Title IV loans (including other federal loans).

The new Federal Reserve Board rules amending 12 CFR Part 226, also known as Regulation Z, become effective on September 14, but compliance is optional until February 14, 2010. A new subpart F, Special Rules for Private Education Loans, is added, along with conforming changes to the existing rules. In general, the requirements of subpart F are in addition to, not in lieu of, other existing requirements of Regulation Z.

In addition to reauthorizing the Higher Education Act, last year's Higher Education Opportunity Act (HEOA) added a new section to TILA specifically regulating the private education loan market for the first time. A private education loan is defined as any loan made expressly, in whole or in part, for postsecondary education expenses that is not (a) made or guaranteed under Title IV of the HEA; (b) an open-ended credit plan; (c) secured by real property or a dwelling. In a change from the [proposed rules](#), the final regulations also exclude extensions of credit made by an institution of higher education to students if the term is less than 90 days, or is a tuition billing plan that does not charge interest on the balance and the term is not greater than a year. NACUBO, in [joint comments](#) with several associations, had asked for an exemption for emergency loans and tuition payment plans. The Federal Reserve did not, however, go along with

several other recommendations made by the associations regarding institutional loans.

Under TILA, lenders, including colleges and universities, must:

- provide borrowers with specific disclosures at three points in the loan process (solicitation/application, approval, and final);
- give potential borrowers at least 30 days to accept a loan offer, generally without changing the terms;
- obtain a self-certification form signed by the borrower before consummating a loan; and
- delay disbursement for three days after the borrower receives the final disclosures, during which time the borrower may cancel the loan.

In addition, lenders are restricted in using an institution's name, logo, or other words or symbols to imply that the institution endorses its loans.

In drafting the legislation, a key concern of Congress and policymakers was data showing that many students were turning to the private loan market without taking advantage of less expensive options, such as federal loans, first. Therefore, ensuring that student borrowers are aware of their options for federal loans and encouraging them to consult with their institution's financial aid office is a recurrent theme in the required consumer disclosures and self-certification forms.

Key provisions of the regulations are discussed below. (Note: The Federal Reserve's rules are structured a little differently than those from ED and other agencies more familiar to higher education. The introductory text (pages 41194-41231), known as the preamble, explains provisions of the rule generally and discusses comments received on the proposed rule and any changes made in response. The regulatory language follows on pages 41231-36, followed by an appendix providing the three model disclosure forms and three sample filled-out forms. Then, beginning on page 41248, is a supplemental section called "Official Staff Interpretations" which provides more detailed advice elaborating on the regulatory requirements, including how certain elements should be calculated, etc.)

CONSUMER DISCLOSURES

Lenders that offer private education loans, including colleges and universities, must provide specific disclosures at three points in the lending process. The disclosures must

be in writing, in a form that the consumer may keep, and may be provided electronically in compliance with E-Sign Act requirements. The regulations delineate the specific information and data elements that must be included in each disclosure, and provide model forms and filled-out samples for each.

Application or Solicitation Disclosures. The first disclosures must be provided on or with any application or solicitation (defined as an offer of credit that does not require the consumer to complete an application). However, if the lender provides the required approval disclosures within three days of the application, it need not provide the application disclosures. The application disclosure must include information on:

- Interest rate
- Fees and default or late payment costs
- Repayment terms
- Estimates of the total cost of the loan
- Eligibility
- Alternatives to private education loans
- Rights of the consumer, including that, if approved, the terms of the loan will remain available for 30 days
- Self-certification form

Approval Disclosures. These disclosures must be provided before consummation or with any notice of approval provided to the consumer. If approval is mailed or provided electronically, the approval disclosure must be included in the same manner. If approval is provided by telephone, it must be mailed within three business days, and if approval is provided in person, it should be provided at the same time. The information that must be provided on the approval disclosure is very similar to that required on the application disclosure except that it will be more specific. It also must state that the consumer has thirty days to accept the loan and that the lender will not change the terms of the loan during that time except for certain permissible changes in the interest rate or other terms. The means by which the consumer may communicate acceptance of the loan must also be included.

Final Disclosures. The final disclosure must be provided after the consumer accepts the loan. In addition to information previously disclosed on interest rate, fees and default or late payment costs, and repayment terms, this disclosure must state conspicuously that the consumer has the right to cancel the loan within three business days and specify how to do so. It must also state that loan proceeds will not be disbursed until the

cancellation period expires. The Federal Reserve decided to use its discretion and not require that information on other alternatives, including federal loans, be repeated on this disclosure.

LIMITATIONS ON PRIVATE EDUCATION LOANS

Self Certification. One of the innovations in these rules is a new requirement that the student borrower submit to the lender a signed self-certification form before a private education loan can be consummated, even for institutional loans. This form is intended to serve two purposes: (1) again informing the borrower about other options for financing their education; and (2) providing information to the lender about the student's educational expenses and other aid. (This was a legislative middle ground between those who wanted to require direct school certification of private loans and those that didn't.) This new process may also alert the institution's financial aid office that the student intends to take out a private education loan, allowing them to offer counseling to the student. The HEOA tasks ED with developing a model form, in consultation with the Federal Reserve Board and other interested parties.

In general, student borrowers are supposed to get the form, and the information needed to complete it, from their institution, sign it, and submit it to their lender. Under the [rules proposed recently by ED](#), institutions would be required to provide the self-certification form and information to admitted or enrolled students upon request. The self-certification form must include certain required disclosures about the availability of other financial aid and loans, as well as places for the student to fill in their cost of attendance, expected family contribution, and financial aid. Both the ED proposed rules and the Federal Reserve final regulations allow the self-certification form to be provided electronically. The Federal Reserve rules will also allow the form to be signed and submitted electronically to the lender.

The Federal Reserve did not choose to eliminate the requirement that the student sign and submit the self-certification form if the institution and lender have systems in place for direct certification, or in the case of loans made by the institution itself, as recommended by NACUBO and the other associations. The Federal Reserve does, however, provide some flexibility as to how the self-certification form is routed. Instead of the lender receiving the form directly from the consumer, the institution may pass the signed form on to the lender. Or, instead of the borrower getting the form from the

institution, the lender may provide the self-certification form to the borrower directly-and the personal financial aid information required to complete it-presumably because the lender has the information through a certification arrangement with the institution.

Co-Branding. A creditor may not use the name, emblem, mascot, or other words or symbols of an institution in its marketing to imply that the institution endorses its loans. The final rules make it clear that an institution is, of course, allowed to use its own name and symbols, as is a credit union whose name includes the institution's name.

A safe harbor is provided so that a lender's marketing will not be considered to imply endorsement if the message includes a "clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution that the covered educational institution does not endorse the creditor's loans and that the creditor is not affiliated with the covered education institution." The Federal Reserve rules go further to allow references to an institution in marketing in cases where the institution has agreed to endorse the creditor's education loans, if a similar statement without the reference to endorsement is provided. There is a caveat to this provision-- "if such arrangement is not prohibited by other applicable law or regulation." Interestingly, in the final rules, the Federal Reserve uses a new undefined term "endorsed lender arrangement" in this paragraph rather than "preferred lender arrangement" which was defined in the HEOA, and is used later in the TILA rules.

Consumer's Rights. As mentioned above, borrowers must be given 30 days to accept a loan once it is approved. In general, the lender may not change the terms during this period without providing revised disclosures, although some exceptions are provided (such as reducing the loan amount in response to information received from the institution).

The borrower must also be given three business days after receiving the final loan disclosures to cancel a loan. The creditor, including a college or university, may not disburse the proceeds until the three business days have passed.

Preferred Lender Arrangements. Any lender that is party to a preferred lender arrangement with an institution of higher education with respect to private education loans is required under the TILA regulations to provide detailed information about its loan products to the institution annually, if it knows about the arrangement. Under the

final rules, by April 1 of each year, lenders are required to provide the institution with the loan information provided in the application disclosure for each type of private education loan it plans to offer for the following award year (beginning July 1). This requirement also ties back to the ED rules on private education loans which provide the definition of preferred lender arrangement. The proposed definition is quite expansive so that, for instance, if a college listed the ten lenders used most often by its students over the last three years, it would be deemed to have a preferred lender arrangement with each of the lenders. This is why the TILA regulations only require lenders to provide the information if they are aware of the preferred lender arrangement. Since institutions will be required under the ED regulations to make this detailed information about private loans offered by such lenders available to their students, institutions should make sure lenders know if they are on the institution's preferred lender list.