

Limitations on Exception to Discharge of Private Student Loans

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This document reviews the limitations on the exception to discharge of private student loans as encoded in the US Bankruptcy Code (11 USC 523(a)(8)) as amended by section 220 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), P.L. 109-8, effective October 17, 2005.

These limitations stem from three aspects of the statute:

1. the definition of a "qualified education loan"
2. the nature of the association of the loan with a nonprofit institution
3. the exclusion for cases involving undue hardship

To be excepted from discharge, a debtor would either have to show that his or her education loan was not a qualified education loan and was not funded by a nonprofit institution or that repaying the loan would represent an undue hardship.

Qualified Education Loans

BAPCPA amended the US Bankruptcy Code to include "qualified education loans" within the scope of the exception to discharge for education loans. Private student loans which are not school certified generally do not satisfy the requirements to be considered a qualified education loan. One must, however, review the specific circumstances of each loan to determine whether or not it satisfies the requirements to be considered a qualified education loan.

The term "qualified education loan" is defined in 11 USC 523(a)(8)(B) by cross-reference to 26 USC 221(d)(1), which defines it in terms of other sections of the Internal Revenue Code of 1986 and the Higher Education Act of 1965, including definitions of "qualified higher education expenses", "cost of attendance", "eligible educational institution" and "eligible student".

There are two major types of private student loans: those that are school certified and those that are not school certified.

School certified loans generally satisfy the requirements of a "qualified education loan" because the colleges enforce limits on the amount of debt that are consistent with the restrictions imposed by 26 USC 221(d)(1), which in turn references the definition of cost of attendance in section 472 of the Higher Education Act of 1965 (20 USC 108711).

Private student loans that are not school certified often deliberately circumvent these requirements in order to lend money to students beyond the limits permitted by 26 USC 221(d)(1) or for purposes not allowed by 26 USC 221(d)(1). For example, the overaward regulations at 34 CFR 673.5 require colleges to treat the amount by which a private student loan in combination with other non-need-based loans exceeds the expected family contribution (EFC) as a resource, reducing eligibility for need-based aid. (One of the attractions of a non-school-certified loan is the ability to borrow more than would otherwise be permitted on a school-certified loan. Colleges are only required to adjust for an overaward caused by a private student loan if they know about the education loan.)

Specifically, 34 CFR 673.5(c)(1)(xiii) defines estimated financial assistance as including "any educational benefits paid because of enrollment in a postsecondary education institution, or to cover postsecondary education expenses", which includes private student loans. The amount of estimated financial assistance excludes amounts used to replace the EFC, per 34 CFR 673.5(c)(2)(iii): "Those amounts used to replace the EFC, including the amounts of any unsubsidized Federal Stafford or Direct Loans, Federal PLUS or Federal Direct PLUS Loans, and non-federal non-need-based loans, including private, state-sponsored, and institutional loans." But amounts of non-need-based loans in excess of the EFC are not excluded from the definition of estimated financial assistance, per 34 CFR 673.5(c)(2)(iii): "However, if the sum of the loan amounts received that are being used to replace the student's EFC actually exceed the EFC, the excess amount must be treated as estimated financial assistance". If estimated financial assistance exceeds financial need (which is the difference between the cost of attendance and the expected family contribution), the overaward regulations require certain forms of need-based aid to be reduced.

These regulations parallel the definitions and requirements encoded into the Higher Education Act of 1965 as specified in sections 471, 480(j), 428(a)(2)(C), 428H(c), 428H(d) and 443(b)(4). Section 471 (20 U.S.C. 1087kk) defines financial need as the difference between the cost of attendance and the expected family contribution and estimated financial assistance. Most federal student aid programs are capped at financial need. Section 480(j)(1) defines estimated financial assistance as including education loans:

For purposes of determining a student's eligibility for funds under this title, estimated financial assistance not received under this title shall include all scholarships, grants, loans, or other assistance known to the institution at the time the determination of the student's need is made, including veterans' education benefits as defined in subsection (c), and national service educational awards or post-service benefits under title I of the National and Community Service Act of 1990 (42 U.S.C. 12571 et seq.).

Although non-school-certified loans generally do not satisfy the requirements to be considered qualified education loans, it is important to evaluate whether each individual loan satisfies those requirements on a case-by-case basis. An education loan that is not school certified could still be a qualified education loan if it did not exceed the limits of a qualified education loan and was not disbursed for expenses outside the scope of a qualified education loan.

Some of the more common ways in which an education loan may fail to satisfy the requirements of a qualified education loan include:

1. Use at a college that is not a Title IV institution (i.e., a college that is subject to a program participation agreement under 20 USC 1087ll).
2. Use for costs not included within the definition of cost of attendance or in excess of the expected family contribution (or cost of attendance minus aid received).
3. Use for study abroad not approved for credit by the home institution.
4. Use for rental or purchase of equipment, materials or supplies that are not required by the institution.
5. Use for purchase of a computer without obtaining an adjustment to cost of attendance from the college for the cost of the computer.
6. Use for a previous year's school charges.

In order to be considered a "qualified education loan", an education loan must satisfy all of the following requirements:

1. The debt must be incurred "by a debtor who is an individual", per 11 USC 523(a)(8)(B).
2. The debt must be "incurred solely to pay qualified higher education expenses", per 26 USC 221(d)(1) by cross-reference from 11 USC 523(a)(8)(B). Mixed used loans, such as credit card debt or home equity loans, are not eligible, per example 6 of 26 CFR 1.221-1(e)(4). Even education loans are not eligible if they are incurred to pay for expenses other than qualified higher education expenses.
3. The debt must be incurred on behalf of a student who is either the debtor, the debtor's spouse, or the debtor's dependent (eligible to be claimed as an exemption on the debtor's income tax return, per 26 CFR 1.221-1(b)(2)) at the time the indebtedness was incurred, per 26 USC 221(d)(1)(A) by cross-reference from 11 USC 523(a)(8)(B).
4. The debt must be "paid or incurred within a reasonable period of time before or after the indebtedness is incurred", per 26 USC 221(d)(1)(B) by cross-reference from 11 USC 523(a)(8)(B). The regulations at 26 CFR 1.221-1(e)(3)(ii)(B) provide for a safe harbor of 90 days before or after the academic period to which the expenses relate. It is possible that a longer period of time would still be considered reasonable based on the relevant facts and circumstances, per 26 CFR 1.221-1(e)(3)(ii), but use of a loan to pay for a previous year's school charges would generally not qualify unless there were extenuating circumstances.
5. The debt must be "attributable to education furnished during a period during which the recipient was an eligible student" per 26 USC 221(d)(1)(C) by cross-reference from 11 USC 523(a)(8)(B). To be an eligible student, the student must be enrolled at least half-time in a Title IV institution and be degree-seeking. Study abroad is only eligible to the extent that it is approved for credit by the home institution.

Specifically, eligible student is defined by 26 USC 221(d)(3) by cross-reference to 26 USC 25A(b)(3), which in turn requires the student to be enrolled on at least a half-time

basis and to fulfill the requirements of section 484(a)(1) of the Higher Education Act of 1965 (20 USC 1091(a)(1)). This requires the student to "be enrolled or accepted for enrollment in a degree, certificate, or other program (including a program of study abroad approved for credit by the eligible institution at which such student is enrolled) leading to a recognized educational credential at an institution of higher education that is an eligible institution in accordance with the provisions of section 1094 of this title, except as provided in subsections (b)(3) and (b)(4) of this section, and not be enrolled in an elementary or secondary school".

The definition of qualified higher education expenses in 26 USC 221(d)(2) references 26 USC 25A(f)(2) for the definition of "eligible educational institution". This ultimately requires the institution to be a Title IV institution. So the requirement that the institution be a Title IV institution derives both from the definition of "eligible student" and the definition of "qualified higher education expenses".

6. The debt may include any debt used to refinance a qualified education loan, per 26 USC 221(d)(1) by cross-reference from 11 USC 523(a)(8)(B).
7. The debt does not need to be a federally-guaranteed loan to qualify, per 26 CFR 1.221-1(e)(3)(iv).
8. The debt may not be owed to a relative or borrowed from a qualified employer plan (retirement plan), per 26 USC 221(d)(1) by cross-reference from 11 USC 523(a)(8)(B).
9. The debt must be used to pay "qualified higher education expenses", per 26 USC 221(d)(1) by cross-reference from 11 USC 523(a)(8)(B). This term is defined by 26 USC 221(d)(2) as the "cost of attendance" as defined by section 472 of the Higher Education Act of 1965 (20 USC 108711) as in effect on August 4, 1997, reduced by educational expenses paid certain other programs.

The intention of these double-dip provisions is to prevent the same education expenses from being used to justify benefits under more than one education tax benefit. To the extent that the education expenses were paid by another education tax benefit they are not attributable to the qualified education debt. The specific reductions mentioned by 26 USC 221(d)(2) include amounts paid from employer tuition assistance (26 USC 127), US Savings Bonds (26 USC 135), qualified tuition programs such as section 529 college savings plans and prepaid tuition plans (26 USC 529), Coverdell education savings accounts (26 USC 530), and scholarships, veterans education benefits or military student aid, and other payments for education expenses or attributable to enrollment in an eligible education institution which are excludable from gross income (26 USC 25A(g)(2)). The latter includes the tuition & fees deduction (which is an exclusion from income) but not, apparently, the Hope Scholarship and Lifetime Learning Tax Credit (which are tax credits).

These definitions require the reduction of cost of attendance by most forms of student aid, such as the Pell Grant, education loans and institutional aid. However, there may be a little play in the joints between the reductions mentioned by 26 USC 221(d)(2) and the

definition of estimated financial assistance in section 480(j)(1) of the Higher Education Act of 1965, such as Federal Work Study (which is not excluded from gross income). But for the most part the two definitions are consistent with each other.

The language in Section 472 of the Higher Education Act of 1965 (20 USC 10871l) requires cost of attendance to be "determined by the institution". While this doesn't specifically require the education loan to be school certified, since the lender could determine the cost of attendance from the institution's published student budget, any amounts beyond the amounts in the student budget must be approved by the school in advance. For example, while Section 472(2) of the Higher Education Act permits a computer to be included in cost of attendance, the "as determined by the institution" language provides the institution with the authority to determine whether or not the cost of a computer is included in the cost of attendance. Most colleges do not include the cost of a computer in the standard student budget, but instead have an appeals process for adjusting the cost of attendance to include the actual cost of a computer subject to certain limits, such as a reasonable cap on the cost and no more than one computer per undergraduate career. If an education loan was incurred to pay for a computer without the college approving an increase in the cost of attendance corresponding to the cost of the computer, the loan is not a qualified education loan. Likewise, if an education loan is incurred for purposes not permitted by the cost of attendance, it is not a qualified education loan. For example, equipment must be required by the institution to be considered part of the cost of attendance under section 472(1) of the Higher Education Act of 1965. If an education loan is incurred to purchase a cell phone, iPod, calculator, camera, PDA or other equipment that is not "required of all students in the same course of study", the loan is not a qualified education loan. Similarly, although section 472(2) of the Higher Education Act of 1965 includes "transportation" within the definition of cost of attendance, this does not permit the purchase of an automobile or motorcycle. The specific language is for "an allowance for ... transportation ... as determined by the institution".

Thus an education loan which exceeds the remaining cost of attendance (after reducing it by other aid received and expenses paid with funds from certain education tax benefits) would not be considered a qualified education loan.

If an education loan fails to satisfy any of these requirements, it is not considered a qualified education loan within the meaning of 11 USC 523(a)(8) and hence may be subject to discharge in a bankruptcy proceeding.

Association with a Nonprofit Institution

11 USC 523(a)(8)(A)(i) excepts from discharge any education loan "made under any program funded in whole or in part" by a nonprofit institution. This exception is limited to loans funded by the nonprofit institution. One could argue that loans guaranteed by a nonprofit institution are not excepted from discharge by virtue of the nonprofit nature of the institution (but might be excepted from discharge as a qualified education loan under 11 USC 523(a)(8)(B)). This becomes clear when one examines the full context of the language in 11 USC 523(a)(8)(A)(i), which has two clauses:

an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit,

or made under any program funded in whole or in part by a governmental unit or nonprofit institution

The first clause excepts from discharge any loan made, insured or guaranteed by a government unit (including the federal government and state agencies), regardless of the source of funds. The second clause does not include parallel language for "insured or guaranteed", but rather just language concerning the funding of the loans. This is a clear indication that Congress did not intend to except from discharge loans that were merely *guaranteed* by a nonprofit institution, but rather just those *funded* by a nonprofit institution.

Thus a private student loan that is funded by a nonprofit institution should be excepted from discharge, but not a private student loan that is guaranteed or insured by a nonprofit institution.

A recent bankruptcy case in Massachusetts, Taratuska v. TERI (Chapter 7 Case 01-10361-RS, Adversary Proceeding 05-1653, August 16, 2007) used similar reasoning to find that a private student loan guaranteed by TERI was not excepted from discharge. The judge's decision involved several nuances:

- Although the statute requires the program to be funded by the nonprofit institution and not the loan, the judge concluded that funding a program means "advancing funds for a loan or loans under that program". The judge rejected the contention that guaranteeing a loan constitutes funding the program, in part because a guarantee does not mean advancing funding but rather only payment upon a possible future default.
- The judge made the same argument regarding the terminology used in the two clauses, finding "Notably, the statute employs both terms, plainly indicating that they have different meanings; otherwise, one or the other would be unnecessary."
- Marketing of a loan program by a nonprofit institution does not constitute funding that program or making of loans under that program.
- Commingling of nonprofit and commercial student loans in a single program appellation without regard for the different attributes of the loans does not constitute a program funded by a nonprofit institution because it unfairly "converts dischargeable commercial student loans into non-dischargeable commercial student loans" solely as a consequence of the classification system and "for reasons having little to do with the loan itself". The judge's decision would require separate discrete classifications for nonprofit and commercial student loans. (This is the weakest aspect of the judge's decision. One could argue that lumping together multiple distinct loan types into a single loan program is consistent with the statutory language that focuses on funding of a loan *program* as opposed to funding of a loan. However, a loan program should exhibit a degree of cohesiveness as is exhibited by the Stafford Loan Program or the PLUS Loan Program. It is worth noting that this clause was most likely intended to except Perkins Loans (formerly, National Direct Student Loan Program) from discharge and not private student loans.)

However, the case was reversed on appeal on August 25, 2008 (07-11938-RCL). The appellate judge focused on the plain language distinction between “loan” as used in the first clause (“loan made, insured or guaranteed by a governmental unit”) and “program” as used in the second clause (“made under any program funded in whole or in part by a governmental unit or nonprofit institution”). The argument is that such a distinction is intentional by Congress. The judge reasoned from precedent set in other bankruptcy cases that “program” encompasses guarantees even though “funded” is not synonymous with “guaranteed” and that the intent of Congress was to include “loans made under a program in which a nonprofit organization plays any meaningful part in providing funds”. The argument is that the use of expansive language in the second clause increases the scope and is not intended to limit it. The judge further concluded that an agreement to purchase loans in the event of default plays a meaningful part in providing funds. Since the provision of funds by the lender was conditioned on the inclusion of the guarantee, the guarantor played a meaningful part in the provision of funds. The judge did not ascribe any significance to the absence of the word “guaranteed” in the second clause, arguing that while the guarantor did not fund the particular loan, the guarantor did fund the program by playing a meaningful part in the provision of funds. (The promissory note also described the loan as made under a program funded in part by a nonprofit institution within the scope of 523(a)(8).)

Thus the case hinges on the distinction between funding a loan and funding a loan program, with the court concluding funding a loan program includes providing a guarantee against default because providing the guarantee to the program played a meaningful role in the provision of funds to the program.

However, the court appears to have erred in overlooking the historical context of this exception to discharge. The original language in the US Bankruptcy Code in 1978 read “to a governmental unit, or a nonprofit institution of higher education, for an educational loan”. This was amended by P.L. 96-56 in 1979 to read “for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education”. (The words “of higher education” were struck by P.L. 98-353 in 1984.) The language was amended because of concern that loans made under the National Defense Student Loan Program (NDSL), the precursor to the Perkins Loan Program, would not be excepted from discharge since those loans were made by colleges from a revolving fund consisting of federal contributions with an institutional match. The colleges and the federal government each provided part of the funds from which the loans were made and there was no guarantee against default. The only loan program with a guarantee at the time was the Guaranteed Student Loan Program, which had a federal guarantee. Guarantors of private student loans did not exist until the mid-1980s. It is therefore clear from historical context that Congress intended funding of a program in whole or in part to mean advancing all or part of the funds used to make loans from a program and did not contemplate the possibility of a loan program being guaranteed by a nonprofit institution.

It is ironic that TERI, the guarantor of loans in this case, was itself able to file for bankruptcy on April 7, 2008, a benefit denied to the borrower.

Undue Hardship

11 USC 523(a)(8) allows any education loan to be subject to discharge if excepting such debt from discharge "would impose an undue hardship on the debtor and the debtor's dependents".

Most court cases cite *Brunner v. New York State Higher Education Services Corp.* [October 14, 1987, #41, Docket 87-5013] for a definition of "undue hardship". That decision adopted the following three-part standard for undue hardship:

1. That the debtor cannot both repay the student loan and maintain a minimal standard of living.
2. That this situation is likely to persist for a significant portion of the repayment period of the student loans.
3. That the debtor has made good faith efforts to repay the loans.

In practice the first element usually involves evaluating what the monthly payment would be under the Income-Contingent Repayment plan. This repayment plan uses two caps on the monthly payment, one based on the poverty line and one based on income percentage factors. The first cap is 20% of the amount by which income exceeds 100% of the poverty line for the family size. The second cap is the amount of the monthly payment for 12-year level repayment multiplied by an income percentage factor that ranges from 50% to 200% depending on income. For most bankruptcy cases the first cap is the most salient. There is also a \$5 minimum monthly payment. If repaying the education loans under the income contingent repayment plan precludes the debtor from maintaining a minimal standard of living, the education debt is potentially subject to discharge, assuming that the other two elements of *Brunner v. NY HESC* apply. In some cases courts have selectively discharged education loans until the total remaining fell under the threshold established by the first element.

However, Section 418 of BAPCPA established fee waiver provisions for a chapter 7 filing when the individual debtor has income less than 150% of the poverty line for the family size and is unable to pay the fee in installments. This could potentially lead to a situation in which a debtor qualifies for a bankruptcy fee waiver yet has education loans not dischargeable under an undue hardship petition if the debtor's income is greater than 100% of the poverty line but less than 150% of the poverty line.

One could argue that both standards should apply when determining whether a debtor cannot repay the student loans and still maintain a minimal standard of living. Specifically, if the debtor's income falls below 150% of the poverty line, the education debt should be subject to discharge, and if the debtor's income is greater than or equal to 150% of the poverty line, then the standard established by income contingent repayment should apply with regard to the amount of debt.

In fact, the 110th Congress has recognized this flaw and enacted the College Cost Reduction and Access Act of 2007 (P.L. 110-84) to establish a new Income-Based Repayment plan with a new cap on monthly payments based on 15% of the amount by which adjusted gross income exceeds 150% of the poverty line for the family size. The new repayment plan is effective on July 1,

2009. It is likely that the courts will switch from Income-Contingent Repayment to Income-Based Repayment in the three-prong test. Both cap monthly payments at a percentage of discretionary income, but Income-Based Repayment uses a smaller percentage and a smaller definition of discretionary income, yielding a smaller monthly payment. In addition, basing discretionary income on 150% of the poverty line meshes well with the similar threshold used for eligibility for bankruptcy fee waivers.

The second element usually requires the debtor to demonstrate exceptional circumstances that will preclude repaying the debt for most of the repayment term, such as a disability. An inability to work in one's chosen profession is not sufficient, if it does not preclude being able to work in another field.

The third element usually involves examining whether the borrower made an attempt to repay the debt and whether the borrower tried using forbearances and the economic hardship deferment before defaulting on the debt.

Pending Legislation

Legislation introduced by Senator Richard Durbin (110 S.1561) would roll back the changes introduced by BAPCPA by striking the exception for qualified education loans. It would also repeal the exception for loans funded by nonprofit institutions.

Legislation introduced by Senator Hillary Clinton (110 S. 511), the Student Borrower Bill of Rights Act of 2007, would restore the pre-1998 language which allowed for a discharge of education loans after seven years in repayment.

Neither of these bills were ultimately passed by Congress, but they could serve as models for future attempts to provide limited bankruptcy relief to borrowers of education loans.

Appendix: Legislative and Regulatory Citations

11 USC 523(a)(8):

Section 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

...

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for --

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

26 USC 221(d):

Definitions

For purposes of this section --

(1) Qualified education loan

The term "qualified education loan" means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses --

(A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,

(B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and

(C) which are attributable to education furnished during a period during which the recipient was an eligible student.

Such term includes indebtedness used to refinance indebtedness which qualifies as a qualified education loan. The term "qualified education loan" shall not include any indebtedness owed to a person who is related (within the meaning of section 267 (b) or 707 (b)(1)) to the taxpayer or to any person by reason of a loan under any qualified employer plan (as defined in section 72 (p)(4)) or under any contract referred to in section 72 (p)(5).

(2) Qualified higher education expenses

The term "qualified higher education expenses" means the cost of

attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 108711, as in effect on the day before the date of the enactment of this Act) at an eligible educational institution, reduced by the sum of -

- (A) the amount excluded from gross income under section 127, 135, 529, or 530 by reason of such expenses, and
- (B) the amount of any scholarship, allowance, or payment described in section 25A (g)(2).

For purposes of the preceding sentence, the term "eligible educational institution" has the same meaning given such term by section 25A(f)(2), except that such term shall also include an institution conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training.

(3) Eligible student

The term "eligible student" has the meaning given such term by section 25A(b)(3).

(4) Dependent

The term "dependent" has the meaning given such term by section 152 (determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof).

Section 472 of the Higher Education Act of 1965 (20 USC 108711):

Cost of attendance

For the purpose of this subchapter and part C of subchapter I of chapter 34 of title 42, the term "cost of attendance" means --

- (1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;
- (2) an allowance for books, supplies, transportation, and miscellaneous personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer, for a student attending the institution on at least a half-time basis, as determined by the institution;
- (3) an allowance (as determined by the institution) for room and board costs incurred by the student which -
 - (A) shall be an allowance determined by the institution for a student without dependents residing at home with parents;
 - (B) for students without dependents residing in institutionally owned or operated housing, shall be a standard allowance determined by the institution based on the amount normally assessed most of its residents for room and board; and

- (C) for all other students shall be an allowance based on the expenses reasonably incurred by such students for room and board;
- (4) for less than half-time students (as determined by the institution) tuition and fees and an allowance for only books, supplies, and transportation (as determined by the institution) and dependent care expenses (in accordance with paragraph (8));
 - (5) for a student engaged in a program of study by correspondence, only tuition and fees and, if required, books and supplies, travel, and room and board costs incurred specifically in fulfilling a required period of residential training;
 - (6) for incarcerated students only tuition and fees and, if required, books and supplies;
 - (7) for a student enrolled in an academic program in a program of study abroad approved for credit by the student's home institution, reasonable costs associated with such study (as determined by the institution at which such student is enrolled);
 - (8) for a student with one or more dependents, an allowance based on the estimated actual expenses incurred for such dependent care, based on the number and age of such dependents, except that -
 - (A) such allowance shall not exceed the reasonable cost in the community in which such student resides for the kind of care provided; and
 - (B) the period for which dependent care is required includes, but is not limited to, class-time, study-time, field work, internships, and commuting time;
 - (9) for a student with a disability, an allowance (as determined by the institution) for those expenses related to the student's disability, including special services, personal assistance, transportation, equipment, and supplies that are reasonably incurred and not provided for by other assisting agencies;
 - (10) for a student receiving all or part of the student's instruction by means of telecommunications technology, no distinction shall be made with respect to the mode of instruction in determining costs;
 - (11) for a student engaged in a work experience under a cooperative education program, an allowance for reasonable costs associated with such employment (as determined by the institution); and
 - (12) for a student who receives a loan under this or any other Federal law, or, at the option of the institution, a conventional student loan incurred by the student to cover a student's cost of attendance at the institution, an allowance for the actual cost of any loan fee, origination fee, or insurance premium charged to such student or such parent on such loan, or the average cost of any such fee or premium charged by the Secretary, lender, or guaranty agency making or insuring such loan, as the case may be.

26 USC 25A(b)(3):

Eligible student

For purposes of this subsection, the term "eligible student" means, with respect to any academic period, a student who -

- (A) meets the requirements of section 484(a)(1) of the Higher Education Act of 1965 (20 U.S.C. 1091 (a)(1)), as in effect on the date of the enactment of this section, and
- (B) is carrying at least 1/2 the normal full-time work load for the course of study the student is pursuing.

Section 484(a)(1) of the Higher Education Act of 1965 (20 USC 1091(a)(1)):

be enrolled or accepted for enrollment in a degree, certificate, or other program (including a program of study abroad approved for credit by the eligible institution at which such student is enrolled) leading to a recognized educational credential at an institution of higher education that is an eligible institution in accordance with the provisions of section 1094 of this title, except as provided in subsections (b)(3) and (b)(4) of this section, and not be enrolled in an elementary or secondary school;

26 CFR 1.221-1(e):

Definitions -

- (1) Eligible educational institution. In general, an eligible educational institution means any college, university, vocational school, or other postsecondary educational institution described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), as in effect on August 5, 1997, and certified by the U.S. Department of Education as eligible to participate in student aid programs administered by the Department, as described in section 25A(f)(2) and §1.25A-2(b). For purposes of this section, an eligible educational institution also includes an institution that conducts an internship or residency program leading to a degree or certificate awarded by an institution, a hospital, or a health care facility that offers postgraduate training.
- (2) Qualified higher education expenses --
 - (i) In general. Qualified higher education expenses means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 108711, as in effect on August 4, 1997), at an eligible educational institution, reduced by the amounts described in paragraph (e)(2)(ii) of this section. Consistent with section 472 of the Higher Education Act of 1965, a student's cost of attendance is determined by the eligible educational institution and includes tuition and fees normally assessed a student carrying the same academic workload as the student, an allowance for room and board, and an allowance for books, supplies, transportation, and miscellaneous expenses of the student.

- (ii) Reductions. Qualified higher education expenses are reduced by any amount that is paid to or on behalf of a student with respect to such expenses and that is--
 - (A) A qualified scholarship that is excludable from income under section 117;
 - (B) An educational assistance allowance for a veteran or member of the armed forces under chapter 30, 31, 32, 34 or 35 of title 38, United States Code, or under chapter 1606 of title 10, United States Code;
 - (C) Employer-provided educational assistance that is excludable from income under section 127;
 - (D) Any other amount that is described in section 25A(g)(2)(C) (relating to amounts excludable from gross income as educational assistance);
 - (E) Any otherwise includible amount excluded from gross income under section 135 (relating to the redemption of United States savings bonds);
 - (F) Any otherwise includible amount distributed from a Coverdell education savings account and excluded from gross income under section 530(d)(2); or
 - (G) Any otherwise includible amount distributed from a qualified tuition program and excluded from gross income under section 529(c)(3)(B).
- (3) Qualified education loan -
 - (i) In general. A qualified education loan means indebtedness incurred by a taxpayer solely to pay qualified higher education expenses that are--
 - (A) Incurred on behalf of a student who is the taxpayer, the taxpayer's spouse, or a dependent (as defined in section 152) of the taxpayer at the time the taxpayer incurs the indebtedness;
 - (B) Attributable to education provided during an academic period, as described in section 25A and the regulations thereunder, when the student is an eligible student as defined in section 25A(b)(3) (requiring that the student be a degree candidate carrying at least half the normal full-time workload); and
 - (C) Paid or incurred within a reasonable period of time before or after the taxpayer incurs the indebtedness.
 - (ii) Reasonable period. Except as otherwise provided in this paragraph (e)(3)(ii), what constitutes a reasonable period of time for purposes of paragraph (e)(3)(i)(C) of this section generally is determined based on all the relevant facts and circumstances. However, qualified higher education expenses are treated as paid or

incurred within a reasonable period of time before or after the taxpayer incurs the indebtedness if--

- (A) The expenses are paid with the proceeds of education loans that are part of a Federal postsecondary education loan program; or
 - (B) The expenses relate to a particular academic period and the loan proceeds used to pay the expenses are disbursed within a period that begins 90 days prior to the start of that academic period and ends 90 days after the end of that academic period.
- (iii) Related party. A qualified education loan does not include any indebtedness owed to a person who is related to the taxpayer, within the meaning of section 267(b) or 707(b)(1). For example, a parent or grandparent of the taxpayer is a related person. In addition, a qualified education loan does not include a loan made under any qualified employer plan as defined in section 72(p)(4) or under any contract referred to in section 72(p)(5).
- (iv) Federal issuance or guarantee not required. A loan does not have to be issued or guaranteed under a Federal postsecondary education loan program to be a qualified education loan.
- (v) Refinanced and consolidated indebtedness -
- (A) In general. A qualified education loan includes indebtedness incurred solely to refinance a qualified education loan. A qualified education loan includes a single, consolidated indebtedness incurred solely to refinance two or more qualified education loans of a borrower.
 - (B) Treatment of refinanced and consolidated indebtedness.
[Reserved]
- (4) Examples. The following examples illustrate the rules of this paragraph (e):

Example 1. Eligible educational institution. University F is a postsecondary educational institution described in section 481 of the Higher Education Act of 1965. The U.S. Department of Education has certified that University F is eligible to participate in federal financial aid programs administered by that Department, although University F chooses not to participate. University F is an eligible educational institution.

Example 2. Qualified higher education expenses. Student G receives a \$3,000 qualified scholarship for the 2003 fall semester that is excludable from Student G's gross income under section 117. Student G receives no other forms of financial assistance with respect to the 2003 fall semester. Student G's cost of attendance for the 2003 fall semester, as determined by Student G's eligible educational institution for purposes of calculating a student's financial need in accordance with section 472 of the Higher Education Act, is \$16,000. For the 2003 fall semester, Student G has qualified higher education expenses of \$13,000 (the cost of attendance as determined by the institution (\$16,000)

reduced by the qualified scholarship proceeds excludable from gross income (\$3,000)).

Example 3. Qualified education loan. Student H borrows money from a commercial bank to pay qualified higher education expenses related to his enrollment on a half-time basis in a graduate program at an eligible educational institution. Student H uses all the loan proceeds to pay qualified higher education expenses incurred within a reasonable period of time after incurring the indebtedness. The loan is not federally guaranteed. The commercial bank is not related to Student H within the meaning of section 267(b) or 707(b)(1). Student H's loan is a qualified education loan within the meaning of section 221.

Example 4. Qualified education loan. Student I signs a promissory note for a loan on August 15, 2003, to pay for qualified higher education expenses for the 2003 fall and 2004 spring semesters. On August 20, 2003, the lender disburses loan proceeds to Student I's college. The college credits them to Student I's account to pay qualified higher education expenses for the 2003 fall semester, which begins on August 25, 2003. On January 26, 2004, the lender disburses additional loan proceeds to Student I's college. The college credits them to Student I's account to pay qualified higher education expenses for the 2004 spring semester, which began on January 12, 2004. Student I's qualified higher education expenses for the two semesters are paid within a reasonable period of time, as the first loan disbursement occurred within the 90 days prior to the start of the fall 2003 semester and the second loan disbursement occurred during the spring 2004 semester.

Example 5. Qualified education loan. The facts are the same as in Example 4 except that in 2005 the college is not an eligible educational institution because it loses its eligibility to participate in certain federal financial aid programs administered by the U.S. Department of Education. The qualification of Student I's loan, which was used to pay for qualified higher education expenses for the 2003 fall and 2004 spring semesters, as a qualified education loan is not affected by the college's subsequent loss of eligibility.

Example 6. Mixed-use loans. Student J signs a promissory note for a loan secured by Student J's personal residence. Student J will use part of the loan proceeds to pay for certain improvements to Student J's residence and part of the loan proceeds to pay qualified higher education expenses of Student J's spouse. Because Student J obtains the loan not solely to pay qualified higher education expenses, the loan is not a qualified education loan.