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July 25, 1988

Part III

Department of Health and Human Services

Public Health Service

42 CFR Part 60

Health Education Assistance Loan Program; Notice of Proposed Rulemaking

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 60

Health Education Assistance Loan Program

AGENCY: Public Health Service, HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would amend existing regulations governing the Health Education Assistant Loan (HEAL) program to clarify the litigation requirement for all lenders and holders and to clarify the applicability of various sections of the HEAL regulations to the Student Loan Marketing Association (Sallie Mae). Since it was the Department's intent that all lenders and holders be subject to this requirement, this proposed rule would amend the language of the litigation provision to assure that all lenders and holders must litigate as part of their due diligence procedures.

DATE: Comments on this proposed rule are invited. To be considered, comments must be received by August 24, 1988.

ADDRESSES: Respondents should address written comments to J. Jarrett Clinton, M.D., Director, Bureau of Health Professions (BHPr), Room 8–05, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. All comments received will be available for public inspection and copying at the Office of Program Support, BHPr, Room 7–74, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland, weekdays (Federal holidays excepted) between the hours of 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Ms. Peggy Washburn, Chief, Program Development Branch, Division of Student Assistance, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8–48, 5600 Fishers Lane, Rockville, Maryland 20857; telephone number: 301 443–4540.

SUPPLEMENTARY INFORMATION: On January 8, 1987, the Department published final regulations (52 FR 730) to improve the procedures at schools and lending institutions for making, servicing, and collecting HEAL loans and to clarify the rights and responsibilities of lenders, holders, schools, borrowers, and the Federal Government. Since publication of these regulations, there has been confusion regarding the applicability of the litigation requirement contained in § 60.35(c)(3) to HEAL lenders and holders. Some lenders and holders have attempted to interpret this requirement as not applying to them because of the wording of the provision. Since it was the Department's intent that all lenders and holders be subject to this requirement, this proposed rule would amend the language of the litigation provision to assure that all lenders and holders must litigate as part of their due diligence procedures. The litigation provision would also be amended to include criteria for lenders and holders to follow in determining when litigation is required.

There has also been confusion regarding the applicability to Sallie Mae of certain regulatory provisions. This confusion has arisen as a result of Sallie Mae's unique position in the HEAL program. Under the HEAL statute, Sallie Mae is not included in the definition of an eligible HEAL lender, but is authorized to purchase, service, and sell loans insured by the Secretary under the HEAL program. This makes Sallie Mae the only organization included under sections 727–739 of the Public Health Service (PHS) Act which is not authorized to originate HEAL loans but is authorized to buy and hold them. We note that a HEAL loan, by statute, can only be sold to an eligible HEAL lender or to Sallie Mae.

Sallie Mae's exclusion from the definition of eligible lenders in the HEAL statute has caused misunderstandings regarding whether certain regulatory provisions addressed to lenders apply to Sallie Mae as well. Therefore, these proposed regulatory amendments are designed to clarify the applicability to Sallie Mae of the sections of the HEAL regulations discussed below. The Department notes that Sallie Mae has been cooperating in efforts to resolve the applicability of the existing litigation provision.

Section 60.31 The application to be a HEAL lender

The Department is proposing to amend paragraph (a) of this section to state that, to be a lender or a holder of HEAL loans, an organization must submit an application to the Secretary annually. This change would extend the existing requirement for an annual application to include holders, such as Sallie Mae, as well as lenders

Section 60.32 The HEAL lender insurance contract

The Department is proposing to amend paragraph (a) of this section to clarify that a holder of HEAL loans must be approved by and sign a contract with the Secretary. This requirement already exists for lenders, and is being extended to include holders.

The Department is also proposing to add a new paragraph (d) to this section to state that any holder that is not also a lender must enter into a contract with the Secretary annually to hold HEAL loans. Annual contracts are already required for HEAL lenders.

Section 60.35 HEAL loan collection

The Department is proposing to amend paragraph (c)(3) of this section to clarify that all lenders and holders are required to use litigation in the collection of HEAL loans, and to clarify when litigation must be used. The existing regulatory language, which requires litigation in accordance with the procedures a lender uses in the collection of its other loans of comparable dollar value, has caused confusion because lenders consider HEAL loans unique and have asserted that it is difficult to identify other loans that are of "comparable dollar value." This provision has also had the unintended effect of excluding one HEAL loan holder from the litigation requirement since that holder has informed the Department that it never utilizes litigation in the collection of any of its other loans.

The Department did not intend to exclude any lender or holder from this important step of the due diligence process, and is proposing to revise this section to clarify that a lender's or holder's collection practices for HEAL loans must include the use of litigation, after collection attempts have failed, except in the following situations:

(1) The lender or holder, despite the use of skip-tracing procedures, is unable to locate a defaulted borrower and is therefore unable to effect service upon the borrower;

(2) The total HEAL debt, including interest and late charges, is less than $1,500, unless the lender or holder has a policy or practice of litigating loan amounts of less than $1,500, in which case the Secretary may require the lender or holder to follow the same policy or practice regarding HEAL loans; or

(3) The lender or holder reasonably determines, and the Secretary concurs, that the probable expense to it of suing a defaulted borrower will be equal to or greater than the probable recovery of the debt during the period of a judgment. In this case, the lender or holder would be required to note the basis for its determination of the probable expense and recovery in the documentation submitted with the claim, and compare it to the normal commerical standards regarding expenses of litigation and probable recovery.

The Department is proposing to exclude loans with a value of less than $1,500 from the litigation requirement since it believes that the costs of litigating in these cases would be overly burdensome to the lender or holder compared with the expected return. The proposal to require a lender or holder to compare the probable expense of litigation with the probable recovery during the period of a judgment is designed to assure that a borrower's future earning potential is evaluated in determining whether to litigate. This provision should allow exceptions to the litigation requirement when it is unlikely that the borrower's financial situation will improve in the future, while requiring litigation in those cases where a borrower's ability to repay can be expected to improve over time.

These proposed exceptions do not mean that the Department itself will not pursue these debts after paying the claims. Indeed, the Department's policy is to pursue recovery on *all* debts which it receives through assignment. Accordingly, it is important to emphasize that payment by the Department of a claim to the lender or holder does not alter the student's obligation to repay the full amount owed under the HEAL program.

The Department is also proposing to clarify in this section that a lender or holder may satisfy its obligation to litigate by obtaining a judgment against a defaulted borrower and recording that judgment. Upon obtaining and recording such a judgment, the lender or holder must either pursue collection of the judgment or assign the judgment to the Secretary. This provision recognizes that, since the lender or holder will bear the costs of litigation if it is not able to collect from the borrower, the lender or holder may want to minimize these costs by assigning the judgment to the Department immediately. The Department believes that, even without further effort on the part of lenders or holders, the obtaining of a judgment prior to the filing of a default claim will serve to reduce defaults and will thus benefit the HEAL program. However, the Department also does not want to prohibit lenders or holders from pursuing collection of a judgment where they believe that payment will be forthcoming as a result of the legal proceedings. Therefore, this provision is designed to give a lender or holder flexibility in determining whether to continue its collection efforts after obtaining a judgment or to immediately assign the judgment to the Department.

It has been the Department's intent, in developing the litigation provision, that the use of litigation by all lenders and holders would be an effective deterrent to default and would reduce unnecessary expenditures from the Student Loan Insurance Fund (SLIF). Should the Department find, after additional experience with this provision, that the litigation requirement needs further restructuring to be most effective in preventing default or reducing SLIF expenditures, this provision may be reexamined.

Section 60.40 Procedures for filing claims

The Department is proposing to add a new paragraph (c)(1)(ii) to this section to clarify the time frames for filing a claim when the lender or holder has sued a defaulted borrower. This paragraph would explain that the lender or holder must file its claim with the Department within 30 days of obtaining the judgment if it does not pursue collection of the judgment. If the lender or holder does pursue collection of the judgment, and the debtor fails to make payment pursuant to the judgment, the lender or holder must file its claim within 120 days after the debtor's failure to make payment. These time frames are consistent with those applicable to the filing of default claims for which litigation is not required.

The Department is also proposing to clarify in this section that when a lender or holder files a default claim for which litigation was required, the lender or holder must assign the judgment to the Secretary as part of the default claim. Although this is already required for the Department to be able to pursue collection of a judgment after a default claim is paid, it is not specifically stated in the existing regulations.

Section 60.41 Determination of amount of loss on claims

The Department is proposing to add a new paragraph (d) to this section to clarify how claims will be paid when litigation has been required. Subparagraph (1) addresses the amount of the payment on a claim when the lender or holder has agreed to accept less than the unpaid balance of principal and interest on a HEAL loan through entering into a stipulated or consent judgment. In any such case, the amount payable on the default claim will be limited to the judgment amount. This will ensure that the Department will not be obligated to pay more on a default claim than it legally will be able to collect from the borrower, in cases where the lender or holder voluntarily agreed to the lesser amount.

Subparagraph (2) deals with situations where the lender or holder does not prevail in court or is awarded a judgment in an amount which is less than the unpaid balance of principal and interest on a HEAL loan, due to circumstances not within the control of the lender or holder (or a prior holder of the loan) and not due to negligence on the part of the lender or holder (or a prior holder of the loan). In these cases, the Department will pay the lender or holder the unpaid balance of principal and interest on the HEAL loan, provided that the claim would otherwise qualify for payment and that the lender or holder has filed by the due date a notice of appeal. In this instance, the lender or holder must file the claim with the Secretary within 10 days of receiving the adverse decision. This provision is designed to protect the lender or holder from having to absorb the loss of principal and interest that would otherwise be paid to it had the court ruled in the lender's or holder's favor, and that was not lost due to any fault on the part of the lender or holder.

Regulatory Flexibility Act and Executive Order 12291

The Department believes that the resources required to implement the proposed requirements in these regulations are minimal in comparison to the overall resources of lenders and holders. Therefore, in accordance with the requirements of the Regulatory Flexibility Act of 1980, the Secretary certifies that these regulations will not have a significant impact on a substantial number of HEAL lenders or holders.

The Department has also determined that this rule is not a major rule under Executive Order 12291; therefore, a regulatory impact analysis is not required. In addition, the rule will not exceed the threshold level of $100 million established in section (b) of Executive Order 12291.

Paperwork Reduction Act of 1980

These proposed regulations do not affect the recordkeeping, reporting, or disclosure/notification requirements for the HEAL program.

List of Subjects in 42 CFR Part 60

Educational study programs, Medical and dental schools, Health professions, Reporting requirements, Loan programs-education, Student aid, Loan programs-health.

Accordingly, the Department of Health and Human Services proposes to amend 42 CFR Part 60 as follows:

Dated: March 25, 1988.

Robert E. Windom,

Assistant Secretary for Health.

Approved: May 20, 1988.

Otis R. Bowen,

Secretary.

(*Catalog of Federal Domestic Assistance*, No. 13.108, Health Education Assistance Loan Program)

PART 60—HEALTH EDUCATION ASSISTANCE LOAN PROGRAM

1. The authority citation for Part 60 continues to read as follows:

Authority: Section 215 of the Public Health Service Act, 58 Stat. 690, as amended, 63 Stat. 35 (42 U.S.C. 216); sections 727–739 of the Public Health Service Act, 90 Stat. 2243, as amended, 93 Stat. 582, 99 Stat. 529–532 (42 U.S.C. 294–1941).

2. Section 60.31 is amended by revising the heading of the section and paragraph (a) to read as follows:

§ 60.31 The application to be a HEAL lender or holder.

(a) In order to be a HEAL lender or holder, an eligible organization must submit an application to the Secretary annually.

* * * * *

3. Section 60.32 is amended by revising the heading of the section and paragraph (a) and adding a new paragraph (d) to read as follows:

§ 60.32 The HEAL lender or holder insurance contract.

(a) (1) If the Secretary approves an application to be a HEAL lender or holder, the Secretary and the lender or holder must sign an insurance contract. Under this contract, the lender or holder agrees to comply with all the laws, regulations, and other requirements applicable to its participation in the HEAL program and the Secretary agrees to insure each eligible HEAL loan held by the lender or holder against the borrower's default, death, total and permanent disability, or bankruptcy. The Secretary's insurance covers 100 percent of the lender's or holder's losses on both unpaid principal and interest, except to the extent that a borrower may have a defense on the loan other than infancy.

(2) HEAL insurance, however, is not unconditional. The Secretary issues HEAL insurance on the implied representations of the lender or holder that all the requirements for the initial insurability of the loan have been met. HEAL insurance is further conditioned upon compliance by the lender and any subsequent holder of the loan with the HEAL statute and regulations, the insurance contract, and its own loan management procedures set forth in writing pursuant to § 60.31(c). The contract may contain a limit on the duration of the contract and the number or amount of HEAL loans a lender may make or a lender or holder may hold. Each HEAL lender or holder has either a standard insurance contract, a comprehensive insurance contract, or an insurance contract to hold HEAL loans with the Secretary, as described below.

* * * * *

(d) *Contract to hold HEAL loans.* An eligible holder of HEAL loans which is not also a lender must enter into an annual contract with the Secretary to hold HEAL loans. This contract will specify the holder's authority and responsibilities under the HEAL statute and regulations.

4. Section 60.35 is amended by revising paragraph (c)(3) to read as follows:

§ 60.35 HEAL loan collection.

* * * * *

(c) * * *

(3) The use of litigation, after collection attempts have failed, except in the following situations:

(i) The lender or holder, despite the use of skip-tracing procedures, as required in paragraph (a)(2) of this section, is unable to locate a defaulted borrower and is therefore unable to effect service upon the borrower;

(ii) The total HEAL debt owed to the lender or holder by a defaulted borrower, including interest and late charges, is less than $1,500, unless the lender or holder has a policy or practice of litigating loan amounts of less than $1,500, in which case the Secretary may require the lender or holder to follow the same policy or practice regarding HEAL loans; or

(iii) The lender or holder determines, and the Secretary concurs, that the probable expense to it of suing a defaulted borrower will be equal to or greater than the probable recovery of the debt during the period of a judgment. In this case, the lender or holder shall note the basis for its determination of the probable expense and recovery in the documentation submitted with the claim, and compare its determination to normal commercial experience with litigation expense and probable recovery.

A lender or holder will be deemed to have satisfied its duty to litigate, if it obtains a judgment from a court of competent jurisdiction against the defaulted borrower and records that judgment with the appropriate State or local governmental entity. Upon obtaining and recording such a judgment, the lender or holder must either pursue collection of the judgment or, within 30 days of obtaining the judgment, assign the judgment to the Secretary.

* * * * *

5. Section 60.40 is amended by redesignating paragraphs (c)(1)(ii) and (c)(1)(iii) as (c)(1)(iii), and (c)(1)(iv) respectively, and adding new paragraph (c)(1)(ii) to read as follows:

§ 60.40 Procedures for filing claims.

* * * * *

(c) * * *

(1) * * *

(ii) If a lender or holder files suit against a defaulted borrower pursuant to § 60.35(c)(3), and pursues collection of the judgment obtained as a result of the suit, it may retain the account. However, if the debtor fails to make payment pursuant to the judgment, the lender or holder must file a default claim with the Secretary within 120 days after the debtor's failure to make payment. Except as provided for in § 60.41(d)(2), if a lender or holder files suit against a defaulted borrower pursuant to § 60.35(c)(3), and obtains a judgment against that borrower, but does not pursue collection of that judgment, then it must file a default claim with the Secretary within 30 days of obtaining the judgment. In either of these cases, the lender or holder must assign the judgment to the Secretary as part of the default claim.

* * * * *

6. Section 60.41 is amended by redesignating paragraphs (d) and (e) as (e) and (f) respectively and adding new paragraph (d) to read as follows:

§ 60.41 Determination of amount of loss on claims.

* * * * *

(d) *Special rules for loans which have been subject to litigation.*

(1) In the course of discharging its collection and litigation duties under these rules, a lender or holder may settle or otherwise compromise a claim against a defaulted borrower for an amount less than the unpaid balance of the principal and interest on a HEAL loan. In such instances, the amount due under the settlement agreement must be incorporated into a stipulated judgment and the amount payable to the lender or holder from the Secretary on the default claim will be limited to the unliquidated portion of that stipulated judgment. In no event, however, will the amount payable to the lender or holder from the Secretary exceed the amount of the stipulated judgment.

(2) If a lender or holder should not prevail in any litigation undertaken

pursuant to § 60.35(c)(3) or should be awarded a judgment at an amount less than the unpaid balance of principal and interest on a HEAL loan, due to circumstances not within the control of the lender or holder (or a prior holder of the loan) and not due to negligence on the part of the lender or holder (or a prior holder of the loan), the lender or holder may file a default claim with the Secretary and such claim shall be paid, provided that the claim would otherwise qualify for payment and that the lender or holder has filed by the due date a notice of appeal. In this instance, the lender or holder must file the claim with the Secretary within 10 days of receiving the adverse decision.

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[2] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1987. The CFR volume issued January 1, 1987, should be retained.

[3] No amendments to this volume were promulgated during the period Apr. 1, 1980 to March 31, 1988. The CFR volume issued as of Apr. 1, 1980, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

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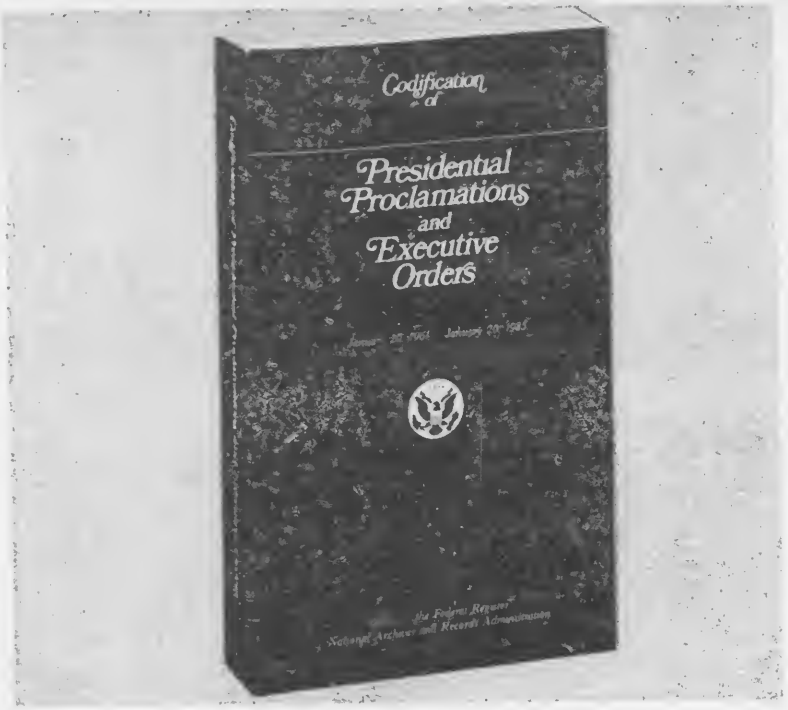

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