

**Action Item**

***California Student Aid Commission***

**Authorizing the Executive Director to Sign the Agreement with the United States Department of Education for Federal Advances for Lender of Last Resort Services for the 2008-09 Academic Year**

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**Recommendation:**

Authorize the Executive Director to Sign the Agreement with the United States Department of Education for Federal Advances for Lender of Last Resort Services for the 2008-09 Academic Year.

**Discussion:**

Federal law guarantees the availability of a Federal Family Education Loan to eligible students through a lender-of-last-resort (LLR) program. A student is eligible for the LLR program if he or she:

- is otherwise eligible for a Stafford Loan,
- has received two rejection notices, and
- has been unable to find a FFEL lender willing to make such a loan is eligible for the LLR program.

The guaranty agency must ensure that the agency or an eligible lender act as an LLR in the state in which it is the designated guaranty agency. As California's designated guaranty agency, the California Student Aid Commission must designate an eligible lender to serve as a LLR or must itself serve in that capacity.

If access to FFEL loans becomes a problem, the FFEL program requires guarantors to provide lender-of-last-resort services under their existing LLR programs using non-federal funding sources. The first choice for an LLR process is to secure lenders who are willing to serve as lenders of last resort. Guarantors, however, may have very limited capacity to use their own funds in making LLR loans. During times where broad-scale loan-access problems prohibit the implementation of LLR programs, the Secretary of Education has the authority to advance federal funds to guaranty agencies to make LLR loans. If a guarantor advises the Secretary that it has been unable to find a lender or lenders to act in the lender of last resort capacity, the Secretary will make federal advances available to the guarantor consistent with its authority under Sec. 428(j)(3) of the Higher Education Act, in order to make such loans. Before federal advances are made, the guaranty agency would need to provide a detailed description of the guaranty agency's administrative capability and a detailed rationale of why the guaranty agency does not have sufficient funds to issue LLR loans itself.

Currently Sallie Mae and Nelnet organizations have announced that they will provide loans to all students; therefore, in theory there would not be a need to utilize the LLR program or federal advance.

On July 23, 2008, CSAC staff was notified by EdFund it was unable to obtain LLR lenders and would be utilizing the federal advance program. President Kipp executed a contract not to exceed \$5 million on July 1, 2008 with National Education Servicing (NES) for LLR loan origination and servicing.

At the time the contract with NES was signed, State law contained language that would have potentially prohibited the Commission from participating in the federal advance program. However, the Governor's May Revision contained proposed trailer bill legislation to remove the potential statutory conflict that may have affected the Commission's ability to act as an LLR should it be necessary for the Secretary of Education to advance federal funds to guaranty agencies to make LLR loans.

On September 19, 2008, United States Education Department (USED) presented guaranty agencies with the Federal Advance Agreement for review and signature. (Tab 6.a) Based on the USED agreement, EdFund staff provided Commission staff with assurances that EdFund will be able to implement the federal advance model for LLR using the NES contract.

On September 30, 2008, the Governor signed the trailer bill legislation - AB519 – that clarified the Commission's ability to act as a lender of last resort under the Federal Advance Agreement.

Commission staff reviewed the Federal Advance agreement and EdFund's assurances and recommends that the Commission authorize the CSAC Executive Director to Sign the Agreement with the United States Department of Education for Federal Advances for Lender of Last Resort Services for the 2008-09 Academic Year.

**Responsible Persons:** Ed Emerson, Chief  
Federal Policy and Programs Division

Janet McDuffie, Chief  
Administration and External Affairs

**AGREEMENT FOR FEDERAL ADVANCES FOR  
LENDER OF LAST RESORT SERVICES FOR THE  
2008-2009 ACADEMIC YEAR**

This Agreement is between the United States Department of Education (“Department”) and \_\_\_\_\_, (the “Guaranty Agency” or “Agency”), which participates as a guaranty agency in the Federal Family Education Loan (“FFEL”) Program under § 421 et seq. of the Higher Education Act of 1965, as amended (“HEA”). 20 U.S.C. § 1071 et seq.

WHEREAS under § 428(j) of the HEA, the Guaranty Agency is required to act as a lender of last resort (“Lender of Last Resort”) to ensure that FFEL Program loans are available to eligible borrowers who are not otherwise able to obtain FFEL Program loans; and

WHEREAS §§ 422(c)(7) and 428(j)(3) of the HEA authorizes the Department to provide Advances (“Advances” or “Federal Advances”) to a Guaranty Agency to ensure that the Guaranty Agency is able to make loans as the Lender of Last Resort; and

WHEREAS the HEA provides that such Advances will be provided on terms and conditions established by the Secretary for providing Federal Advances; and

WHEREAS the Department and the Guaranty Agency are entering into this Agreement to memorialize the terms and conditions for the provision of such Federal Advances by the Department to the Guaranty Agency;

NOW, THEREFORE, the Department and the Guaranty Agency agree as follows:

1. This Agreement becomes effective on the date on which it is executed by the Department, as evidenced by the signature and date of the Department’s authorized official.
2. This Agreement is subject to, and, to the extent necessary, shall be deemed to have been modified by, any subsequent changes in the HEA, other applicable Federal law or the Department’s regulations in accordance with the effective date of such changes.
3. The Agency shall, from any Federal Advances it receives as provided in this Agreement, provide Lender of Last Resort loans in the states for which it is the designated guarantor, and upon mutual agreement of the Agency and the Department, shall make Lender of Last Resort loans from such Advances in other states designated by the Department. For purposes of this Agreement, the states for which the Agency is the designated guarantor and any other states where the Secretary has requested, and the Agency has agreed, that the Agency serve as the Lender of Last Resort shall be referred to as “LLR States” of the Agency. Lender of Last Resort loans made under this Agreement include loans made to students and parents of students attending any postsecondary educational institution that is an eligible institution located in one of the Agency’s LLR States, and to students and parents of eligible students who reside in those LLR States but who attend an eligible institution located in another state or who attend a foreign institution.

**AGREEMENT FOR FEDERAL ADVANCES****PAGE 2 OF 8**

4. The terms of the loans made to borrowers under this Agreement shall be the terms specified in the HEA and the Department's regulations and, as such, the borrower has all of the rights, privileges, obligations and responsibilities that apply to a FFEL Program loan.
5. Unless expressly directed otherwise by the Department, the Agency shall use Advances received under this Agreement only to make 2008-2009 academic year loans in the Agency's LLR States. An eligible 2008-2009 academic year loan is one made under §§ 428 (subsidized Stafford Loan), 428H (Unsubsidized Stafford Loan), or 428B (PLUS Loan) that was made for a loan period that includes, or begins on or after, July 1, 2008 and on which the first disbursement is made on or after the date this agreement is executed but no later than July 1, 2009.
6. For each of the Agency's LLR States for which it requests Federal Advances from the Department, the Agency shall establish a separate account ("Advance Account") in the Federal Fund, established pursuant to Section 422A of the HEA, and shall deposit such Advances in the respective Advance Account for each of the Agency's LLR States. The Agency shall create and maintain appropriate accounting books and records to reflect the receipt and use of Federal Advances. The Agency shall afford access to such books and records to representatives of the Department, its designees, or the Government Accountability Office of the United States. The Agency shall maintain the loans made from such Advances as assets of the respective Advance Account and shall hold legal title to the loans on behalf of the Department, which is the sole beneficial owner of the loans. The Agency shall not spend funds from the Advance Account for any purpose other than making Lender of Last Resort Loans.
7. The Guaranty Agency shall create and maintain such accounts and records regarding Lender of Last Resort loans made hereunder as are necessary to document the Guaranty Agency's compliance with this Agreement. These accounts and records shall include, but not be limited to; the number of loans made, the dollar amount of each loan, the dates and amounts of each disbursement, the dates and amounts of any payments received from or on behalf of the borrower, and any refunds or cancellations. The Guaranty Agency shall perform such reconciliations as necessary to ensure proper funds control. The Guaranty Agency shall afford access to such accounts and records to representatives of the Department, or its designees, or to the Government Accountability Office of the United States.
8. The Agency shall deposit in the Advance Account any other funds it receives related to the LLR loans it made from Advances (borrower payments, cancellations, etc.) and any interest earned on funds in the Advance Account, including interest earned on the Advances themselves. The Agency shall forward all such other funds to the Department, as directed by the Department.
9. Unless otherwise directed by the Department, the Agency shall submit the audits required under Section 428(b)(2)(D) of the HEA and of any third party servicer it retains as required under HEA section 487(c)(1)(C) and the Department shall accept these audits as satisfying any audit requirement applicable to this Agreement.

**AGREEMENT FOR FEDERAL ADVANCES****PAGE 3 OF 8**

10. An Agency will be eligible to receive an Advance under this Agreement only if the Department has determined that –
- a) The Agency has in effect a Lender of Last Resort plan that has been approved by the Department;
  - b) The Agency has the administrative ability to provide Lender of Last Resort loans in the Agency's LLR States;
  - c) The Agency is not able and will not be able, in light of its other anticipated programmatic expenses, to make Lender of Last Resort loans from the Agency's own unrestricted net assets or from other non-Federal sources; and
  - d) Providing a Federal Advance would be a cost-effective way to ensure that eligible students and parents obtain FFEL loans.
11. If the Department determines that the requirements of Paragraph 10 are not met, it will so notify the Agency. If the Agency objects to that determination, the Agency may present, and the Department will consider, evidence on whether the Agency meets these requirements. The Agency agrees that the determinations in Paragraph 10 are in the sole discretion of the Department, and that the Department, by entering into this Agreement, does not commit to provide any Federal Advance. If the Department determines that the Agency does not have the capability to provide LLR loans in a timely and cost-effective manner, the Department may instead provide Advances to another guaranty agency that will make Lender of Last Resort loans for students attending an institution within the state for which the Agency is the designated guaranty agency, or for students and parents of students who reside within that state. The Agency waives any judicial or administrative appeal or review of the determinations made by the Department under this paragraph or Paragraph 10, other than that provided in this paragraph.
12. The Department will make an Advance under this Agreement for the first disbursement of a loan only if the Department has determined that the Agency meets the conditions in Paragraph 10 and the Agency submits a request for funds under this Agreement. By submitting a request for funds, the Agency warrants and represents to the Department, under penalty of law that –
- a) The Agency has complied with the requirements of its approved Lender of Last Resort plan, including the provision that the Agency had attempted to find a FFEL lender that will make conventional FFEL loans to the students or parents;
  - b) After compliance with the steps required under that plan, the Agency has determined that it nevertheless lacks the amount of funds or the ability to obtain such funds from sources other than those available under this Agreement;
  - c) The Agency needs the amount requested in the submission to make Lender of Last Resort loans; and
  - d) The Agency shall use funds it requests only to make Lender of Last Resort loans pursuant to this Agreement to students or parents of students who are enrolled at an institution that the Department has determined to be eligible for Lender of Last Resort Loans on an institutional basis, as provided in Paragraph 21, or to individuals who have sought and are unable to obtain FFEL loans from FFEL lenders.

**AGREEMENT FOR FEDERAL ADVANCES****PAGE 4 OF 8**

Upon receiving Advances for first disbursements from the Department pursuant to the Agency's request, the Agency commits to making, in addition to the first disbursement, all otherwise permissible disbursements on the loans. The Department agrees that it will deem requests for Advances to make such subsequent disbursements to have met the above requirements as they applied to the first disbursements.

13. The Agency must disburse Advance funds within three (3) business days of the date the funds are received by the Agency. Upon disbursement, the Agency shall provide, in a form and format established by the Department, the names, identifying data, and loan and disbursement amounts for each of the borrowers for whom the Agency disbursed funds.
14. Within 30 days of the date on which the Agency makes the final scheduled disbursement from an Advance, or the date on which the Agency determines that no further disbursements will be made on a loan, the Agency shall notify the Department that no further disbursements on the loan will be made. By this notification, the Agency transfers to the Department all of its right, title, and interest in the loan.
15. The Agency shall repay the Department the Federal Advances received under this Agreement. The Department will consider the Agency to satisfy this repayment obligation by:
  - a) Assigning to the Department the Agency's right, title and interest in all loans made from such Advances, pursuant to Paragraph 14;
  - b) Upon written demand by the Department, remitting to the Department any unexpended Advances the Agency received; and
  - c) Upon written demand by the Department, remitting to the Department any other funds the Agency has received related to the LLR loans that were made with the Advances, including interest earnings.
16. The Agency hereby grants the Department an irrevocable power of attorney to take the actions below with respect to loans made under this Agreement after the loans are fully disbursed:
  - a) Individually endorse or cause to be endorsed in the name of the Agency any promissory note or payment instrument on the loan;
  - b) Cause to be transferred physical possession of any promissory note executed on such loans; and
  - c) Perform any other acts that the Department deems appropriate to protect, preserve and realize on the loan.
17. The Agency shall not include any LLR loans made under this Agreement in any claim for account maintenance fees or for the loan processing and issuance fee or include loans made under this Agreement in the calculation of its reinsurance rate. The Department will not pay the Agency interest benefits or special allowance payments on such loans. The Agency is not obligated to pay the Department the lender loan fee pursuant to HEA Section 438(d).

**AGREEMENT FOR FEDERAL ADVANCES****PAGE 5 OF 8**

18. The Department shall pay a fee (the “Fee”), pursuant to HEA Section 428(j)(3)(B), to the Agency. Proceeds of the Fee shall be considered the exclusive property of the Agency, and shall not be part of its Federal Fund. The Department shall pay the Fee monthly according to the following terms:
- a) \$20.00 per new loan originated by the Agency pursuant to this Agreement (unless the loan is canceled before the first disbursement) for loans that have been accepted by the Department for servicing consistent with of Paragraph 22(e) below.
  - b) \$ 3.50 for each credit check the Agency performs for a PLUS loan applicant.
19. The Agency shall charge the borrower the borrower origination fee, pursuant to HEA Section 438(c), and the borrower default fee, pursuant to HEA Section 428(b)(1)(H).
20. The Agency agrees to develop such rules and operating procedures for its Lender of Last Resort program so to ensure that applicants for loans under the Lender of Last Resort program shall not be subject to additional eligibility requirements or requests for additional information beyond what is required under the HEA and the Department’s regulations.
21. The Department may designate an entire institution as eligible for Lender of Last Resort Loans for its students and for parents of its students. The Agency shall consider such an individual who meets FFEL Program requirements and who applies for a loan for attendance at the designated institution to qualify to receive a Lender of Last Resort loan from the Agency under this Agreement and shall not require the individual to demonstrate that FFEL Program lenders have refused to make a loan requested by that individual.
22. Except as otherwise provided herein or through specific written agreement of the parties, the Agency agrees that, with respect to all loans made hereunder, it will abide by all Departmental FFEL Program regulations pertaining to duties of lenders for the following loan origination activities for which the Agency is responsible:
- a) Receiving and processing loan certifications received from schools;
  - b) Executing promissory notes between the Agency and borrowers;
  - c) Producing and distributing to borrowers origination disclosure statements;
  - d) Making the first disbursement of the LLR loan;
  - e) Upon making the first disbursement, transferring servicing functions to the Department, consistent with Departmental guidance and instructions;
  - f) Making all required subsequent disbursements for the LLR loan;
  - g) Performing other normal FFEL lender loan origination functions, except that the Department will be responsible for all reporting other than that explicitly required in this Agreement;
  - h) Upon full disbursement, transferring title to the loan, and an original or true and exact copy of all promissory notes and other documents and records, to the Department, consistent with Departmental guidance and instructions; and
  - i) Receiving any loan proceeds returned by the school after disbursement (adjustments and cancellations) and transferring such funds to the Department (along with appropriate documentation), consistent with Departmental guidance and instructions.

**AGREEMENT FOR FEDERAL ADVANCES**

**PAGE 6 OF 8**

- 23. The Department, in its sole discretion, may determine that Federal Advances are no longer needed for new Lender of Last Resort loans for the Agency. If the Agency objects to that determination, the Agency may present, and the Department will consider, evidence as to the continuing need for Advances for new Lender of Last Resort loans in the Agency's Lender of Last Resort States. The Agency waives any judicial or administrative appeal or review of the Department's determination, other than that provided in this paragraph.
- 24. The parties agree that the Department may collect by administrative offset pursuant to the procedures set forth at 34 C.F.R. Part 30 amounts that are owed by the Agency to the Department under this Agreement but not paid promptly pursuant to Paragraph 15.
- 25. The Agency may contract with another entity to perform any of the Agency's obligations under this Agreement.
- 26. Subject to Paragraphs 11 and 23, nothing set forth herein restricts the parties' remedies under federal law for claims based on this Agreement.
- 27. This document contains the entire Agreement between the parties regarding the matters set forth herein. It may not be amended or modified except upon written consent of the parties.

**Contact Information:**

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Name of Guaranty Agency

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Guaranty Agency Contact Name

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Contact Mailing Address

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Contact Phone Number

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Contact FAX Number

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Contact E-Mail Address

**AGREEMENT FOR FEDERAL ADVANCES**

**PAGE 7 of 8**

IN WITNESS WHEREOF, this Agreement has been executed by an authorized official of the Guaranty Agency and of the Department, as follows:

FOR \_\_\_\_\_  
Name of Guaranty Agency

\_\_\_\_\_  
Typed Name of Guaranty Agency Official

\_\_\_\_\_  
Title of Guaranty Agency Official

\_\_\_\_\_  
Signed Name of Guaranty Agency Official

Date Signed \_\_\_\_\_

FOR THE UNITED STATES DEPARTMENT OF EDUCATION

James F. Manning  
Typed Name

Deputy Chief Operating Officer, Federal Student Aid  
Title of Department Official

\_\_\_\_\_  
Signed Name of Department Official

Date Signed \_\_\_\_\_

**AGREEMENT FOR FEDERAL ADVANCES**

**PAGE 8 of 8**

**Submission Instructions**

The Agency must complete, sign, and date one original copy of this Agreement. That copy must be sent to the Department at the address provided below. Note that for government security reasons, there is normally a delay in the delivery of mail sent via the U.S. Postal Service to the Department. Therefore, if at all possible, the packet should be sent by courier or express mail to:

United States Department of Education  
830 First Street, N.E.  
Room 111G3  
Washington, DC 20002  
Attention: FFEL Agreement Process Team

If the Agency uses the U.S. Postal Service, the packet should be addressed to:

United States Department of Education  
400 Maryland Avenue, SW  
UCP, Room 111G3  
Washington, DC 20202-5402  
Attention: FFEL Agreement Process Team

Questions regarding the submission and receipt of the Agreement should be submitted by e-mail to [ffel.agreementprocess@ed.gov](mailto:ffel.agreementprocess@ed.gov) or by phone to (202) 377-4401.