

**Designation of Exceptional Performance (EP)
for Lenders and Servicers
Questions and Answers
March 2004**

FP-04-04

Subject: Exceptional Performer

Summary: The attachment to this letter provides members of the FFEL Community with information about the Exceptional Performer designation.

Dear Colleague:

Section 428I of the Higher Education Act of 1965, as amended (HEA) and the implementing regulations at 34 C.F.R. 682.415 authorize the Secretary to recognize qualified lenders and guaranty agencies and servicers (as agents for eligible lenders and guaranty agencies) for an exceptional level of performance in servicing Federal Family Education Loan (FFEL) Program loans, if the lender, guaranty agency, or servicer requests such status and meets all statutory and regulatory requirements.

During the past few months, several organizations have applied for this “exceptional performer” designation, and others are considering it. These organizations have asked us questions concerning various aspects of being designated an exceptional performer. So that all members of the community are aware of the Department’s guidance, we are publishing those questions and our responses in an attached Question & Answer (Q&A) format.

If you have questions that are not covered in the attachment, please contact Tim Cameron in the Department's Federal Student Aid office. Tim can be contacted as follows:

Tim Cameron
Chief of Staff, Financial Partners Services
Federal Student Aid
U.S. Department of Education
Room 11112
830 First Street, NE, Washington, DC 20202

voice: 202-377-3064

fax: 202-275-0913

tim.Cameron@ed.gov

Sincerely,

Victoria L. Bateman, CPA, CGFM
FSA Chief Financial Officer and Acting General Manager, Financial Partner Services

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General Program Requirements & Information

Q1.10 The EP designation requires that default claims be paid at 100% of unpaid principal and accrued interest. Is reinsurance paid to the guaranty agency at 95% of the amount paid (100%), or at 95% of 98% (the amount that would have been paid had the lender not been designated an exceptional performer)? For example, the exceptional performer claim is \$1,000 (total of unpaid principal and interest). Is reinsurance paid to the guarantor at \$950 (95% of 100%), or is reinsurance paid at \$931 (98% of \$1,000 is \$980 x 95% = \$931)?

A1.10 Under Section 428(c)(1) of the HEA, "the amount to be paid a guaranty agency as reimbursement under this subsection shall be equal to 95 percent of the amount expended by it in discharge of its insurance obligation . . . ". In this case, the amount expended by the agency is 100% of the claim amount so reinsurance should be 95% of the 100% claim payment amount. In your example, the payment would be \$950 rather than \$931. (NOTE: The rates included in this example assume that the agency has not hit the trigger for lower reinsurance rates)

Q1.01 Does the EP designation apply to defaulted loans only or to other types of claims as well?

A1.01 As stated in the 34 C.F.R. § 682.415 (a)(1), the lender/lender servicer receives 100 percent reimbursement on ALL claims submitted for insurance.

Q1.02 It seems that repurchases are not addressed in the law. If a claim is paid and a problem is found at a later date, can the guarantor demand repurchase?

A1.02 The regulations at, 34 C.F.R. § 682.415 (b)(5)(ii), states that "A guaranty agency or the Secretary may require the lender or lender servicer to repurchase a loan if the agency determines the loan should not have been submitted as a claim. A guaranty agency may not require repurchase of a loan based solely on the lender's violation of the requirement relating to repayment conversion, due diligence, or timely filing."

Q6.06 Please describe the multiple types of audit requirements as part of the application process.

A6.06 Two audits are required to obtain the EP designation:

1. An financial audit performed in accordance with the Audit Guide developed by the Department or:

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a. A lender may submit a copy of the annual audit required by 34 C.F.R. §682.305(c) if the audit period ends no more than 90 days prior to the date the lender submits its request for designation;

b. A servicer may submit a copy of the annual financial audit as required by 34 C.F.R. §682.416(e) if the audit period ends no more than 90 days prior to the date the servicer submits its request for designation.

2. A compliance audit of its loan portfolio performed in accordance with the EP Lender Audit Guide.

See § 682.415(a)(2)(iii)(B)

EP Application, Designation & Implementation

Q6.12 What form does the application for EP take?

A6.12 Currently, the “form” is a written letter from the applicant, along with all required documentation.

Q6.01 The regulations state that the lender or servicer must submit a written request for the EP designation. Can this be electronic? Will electronic signatures be accepted for the certification statements?

A6.01 The regulations at 32 C.F.R. § 682.415(a)(2)(i) require that applicant to submit a “written request”. An electronic application and signature process is not currently available for applying for the EP designation. FSA will monitor this process and determine if an electronic process would be beneficial.

Q6.02 The audit period end date requirement for the EP designation ties to the date the lender submits the request for designation. Please clarify the “date the lender submits the request” – is this the date of the written request? What if the application is subsequently found to be incomplete? Does the “submittal date” change to the date that a complete application is received?

A6.02 The “date the lender submits the request” would be the date that the lender submits to FSA their letter for consideration of the designation along with all other required documentation. The submittal date, therefore, is the date that a complete application is received by FSA.

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Q6.13 If audit work papers are incomplete at the time of submission, how does that relate to the processing procedures of that application?

A6.13 The application would be considered incomplete. Until an application is complete, it will not be considered for the EP designation. (See also Q6-02)

Q1.20 The current audit guide states that the audit requirements are for quarterly audits, yet maintains the designation is based on monthly calculations, not quarterly ones. Please clarify and provide specific guidance on how the calculations should be made and reported.

A1.20 The lender/lender servicer that receives the EP designation must develop a sampling plan that ensures that adequate sampling occurs for each month of the quarter being audited. A lender/ lender servicer may perform the audit on a monthly basis to meet this requirement. See the OIG Audit Guide.

Q6.04 What lead-time for implementation will be provided with each new designee?

A6.04 The regulations state that the effective date for the implementation of the designation is the date of notification. As applications for the designation are approved, FSA will work with those organizations that are approved to determine the effective date for their guarantors to implement. See § 682.415(a)(1)

Q1.09 How will FSA track loans paid to the lender at 100% under the EP designation?

A1.09 It has been determined that NSLDS will be used to track the EP volume. A Technical Update will be issued by NSLDS to re-state the importance of accurate and timely submission of the following data: servicer transfers, amount of claim paid to lender, and the proper use of the servicer ID. This information will be critical to the tracking of the EP volume. Alternate solutions, such as adding a new value for Claim Paid Type, or adding an additional value of Claim Submittal Date to NSLDS will be discussed as part of the NSLDS re-engineering efforts. In the interim, NSLDS will develop a query formula to be used to identify the EP volume. It has been noted that NSLDS does not capture the claim submittal date, but only the claim paid date and this factor will be considered in the reporting of EP volume.

Q3.01 Review the potential changes required to the Form 2000 to track EP claims paid.

A3.01 No changes to Form 2000 are anticipated to track EP claims paid.

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Q6.10 Please quantify, in the definition of a servicer, what is meant by “an entity with substantial experience in servicing and collecting consumer or student loans.”

A6.10 “Substantial Experience” is a term that comes from the HEA and is applied on a case-by-case basis.

Q6.07 Can a lender receive the EP designation if they are not also servicing the portfolio?

A6.07 No. An organization must service the loan to receive the designation. See 34 C.F.R. § 682.415(a)(5)

Q6.11 The EP Lender Audit Guide indicates that a lender may receive the EP designation based on loans that it services itself and that the lender does not have to service its entire portfolio. Please elaborate on this discussion as it relates to comments made about lenders with multiple servicers.

A6.11 A lender may receive the designation for loans that it services itself. A lender is not required to service its entire portfolio, but can only receive the benefits of the EP designation for those that it does service. If a lender has multiple servicers for various portions of its portfolio, only those servicers that receive the EP designation will qualify for 100% reinsurance. See 34 C.F.R. § 682.415(a)(5)

Q1.15 How would a servicer or lender who simultaneous to their servicing of a loan has a 3rd party perform some collection or skip tracing activities on the same loan be evaluated? Servicing is not totally being done in-house, but not totally by a 3rd party either. Would both entities have to apply and qualify for EP status?

A1.15 An entity can only be designated as an exceptional performer based on activities it performs itself. A lender or servicer must perform all of the required activities itself to get the EP designation. Therefore, if a loan servicer is not performing all due diligence activities (but subcontracts some activities out to another service provider) the loan servicer cannot get the EP designation. See 34 C.F.R. § 682.415(a)(5).

Q6.14 Please explain the role of the application coordinator.

A6.14 Financial Partner Services will identify a single resource in the Washington, D.C. office to serve as the EP coordinator for all applications for the EP designation. Additionally, an application coordinator will also be assigned to each application to assist in the evaluation, guarantor feedback collection, etc. The point of contact for new applicants will be the Washington D.C. EP coordinator.

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Q6.15 Will ED grant any extensions to the 90-day audit reporting requirement, perhaps to 120 days, because of the initial start up period and additional guidance discussions?

A6.15 It is not anticipated that any extensions will be granted.

Q6.16 Please clarify 34 C.F.R. § 682.415(b)(7)(ii) which states that “a lender or lender servicer designated under this section that fails to service loans or otherwise comply with the applicable program regulations is considered in violation of 31 U.S.C. 3729.”

A6.16 The language of the regulation reflects § 428I(g) of the HES. The Statute referenced, 31 USC 3729 is the Federal False Claims Act and provides for treble damages against violators. If a lender or lender servicer that has received the EP designation is found to be out of compliance with any program regulation, not just timely conversion to repayment, timely filing of claims and compliance with due diligence standards, in the servicing of loans, they may be subject to triple damage penalties. Organizations should consult with their legal counsel about the possible implications

Q6.17 Several references have been made to the fact that the FSA procedures for determining eligibility for the EP designation are a “work in progress.” Please provide clarification.

A6.17 FSA, particularly Financial Partner Services, is in the process of finalizing the procedures from an internal personnel perspective, not from a review and determination perspective. The criteria used to evaluate the first organization to receive the designation, are the same criteria that will be used in the review of future applicants. The work in progress is merely referring to the internal FSA procedures for tracking, coordinating and implementing new applications.

Q6.03 One of the factors considered in the determination of eligibility for the EP designation was explained to include the following NSLDS multi function queries: 6, 9, 10, 13, 35, and 36. Please provide a description of what information is contained in these queries and how it is used in the determination process.

A6.03 Query #6 identifies open loans that have not been updated with a current Outstanding Principal Balance (OPB). Query #9 Identifies loans that have been in repayment for more than twelve years with OPB not updated in the past year. Query #10 identifies loans that have been open longer than the normal repayment period. Query #13 identifies loans with outstanding principal balances in excess of the loan amount plus capitalized interest. Query # 35 identifies loans with moving OPB dates but static OPB amounts. Query # 36 identifies loans in repayment for more than twelve years with OPB not updated in the past 4 1/2 years.

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Q6.05 If a lender has volume on multiple servicing systems under the same LID, and only one of those servicers has the EP designation, how will guarantors know how to pay claims that come in for that particular lender?

A6.05 Part of the confirmation process with regard to a lender/lender servicer receiving the EP designation is written notification to each guaranty agency. Lender and servicer ID's associated with the designation will be shared – to the best degree possible – with each guarantor. Additionally, ED understands that the community has been implementing the Common Claim Initiative which provides a mechanism for a lender/lender servicer to notify the guarantor on each claim submitted whether it is an EP claim (both in the processing of paper and electronic claims). We note that the lender or servicer will have to take steps to ensure that it is only submitting proper claims for EP status. Otherwise, it may be subject to liability under the Federal False Claims Act as discussed in Answer 6.16 above.

Q1.16 If a loan servicer received the EP designation and subsequently begins servicing loans for new lender clients, are the loans from the new lenders portfolio eligible for the EP benefits? Are there any special notification requirements to ED if new lender volume is added to the servicer's loan portfolio?

A1.16 There are no restrictions or conditions other than those specifically referenced in the regulation. A loan servicer that receives the EP designation would receive that benefit for any lender that it services – not just those lenders that it services at the time it receives the designation. A loan servicer that receives the designation is not required to reapply for the designation each time a new lender enters into a servicing agreement with the servicing organization. See 34 CFE 682.415(a)(1). However, the servicer is only entitled to EP treatment on loans it services for the period required for the EP status.

Q6.08 If a servicer is submitting an application for the EP designation, do they need to identify all of the lender id's that they are servicing?

A6.08 Although this is not a requirement for an application for the EP designation, FSA will work with each applicant to collect this information at the time the application is submitted. Additionally, FSA will request that subsequent changes to the list of lender id's serviced are submitted in conjunction with the quarterly audits.

Q6.09 A lender/lender servicer's cure rate was indicated as a criteria used in the determination of their application for the EP designation. Please clarify if it would be the cure rate with regard to default aversion requests or reinstatement of guarantee requirements.

A6.09 The rate that will be looked at is the cure rate with regard to curing denied claims.

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Claim Review**

Q1.17 Does a guaranty agency need to review the entire claim package when the lender has an EP designation?

A1.17 Both the HEA and the regulations state that the EP designation applies to "all claims". Thus, the guarantors are not required to review collection activities on all loans. However, under 34 C.F.R. § 682.402 it is the guarantor and not the lender who determines if the borrower qualifies for a discharge based on death, closed school, false certification or an unpaid refund and the guarantor does its own review of the borrower's eligibility for a disability discharge before the Secretary makes the ultimate determination. The guarantor still has to do that review and determine the borrower's eligibility for these discharges and can deny payment to the lender if the borrower is not eligible for the discharge.

For these "specialty claims" such as death/disability, closed school, etc. the guarantor needs to review the documentation to ensure that the claim is appropriate but is not required to look at due diligence.

For defaults, the guarantor should be looking to make sure the necessary documentation is in the claim package. Even if the specific due diligence steps are not reviewed, documentation of those steps should be present in the package as well as all other claims documentation required. See 34 C.F.R. § 682.414

Q1.13 Are supplemental claims paid at the same insurance rate as the original claim payment?

A1.13 A supplemental claim would be paid at the same insurance rate as the original claim. The reasoning is that it is an increase to an existing claim, which, if the amount of the supplemental claim had been included in the original claim, would have been paid at the rate in effect prior to the EP designation.

Q1.24 If a loan has previously been deemed irrevocably out of guarantee and is subsequently submitted by the EP lender/servicer for reinsurance, does the guarantor assume any liability for paying that claim (as it would not be reviewed per the EP rules)?

A1.24 Yes, the GA would be liable for paying that claim. It is still the GA's responsibility to validate that the loan for which a claim is being submitted is a valid loan prior to the claim payment actually being made. As a reminder, please note the following basic reinsurance rules from 34 C.F.R. § 682.406(a):

(a) A guaranty agency may make a claim payment from the Federal Fund and receive a reinsurance payment on a loan only if --

(7) The lender satisfied all conditions of guarantee coverage set by the agency...

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(12) The agency and lender, if applicable, complied with all other Federal requirements with respect to the loan...

Q1.12 If a claim is filed and rejected prior to the effective date of an EP designation, and then the claim is resubmitted after the EP designation effective date, are the claim review and payment processes dictated by the original submittal date, or the resubmittal date?

A1.12 The claim review and payment processes would be dictated by the original submittal date. Therefore, claims that are rejected prior to the EP designation and resubmitted after the EP designation, are not eligible for the 100% reinsurance. See 34 C.F.R. § 682.406 (a)(6) and (8)

Q1.26 If a claim was rejected for timely filing, due diligence or conversion to repayment violations prior to a lender/servicer receiving the EP designation and was not cured prior to the effective date of the designation, may the lender refile/appeal the loss of guarantee once the designation is effective?

A1.26 No. The lender/lender servicer should only refile the claim upon successful cure. See 34 C.F.R. § Part 682, Appendix D

Q1.27 When a cure has been performed, is the EP lender/servicer still subject to denial of interest for the cure period or does the guaranty agency pay all outstanding interest including the interest during the uninsured period?

A1.27 The claim would still be subject to a denial of interest for the uninsured period. See 34 C.F.R. § Part 682, Appendix D.

Q1.28 If the guaranty agency shows that a borrower has been continuously enrolled at least half time and the lender has placed the borrower in repayment, should the guaranty agency contact the lender regarding the discrepancy prior to the claim payment? Paying the claim would have a very negative impact on the borrower and the school.

A1.28 Enrollment verification is not part of the due diligence in collecting a loan and therefore should still be reviewed as part of the claims process for lenders/servicers with the EP designation.

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Q1.29 What happens if a guarantor's system reflects a different lender than the EP lender submitting the claim for payment, because the guarantor was not notified of the loan transfer? Should the guarantor reject the claim, or pay the claim and rely on the lenders self certification?

A1.29 If a guarantor receives a claim from a different lender of record than what their records reflect, the claim should be returned and the details of the loan transfer resolved before payment is made. See 34 C.F.R. § 682.208 (e)(4).

Program Reviews & Guarantor Audits

Q1.14 It is possible that there may be confusion and/or conflicts between program review requirements and the claims processing requirements outlined in the EP regulations. Normally required corrective actions in a guarantor's program review of a lender or servicer may in some cases conflict with the special provisions of EP. Is there any impact to guarantor program reviews of lenders and servicers?

A1.14 There are no changes to a guarantor's program review of a lender/lender servicer who has received an EP designation. Although the claim processing is streamlined, the program review procedures are not changed. See 34 C.F.R. § 682.410(c)(1).

Q1.22 What assurance does a guarantor have that ED and or/OIG will not assess a finding/penalty on a claim that contained an error but was paid by the guarantor as the lender/lender servicer had the EP designation?

A1.22 Any guarantor that reviews a claim for an organization with the EP designation may not reject that claim for repayment conversion, timely filing, or due diligence errors. However, if the guarantor determines that the claim is incomplete or otherwise ineligible, it must reject the claim. See 34 C.F.R. § 682.460(s). The guarantor still has the responsibility to ensure that all normally required documentation/requirements are met prior to payment of the claim. If the guarantor has reviewed and paid a claim submitted by an exceptional performer in accordance with the regulations and guidance issued by the Department in regard to the review and payment of such claims, there will not be a basis for liability. See 34 C.F.R. § 682.414