

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STUDENT LOAN FINANCE CORPORATION)
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Aberdeen, SD 57401)
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COMPLAINT FOR
DECLARATORY RELIEF

Civil Action No.

I. JURISDICTION AND VENUE

1. This action arises under the Administrative Procedure Act (“APA”) and under Title IV, Part D of the Higher Education Act (“HEA”), 20 U.S.C. §§ 1087a *et seq.*, known popularly as the William D. Ford Federal Direct Loan Program, 20 U.S.C. § 1087a(b)(1) (“the Direct Loan Program”). An actual controversy exists between Plaintiffs and Defendant with respect to Defendant’s interpretation of, and compliance with (A) the statutory provision fixing the origination fee for Direct Loan Program loans, 20 U.S.C. § 1087e(c); (B) the provision setting the interest rate for Direct Consolidation Loans, 20 U.S.C. § 1087e(b)(6)(D); (C) the provision establishing maximum Direct Loan Program loan amounts, 20 U.S.C. § 1087e(a)(1); and (D) the provision allowing the Secretary to establish incentives for timely repayment of Direct Loan Program loans, 20 U.S.C. § 1087e(b)(7). Defendant’s interpretations of and noncompliance with these provisions are contrary to the statute’s unambiguous text, and are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and violate both the HEA and the APA. The Secretary has, unfairly, made these taxpayer-funded benefits available only to the minority of borrowers who choose the Direct Loan Program; none is available to the majority of borrowers who choose the competing Federal Family Education Loan Program. As a result of Defendant’s erroneous interpretation of and noncompliance with these statutory provisions, Plaintiffs, which collectively make and/or hold, or represent the makers, holders, and guarantors of, billions of dollars in loans made under the competing Federal Family Education Loan Program, have been and are being harmed. Plaintiffs seek declaratory relief with respect to the proper construction of, and the Defendant’s noncompliance with, the Direct Loan Program statute.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 703.

3. Defendant is an officer or employee of the United States or an agency thereof acting in his official capacity or under color of legal authority. A substantial part

of the events or omissions giving rise to the claims alleged herein occurred in this District. Plaintiffs Education Finance Council and National Council of Higher Education Loan Programs, Inc. are residents and citizens of this District. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e).

II. PARTIES

4. Plaintiffs are participants, or representatives of participants, in the Federal Family Education Loan Program (“FFEL Program” or “FFELP”), formerly known as the Guaranteed Student Loan Program, a federal program established under Title IV, Part B of the HEA, 20 U.S.C. §§ 1071 *et seq.* Under the FFELP, Plaintiffs, their constituent members, and other participants make, hold, or guarantee loans to students and their families to assist in financing the students’ post-secondary education.

5. Plaintiff Student Loan Finance Corporation is a South Dakota corporation that acts principally as a secondary market for student loans that are originated throughout the United States. Its main offices are located in Aberdeen, South Dakota.

6. Plaintiff Education Finance Council, Inc. (“EFC”) is a Delaware corporation with principal offices in Washington, DC. EFC participates as a trade association of organizations that hold, originate and service loans under the FFEL Program.

7. Plaintiff Key Bank USA, N.A., is a national bank organized and existing under the laws of the United States. Plaintiff Key Bank USA, N.A., participates as a lender and holder of loans under the FFEL Program.

8. Plaintiff Bank of America, N.A., is a national bank with its principal place of business in North Carolina. Plaintiff Bank of America, N.A., participates as a lender and holder of loans under the FFEL Program.

9. Plaintiff NELnet, Inc. is a Nevada Corporation with its principal place of business located in Lincoln, Nebraska. Plaintiff NELnet, Inc. participates (through a trust

for which an eligible lender serves as trustee) as a lender and holder under the FFEL Program.

10. Plaintiff Wells Fargo Bank South Dakota, N.A., is a national bank with its principal place of business in South Dakota. Wells Fargo Bank South Dakota, N.A., participates as a lender and holder of loans under the FFEL Program.

11. Plaintiff North Texas Higher Education Authority, Inc., is a non-profit corporation with its principal place of business in Arlington, Texas. North Texas Higher Education Authority, Inc. acts principally as a secondary market for student loans of Texas residents or students attending Texas institutions of higher education.

12. Plaintiff, The Student Loan Corporation, is a corporation organized under the laws of the State of Delaware with its principal office in the State of Connecticut. Plaintiff, The Student Loan Corporation, participates, through a trust agreement with Citibank (New York State) as a lender and holder of loans under the FFEL Program.

13. Plaintiff National Council of Higher Education Loan Programs, Inc. (“NCHHELP”) is a Delaware non-profit corporation with its principal offices in Washington, D.C. NCHHELP is a national trade association representing guarantors, lenders, secondary markets, loan servicers, loan collectors, and other organizations that participate in and support the FFEL Program.

14. Plaintiff Bank One, N.A., is a national bank with its principal place of business in Columbus, Ohio. Plaintiff Bank One, N.A., participates as a lender and holder of loans under the FFEL Program.

15. Plaintiff USA Education, Inc. (“USAE”), formerly known as SLM Holding Corporation, is a Delaware holding corporation formed in connection with the Student Loan Marketing Association Reorganization Act of 1996. USAE’s wholly owned subsidiary, the Student Loan Marketing Association (“Sallie Mae”), is a federally chartered corporation created by Act of Congress to act as a secondary market for the FFEL program. USAE also originates FFEL Program loans through a number of its

state-chartered subsidiaries, including Nellie Mae Corporation and Student Loan Funding Resources. USAE, through its subsidiaries, owns or manages approximately \$60 billion in FFELP loans.

16. Defendant Richard W. Riley (“Defendant” or “the Secretary”) is Secretary of the United States Department of Education (“the Department”). Defendant is charged under 20 U.S.C. § 1087a(a) with executing, administering, and enforcing the Direct Loan Program, including the origination fee, consolidation loan interest rate, maximum loan amount, and repayment incentive provisions at issue in this case. Defendant is sued solely in his official capacity.

III. ALLEGATIONS COMMON TO ALL CLAIMS

A. The Federal Family Education Loan Program

17. Congress enacted the Higher Education Act in 1965 through Pub. L. No. 89-329. Title IV, Part B of the HEA created the Guaranteed Student Loan Program, which has been renamed the Federal Family Education Loan Program (“FFEL Program” or “FFELP”).

18. The purpose of the FFEL Program, as set forth in 20 U.S.C. § 1071(a)(1), is to provide financial assistance in the form of loans to qualifying students seeking post-secondary education. Under the FFELP, private lenders make loans to eligible students and their parents. The HEA promotes the making of FFELP loans by private lenders by providing, in 20 U.S.C. § 1078(b) and (c), for loan guarantees by state agencies and non-profit private companies in the event borrowers default on their obligations under such loans. The Department, in turn, reinsures the guarantors. *Id.* § 1078(c). The plaintiffs in this case make, hold, or represent makers, holders, or guarantors of, large portfolios of FFELP loans.

B. The William D. Ford Federal Direct Loan Program

19. Congress amended the HEA by creating the Direct Loan Program as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66. The authorization legislation for the Direct Loan Program is now codified at 20 U.S.C. §§ 1087a *et seq.*

20. Under the Direct Loan Program, the Department of Education makes loans directly to eligible borrowers. It competes directly with FFELP participants, including Plaintiffs, for loan volume. Although an early flurry of schools converted from FFELP to Direct Loan Program participation following its enactment in 1993, competitive responses from FFELP lenders later reversed this trend. The Direct Loan Program now serves only about 30% of borrowers in the federally sponsored student loan market. The remaining borrowers obtain their loans through the FFEL Program.

21. In an effort to improve the competitive position of the Direct Loan Program, the Secretary in 1998 sought and obtained legislation authorizing him to offer interest rate discounts to encourage timely repayment of Direct Loan Program loans. The statute, however, established important procedural and substantive preconditions to the exercise of this authority, including the requirement that such incentives be certified by the Office of Management and Budget and the independent Congressional Budget Office as cost neutral to the taxpayer, and that the incentives be promulgated through notice-and-comment rulemaking. Also, no change was made in the statutory requirement that the Secretary “shall charge” a Direct Loan borrower a 4.0-percent origination fee. 20 U.S.C. § 1087e(c).

22. In 1999, the Secretary reduced the origination fee on Direct Loan Program loans to student borrowers from 4.0 percent to 3.0 percent, in violation of the statutory requirement that “[t]he Secretary shall charge the borrower of a loan made under [the Direct Loan Program] an origination fee of 4.0 percent of the principal amount of loan.” 20 U.S.C. § 1087e(c).

23. Then, this year, the Secretary began offering a number of other borrower incentives on Direct Loan Program loans, but consistently violated the conditions laid down by the statute for doing so.

24. The Secretary has made these taxpayer-funded benefits available only to borrowers who choose the Direct Loan Program; none is available to the 70% of borrowers who choose the FFEL Program. It is these taxpayer-funded benefits, and the Secretary's failure to interpret correctly and to comply with the conditions set by statute in this area, that are at issue in this case.

1. The 1998 HEA Amendments, the Department's 1999 Regulation, and the Department's Announcement Reducing the Direct Loan Origination Fee to 3%

25. Congress amended the HEA in the Higher Education Amendments of 1998, Pub. L. No. 105-244 ("the 1998 HEA Amendments").

26. The 1998 HEA Amendments did not amend 20 U.S.C. § 1087e(c).

27. The Secretary published a proposed regulation on June 16, 1999, which he contends implemented the 1998 HEA Amendments. *Notice of Proposed Rulemaking*, 64 Fed. Reg. 32,358 (1999) ("Notice").

28. The Notice asserted that the 1998 HEA Amendments, which did not amend 20 U.S.C. § 1087e(c), nevertheless conferred new authority on the Secretary to charge a lower origination fee for Direct Loan Program loans made to student borrowers than the 4.0-percent fee mandated by the statute. The Notice declared that "[t]he Secretary interprets the 1998 [HEA] Amendments as authorizing him to charge a reduced loan fee to all Direct Subsidized and Direct Unsubsidized Loan borrowers[.]" *Notice of Proposed Rulemaking*, 64 Fed. Reg. at 32,359. ("Direct Subsidized and Direct Unsubsidized Loans" are the two types of Direct loans made to student borrowers, as distin-

guished from parent borrowers. Direct loans to parents are referred to as “Direct PLUS Loans.”

29. The final rule promulgated by the Secretary amended 34 C.F.R. § 685.202(c)(1), purporting to confer on the Secretary the authority to charge “a loan [origination] fee *not to exceed* four percent of the principal amount of the loan on a Direct Subsidized or Direct Unsubsidized Loan.” Final Regulations, 64 Fed. Reg. 46,252 (1999) (to be codified at 34 C.F.R. § 685.202(c)(1)(i) (2000)).¹ Thus, the regulation purported to confer on the Secretary the discretion to establish any origination fee less than or equal to 4.0 percent without promulgating a further regulation. The statute, however, continues to require the Secretary to charge a 4.0 percent origination fee. 20 U.S.C. § 1087e(c).

30. In a press release issued June 16, 1999, the Secretary unilaterally announced that the origination fee charged to Direct Loan Program student borrowers would be reduced from 4.0 percent to 3.0 percent effective August 15, 1999. No regulation establishing this 3.0-percent fee was ever published. The Secretary’s announcement constituted final agency action. Indeed, borrowers are currently receiving this discount.

31. The Secretary’s interpretation that he has authority to charge a different origination fee for Direct Loan Program loans than the 4.0 percent fee required by the statute has been rejected by the independent Congressional Research Service (“CRS”). A May 13, 1999, CRS memorandum concluded that “the Secretary has been given express and unambiguous direction from Congress to charge a 4.0 percent origination fee under the Direct Loan Program.” A June 23, 1999, CRS memorandum again rejected the Secretary’s contention that ambiguity in the statute gave him the authority to charge an origination fee of less than 4.0 percent. The CRS’s analysis concluded that the term

¹ Before the amendment, this regulation recognized that the Secretary “[c]harge[d] a borrower a loan [origination] fee of four percent of the principal amount of the loan on a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan[.]” 34 C.F.R. § 685.202(c)(1) (1999).

“shall” in 20 U.S.C. § 1087e(c) was mandatory. Similarly, the General Accounting Office (“GAO”) has rejected the Secretary’s interpretation as inconsistent with the statutory text. In a September 23, 1999 letter to U.S. Representative Bill Goodling, the GAO’s General Counsel found meritless the Secretary’s argument that the 1998 HEA Amendments (specifically, the “same terms and conditions” language of 20 U.S.C. § 1087e(a)(1)) conferred upon him new authority to alter the origination fee.

32. The Congressional Budget Office (“CBO”) estimated that the Secretary’s decision to reduce direct loan origination fees by 1.0 percent would increase federal program costs by \$590 million over the 1999–2004 period, and by \$1.45 billion through 2009.

2. The Department’s August 2000 1.5% Additional Direct Loan Origination Fee Reduction

33. On August 10, 2000, the Secretary issued a press release announcing a further 1.5-percent reduction in the origination fees the Department would charge for all Direct Loans, this time including loans to parents (Direct PLUS Loans) as well as loans to students. The Secretary attempted to circumvent the statutory prohibition on origination fee reductions by characterizing this reduction as a “rebate” of interest the borrower *might* be charged *in the future* on the loan. The Secretary’s announcement further specified that, if the borrower did not remain current in repayment on the loan for the first twelve months of repayment, the 1.5-percent origination fee reduction would be rescinded and would be added to the borrower’s outstanding principal balance owed. Borrowers who remained current for the first twelve months of repayment were allowed to keep the full discount even if they thereafter became late or delinquent in repayment. They were also allowed to keep the discount even if they prepay their loan prior to incurring any interest expense.

34. Contrary to the HEA and the APA, the Secretary did not promulgate a regulation establishing the 1.5-percent origination fee discount or the various conditions

and requirements that the borrower must meet to retain it. The Secretary issued a Direct Loan Bulletin in October 2000, referred to as “DLB 00-48,” describing the operation of the refund. DLB 00-48 was not promulgated after notice and comment, as those terms are defined in the Administrative Procedure Act. In DLB 00-48, the Secretary makes clear that the effect of his interpretation is to reduce the origination fee from 3.0 percent to 1.5 percent.

35. The Secretary’s announcement that he would henceforth provide a 1.5-percent discount of the origination fee on direct loans represents final agency action. Indeed, borrowers are currently receiving this discount.

36. Under the Secretary’s announcement, the 1.5-percent origination fee discount is paid to all borrowers at the time the loan is originated, either in the form of a reduction in the borrower’s outstanding balance or, for loans made for academic years beginning on or after July 1, 2001, by increasing the amount of funds disbursed to the borrower. Because the discount is paid to a borrower before the borrower or any other party has commenced repayment on the loan, it does not represent a “rebate,” which is defined as a return of payments already made.

37. The 1.5-percent origination fee discount is paid to all borrowers at the time the loan is originated, irrespective of whether the borrower ever actually incurs interest charges equal to or exceeding 1.5 percent of the amount borrowed.

38. The 1.5-percent origination fee discount can never be taken away from a borrower who first makes a late payment 13 or more months into the repayment period. Thus, even borrowers who do not timely repay the loan receive the discount.

39. The 1.5-percent origination fee discount does not affect the interest rate the borrower is charged on the loan. The borrower is still charged the same rate of interest that would have been applicable to the loan before the Secretary’s announcement of a 1.5-percent origination fee discount.

40. The Secretary has suggested that he regards the 1.5-percent origination fee discount as a form of reduction in the borrower's interest rate. Even assuming *arguendo* that that is correct, the Secretary failed to comply with the statutory prerequisites required by 20 U.S.C. § 1087e(b)(7) for any reduction in the borrower's interest rate on Direct Loan Program loans. To wit:

- (A) The 1.5-percent origination fee discount was not "prescribe[d] by regulation" as required by the plain language of 20 U.S.C. § 1087e(b)(7)(A).² The discount was also not issued as a rule promulgated after notice and comment as required by the Administrative Procedure Act.
- (B) The 1.5-percent origination fee discount does not operate to "encourage on-time repayment of the loan" as required by 20 U.S.C. § 1087e(b)(7)(A). The discount is credited or paid in cash to all borrowers at the time of origination, before the borrower has made even a single timely payment. Furthermore, the discount can never be taken away from a borrower who makes timely payments for the first twelve months of repayment, no matter how delinquent the borrower may subsequently become.
- (C) On information and belief, the Secretary has not obtained an official report from the Director of the Office of Management and Budget certifying that the 1.5-percent origination fee discount "will be completely cost neutral" as required under 20 U.S.C. § 1087e(b)(7)(B). In fact, the Secretary has determined that the 1.5-percent origination fee discount will cost the federal government \$153 million through 2005.
- (D) The Secretary has not obtained an official report from the Director of the Congressional Budget Office certifying that the 1.5-percent origination fee discount "will be completely cost neutral" as required under 20 U.S.C. § 1087e(b)(7)(B). In fact, the CBO has de-

² The Secretary did promulgate a rule, effective July 1, 2000, purporting to broadly authorize the Secretary to establish interest rate reductions "for a borrower who repays a loan under a system or on a schedule that meets requirements specified by the Secretary." Final Regulations, 64 Fed. Reg. 57,960, 57,961 (1999) (to be codified at 34 C.F.R. § 685.211(b) (2000)). The preamble accompanying the proposed rule indicated that the Secretary then contemplated providing an interest rate reduction for borrowers who agreed to electronic payment, but did not specify the amount. The 0.25-percent reduction subsequently announced by the Secretary was never specified in the text of any proposed or final regulation as the HEA and APA require. Further, the CBO, rather than certifying the cost-neutrality of the 0.25-percent interest rate reduction, determined that such reduction would cost the federal government \$69 million in 2000 and \$123 million through 2005.

terminated that the 1.5-percent origination fee discount will cost the federal government \$145 million through 2005.

- (E) The Secretary has failed to ensure that any increase in subsidy costs resulting from the 1.5% origination fee discount is “completely offset by corresponding savings in funds available for [the Direct Loan Program] in that fiscal year . . . and other administrative accounts,” as required by 20 U.S.C. § 1087e(b)(7)(A).

41. The Secretary’s payment of the discount in cash to borrowers on Direct Loan Program loans for academic periods beginning on or after July 1, 2001, violates the applicable statutory maximum loan amounts for many borrowers.

3. The Secretary’s August 2000 Interest Rate Reduction for Direct Consolidation Loans

42. The Department also makes “Federal Direct Consolidation Loans,” 20 U.S.C. § 1087e(g), which compete with consolidation loans offered under the FFEL Program. Consolidation loans permit borrowers to consolidate outstanding FFELP and/or Direct loans into a single debt. The Secretary has acknowledged that, as a result of the 0.8-percent Direct Consolidation Loan interest rate reduction discussed in this section, a substantial amount of FFELP loans will be consolidated into the Direct Loan Program. Consolidating loans from the FFEL Program into the Direct Lending Program harms FFELP lenders by depriving them of their assets and the future stream of income they represent. Since the Department has often expressed its intent to compete with FFELP lenders for borrowers, any inducement by the Secretary to encourage FFEL Program borrowers to consolidate their FFELP loans into the Direct Loan Program amounts to a use of the Department’s regulatory authority to advance its competitive self-interest and disadvantage FFELP lenders, holders, and guarantors, including the Plaintiffs here, who both compete with and are regulated by the Secretary.

43. The interest rates for Federal Direct Consolidation Loans made after February 1, 1999, are fixed by 20 U.S.C. § 1087e(b)(6)(D). That subparagraph requires the Secretary to charge borrowers on Federal Direct Consolidation Loans the lesser of (1) the

weighted average of the interest rates of the loans consolidated, rounded to the next higher one-eighth of a percentage point; or (2) 8.25% interest.

44. At the same time the Secretary announced he would discount 1.5 percent of the origination fee paid by borrowers under the Direct Loan Program, he also announced a 0.8-percent reduction in the interest rate the Department would charge borrowers for Direct Consolidation Loans. This 0.8-percent reduction applies across the board to all borrowers who consolidate loans after October 1, 2000, but the reduction is rescinded if the borrower fails to make the first twelve payments on time.

45. The Secretary's announcement that he would henceforth reduce by 0.8 percent the interest rate charged for Direct Consolidation Loans represents final agency action. Indeed, borrowers are currently receiving this reduction.

46. 20 U.S.C. § 1087e(b)(6)(D) requires that Federal Direct Consolidation Loans "shall bear interest" at the rate provided therein, and does not authorize the Secretary to charge any interest rate for Direct Consolidation Loans other than the rate fixed by statute.

47. 20 U.S.C. § 1087e(b)(7) permits the Secretary "to prescribe by regulation such reductions in the interest rate paid by a borrower of a loan . . . to encourage on-time repayment of the loan" but establishes various substantive and procedural prerequisites for any such regulation. The Secretary's 0.8-percent reduction in the interest rate fails to satisfy the requirements of that provision. To wit:

- (A) The Secretary's 0.8-percent interest rate reduction for Direct Consolidation Loans was not "prescribe[d] by regulation" as required by 20 U.S.C. § 1087e(b)(7)(A). The 0.8-percent interest rate reduction was also not issued as a rule promulgated after notice and comment as required by the Administrative Procedure Act.
- (B) The Secretary does not limit eligibility for the 0.8-percent interest rate reduction to those borrowers who maintain prompt payment behavior after the first 12 months, or require that borrowers make even a single payment on time before becoming eligible for the 0.8-percent interest rate reduction. The 0.8-percent interest rate

reduction for Direct Consolidation Loans, accordingly, does not operate to “encourage on-time repayment of the loan” as required by 20 U.S.C. § 1087e(b)(7)(A). Rather, the reduction is designed merely to encourage consolidation of FFELP loans into the Direct Loan Program.

- (C) The Secretary has failed to ensure that any increase in subsidy costs resulting from the 0.8-percent interest rate reduction on Direct Consolidation Loans is “completely offset by corresponding savings in funds available for [the Direct Loan Program] in that fiscal year . . . and other administrative accounts,” as required by 20 U.S.C. § 1087e(b)(7)(A).

C. The Parties’ Dispute

1. The Secretary’s 1% Reduction of the Origination Fee in 1999

48. With regard to the origination fee, the applicable statute, 20 U.S.C. § 1087e(c), has consistently required that the Secretary “*shall* charge the borrower of a loan made under this part an origination fee of 4.0 percent of the principal amount of [the] loan.” (Emphasis supplied.) Nothing in the 1998 HEA Amendments altered this statutory requirement.

49. The Secretary has erroneously decided that another provision of the 1998 HEA Amendments, 20 U.S.C. § 1087e(a)(1), conferred on him new authority to reduce the origination fee for borrowers under the Direct Loan Program. By its terms, however, that provision expressly avoids overriding other statutory provisions, including the unambiguous statutory requirement in 20 U.S.C. § 1087e(c) fixing the origination fee for Direct Loan Program loans at 4.0 percent. The section on which the Secretary relies states: “[*u*nless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers under [FFELP].” (Emphasis supplied.) The origination fee for Direct Loan Program loans is “otherwise specified in this part”; it is fixed at 4.0

percent by 20 U.S.C. § 1087e(c). Accordingly, the statute on which the Secretary relies has no application here.

50. The Secretary's regulation promulgated in 1999, providing for a 1-percent reduction in the Direct Loan origination fee, is contrary to, or an unreasonable interpretation of, 20 U.S.C. § 1087e(c), and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

51. The Secretary's attempt to establish a 3.0-percent Direct Loan origination fee without promulgation of a regulation violates § 553 of the APA.

52. Plaintiffs have exhausted all administrative remedies and/or any administrative remedy would be futile.

2. The Secretary's Further 1.5% Reduction of the Origination Fee in 2000

53. The Secretary's announcement on August 10, 2000, of a further 1.5-percent reduction in the Direct Loan origination fee, is contrary to, or an unreasonable interpretation of, 20 U.S.C. § 1087e(c), and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

54. As noted above, the statute fixing the origination fee for Direct Loan Program loans at 4.0 percent does not authorize the Secretary to charge a lesser fee. 20 U.S.C. § 1087e(c). The 1998 HEA Amendments, which did not alter section 1087e(c), conferred no new authority on the Secretary to reduce the origination fee below the level fixed by statute. The 1.5-percent discount of the origination fee the Secretary announced in 2000 is unlawful for the same reasons as the 1.0-percent reduction of the origination fee the Secretary announced in 1999.

55. The Secretary cannot salvage the 1.5-percent discount in the origination fee by mischaracterizing it as a reduction in the borrower's interest rate. Because it is credited to the borrower up front at the time of origination, before the borrower or anyone

else has paid so much as a dollar in interest, the Secretary's action is, in substance, a discount of the origination fee, rather than a reduction in the borrower's interest rate.

56. Even assuming *arguendo* that the Secretary's action could be recharacterized as a reduction in the borrower's interest rate, the Secretary's conduct would still violate the HEA and the APA. The HEA, in 20 U.S.C. § 1087e(b)(7), establishes substantive and procedural requirements for any reduction in the borrower's interest rate with which the Secretary has not complied. Subsection (b)(7), as well as the APA, requires that any interest rate reduction, as well as any related requirement such as the requirement that the borrower make twelve on-time payments, must be issued as a regulation promulgated upon notice and comment. The Secretary has not engaged in such rulemaking with respect to the 1.5-percent "rebate." Furthermore, the Secretary may make no reduction in the interest rate charged on Direct Loan Program loans without first obtaining written certifications from the Directors of both the Office of Management and Budget and the Congressional Budget Office that any such reductions "will be completely cost neutral." On information and belief, the Secretary has obtained no such certifications here. The Secretary has also failed to ensure that any increase in subsidy costs resulting from the 1.5-percent discount is "completely offset by corresponding savings in funds available for [the Direct Loan Program] in that fiscal year . . . and other administrative accounts," as required by 20 U.S.C. § 1087e(b)(7)(A). Finally, the payment of the "rebate" in cash beginning in 2001 will result in violations of the statutory loan limits for many borrowers.

57. The Secretary's erroneous interpretation of and noncompliance with 20 U.S.C. § 1087e(c) and the APA has harmed Plaintiffs by placing them, and their constituent members, at a competitive disadvantage in the marketing of FFELP loans to eligible student borrowers. By placing its economic competitors at a competitive disadvantage, the Department has used its regulatory power not to carry out Congressional intent, but to advance its own competitive interests.

58. The Secretary's erroneous interpretation of and noncompliance with 20 U.S.C. § 1087e(c) and the APA has harmed the public interest. By reducing the origination fee below the amount required by statute, the Department has reduced the amount of federal revenues generated by the origination fee, essentially creating an expenditure of public funds not authorized by statute.

59. Plaintiffs have exhausted all administrative remedies and/or any administrative remedy would be futile.

3. The Secretary's 0.8-Percent Reduction in the Statutorily Mandated Interest Rate for Direct Consolidation Loans

60. With regard to the interest rate on Federal Direct Consolidation Loans, the Secretary's announcement on August 10, 2000, of a 0.8-percent reduction in the interest rate he would charge on Direct Consolidation Loans is contrary to, or an unreasonable interpretation of, 20 U.S.C. § 1087e(b)(6)(D), and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

61. The applicable statute, 20 U.S.C. § 1087e(b)(6)(D), establishes the interest rate for such loans and provides no discretion for the Secretary to charge a rate different from the one Congress has fixed by statute.

62. The statutory provision authorizing the Secretary to reduce borrower interest rates to encourage prompt payment, 20 U.S.C. § 1087e(b)(7), does not authorize the Secretary's 0.8-percent reduction in the interest rate charged on Direct Consolidation Loans because the Secretary has not complied with the substantive and procedural requirements of that paragraph. The 0.8-percent reduction does not apply unless a borrower consolidates the borrower's loans into the Direct Loan Program. The reduction is thus first and foremost an inducement to a FFELP borrower to consolidate the borrower's loans in the competing Direct Loan Program. The borrower keeps the benefit if

the borrower pays on time for twelve months, but would never have been eligible for the reduction without consolidating the borrower's loans.

63. The Secretary's rule is also procedurally flawed. Under the HEA and the APA, any interest rate reduction, as well as any related requirement such as the requirement that the borrower make twelve on-time payments, must be issued as a regulation promulgated upon notice and comment. The Secretary has not engaged in such rulemaking with respect to the 0.8-percent interest rate reduction. Furthermore, the Secretary has failed to ensure that any increase in subsidy costs resulting from the 0.8-percent interest rate reduction is "completely offset by corresponding savings in funds available for [the Direct Loan Program] in that fiscal year ...and other administrative accounts", as required by 20 U.S.C. § 1087e(b)(7)(A).

64. Plaintiffs have exhausted all administrative remedies and/or any administrative remedy would be futile.

**COUNT I
(HIGHER EDUCATION ACT —
1999 ORIGINATION FEE REDUCTION)**

65. Plaintiffs repeat and reallege paragraphs 1 through 64 of this Complaint as if fully set forth here.

66. Under the plain language of the HEA, 20 U.S.C. § 1087e(c), the Secretary is required to "charge the borrower of a loan made under [the Direct Loan Program] an origination fee of 4.0 percent of the principal amount of [the] loan."

67. Despite the clear dictates of the HEA, the Secretary has declared, in the regulation promulgated in 1999, that he need not charge Direct Loan Program student borrowers the 4.0-percent origination fee the statute requires, and has thereafter charged such borrowers a 3.0-percent origination fee.

68. The Secretary's decision to charge a 3.0-percent origination fee violates the plain language of the statute, and was not promulgated in compliance with the APA.

WHEREFORE, Plaintiffs pray for the following relief:

- (a) A declaratory judgment that the Secretary's decision regarding the Direct Loan Program origination fee violates the HEA and the APA;
- (b) A declaratory judgment that the HEA requires the Secretary to charge a borrower under the Direct Loan Program "an origination fee of 4.0 percent of the principal amount of [the] loan" notwithstanding the Secretary's contrary contention;
- (c) The costs of this suit;
- (d) Attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (e) Such other or further relief as this Court deems just and proper.

**COUNT II
(HIGHER EDUCATION ACT —
2000 ORIGINATION FEE DISCOUNT)**

69. Plaintiffs repeat and reallege paragraphs 1 through 68 of this Complaint as if fully set forth here.

70. Under the plain language of the HEA, 20 U.S.C. § 1087e(c), the Secretary is required to "charge the borrower of a loan made under [the Direct Loan Program] an origination fee of 4.0 percent of the principal amount of [the] loan."

71. Despite the clear dictates of the HEA, the Secretary has announced, on August 10, 2000, that he will provide Direct Loan Program borrowers with an additional 1.5-percent discount on the origination fee.

72. Even if this discount could be characterized as a reduction in interest rate, the Secretary's action still contravenes the HEA and the APA. The discount violates the maximum loan amount provisions of the HEA for many borrowers. It was not promulgated through notice-and-comment rulemaking. The Secretary has not obtained official reports from the Director of the Office of Management and Budget and the Director of the Congressional Budget Office certifying that the reduction in the origination fee will

be “completely cost neutral,” and in fact, the CBO has determined that the reduction in the origination fee will cost the government millions of dollars. Finally, the Secretary has failed to ensure that any increase in subsidy costs resulting from the 1.5-percent origination fee reduction is “completely offset by corresponding savings in funds available for [the Direct Loan Program] in that fiscal year . . . and other administrative accounts,” as required by 20 U.S.C. §1087e(b)(7)(A).

73. The Secretary’s decision to offer the 1.5-percent origination fee discount (or, as the Secretary characterizes it, a 1.5-percent “rebate” of future possible interest charges) violates the plain language of the HEA and the APA.

WHEREFORE, Plaintiffs pray for the following relief:

- (a) A declaratory judgment that the Secretary’s decision regarding the Direct Loan Program origination fee violates the HEA and the APA;
- (b) A declaratory judgment that the HEA requires the Secretary to charge a borrower under the Direct Loan Program “an origination fee of 4.0 percent of the principal amount of [the] loan” notwithstanding the Secretary’s contrary contention;
- (c) A declaratory judgment that the 1.5-percent rebate is an illegal discount of the statutorily mandated 4.0-percent origination fee, or, in the alternative, violates the procedural requirements of 20 U.S.C. § 1087e(b)(7) and statutory loan limits;
- (d) The costs of this suit;
- (e) Attorneys’ fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (f) Such other or further relief as this Court deems just and proper.

**COUNT III
(HIGHER EDUCATION ACT —
CONSOLIDATION INTEREST RATE REDUCTION)**

74. Plaintiffs repeat and reallege paragraphs 1 through 73 of this Complaint as if fully set forth here.

75. Under the plain language of the HEA, 20 U.S.C. § 1087e(b)(6)(D), any Direct Consolidation Loan for which the application is received between February 1, 1999, and July 1, 2003, “shall bear interest at an annual rate . . . that is equal to the lesser of (i) the weighted average of the interest rates on the loans consolidated . . . or (ii) 8.25 percent.”

76. Despite the clear dictates of the HEA, the Secretary has announced, on August 10, 2000, that he will not charge Direct Consolidation Program borrowers the interest rate established by statute.

77. Despite the requirements of 20 U.S.C. § 1087e(b)(7) and the APA, the Secretary did not promulgate this rate reduction through notice-and-comment rulemaking and failed to ensure that any increase in subsidy costs resulting from the rate reduction is completely offset by corresponding savings in funds available for [the Direct Loan Program] in that fiscal year . . . and other administrative accounts.”

78. The Secretary’s decision to reduce Direct Consolidation Loan interest rates by 0.8 percent violates the plain language of the HEA and the APA.

WHEREFORE, Plaintiffs pray for the following relief:

- (a) A declaratory judgment that Defendant’s decision regarding the Federal Direct Loan Program interest rate violates the HEA and the APA;
- (b) The costs of this suit;
- (c) Attorneys’ fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (d) Such other or further relief as this Court deems just and proper.

**COUNT IV
(ADMINISTRATIVE PROCEDURE ACT —
1999 ORIGINATION FEE REDUCTION)**

79. Plaintiffs repeat and reallege paragraphs 1 through 78 of this Complaint as if fully set forth here.

80. Under the plain language of the applicable provision of the HEA, 20 U.S.C. § 1087e(c), the Secretary is required to “charge the borrower of a loan made under [the Direct Loan Program] an origination fee of 4.0 percent of the principal amount of [the] loan.”

81. Despite the clear dictates of the HEA, the Secretary in 1999 promulgated a regulation declaring that the Secretary may charge Direct Loan Program student borrowers an origination fee other than in the amount specified by the HEA, and has thereafter charged such borrowers a 3.0-percent origination fee.

82. The Secretary’s announcement on June 16, 1999 that he would charge Direct Loan student borrowers an origination fee of 3.0 percent is a “rule” as that term is defined in 5 U.S.C. § 551(4), and is required to be promulgated through notice-and-comment rulemaking by 5 U.S.C. § 553.

83. The Secretary did not engage in notice-and-comment rulemaking, as required by 5 U.S.C. § 553, in issuing the rule providing for a 3.0-percent origination fee.

84. The Secretary’s decision constitutes final agency action within the meaning of 5 U.S.C. § 704. As a direct result of the Secretary’s decision, Plaintiffs have suffered a legal wrong because of an agency action or have been adversely affected or aggrieved by agency action, within the meaning of 5 U.S.C. § 702.

85. The Secretary’s issuance of a rule providing for a 3.0-percent origination fee without following the procedures mandated by 5 U.S.C. § 553, and in violation of the HEA, is arbitrary, capricious, an abuse of discretion, and/or otherwise contrary to law, within the meaning of 5 U.S.C. § 706.

WHEREFORE, Plaintiffs pray for the following relief:

- (a) A declaratory judgment that the Secretary’s rule and erroneous decision regarding the 1.0-percent Direct Loan Program origination fee discount are each arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, and violates the APA;

- (b) A declaratory judgment that the Secretary's rule and erroneous decision regarding the 1.0-percent Direct Loan Program origination fee discount are each in excess of statutory authority or limitations or short of statutory right, and violates the APA;
- (c) The costs of this suit;
- (d) Attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (e) Such other or further relief as this Court deems just and proper.

**COUNT V
(ADMINISTRATIVE PROCEDURE ACT —
2000 ORIGINATION FEE DISCOUNT)**

86. Plaintiffs repeat and reallege paragraphs 1 through 85 of this Complaint as if fully set forth here.

87. The Secretary's announcement on August 10, 2000 that he would further discount the origination fee paid by borrowers in the Direct Loan Program by 1.5 percent (which the Secretary characterized as a "rebate" of future interest that might be paid) is a "rule" as that term is defined in 5 U.S.C. § 551(4), and is required to be promulgated through notice-and-comment rulemaking by 5 U.S.C. § 553.

88. The Secretary did not engage in notice and comment rulemaking, as required by 5 U.S.C. § 553, in issuing the rule providing for a 1.5-percent discount of the origination fee.

89. The Secretary's decision constitutes final agency action within the meaning of 5 U.S.C. § 704. As a direct result of the Secretary's decision, Plaintiffs have suffered a legal wrong because of an agency action or have been adversely affected or aggrieved by agency action, within the meaning of 5 U.S.C. § 702.

90. The Secretary's issuance of a rule providing for a discount of the origination fee without following the procedures mandated by 5 U.S.C. § 553, and in violation of various requirements of the HEA, is arbitrary, capricious, an abuse of discretion, and/or otherwise contrary to law, within the meaning of 5 U.S.C. § 706.

WHEREFORE, Plaintiffs pray for the following relief:

- (a) A declaratory judgment that the Secretary's rule and erroneous decision regarding the 1.5-percent Direct Loan Program origination fee discount are each arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, and violates the APA;
- (b) A declaration that the Secretary's rule and erroneous decision regarding the 1.5-percent Direct Loan Program origination fee discount is in excess of statutory authority or limitations or short of statutory right, and violates the APA;
- (c) The costs of this suit;
- (d) Attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (e) Such other or further relief as this Court deems just and proper.

**COUNT VI
(ADMINISTRATIVE PROCEDURE ACT —
CONSOLIDATION INTEREST RATE REDUCTION)**

91. Plaintiffs repeat and reallege paragraphs 1 through 90 of this Complaint as if fully set forth here.

92. The Secretary's announcement on August 10, 2000 that he would reduce by 0.8 percent the interest paid by borrowers of Federal Direct Consolidation Loans is a "rule" as that term is defined in 5 U.S.C. § 551(4), and is required to be promulgated through notice-and-comment rulemaking by 5 U.S.C. § 553.

93. The Secretary did not engage in notice-and-comment rulemaking, as required by 5 U.S.C. § 553, in issuing the rule providing for a 0.8-percent reduction in the consolidation loan interest rate.

94. The Secretary's decision constitutes final agency action within the meaning of 5 U.S.C. § 704. As a direct result of the Secretary's decision, Plaintiffs have suffered a legal wrong because of an agency action or have been adversely affected or aggrieved by agency action, within the meaning of 5 U.S.C. § 702.

95. The Secretary's issuance of a rule providing for a reduction in the consolidation loan interest rate without following the procedures mandated by 5 U.S.C. § 553 or the requirements of the HEA, is arbitrary, capricious, an abuse of discretion, and/or otherwise contrary to law, within the meaning of 5 U.S.C. § 706.

WHEREFORE, Plaintiffs pray for the following relief:

- (a) A declaratory judgment that the Secretary's rule and erroneous decision regarding the 0.8-percent Direct Consolidation Loan interest rate reduction are each arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, and violates the APA;
- (b) A declaration that the Secretary's rule and erroneous decision regarding the 0.8-percent Direct Consolidation Loan interest rate reduction are each in excess of statutory authority or limitations or short of statutory right, and violates the APA;
- (c) The costs of this suit;
- (d) Attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (e) Such other or further relief as this Court deems just and proper.

Respectfully submitted,

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Dated: November 3, 2000