LOANS COMMITTEE NEGOTIATED RULEMAKING COMMENTS
U.S. DEPARTMENT of EDUCATION – 34 CFR 674, 682 and 685

Simplification of Deferment Process - (Section 674.38, 682.210, 682.210 and 685.203).

The Higher Education Act authorizes deferments for borrowers in the FFEL, Direct and Perkins Loan programs under certain circumstances. The current regulations require a borrower, who has loans held by one or more lenders to apply separately to each lender for a deferment; and each lender is required to review the deferment request, and t make its own determination as to the borrower's eligibility for the requested deferment. The proposed rule would greatly simplify this process for borrowers by allowing FFEL lenders to grant graduate fellowship deferments, rehabilitation training deferments, unemployment deferments, military service deferments, and economic hardship deferments **based on information that another FFEL lender, or the Department has granted the borrower a deferment for the same reasons and for the same time period.** The Department could also base a deferment on information from an FFEL lender, and Perkins Loan schools may also provide a deferment based on information from another Perkins Loan holder, an FFEL lender, or the Department. Importantly, the proposed rule would allow a "borrower's representative" to apply for a military service deferment on behalf of the borrower. The latter change would apply to both Armed Forces deferment for loans made before July 1, 1993 and the current military service deferment. **This simplified deferment procedure are available only to borrowers who received a Title IV loan on or after July 1, 1993.** UNCF supports these simplifications in the process of deferring student borrower debt obligations, and believes they will lessen student loan defaults.

Accurate and Complete Copy of a Death Certificate - (Section 674.61, 682.402, and 685.212).

The HEA provides for the discharge of a loan of a student who dies, or the parent loan of a student who dies. Current regulations permit the discharge of the borrower's loan upon presentation of an original or certified copy of the former student's death certificate. Although exceptions are available on a case-by-case basis, state law often limits the number of "free" original death certificate, and other circumstances, e.g. life insurance claims, probate and estate matters, etc. frequently exhaust the supply of "free" death certificates. The proposed rule would relax the existing requirement and allow the use of an accurate and complete photocopy of the original or a certified copy to allow the lender to accept a photocopy of the original or certified copy. UNCF agrees with the Secretary, and welcomes this change as a means of reducing the cost of securing additional original or certified copies for lower income families. We support the intent of this change, i.e. not to require the family to provide the original or a certified copy to the lender for

reproduction, but rather to allow the lender to accept a photocopy of the original or certified copy of the death certificate.

Total and Permanent Disability Discharge - (Sections 674.61, 682.402 and 685.213).

The Department's attempt to simplify and improve the current system for considering and approving or denying borrower requests for disability discharges is welcomed, however, the proposed solution falls well short of the mark. The current system and the proposed change – while well-intended – seems based on an unsatisfactory foundation that may require statutory correction. The regulatory definitions for "total and permanent disability" in section 674.51 for the Perkins Loan program and for "totally and permanently disabled " for purposes of the FFEL and Direct Loan programs appear focused on the permanent inability of an individual to hold gainful employment in any field. This contrasts sharply with the general focus of Social Security disability, as well as State Workman's Compensation and Disability laws which focus on the inability of the individual to perform a specific task or defined work responsibilities. Additionally, reliance on a single physician's certification or determination of permanent disability may encourage fraud and abuse. UNCF believes the Department may be ill-suited to define and manage a system for determining whether or not, and when a borrower is 'permanently and totally' disabled. A simplified system that relied on Social Security and State Workman's Compensation Agency decisions for such determinations, and that used definitions already established under Federal or State law, would be preferable. In view of UNCF's concerns, we express no view on the proposed modifications to the current regulations, which appear to be cumbersome and difficult for disabled borrowers to understand and navigate. The shear length of the proposed new rule suggests a degree of difficulty that will discourage needy families and low-income borrowers from exercising their rights.

NSLDS Reporting Requirements - (Section 674.16, 628.208, and 682.414).

Current law (section 485B(e) of the HEA) authorizes the Secretary to prescribe the standards and procedures for all lenders and guaranty agencies to report information to the National Student Loan Data System (NSLDS) on all Title IV loans made or guaranteed by that entity. Although the current Perkins and FFEL Program regulations don not contain any NSLDS reporting requirements, section 682.401 (b)(20) does require guaranty agencies to monitor the student enrollment status of FFEL student and parent borrowers, and to report to the current loan holder, within 60 days, any change in the student's enrollment status that would start the borrower's grace period, or the beginning or resumption of the borrower's obligation to make a scheduled payment.

The proposed rule change will significantly impact institutions that administer Perkins Loan Programs (section 674.16(j), as well as those that participate in the FFEL Program (sections 672.208(i) and 682.414 (b)(4)) since they will be required to report enrollment and loan status information, or any other Title IV-loan related information to the Secretary **by a deadline established by the Secretary.** The deadline date is not stated in

the proposed rule, but was discussed during the Loans Committee negotiations. Concern was expressed by the HBCU non-Federal negotiators about reducing the sixty (60) day reporting period to thirty (30) days.

While UNCF appreciates the Secretary's need for accurate and timely loan information, we believe the increased reporting burden imposed on institutions will be especially onerous for the HBCUs and other smaller, low resource institutions with large numbers of student/parent borrowers. This new requirement could be especially burdensome for those HBCU institutions that continue to participate in the Perkins Loan Program. UNCF is particularly concerned about the need to include the HBCUs in the consultation with the higher education community, under section 432(e), and specifically urges the Secretary to ensure that at least one UNCF/HBCU financial aid administrator is included in all work groups and conference calls regarding the establishment of timeframes for reporting enrollment status changes.

Certification of Electronic Signatures on Master Promissory Notes (MPNs) Assigned to the Department - (Sections 674.19, 674.50, 682.409, and 682.414).

Section 467 (a) of the HEA authorizes the Secretary to collect assigned Perkins Loans based upon regulations prescribed by the Secretary, and section 432 (a) provides a general authorization for the Secretary to prescribe regulations for the FFEL Program to carry out the program and to establish minimum standards for the sound management and accountability for the program. There are no current regulations for the Perkins Loan Program governing collection and retention of neither MPNs electronic signatures, nor are there regulations governing the creation and retention of their electronic signature process for promissory notes and MPNs.

UNCF believes that the proposed changes to section 674.19 (e)(4)(ii) would impose a substantial new record-keeping burdens on institutions that participate in the Federal Perkins Loan program, which would be exacerbated by the short time frames required for colleges and universities to respond to departmental requests. These new burdens could be especially problematical for smaller, private colleges and universities. For example, under the Department's proposed changes: (1) an institutional Perkins lender would have to retain an original electronically signed MPN for three (3) years after all the loans made on the MPN have been satisfied; and (2) the institution would have to respond to a departmental request for information **within ten (10) business days**. While UNCF understands and appreciates the Department's desire to strengthen program integrity and efficiency, we believe the proposed rule ignores the enormous record-keeping and staffing burdens required to achieve these objectives. Moreover, the institutional burden may not be cost-effective, nor realize the stated goals outlined by the Department.

We recommend an alternative that would be less burdensome for institutions, and urge the Department to amend the proposed rule. First, Perkins institutional lenders (at the institution's option) would be required to create and maintain, or transmit to the Department within sixty days of execution, a certification regarding the creation and maintenance of any electronically signed Perkins Loan promissory note or MPN. If the

institution selects the option of transmitting the promissory note or MPN to the Department, the institution must apprise the Department of any changes in the status of the promissory note or MPN until all loans on the MPN are satisfied.

Second, if the institution retains the electronically signed Perkins Loan promissory note or MPN, it may transmit the electronically signed promissory note to the Department when all loans on the MPN are satisfied (with appropriate certifications), rather than retaining it for three years as would be required by the proposed rule.

Finally, UNCF urges the Department to extend the ten business day response time in section 674.50(c)(12)(iii) to twenty-five days. This would provide additional flexibility for institutions with limiting staffing in their financial aid offices.

Record Retention Requirements on Master Promissory Notes (MPNs) Assigned to the Department - (Section 674.19, 674.50, 682.406, and 682.409).

Section 443(a) of the General Education Provisions Act requires institutional recipients of Federal funds to retain records of the amount and distribution of those funds in order to facilitate effective audits of such funds. Current regulations (section 668.24(c)(1)(iv)) and (e)(1) require institutions to maintain disbursement records for three years – after the end of the award year for which the aid was awarded and disbursed. Section 674.50(c) does not currently require disbursement records to provide to the Secretary when a Federal Perkins Loan is assigned to the Department. Section 674.50 (c) (11) add this requirement when requested by the Secretary.

After extended discussion during the Loans Committee negotiated rulemaking sessions, UNCF is pleased that the Department has recognized the extreme burden on institutions if they were required to collect, retain and submit a **school-based record documenting each disbursement of an FFEL loan, especially given the limited utility and benefit to the Department of imposing this record collection and retention requirement.**

We do note that the Department has required that Perkins institutions must retain such disbursement records for at least three years after a Perkins Loan is satisfied, and they must be submitted to the Department with an assigned Perkins MPN, if requested by the Secretary.

Loan Counseling for Graduate or Professional Student PLUS Loan Borrowers - (Section 682.603, 682.604(g), 685.301, 685.304(a), and 685.304(b))

UNCF has no comments on this section of the proposed rules.

Mandatory Assignment of Defaulted Perkins Loans - (Section 674.8 and 674.50)).

Current law does not authorize the Secretary to require the assignment of defaulted Federal Perkins Loans, nor is the Secretary to unilaterally amend the Program

Participation Agreement (PPA) to mandate such an assignment. Section 463(a)(9) does of the Act permit the PPA to be amended, if such provisions are necessary to protect the U.S. from unreasonable risk of loss, and **if such amendments are agreed to by the Secretary and the institution.**

Under current section 674.8(d), the PPA provides that an institution may voluntarily assign a defaulted Perkins Loan to the Department, it the college or university decides not to service or collect the loan, or the loan is default despite the institution's best efforts to collect the loan. The proposed rule would amend the PPA that would allow the Secretary to mandate the assignment of a Federal Perkins Loan if: (1) the outstanding principal balance is more than $100 or more, the loan has been in default for seven or more years; and (3) a payment has not been received on the loan in the preceding twelve months. An exception is provided if payments were not due on the loan in the preceding twelve months. The Secretary would also accept assigned Federal Perkins Loans without the student's social security number.

UNCF objects to the proposed rule on several grounds, including the lack of any statutory basis for the proposed amendment, and because the proposed amendment appears to conflict with the existing statutory language that states that the Secretary and the institution must agree to amendments to amendments to the PPA. Notwithstanding the assertion that the Department possesses additional tools that may lead to enhanced Federal Perkins Loan collection efforts by the Department, this rationale should not be used to justify ignoring the HEA. Moreover, the Department's refusal to accept any of the proposed alternatives – during negotiated rulemaking – that would return a portion of the Perkins it collects to the institution is confiscatory since institutional "matching" funds would be returned to the Treasury.

UNCF believes that the Department should reconsider its rejection of the proposal advanced by several non-Federal negotiators, including representatives of COHEAO/University of Illinois at Chicago, i.e. a referral process, whereby an institution would refer a loan to the Department – and the Department would collect the loan and return the proceeds, minus collection costs, to the institution. UNCF believes that several variations on this proposal, including returning the institution's "match" and one-half the balance, would be preferable to denying institutional Federal Perkins lenders any return on their investment.

Reasonable Collection Costs - (Section 674.45))

The Act does not provide a definition for "reasonable collection costs" for purposes of the Federal Perkins Loan program. The current regulations at 674.45(e) requires a school to assess collection costs to a borrower – based on either the actual costs incurred for those collection actions, or an average of the costs incurred for similar actions taken to collect loans in similar circumstances of delinquency. Although the Department's representatives suggested that there was evidence of "abuse" in the assessment of collection charges, no evidence of the type of abuse asserted and the widespread nature that abuse was offered, or has been documented. The current regulations do not cap

collection costs that are chargeable to the borrower, except in the case of a loan that has been successfully rehabilitated (see section 674.39). In fact, the very nature of this type of work makes it very difficult to adopt or impose "generic" rules relative to the costs of collecting defaulted loans.

UNCF opposes the Department's attempt to standardize defaulted loan collection fees for the Federal Perkins Loan Program, in part, because such loan collection fees defy standardization, and the regulatory proposal may unintentionally cripple or compromise institutional loan collection efforts! If institutions are unable to recover the cost of collecting `hard-to-collect' or older loans, especially if litigation is necessary, institutions will be deterred from pursuing these loans, and could be forced to turn them over to the Department (under revised section 674.8 and 674.50). UNCF believes that the only "cap" on collection costs should be documented actual costs.

Child of Family Service Cancellation – (Section 674.56)

No UNCF Comments on this provision.

Prohibited Inducements – (Section 682.200 and 682.401)

The Department has proposed a far-reaching change in the existing regulations without specific statutory authorization, and while the Congress is in the process of making changes in the Higher Education Act that will surely impact the proposed regulatory changes. While UNCF understands the Department's desire to strengthen its oversight and compliance with regard to certain institutional, lender and guarantor behavior, the prohibited inducement area should await legislative policy parameters enacted by the Congress.

UNCF does appreciate the Department's attempts to clarify and to respond to concerns raised by the non-Federal negotiators during the Loans Committee deliberations as they relate to the prohibited inducements proposed revisions in section 682.200 and 682.401. The proposed rule does attempt to clarify those prohibited inducements and activities that lenders and guarantors are prohibited from offering in exchange for FFEL loan applications or other loan products. We are also pleased that the proposed rule largely tracks previous sub-regulatory guidance, i.e. Dear Colleague Letters from February 1989 (No. 89-L-129) in providing a non-exhaustive list of prohibited activities and an exhaustive list of permissible activities. We believe the latter should be expanded to include additional permissible activities that we will outline later. In spite of these helpful clarifications, and the additional permissible activities we recommend be incorporated, UNCF has significant reservations regarding the proposed expansion of the existing regulatory requirements and sub-regulatory guidance is **not supported by current law,** and expands coverage to include institutions of higher education and "school-affiliated organizations."

Prohibited inducements and other impermissible activities by lenders are contained in the definition of **lender** in 34 CFR 682.200(b), while the comparable regulations affecting

guaranty agencies can be found in 34 CFR 682.401(e). As previously indicated, the proposed rules – for both lenders and guaranty agencies – adopt the 1989 Dear Colleague format by outlining a non-exhaustive list of examples of prohibited inducements and activities, and an exhaustive list of permissible activities.

UNCF strongly urges the Department to add the following to the list of permissible activities to the proposed section 682.200(5)(ii):

(C) Staff training for financial aid office personnel to acquaint such staff with loan processing, use of software, technical procedures and Title IV compliance, including specialized training to support FFELP processes – either in person, on or off campus, or through the use of technology'

(D) Computer support in the form of computer software, technical support, and training in the technological processes used by the lender in its administration of the FFEL Program;

(E) Printing and distribution of any financial aid counseling, financial literacy, or Federal Title IV, state, or institutional financial aid information, including any Title IV disclosure or compliance documents and information required by this regulation;

(F) Performance of functions, with appropriate compensation, that the school is required to perform under this part;

UNCF believes that the addition of these specific permissible activities is critical since the Department's proposed list of permissible activities is exclusive and exhaustive. A similar list of permissible activities should be specifically authorized for guarantors in section 682.401. We applaud the latitude that the proposed rules provide – for guarantors – to provide meals and refreshments, at reasonable costs, to facilitate school personnel attendance at training programs and facility service tours that school personnel would not be otherwise able to attend. **We believe that this same latitude should prevail with respect to FFEL lenders in similar circumstances.**

We are most troubled and concerned about the proposed definition of "school-affiliated organization" in section 682.200 as:

> A school-affiliated organization is any organization that is directly or indirectly related to a school and includes, but is not limited to, alumni organizations, foundations, athletic organizations, and social, academic, and professional organizations.

This overly broad, potentially intrusive definition extends the Secretary and the Department's Title IV compliance authority well-beyond its current reach, and into organizational entities with no direct connection to the campus administration of Federal Student Assistance. Moreover, no factual evidence that UNCF is aware of, at this time, would justify the definition of this term and its potential application to fund raising organizations – like the United Negro College Fund and the Thurgood Marshall College Fund – which raise fund from major lending institutions, that also provide loans to students and their parents, as part of their overall corporate loan portfolio, and frequently

provide scholarship aid and fund mentoring and leadership development programs for our students. UNCF shares the view that the phrase should be limited to "organizations that are under the common control and ownership of a school."

This definition of "school-affiliated organization" is especially problematical when read in conjunction with section 682.200 (b)(8), **and the Secretary's new authority to apply a "rebuttable presumption" that the activities or payments were undertaken or made by the lender or guaranty agency to secure FFEL Loan applications or FFEL loan volume.** This change in policy, effectively shifts the burden of proof from the Department's obligation to establish a *quid pro quo*, i.e. an inducement or payment in exchange for loan application or loan volume, **to the institution or a "school-affiliated organization" to explain a way to coincidental events or occurrences.** This presumption of guilt or wrongdoing is not justified in fact or law, and should be deleted from the proposed rule. It will impose an extreme burden on institutions of higher education, in general, and on smaller, private colleges and universities in particular.

UNCF also recommends that the Secretary revise the definition of "school –affiliated organizations" so as to narrow its potential application to higher education fund raising organizations like UNCF. Failing that, we urge a specific exemption.

UNCF is also concerned about the lack of clarity with regard to the application of the "emergency" situation in which a lender or guaranty agency could offer assistance to a school in fulfilling its financial aid responsibilities at little or no cost to the institution. We share the view that the term "emergency" is subjective, and ill-defined, since it could be restricted to presidential or state declared national or natural disasters, or extraordinary circumstances, e.g. a local health crisis. UNCF believes the Secretary should: (1) should specifically state the "emergency" means a Federal or State-declared national/regional/ local or natural disaster, e.g. Hurricane Katrina or Rita; but (2) could also encompass broader circumstances, or an incident or event, e.g. Virginia Tech, or institutionally declared situation, i.e. electricity blackout or brown out, hostage situation, or health crisis, .e.g Bird flu. Finally, UNCF does not believe the restriction of `short-term' and 'non-recurring' can be consistently applied in defining "emergency." Certain areas of the Nation, e.g. Florida, the Gulf Coast are consistently threatened by hurricanes, while other areas are exposed to flooding, tornadoes, and earthquakes. Other places may now be under constant threat from terrorist attack – why would we limit by regulation, the Secretary's authority to respond to the unknown and unknowable? The terms `short-term' and 'non-recurring' have no real place in these regulations in our view.

Finally, UNCF believes the Department should await enactment of appropriate statutory provisions, including amendments to section 428(b)(3) and 435 (d) (5)(A), some of which are now under consideration before the 110th Congress, before finalizing any regulatory changes with respect to prohibited inducements.

Loan Discharge for False Certification as a Result of Identity Theft – Section 682.208, 682.211, 682.300, 682.302, and 682.411.

No UNCF comments on this section.
*Preferred Lender Lists – (*Section 682.212 and 682.401)

This topic, perhaps more than any other, except prohibited inducements occupied the discussion time and produced a protracted and complicated discussion of what policy alternatives made the most sense for students and parents, for financial aid administrators, and which policy would operate in the best interests of the public whose taxes underwrite both the FFFELP and The Ford Direct Student Loan program. Unfortunately, there was very little comprehensive, factual evidence to support the broad assertions of inappropriate or illegal behavior by campus aid administrators, nor evidence from departmental compliance and enforcement actions to support some of the policy changes proposed by the Federal negotiators on behalf of the Department. While UNCF supports many of the policy changes included in the proposed regulations, and supported by many of the non-Federal negotiators, other consumer information and burdensome requirements should be reconsidered.

UNCF supports the following changes in the proposed rules: (1) prohibition against use of a preferred or recommended lender list to deny a student or parent the lender of their choice; (2) prohibition against a school including a lender on a list of preferred lenders that have offered , or been solicited to offer financial or other benefits to the school in exchange for placement on the preferred or recommended lender list; (3) if a lender provides special student benefits, it must offer to provide those benefits to all of the school's borrowers; (4) the school should disclose to all student borrowers the method and criteria it used in selecting a lender or lenders on that institution's preferred lender list, and to include a prominent statement **advising prospective borrowers that they are not required to use one of the institution's preferred or recommended lenders;** and that the institution can never delay certification of r processing of a loan application for a student that chooses a non-preferred or recommended lender**.**

UNCF strongly objects to two key provisions in the proposed regulations. First, UNCF believes that there is no rationale basis for requiring a minimum of three preferred lenders on an institution's preferred or recommended lender list. Repeated requests by UNCF/HBCU representatives during the negotiated rulemaking for a factual justification for the "three-lender rule" were not responded to. UNCF believes that an institution should have the option of selecting and justifying a single or two preferred/recommended lenders in the same way an institution can choose a single Ford Direct Student Loan lender, e.g. the U.S. Department of Education. We believe that if student "choice" can be obviated when the lender is the Department, the same should be true if cost to the student, quality and efficient service to the student, and effective and efficient operation by the institution make a single private lender preferable. A single FFELP lender should be an available option, especially for small, private colleges and universities when cost, efficiency and quality service can be demonstrated.

UNCF also believes that the provision in section 682.212(h)(2) that would require the institution – under the three lender rule – to provide comparative information to prospective borrowers about interest rates and other benefits offered by lenders imposes an extraordinary burden on smaller institutions with limited financial aid office personnel. **How many lender options would the aid office be required to provide comparative information about? How would this information be made available? Is this information to be made available to all student applicants for admission, whether accepted or not? How much detail about various loan options is required?** This information requirement is not justified by current practice at UNCF member colleges or universities, and we believe should be deleted or severely limited to a specific number of national or competitive lenders.

Finally, UNCF believes that the disclosure and comparative information requirements should be imposed on Direct Loan institutions as well in order to ensure that students at those institutions also have a "choice," and have appropriate information about private loan alternatives that may be less costly and provide more efficient service.

UNCF does not believe that the Department lacks sufficient statutory authority to impose the "three lender" requirement, nor to impose such extraordinary new paperwork burdens on institutions. UNCF believes that there are less onerous, and less intrusive means of achieving the improved student information, and loan choice goals that we share. Much of the recent publicity regarding the behavior of a very few financial aid administrators – at large pubic and private colleges and universities – has poisoned the reputations of many aid professionals and created doubt with no factual support for rumor, and unproven claims of wrongdoing.