

July 29, 2013

Director
NSLDS Systems
Operations and Aid Delivery
Management Services, FSA
U.S. Department of Education
Union Center Plaza (UCP)
830 First Street, NE
Room 44F1
Washington, DC 20202-5454

REFERENCE: NSLDS Comments—June 28, 2013, Notice

Dear Director:

On behalf of the higher education associations listed below, I am submitting comments in response to the June 28, 2013, Federal Register notice outlining proposed revisions in the National Student Loan Data System (NSLDS) system of records.

The Department of Education is proposing several revisions to NSLDS for the purposes of:

- (1) Implementing changes made by Public Law 112-141 that limit student eligibility for Direct Subsidized Loans to no more than 150 percent of the published length of the program in which a student is enrolled;
- (2) Modifying provisions related to gainful employment programs to alter the categories of individuals covered, and to revise and streamline the programmatic routine use of these records; and
- (3) Expanding the authority of the NSLDS system of records in order to obtain and distribute to the public information related to the economic return of individual educational institutions and their programs.

The proposed modifications dealing with the new student eligibility limitations for Direct Subsidized Loans are consistent with the purpose of NSLDS, which is to facilitate the operations of the federal student loan programs. We recognize the need to update the system to implement the changes in the statute.

The other proposals, however, exceed the boundaries of the law in ways that the courts have prohibited and that distort the purposes of NSLDS.

Specifically, the notice includes a number of changes related to gainful employment programs without offering any explanation for them. Presumably, most of these changes were made in response to recent court decisions related to the gainful employment regulations. If that is the

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case, then it is puzzling that the notice indicates that the department intends to continue maintaining in NSLDS the records of students who do not receive Title IV aid—given that the United States District Court for the District of Columbia has ruled that it is not permissible for the department to do so. In view of this decision, we do not understand how the inclusion of information about unaided students in NSLDS can be justified.

With respect to the proposed expansion of authority, we do not believe that a Federal Register notice is the appropriate mechanism for extending the reach of NSLDS into program evaluation and consumer information activities. The system was neither intended nor designed for such purposes. The purpose and functions of NSLDS are clearly spelled out in the Higher Education Act. Any decision to substantially expand those purposes and functions should be made through the regular legislative process.

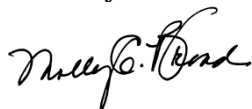
Moreover, the decision to share with other federal and state agencies and the Social Security Administration student records that were provided solely for the operation of federal aid programs raises substantial privacy questions that deserve more public attention and discussion than will be provided by issuance of a notice in the Federal Register with a 30-day comment period.

We recognize the important role that NSLDS plays in the delivery of critically needed federal financial aid to our nation's postsecondary students. NSLDS must remain focused on that role. We also recognize the department's legitimate need for data and analytics to support its multi-billion dollar portfolio of loans and grants in a responsible and accountable manner. However, we believe that any expansion of NSLDS or other data systems should be based on sound policy, be operationally proper, and fully comply with applicable laws.

Finally, in addition to concerns about the proposed expansion of NSLDS, we also are concerned that the department's notice and process fail to comply with important requirements of the Privacy Act. Most notably, we are concerned with the department's failure to conduct a Privacy Impact Assessment prior to issuing this notice. In addition, the notice is riddled with other errors that legally require the department to reframe and republish the notice in conformity with the Privacy Act.

A more detailed explanation of these and other deficiencies is attached below. We would welcome the opportunity to discuss these issues with you at the earliest opportunity. In light of the significant changes envisioned by this notice and the privacy questions they raise, we also request that you extend the period for public comment.

Sincerely,



Molly Corbett Broad
President

MCB/ldw

On behalf of:
American Association of Collegiate Registrars and Admissions Officers

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American Association of Community Colleges

American Association of State Colleges and Universities

American Council on Education

American Indian Higher Education Consortium

Association of American Universities

Association of Jesuit Colleges and Universities

National Association of College and University Business Officers

National Association of Independent Colleges and Universities

**COMMENTS OF HIGHER EDUCATION ASSOCIATIONS ON JUNE 28, 2013,
DEPARTMENT OF EDUCATION NOTICE OF AN ALTERED SYSTEM OF RECORDS**

I. Gainful Employment

A. Categories of Individuals Covered

Under the provisions of the June 28 notice, students who complete a gainful employment program will no longer be specifically identified in the categories of individuals covered by NSLDS. Although this change is not explained in the notice, it appears to have been made to assure consistency with the new provisions for records that will be maintained on the aggregated income and median loan debt of both graduates and non-completers of gainful employment programs.

In addition, the Department intends to continue maintaining in NSLDS the records of students **who do not receive title IV aid** [emphasis added] who either began attendance in a gainful employment program or who began an eligible program at a proprietary or a postsecondary vocational institution.

Again, the notice does not include any explanatory material regarding the inclusion of these student records in the system. So we are perplexed by the apparent decision to continue the collection of records of unaided students, given that the United States District Court for the District of Columbia has ruled that it is not permissible to do so.

Specifically, in an opinion issued on March 19, 2013, Judge Rudolf Contreras stated:

The National Student Loan Data System is a database ‘containing information regarding loans made, insured, or guaranteed under’ various federal programs, 20 U.S.C. § 1092b(a) (Supp. II 2008), as well as information about federal grants, see *id.* § 1092b(h). ***Its ‘overall purpose’ has never included the collection of information on students who do not receive and have not applied for either federal grants or federal loans.*** To expand it in that way would make the database no longer ‘a system (or a successor system) that . . . was in use by the Secretary, directly or through a contractor, as of the day before August 14, 2008.’ 20 U.S.C. § 1015c(b),(2). ***The Department could not create a student unit record system of information on all students in gainful employment programs; nor can it graft such a system onto a pre-existing database of students who have applied for or received Title IV assistance.*** For that reason—and not, as the court previously held, because the added information is unnecessary for the operation of any Title IV program—***the expansion is barred by the statutory prohibition on new databases of personally identifiable student information.*** Because the reporting requirements mandated that expansion, they will remain vacated. [emphasis added]

Recommendation: The department should provide a clearer description of the intent and operation of the gainful employment provisions included in the notice. In addition, in accordance with the district court ruling, the department should discontinue its collection of records of students who do not receive Title IV aid.

B. Programmatic Routine Use

With respect to the gainful employment changes, the programmatic routine use provisions have been streamlined. Presumably, the more specific list of data related to students enrolled in gainful employment programs was deleted in response to court decisions striking down portions of the gainful employment regulations issued in 2010. However, because no explanation of the streamlined language is provided in the notice, it is difficult to determine which records will be disclosed in order to ascertain whether programs lead to gainful employment.

Recommendation: The department should provide an explanation of the records it anticipates disclosing to institutions for purposes of determining if their programs lead to gainful employment in a recognized occupation.

II. Program Evaluation and Consumer Information

Expansion of Authority: The June 28 notice expands the legal authority under which NSLDS operates to include section 431 of the General Education Provisions Act (20 U.S.C. 1231a(2)-(3))¹ and Section 132(i) of the Higher Education Act (20 U.S.C. 1015a(i)).²

Section 431 of the General Education Provisions Act (GEPA): The proposed addition of Section 431 as an authority for the NSLDS system would lead to a substantial expansion of NSLDS and a fundamental shift in its purpose. Adding this authority is an apparent attempt to expand the amount and type of information collected by the system and to assign functions to it that are not related to program operations.

The NSLDS was created by a specific statutory authority for the clear purpose of facilitating the operation of federal student aid programs. The provisions of Section 431 of GEPA deal with the collection of information for program evaluation and consumer information purposes. Worthy as these other purposes may be, they are quite distinct from the operational purposes that NSLDS was created to serve.

¹ Section 431 of the General Education Provisions Act states:

“The Secretary shall—

- (1) prepare and disseminate to State and local educational agencies and institutions information concerning applicable programs, and cooperate with other Federal officials who administer programs affecting education in disseminating information concerning such programs;
- (2) inform the public regarding federally supported education programs; and
- (3) collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving the intended purposes of such programs.”

² Section 132(i) of the Higher Education Act states:

“(i) Consumer information

(1) Availability of title IV institution information. Not later than one year after August 14, 2008, the Secretary shall make publicly available on the College Navigator website, in simple and understandable terms, the following information about each institution of higher education that participates in programs under subchapter IV of this chapter and part C of subchapter I of chapter 34 of title 42, for the most recent academic year for which satisfactory data are available:

...

(W) A link to the appropriate section of the Bureau of Labor Statistics website that provides information on regional data on starting salaries in all major occupations.”

Assigning these extraneous functions to NSLDS would fundamentally change the system. Issuing a notice to revise a system of records is a wholly inappropriate way to expand the authority of a system that has a clear statutory purpose and authority. It is clearly a legislative responsibility to determine whether or not such a substantial change is warranted.

Questions of program effectiveness and useful consumer information are front and center in current policy debates. These issues have been highlighted as priority areas for consideration as Congress focuses attention on the upcoming reauthorization of the Higher Education Act.

These are issues that deserve the full and open debate provided by the legislative process. They should not be settled in an opaque Federal Register notice and grafted onto a system that is neither designed nor intended to accommodate such an expansion of authority.

Section 132(i) of the Higher Education Act (HEA): In a similar vein, it makes no sense to claim Section 132(i) of the HEA as an authority underlying NSLDS. This portion of the Act requires the Department of Education to include on its College Navigator site a link to the website of the Department of Labor's Bureau of Labor Statistics (BLS). This provision was added by the Higher Education Opportunity Act of 2008 in order to allow consumers easy access to the substantial amount of existing earnings information collected by the BLS.³

We see no reasonable way this provision can be construed as an authority for the Department of Education to collect and disclose additional information about the economic return of particular institutions through the NSLDS.

Moreover, the decision to share with other federal and state agencies and the Social Security Administration student records that were provided solely for the operation of federal aid programs raises substantial privacy questions that deserve more public attention and discussion than will be provided by issuance of a notice in the Federal Register with a 30-day comment period.

Recommendation: Eliminate the proposed new programmatic routine use (1)(p) and do not expand the current legal authority for NSLDS into program evaluation and consumer information activities. The purpose and functions of NSLDS are clearly spelled out in the Higher Education Act, and any decision to substantially expand those purposes and functions should be made through the regular legislative process. The current authority is appropriately focused on the administration of the federal student aid programs and this focus should not be diluted by efforts to serve purposes for which it was not intended or designed.

III. Need for a Privacy Impact Assessment

Section 208 of the E-Government Act of 2002, Public Law No. 107-347, 116 Stat. 2899, 44 U.S.C. § 3501 note) requires agencies to conduct Privacy Impact Assessments (PIA) before initiating a new collection of information of personally identifiable information. White House Office of Management and Budget (OMB) guidance for this requirement clarifies the circumstances under which an agency must conduct a PIA. OMB Memorandum 03-22, Sept.

³ See, for example: http://www.bls.gov/oes/current/oes_nat.htm; <http://www.bls.gov/bls/blswage.htm#State>; May 2012 National Occupational Employment and Wage Estimates; May 2012 State Occupational Employment and Wage Estimates; May 2012 Metropolitan Area Occupational Employment and Wage Estimates; May 2012 National Industry-Specific Occupational Employment and Wage Estimates; Occupation Profiles

26, 2003, http://www.whitehouse.gov/omb/memoranda_m03-22/. Several of these circumstances apply to the proposed changes to the NSLDS, including most notably:

- “when agencies adopt or alter business processes so that government databases holding information in identifiable form are merged, centralized, matched with other databases or otherwise significantly manipulated.” OMB Memorandum 03-22 at Appendix A, Part II B (a)(4).
- “when agencies work together on shared functions involving significant new uses or exchanges of information in identifiable form.” OMB Memorandum 03-22 at Appendix A, Part II B (a)(7).
- “when new information in identifiable form added to a collection raises the risks to personal privacy.” OMB Memorandum 03-22 at Appendix A, Part II B (a)(9).

Whether the department conducted a previous PIA for the NSLDS—but we observe that the Federal Register System of Records Notice (SORN) references no previous PIA—does not matter. The changes proposed for the system of records are so significant that a new PIA is required by the E-Government Act and by OMB policy. A PIA offers a mechanism that will result in an analysis of how information is handled: (1) to ensure that handling conforms to applicable legal, regulatory and policy requirements regarding privacy; (2) to determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system; and (3) to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks. See OMB Memorandum 03-22 at Appendix A, Part II A (f).

Each of these analyses is critical for the NSLDS. As discussed elsewhere in these comments, there are new and significant uncertainties about the legal authority of the department to collect additional personal information. The additional processing of personal information proposed in the SORN calls for a determination of the risks and effects that will result. The proposed collection of information on additional categories of individuals, the proposed collection of additional categories of information about individuals and the proposed new and additional routine uses create significant new risks to privacy. It is also important that the department consider alternatives to the processing of personal information in identifiable form.

We state elsewhere in these comments that a Privacy Act Federal Register notice is not the appropriate mechanism for considering the legal and policy issues raised by the extension of NSLDS into program evaluation and consumer information activities. A PIA is one mechanism that is appropriate for that purpose.

Recommendation: We ask the department conduct a PIA, publish the PIA for public comment, consider those comments and prepare a final PIA responsive to the comments. Once this process is complete—and the department has undertaken other consultations with stakeholders affected by the change in the NSLDS, then and only then is it appropriate to publish a revised SORN and to accept and consider public comments on that revised SORN. We are prepared to work with the department to make sure that a broad review of the issues presented will receive the proper attention.

IV. Merging of Disparate Functions in a Single System of Records

These comments elsewhere address the department's intention to add new functions to the NSLDS system, particularly the collection of information for program evaluation and consumer information purposes. The addition of these new functions to an operational system of records creates many new privacy risks. Maintaining separate systems of records for separate activities provides important privacy protections by limiting the size and scope of systems and by narrowing the collection and disclosure of personal information.

For example, if the department established a separate system for program evaluation, some of the personal information included in NSLDS would not be needed in the program evaluation system. That alone would be a significant improvement in privacy protection. In addition, a program evaluation system of records would require many fewer routine uses. Program evaluators have no need to make many of the disclosures that are appropriate for an operational system, including allowing disclosures for activities that relate specifically to day-to-day activities, including identifying applicants, collecting loans, litigation and other routine activities. None of the disclosures associated with these functions is relevant to program evaluation.

Activities that do not require broad authority to share information with other agencies or organizations should not be merged into a single system for the administrative convenience of the department. The applicability and relevance of a system's routine uses provides a good standard for determining whether an activity should be described in a single system or in multiple systems. Applying routine uses to functions for which they are not necessary weakens privacy protections and invites sloppy controls and inappropriate disclosures. Those who use a system with a multitude of inappropriate routine uses are likely think that disclosure controls are meaningless, creating threats to privacy and security that may ultimately be harmful to individuals and costly to the department.

Recommendation: The Department needs to rethink the addition of new functions and new purposes to the NSLDS. We recommend that functions and supporting systems of records be separated so that routine uses and other protections apply more narrowly.

V. Deficiencies in the Notice

The Federal Register System of Records Notice (SORN) for the NSLDS contains errors that require republication of the notice. The notice states:

This system of records was first published in the Federal Register on December 27, 1999 (64 FR 72395-97), altered on September 7, 2010 (75 FR 54331-54336), and most recently altered on June 24, 2011 (76 FR 37095-37100).

This information is incorrect. The publication on Dec. 27, 1999, indicated that the publication of the NSLDS SORN on that date was a *re-publication*. See 64 Federal Register 72384, Dec. 29, 1999.

As far as can be determined, the actual original publication of the SORN occurred in 1994. The 1994 notice adopting the system stated: "The Department published in the Federal Register on June 29, 1994 (59 FR 33491) a notice of a new system of records for the National Student Loan

Data System (18-40-0039).” See Federal Register, December 20, 1994 (page number unavailable).

Whether there are other errors in the described history of this SORN is unknown. There may have been other amendments to the SORN not identified in the June 2013 notice. A statutorily required notice that contains factual errors does not meet the requirements of 5 U.S.C. § 552a(e)(4) to publish a notice, and the published notice is legally deficient. The department is obliged to correct its publication of erroneous information and to restart the public notice and comment period from the beginning.

The notice is deficient in other less material ways. For example, the system location backup is “Iron Mountain, PO Box 294317, Lewisville, Texas 75029-4317.” This is not legally sufficient. Systems of records are not located in post office boxes. The OMB Guidelines for the Privacy Act of 1974 provide that an agency system of records notice specify the “site at which the system of records is located.” 40 Federal Register 28963 (July 9, 1975).

Recommendation: In order to cure these and any other legal deficiencies in its June 28, 2013 notice, the department must republish its notice and restart the public notice and comment period from the beginning.

VI. Routine Uses

Both the existing and proposed SORNs include large numbers of routine uses so broadly written that they are unclear, unjustified, inconsistent with law, or void for vagueness. While some of these routine uses may predate the currently proposed revision, repeated publication of the same defective routine uses does not cure the deficiencies. We offer several representative examples of the problems.

Example #1: Federal and State Agencies.

Many of the routine uses allow disclosures to “Federal and State agencies” or to “Federal, State, and local agencies.” A good example comes from the first listed routine use under program disclosures:

- (a) To verify the identity of the applicant involved, the accuracy of the record, or to assist with the determination of program eligibility and benefits, as well as institutional program eligibility, the Department may disclose records to the applicant, guaranty agencies, educational institutions, financial institutions and servicers, and to Federal and State agencies;

The routine use is generally appropriate and properly identifies the classes of private institutions that may be the recipients of disclosures. Any reader will understand that disclosures will be made to schools and banks and others. We do not argue that each school or each bank be listed. The Privacy Act does not require that degree of specificity. But it does require enough information so that a reader can understand who may receive the information. Stating that disclosures may be made to the entire and unqualified set of federal and state agencies is so broad, so non-specific and so unclear that it fails the objective of the Act that a routine use be descriptive.

The department has operated its student loan activities for many years. It knows which federal and state agencies it uses to verify identities. The department can provide a clearer and much more specific description of the classes of federal and state agencies. If the Social Security Administrative and the Internal Revenue Service are primary sources of applicant identity verification, they should be specifically named. All agencies relied upon routinely should be listed by name or by class (*e.g.*, state departments of motor vehicles). The department has an obligation both to inform data subjects and to limit its own authority within reasonable limits. It cannot continue to maintain routine uses that allow disclosures to unqualified and vast classes of institutions that bear no apparent relationship with the purpose of the disclosure.

We observe that some routine uses do identify specific agencies. The routine use for Freedom of Information Act or Privacy Act Advice Disclosures states expressly that disclosures may be made to the Department of Justice or the Office of Management and Budget. This is precisely how a routine use can and should be specific about the agencies that are possible recipients of personal information.

Recommendation: We ask that the department (1) review each of the routine uses that allows disclosure in an unqualified way to every federal, state, or local agency, (2) identify with specificity the actual agencies that are the most common recipients of disclosures and (3) identify by narrow category any additional classes of agency that are realistic possible recipients of disclosures.

Example #2: Use of "Routine Uses" in Place of Consent

The Department has several routine uses that relate to employment, benefit, and contracting activities:

(a) For Decisions by the Department. The Department may disclose a record to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to a Departmental decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

(b) For Decisions by Other Public Agencies and Professional Organizations. The Department may disclose a record to a Federal, State, local, or other public authority or professional organization, in connection with the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit, to the extent that the record is relevant and necessary to the receiving entity's decision on the matter.

These routine uses are wholly inappropriate. Any individual seeking employment or other benefit from the department (or from any other public agency or professional organization) can and should be asked to give consent to a disclosure that is necessary as a condition of receiving that employment or benefit. Anyone refusing consent may be disqualified on that basis. A routine use is not a substitute for asking for consent. The Privacy Act of 1974 allows disclosures with consent, and consent is the preferred way to authorize disclosures of personal information.

Only when consent is not possible does it become appropriate for an agency to employ a routine uses. An agency cannot rely on a routine use to evade the consent provisions of the Act.

Recommendation: We ask that the department review its routine uses and eliminate those routine uses for which consent is the proper way to authorize disclosure.

Example #3: Use of “Routine Uses” to Improperly Alter the Privacy Act’s Conditions of Disclosure

The Privacy Act of 1974 includes 12 conditions of disclosure that authorize agencies to disclose information from a system of records without consent. (5 U.S.C. § 552a(b).) Some of these allowable disclosures come with conditions and procedures. Thus, one provision allows disclosure to a law enforcement agency if the head of the agency makes a written request. (5 U.S.C. § 552a(b)(7).) The Act provides this procedure as the proper and only way to share information with law enforcement agencies.

The department’s routine use improperly modifies the conditions specified in the Act. The department’s routine use covering disclosure for use by other law enforcement agencies provides:

“The Department may disclose information to any Federal, State, or local or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law or regulation if that information is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility within the receiving entity's jurisdiction.”

The Act expressly tells the department how it can disclose information to law enforcement agencies. Yet the department has a routine use that ignores the specific requirements of the law and ignores the protections that the law provides. The department may not disclose information from the NSLDS for a general law enforcement purpose (especially those wholly unrelated to programs run by the department) without a proper written request from the head of a law enforcement agency.

Our discussion here does not by any means exhaust the deficiencies of the routine uses for the NSLDS (or, as is quite likely, other department systems of records). Frankly, we do not have time to list all of those deficiencies. We note in passing that there are other problems with litigation and judicial disclosures.

Recommendation: We ask at a minimum that all of the routine uses for NSLDS be reconsidered, be narrowed as much as possible, be made as specific as possible or be eliminated when appropriate. The department appears to be coasting in reliance on choices made in years past, choices that in too many instances were ill-considered, casually made or not carefully reviewed by the legal staff. A routine use that is not consistent with the law will expose the department to liability, and the stakes here are significant because of the very large number of data subjects in the NSLDS and the many routine uses that the department relies upon without sufficient justification.