No. 18-16375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN CALVILLO MANRIQUEZ; JAMAL CORNELIUS; RTHWAN DOBASHI; JENNIFER CRAIG, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

ELISABETH DEVOS, in her official capacity as secretary of the United States Department of Education; UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

Of Counsel:

CARLOS G. MUÑIZ
General Counsel

CAROLINE HONG
Attorney

Department of Education

JOSEPH H. HUNT
Assistant Attorney General

ALEX G. TSE
United States Attorney

MARK B. STERN
JOSHUA M. SALZMAN
Attorneys, Appellate Staff
Civil Division, Room 7258
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4747

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INTRODUCTION

The U.S. Department of Education relieves federal student loan borrowers of their obligation to repay their loans, in full or in part, under certain circumstances when the educational institution attended by the borrower made material misrepresentations. Corinthian Colleges, Inc. (Corinthian) misrepresented the job-placement data for their students in dozens of programs in an array of fields and subsequently went out of business. In the wake of Corinthian's closure, more than 100,000 borrowers filed claims seeking to avoid repayment of their student loans.

The Department then sought to establish a fair and administrable mechanism for processing these claims, one that would provide borrowers with relief and that would also account for the value that many claimants received from their Corinthian educations. In furtherance of its assessment of the various Corinthian programs, the Department obtained from the Social Security Administration (SSA) average earnings data for the attendees of those programs. The data produced by SSA to the Department was only aggregated statistical data, and did not include information about the earnings of any individual borrower or any other personally identifying information.

When this aggregated earnings data for the Corinthian programs was compared against average earnings data for comparable programs at other institutions, it showed that students who attended some Corinthian programs (such as the Computer and Information Science program) earned far less than their peers who completed similar

programs at other institutions, while students who attended other Corinthian programs (such as the Pharmacy Technician degree) earned as much as their peers who completed similar programs at other institutions.

The Department devised a methodology for determining the amount of loan forgiveness to provide to Corinthian claimants that draws on these comparisons of average earnings. Under this approach, claimants who attended programs where the earnings of Corinthian students were poor compared to their peers receive more loan relief than those who attended programs in which Corinthian students compared more favorably (*i.e.*, the Computer and Information Science (Associate's Degree) claimants are given full cancellation of their loans, while the Pharmacy Technician (Diploma) claimants are awarded only partial relief). The district court and the plaintiffs referred to this methodology as the "Average Earnings Rule."

A group of Corinthian borrowers filed suit seeking to compel the Department to abandon the Average Earnings Rule and instead provide complete loan forgiveness to all claimants eligible for any measure of relief. Plaintiffs asserted an array of claims under the Administrative Procedure Act (APA) and the Due Process Clause, and moved for a preliminary injunction. The district court rejected most of plaintiffs' arguments, but it concluded that the Department and SSA—which is not a party to this case—violated the Privacy Act of 1974, as amended, 5 U.S.C. § 552a, including certain special restrictions that the Privacy Act imposes on a very particular type of information exchange called a "matching program," *id.* § 552a(a)(8), (o)-(q). On that

basis, the court entered a preliminary injunction that prohibits the Department from using the Average Earnings Rule, reasoning that the Average Earnings Rule is itself contrary to law because it makes use of information that the district court concluded was obtained in violation of the Privacy Act.

The district court erred in two principal respects. First, the information exchange between the Department and SSA, through which the Department obtained only aggregate earnings data, is not a "matching program" for purposes of the Privacy Act, and the disclosures were not otherwise contrary to the Privacy Act. The Privacy Act's restrictions on "matching programs" do not apply to exchanges, like the one at issue here, that produce only aggregate statistical data that does not contain personal identifiers and does not pertain to any specific individual. The disclosures also did not otherwise contravene the Privacy Act because (1) the Department's disclosure of student records to SSA was made pursuant to a properly disclosed routine use of that information, and (2) SSA's disclosure of aggregated data that does not identify any individual did not constitute disclosure of a record protected under the Privacy Act.

Second, even had a Privacy Act violation occurred, the remedy entered by the district court is unmoored from that violation. The Department policy enjoined by the district court does not involve any ongoing disclosure of personal information and does not itself violate plaintiffs' rights under the Privacy Act. The Average Earnings Rule cannot properly be enjoined merely because the Department used aggregate data

from SSA as an input in measuring the value provided by the various Corinthian programs.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. ER47. On May 25, 2018, the district court granted plaintiffs' motion for a preliminary injunction in part. ER39. On June 19, 2018, the district court entered an amended order regarding plaintiffs' motion for a preliminary injunction. ER1-ER2. On July 24, 2018, defendants filed a timely notice of appeal. ER41. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that the information exchange between the Department and SSA constituted a "matching program" and is thus subject to special restrictions under the Privacy Act, or otherwise violated the Privacy Act.

2. Whether, even assuming that a Privacy Act violation occurred, the district court erred in preliminarily enjoining a Department policy that does not involve any ongoing disclosure of personal information, merely because the policy was developed through use of the aggregated data the Department obtained from SSA.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Privacy Act

1. The Privacy Act limits the circumstances under which federal agencies may disclose personal "record[s]," which the Act defines as "information about an individual that is maintained by an agency" and that contains an "identifying particular" for the individual. 5 U.S.C. § 552a(a)(4). Records contained in a "system of records" can only be disclosed, without the prior written consent of the individual to whom the record pertains, in certain enumerated circumstances. *Id.* § 552a(b).[1] One circumstance where disclosure is permitted is when the disclosure is made pursuant to a "routine use," which is the "use of such record for a purpose which is compatible with the purpose for which it was collected," *id.* § 552a(a)(7), (b)(3), after formal publication in the Federal Register of a "system of records notice" describing, among other things, "each routine use of the records contained in the system," *id.* § 552a(e)(4)(D). As discussed below, the Department used properly published system of record notices to establish various relevant routine uses authorizing disclosure of the data at issue here.

2. In 1988, Congress acted on concerns that the Privacy Act did not provide adequate protections for "matching programs," which involve the "computer-assisted

[1] The Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

comparison of two or more automated lists or files to identify inconsistencies or irregularities among the lists or files." S. Rep. No. 100-516, at 2 (1988). Congress noted that federal agencies were increasingly making comparisons between two sets of records in an effort to "detect fraud, error, or abuse in government programs or to determine whether a specific applicant or recipient of benefits under a government program truly qualifies for benefits," and expressed concern that as a result, individuals might lose benefits or the ability to participate in government programs without adequate due process. *Id.* at 2, 6-8; H.R. Rep. No. 100-802, at 6-11 (1988).

The Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503 (Computer Matching Act), supplemented the Privacy Act by imposing additional procedural requirements when systems of records are used in "matching programs." *See* 5 U.S.C. § 552a(o)-(q). As relevant here, the Computer Matching Act defines a "matching program" as "any computerized comparison of . . . two or more automated systems of records" for purposes including "establishing or verifying the eligibility of . . . applicants for . . . payments under Federal benefit programs." *Id.* § 552a(a)(8)(A)(i)(I). The term "matching program" does not include:

> (i) matches performed to produce aggregate statistical data without any personal identifiers; [or]
>
> (ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals.

Id. § 552a(a)(8)(B)(i)-(ii).

B. The Direct Loan Program

1. Federal law authorizes the Department to provide students with loans to pay the costs of post-secondary education through the William D. Ford Federal Direct Loan (Direct Loan) Program, 20 U.S.C. § 1087a *et seq.* The Direct Loan statute directs the Secretary of Education to specify in regulations the "acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." 20 U.S.C. § 1087e(h). Pursuant to that provision, the Department has adopted a "borrower defense" regulation that allows borrowers in any proceeding to collect on a Direct Loan to assert as a defense against repayment "any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c).[2] In other words, Direct Loan borrowers can obtain loan forgiveness from the Department in instances where the borrower would have a valid cause of action against the institution attended by the borrower under state law. The regulation further specifies that where this defense is successfully asserted, "the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay." *Id.* § 685.206(c)(2).

[2] Certain changes to this provision were adopted in 2016, but the effective date of those changes has been delayed until July 2019. *See* 81 Fed. Reg. 75,926, 76,080 (Nov. 1, 2016); 83 Fed. Reg. 6458 (Feb. 14, 2018); *see also* 83 Fed. Reg. 37,242 (July 31, 2018) (proposing changes to the provision that, among other things, would rescind the substantive changes made in 2016).

To receive a Direct Loan, a borrower must sign a Master Promissory Note. ER134-ER141. The Master Promissory Note includes a "Privacy Act Notice," as required by Section 552a(e)(3) of the Privacy Act, which specifically informs each individual borrower that her personal information may be disclosed for a wide array of "routine uses," including "to determine your eligibility to receive . . . a benefit on a loan (such as a deferment, forbearance, discharge, or forgiveness)." ER136; *see* 5 U.S.C. § 552a(e)(3). The Department also published a "system of records notice" that details the routine uses for which student loan borrower information may be used. *See Privacy Act of 1974; System of Records*, 81 Fed. Reg. 60,683 (Sept. 2, 2016).

2. Federal law specifies that certain institutions are only eligible to participate in federal student financial aid programs if the institution provides a program that prepares students for "gainful employment." *See* 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i). Under the Department's existing regulations implementing this provision, the Department's process for analyzing whether a particular program meets the "gainful employment" standard considers the mean and median earnings of students who completed that program. *See* 34 C.F.R. § 668.404(a), (c). As a result, the Department routinely obtained such earnings data from SSA. *Id.* § 668.405(a)(3). To obtain this data, the regulations specify that the Department should submit a list of students to SSA grouped by program, and SSA will return to the Department the mean and median annual earnings for the individuals on the list

submitted by the Department; this earnings information is to be provided "in aggregate and not in individual form." *Id.* § 668.405(d)(1).

In 2013, the Department and SSA entered into an information exchange agreement (the Exchange Agreement) that specified the process through which the Department could obtain this aggregate earnings information from SSA. ER150-ER158. The agreement provided that the Department was to send to SSA a list of students who were enrolled in, or completed programs at, educational institutions that participate in federal student aid programs, with certain identifying information, which SSA would then use to compile aggregate earnings data for those students. ER151-ER152. SSA was to retain the data sent by the Department "only for the time required for any processing" and then "electronically dispose" of that data. ER153-ER154. The aggregate earnings data sent back from SSA to the Department would "contain no personally identifiable records," and the aggregate earnings data was to be sent "in a form that cannot be associated with, or otherwise identify, directly or indirectly, a particular individual." ER153-ER154. The Exchange Agreement specified that "[b]ecause SSA will provide [the Department] with aggregate, statistical data without any personal identifiers, this information exchange is not a 'matching program' for purposes of the Privacy Act." ER150.

C. Factual Background

1. Corinthian was a large college chain that, among other misconduct, substantially misrepresented student job-placement rates to its students and

prospective students. ER5. In 2015, following an investigation by the Department, Corinthian went bankrupt. ER5. More than 100,000 individuals who had used Direct Loans to attend Corinthian programs have asserted that they are entitled to avoid repayment of their loans pursuant to the borrower defense regulation. ER5-ER6.

Following Corinthian's collapse, the Department developed a streamlined process through which Corinthian borrowers could assert a borrower defense. The Department published lists of findings identifying the dates during which specific Corinthian programs disseminated misleading job-placement-rate data. ER6. For borrowers who first enrolled in a specified Corinthian program within the date range when misleading information was being disseminated, the Department allows the borrower to assert a defense to repayment by application, including through attestation forms specifically developed by the Department for Corinthian borrowers. ER6. The attestation forms require borrowers to certify the program they had attended, the dates of enrollment, and that the borrower had relied on the misleading job-placement-rate data in choosing to enroll in the program. ER6-ER7, ER142-ER149. The attestation forms include a "Privacy Act Notice" that informs borrowers that the information collected on the form is subject to disclosure for an array of routine uses. ER145, ER149. This Privacy Act Notice largely mirrors the one attached to the Master Promissory Note discussed above.

2. Initially (from 2015 until early 2017), the Department awarded full loan discharges to all Corinthian borrowers who successfully asserted a borrower defense.

ER10. In early 2017, the Department convened a review panel to reconsider the framework for acting on these borrower defense claims. ER108. The review panel noted that many Corinthian programs had actually performed acceptably when measured under the Department's gainful employment metrics. ER109-ER110. This led the Department to question the assumption that Corinthian borrowers had received nothing of value and, thus, whether it was appropriate to grant a full loan discharge to every borrower who had successfully asserted a defense to repayment. ER109-ER110.

The Department sought to develop a methodology that would account for the value provided by many of Corinthian's programs. Also, in light of the very large universe of borrowers asserting defenses to repayment, the Department was committed to using, to the extent possible, information that it already had in its possession to make relief determinations, in order to avoid protracting the decision-making process. ER111.

In connection with its performance of "gainful employment" analyses, the Department already had a dataset of aggregate earnings data for various programs, broken out by program type (*e.g.*, Plumbing, Dental Assistance, etc.) and credential (*e.g.*, certificate, associate's degree, or bachelor's degree). ER115-ER116. The Department determined that this data could be used as a point of reference, enabling the Department to assess the extent to which the earnings of attendees of Corinthian

programs fell short of the earnings of individuals who completed comparable programs at other institutions. ER115.

The Department did not, however, have average earnings data for many Corinthian programs. ER117. The Department grouped Corinthian borrowers by program type and credential, and identified 79 different groups of Corinthian borrowers seeking loan cancellation. Using the procedures specified in the Exchange Agreement, the Department then submitted a request to SSA for average earnings data for those 79 groups. ER126. In total, the Department sent SSA identifying information for approximately 62,000 Corinthian borrowers. ER126. SSA then computed and sent to the Department mean and median earnings data for each of the 79 groups. ER12. The information sent by SSA was only aggregate statistical data and did not include any personally identifying information for any borrower. ER12.

The Department used this aggregate statistical data and its pre-existing gainful employment data to compute how the average earnings for attendees of each of the 79 Corinthian program/credential groups compared to average earnings of those who completed comparable programs at the same credential levels elsewhere. ER13. Drawing on these calculations, the Department determined that all claimants that attended a given Corinthian program at the same credential level should receive the same percentage cancellation of their loans, and that the amount of relief given should be determined as follows:

Average Earnings For Program Attended By Claimant As A Percentage Of Average Earnings For Comparable Programs	Amount Of Loan Relief
1-49%	100%
50-59%	50%
60-69%	40%
70-79%	30%
80-89%	20%
90% and above	10%

ER13. Under this approach, all Corinthian claimants receive some relief, but a full discharge is reserved for those borrowers who attended programs where average earnings were less than half that of the average earnings for comparable programs elsewhere. This methodology is what the plaintiffs and the district court have referred to as the "Average Earnings Rule."

D. Prior Proceedings

Four Corinthian borrowers brought a putative class action against the Department, seeking to require the Department to grant full discharges to all Corinthian borrowers who successfully assert a borrower defense. Central to plaintiffs' complaint is the assertion that in initially granting full discharges to all Corinthian borrowers, the Department effectively adopted a rule that a full discharge is the appropriate measure of relief in all cases. The district court referred to this alleged rule as "the Corinthian Rule." ER8.

Plaintiffs' first amended complaint (the operative complaint) asserts seven counts, principally arguments under the APA. ER90-ER97. In the only count

relevant to this appeal, plaintiffs assert that the Department violated the Privacy Act (and, thus, the APA) because the exchange of data between the Department and SSA constituted a "matching program" that failed to adhere to the special safeguards applicable to such programs. ER94-ER95. Plaintiffs did not otherwise assert that the information exchange violated the Privacy Act.[3]

Plaintiffs moved for a preliminary injunction that would have required the Department to resume processing borrower defense claims under the "Corinthian Rule" (*i.e.*, would have required the Department to award full discharges to all borrowers who successfully completed an attestation form). ER133. In opposing plaintiffs' Privacy Act claim, the Department explained that the information exchange between the Department and SSA did not constitute a "matching program."

The district court heard oral argument on the motion for the preliminary injunction. Although plaintiffs' Privacy Act claim had centered on plaintiffs' argument that the information exchange constituted a matching program, the court asked counsel for the Department to explain why the disclosures between the Department and SSA were otherwise justified under the Privacy Act. ER101. Department counsel explained that the Department's disclosures fell within various

[3] The complaint does include some brief discussion of the requirements of the Privacy Act outside the context of a matching program (ER54), but, as noted above, does not expressly assert a violation of those requirements.

routine uses identified in the Department's system of records notice published in the Federal Register. ER101-ER105.

The district court ultimately granted plaintiffs' proposed preliminary injunction in part. ER39. The court found that plaintiffs had not shown a likelihood of success on the merits of most of their claims. For example, the court concluded that the Secretary has discretion to account for the value received by claimants in determining the amount of loan forgiveness to provide, and that the Average Earnings Rule represents a reasonable effort to ascertain the value provided by Corinthian programs. ER28-ER31.

The district court concluded, however, that plaintiffs had shown a likelihood of success on their Privacy Act claim. The court held that the exchange of information regarding Corinthian students between the Department and SSA was a "matching program," and that the agencies had not satisfied the Computer Matching Act's special requirements. ER22. The court further concluded that even were that not the case, the disclosure by the Department to SSA of the names, dates of birth, and Social Security numbers of Corinthian students who had pursued loan cancellation violated the Privacy Act and did not fall within any exception to the Act. ER23. The court also concluded that the transmission of aggregate statistical data without any personal identifiers from SSA back to the Department violated the Privacy Act because the information was being used to make determinations about the rights of individual borrowers. ER23. In finding the Privacy Act to have been violated, the court said

nothing at all about the "routine use" exception. Nor did it explain how aggregated data that could not be used to identify any individual constituted a "record which is contained in a system of records," *see* 5 U.S.C. § 552a(b), or offer any other explanation of why the aggregate statistical data sent from SSA to the Department was subject to the Privacy Act.

Based on these purported Privacy Act violations, the district court concluded that plaintiffs had shown a likelihood of success of proving that the Average Earnings Rule is "not in accordance with law," in violation of the APA, and thus should be preliminarily enjoined. ER19 (quoting 5 U.S.C. § 706(2)(A)); *see* ER38 (concluding that the Department likely "violated the APA by implementing a rule, the Average Earnings Rule, that violates the Privacy Act"). The court enjoined the Department from using the Average Earnings Rule, but denied without prejudice plaintiffs' motion to require the Department to re-implement the Corinthian Rule. ER39. The district court subsequently expanded the injunction to provide that the government must cease collection against and provide forbearance to all Direct Loan borrowers who have sought discharge of covered Corinthian loans (not just the named plaintiffs). ER1-ER2.

SUMMARY OF ARGUMENT

The district court preliminarily enjoined the Department of Education from using the Average Earnings Rule methodology for determining the amount of loan forgiveness to provide to borrowers who attended Corinthian. That injunction rests

solely on the court's determination that the Average Earnings Rule is tainted because some of the data used in performing the underlying calculations was obtained in violation of the Privacy Act. The court was wrong to find any Privacy Act violation, but even if that were not the case, the injunction should still be vacated because the Average Earnings Rule does not involve any ongoing violation of the Privacy Act and is not itself contrary to law.

1. The district court cited two grounds for concluding that the exchange of information violated the Privacy Act. First, the court concluded that the information exchanged between the Department and SSA constituted a "matching program," and was thus subject to special restrictions that were not observed. But the statute itself specifies that a "matching program" does not include matches performed to produce "aggregate statistical data without any personal identifiers," 5 U.S.C. § 552a(a)(8)(B)(i), which is precisely what the Department sought and obtained from SSA. Thus, the restrictions governing matching programs simply do not apply.

The court also found that the Department and SSA, in exchanging information, violated the Privacy Act even if there was no matching program. But while the district court concluded that the Department's transmission to SSA of borrower records containing personally identifying information did not fall within any exception to the Privacy Act's general restriction on disclosure of such documents, the court did not even consider the applicability of the routine use exception, 5 U.S.C. § 552a(b)(3), which had been invoked by the Department. In so doing, the court overlooked that

the disclosure here was made pursuant to a routine use that was authorized through a properly promulgated system of records notice and specifically identified to the Corinthian borrowers. Likewise, the court failed to recognize that SSA's transmission of aggregate earnings data that did not contain any personally identifying information was permissible because it did not constitute the disclosure of a "record," and thus was not even subject to the Privacy Act in the first place.

2. Even assuming that any of the disclosures violated the Privacy Act, no basis would exist for the injunction imposed by the district court. The purported violation identified by the court involved a single exchange of information between the Department and SSA. There are no plans for further disclosures to implement the Average Earnings Rule, and there is no ongoing violation of the Privacy Act to enjoin. The district court apparently assumed that it could enjoin the Average Earnings Rule on the theory that because the methodology makes use of the aggregated statistical data from SSA, the methodology itself is "not in accordance with law" in violation of the APA. ER19 (quoting 5 U.S.C. § 706(2)(A)). But the mere fact that the Department developed a methodology that makes use of data allegedly obtained through a discrete, completed violation of the Privacy Act does not mean that the Department's methodology is itself "not in accordance with the law." The Average Earnings Rule does not violate the Privacy Act or any other provision of law and should not have been enjoined.

STANDARD OF REVIEW

This Court "review[s] de novo the legal premises underlying a preliminary injunction" and "will reverse a preliminary injunction when a district court based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Federal Trade Comm'n v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004). The Court otherwise "review[s] for abuse of discretion the district court's grant of a preliminary injunction." *Id.* at 1211.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PRIVACY ACT WAS VIOLATED

A. The District Court Erred In Concluding That The Information Exchange At Issue Here Constituted An Improper "Matching Program"

The Department of Education was confronted with more than 100,000 borrower defense claims asserted by claimants who had attended dozens of different Corinthian programs. The Department sought to develop a methodology for resolving these claims that would apply on a program-wide basis and that would account for the fact that some Corinthian programs furnished meaningful value while others did not. To inform its assessment of the value provided by the Corinthian programs, the Department sought aggregate statistical data from SSA detailing the average earnings for attendees of 79 different Corinthian programs. Because the Department's focus was squarely on the value furnished by the various *programs*, and

not the earnings of any individual claimants, the Department sought and obtained from SSA only aggregate statistical earnings data that was devoid of any personally identifying information. The Department then used that aggregate statistical data, and other data already within its possession, to estimate the value provided by the various Corinthian programs, and to determine the appropriate measure of loan forgiveness to be given to all claimants that attended a given Corinthian program.

The district court concluded that the information exchange between the Department and SSA constituted a "matching program" and was thus subject to certain special procedural requirements applicable to such programs under the Computer Matching Act. *See* ER22; *see also* 5 U.S.C. § 552a(o)-(q). That conclusion is wrong.

The Computer Matching Act does not regulate all automated comparisons of two systems of records. Rather, the Act was a response to a very particular practice, namely, "the computer-assisted comparison of two or more automated lists or files to identify inconsistencies or irregularities among the lists or files," usually "to detect fraud, error, or abuse in government programs or to determine whether a specific applicant or recipient of benefits under a government program truly qualifies for benefits." S. Rep. No. 100-516, at 2. Thus, for example, an agency administering a welfare program might cross-check a list of aid recipients against a list of federal employees (*id.*), or might "compare welfare records with bank records in order to identify welfare recipients with bank accounts that exceeded specified amounts," H.R.

Rep. No. 100-802, at 4. Congress identified two specific types of matching programs for coverage. "Classic" matching programs involve the comparison of all the records in two different databases to find individuals that appear in both files (such as all federal employees receiving food stamps). *Id.* Alternatively, "front end verification" programs involve a comparison of "information provided by a program applicant with data in other Government files" for the purpose of "verification of the accuracy of the applicant's information at the time of application." *Id.*

In either case, the agency obtaining the data is looking for information about individual participants in federal programs. Congress was concerned that such comparisons create a "danger . . . that individuals whose records are matched may have their federal benefits denied, suspended, or reduced, or have other adverse action taken against them, solely on the basis of out of-date or faulty information, and have no opportunity to contest the accuracy of such information." S. Rep. No. 100-516, at 8; *see also* H.R. Rep. No. 100-802, at 6-7.

To address that concern, the Computer Matching Act establishes special protections to ensure that individual benefit determinations are not made solely on the basis of a computer match, without adequate verification of the accuracy of the underlying records and without any opportunity for the applicant to contest the results. The statute provides that "[i]n order to protect any individual whose records are used in a matching program," no agency may deny "any financial assistance or payment under a Federal benefit program to such individual . . . as a result of

information produced by such matching program" until the underlying information is verified and the affected individual receives notice and an opportunity to contest the agency's findings. 5 U.S.C. § 552a(p)(1).

The Computer Matching Act's definition of the term "matching program" reflects the Act's limited purpose. The definition incorporates several limitations that prevent the regulation from sweeping too broadly. *See* H.R. Rep. No. 100-802, at 4 n.9 (noting the existence of "other related computer-based techniques" that "are not generally within the scope" of the Computer Matching Act); *Privacy Act of 1974: Final Guidance Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988*, 54 Fed. Reg. 25,818, 25,823 (June 19, 1989) (describing how four threshold elements "all must be present before a matching program is covered" and that there are also additional "exclusions" from the definition for programs that meet the threshold criteria).

As relevant here, the definition of the term "matching program" includes only comparisons made for the purpose of "establishing or verifying eligibility" for payments under federal benefit programs, or confirming "continuing compliance" by applicants "with statutory and regulatory requirements" for such programs." 5 U.S.C. § 552a(a)(8)(A)(i)(I). And because the Act is focused on the use of computer matching to take specific action against individuals who are the subjects of the match, the Act further modifies this definition by excluding from its scope "matches performed to produce *aggregate statistical data without any personal identifiers*," *id.*

§ 552a(a)(8)(B)(i) (emphasis added), which necessarily produce no information specific to any individual.

The comparison at issue here is quite different from the sort of automated comparison of agency records covered by the Computer Matching Act. The Department sent SSA a list of Corinthian students grouped by program and credential level and asked SSA to provide average earnings data, without personally identifying information, for these 79 groups. The Department's purpose in seeking this data was not to determine the earnings of any individual applicants for loan forgiveness, but rather to obtain statistical data that would facilitate development of a measure "that would be reasonably representative of the value" conferred by the 79 programs. ER118. The Department then made a determination about the harm suffered, as a class, by student borrowers that attended each program.

This information exchange falls squarely within the Computer Matching Act's exclusion for "matches performed to produce aggregate statistical data without any personal identifiers." 5 U.S.C. § 552a(a)(8)(B)(i). Indeed, the Exchange Agreement specifically provides that "[b]ecause SSA will provide [the Department] with aggregate, statistical data without any personal identifiers, this information exchange is not a 'matching program.'" ER150.

In ruling to the contrary, the district court appears to have concluded that the Act's exception for matches performed to obtain "aggregate statistical data" is inapplicable when the aggregate data is used to make decisions that affect the interests

of specific individuals. ER23. But the plain text of that provision provides no basis for that conclusion. *See* 5 U.S.C. § 552a(a)(8)(B)(i). The court instead based its reasoning on an entirely separate exception to the definition of "matching program," which applies to "matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals." 5 U.S.C. § 552a(a)(8)(B)(ii); *see also supra* p. 6. The district court thus appears to have conflated two different exceptions to the definition of "matching program." Moreover, far from supporting the district court's interpretation, the existence of the provision cited by the district court, which expressly excludes matches made for the purpose of deciding the rights of individuals, is strong evidence that the district court was wrong to read a similar limitation into the "aggregate statistical data" exception. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration in original).[4]

[4] A line of legislative history suggests that the "aggregate statistical data" exception should not apply if the data is used to affect the rights or benefits of any individual. *See* H.R. Rep. No. 100-802, at 24. The Court should, however, follow "statutory text" rather than a "single sentence buried in the legislative history." *See United States v. Gonzales*, 520 U.S. 1, 7-8 (1997).

While the district court did not rule on this basis, plaintiffs below also mistakenly sought to rely on guidance issued by the Office of Management and Budget (OMB) that describes the "aggregate statistical data" exception as follows:

> Implicit in this exception is that this kind of match is not done to take action against specific individuals; although, it is possible that the statistical inferences drawn from the data may have consequences for the subjects of the match as members of a class or group. For example, a continuing matching program that shows one geographical area consistently experiencing a higher default rate than others may result in more rigorous scrutiny of applicants from that area, but would not be a covered matching program.

54 Fed. Reg. at 25,823.

This guidance only confirms that the "aggregate statistical data" exception is applicable here. The guidance suggests that the provision may be subject to an "[i]mplicit" limitation when aggregate statistical data without any personal identifiers is used to take action "against specific individuals." But the full passage makes clear that there is no implied limitation when, as here, an agency uses aggregated statistical data derived from a match to draw "statistical inferences" that "may have consequences for the subjects of the match as members of a class or group." Here, any consequences for individual borrowers is wholly derivative of statistical inferences the Department drew about the value furnished by the programs that "class[es] or group[s]" of borrowers attended. To the extent the Department ultimately used the data to make determinations about the appropriate measure of loan forgiveness, it did so on a programmatic basis, granting the same percentage discharge to each class or

group of borrowers that attended a Corinthian program, based on the educational value provided by that program.

Nor did the Department use the data to take action "against" any individuals. The Department used the data in a way that was more beneficial to some groups of borrowers than others, insofar as that data (in conjunction with other statistical data already in the Department's possession) led the Department to conclude that some Corinthian programs provided less value than others. But under the Average Earnings Rule, the Department gives at least a partial discharge to all qualifying borrowers, regardless of the value furnished by the program the borrower attended. *See supra* p. 13. And the applicable regulations do not create any baseline presumption that a successful borrower defense will lead to a complete discharge. *See* 34 C.F.R. § 685.206(c)(2) (successful assertion of a borrower defense will lead to discharge of "all or part of the loan"). Indeed, the district court itself recognized elsewhere in its opinion that "the regulations do not provide a mandatory right to a full discharge," and that "borrowers do not have a mandatory right or entitlement to a specific amount of relief." ER26.

B. The Disclosures Here Did Not Otherwise Violate The Privacy Act

The district court held in the alternative that "[e]ven if the Secretary is correct that the Department's sharing of information with the Social Security Administration was not a matching program . . . the Privacy Act nonetheless bars the disclosure."

ER22. The court proceeded to find that both the Department's transmission of borrower information to SSA, and SSA's transmission of aggregate earnings information back to the Department, violated the Privacy Act. ER23. Both conclusions are mistaken.

1. The district court erred in concluding that the Department violated the Privacy Act when it sent information about Corinthian borrowers to SSA. The information sent by the Department included personally identifying information, but the disclosure was made pursuant to a "routine use," 5 U.S.C. § 552a(b)(3), and was thus permissible.

A "routine use" of a record is a disclosure that is "compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7). The Department's disclosure of borrower information to SSA was entirely consistent with the purpose for which that information was collected. The Department disclosed borrower information to SSA to assess the value of the particular program that the borrower had attended, a question that is relevant to determining the extent to which the borrower was injured by Corinthian's misrepresentations and, ultimately, to the question of how much loan forgiveness would be appropriate.

To invoke the routine use exception, the agency must also publish a list of routine uses in the Federal Register, 5 U.S.C. § 552a(e)(4)(D), and must provide notice to individuals from whom the information is collected, *id.* § 552a(e)(3)(C); *see also Covert v. Harrington*, 876 F.2d 751, 756 (9th Cir. 1989). Those requirements are

satisfied here. The Department has published a system of records notice in the Federal Register, *Privacy Act of 1974; System of Records*, 81 Fed. Reg. 60,683 (Sept. 2, 2016), that identifies an array of routine uses for student loan borrower information, including to "permit making, servicing, collecting, assigning, adjusting, transferring, referring, or discharging a loan." *Id.* at 60,686.

Likewise, the borrowers were given actual notice that their information was subject to disclosure for these sorts of routine uses. A Privacy Act notice was included on both the Master Promissory Note the borrowers signed upon taking out the loan (ER136), and on the attestation forms signed by all four named plaintiffs when they filed their borrower defense claims (ER145, ER149). These Privacy Act notices stated that disclosure might be made for a wide variety of uses including, "to determine your eligibility to receive . . . a benefit on a loan (such as a deferment, forbearance, discharge, or forgiveness)." ER136, ER145, ER149.

The district court failed even to address the routine use exception, which precludes its holding.

2. The district court was on equally unfirm ground in concluding that SSA—which is not even a party to this case—violated the Privacy Act when it transmitted aggregate statistical data to the Department. The Privacy Act's restrictions on disclosure apply to "records" and, more specifically, "any record which is contained in a system of records," *see* 5 U.S.C. § 552a(b). Records are defined as "information about an individual" that contains the individual's name or other "identifying

particular." *Id.* § 552a(a)(4); *see also Unt v. Aerospace Corp.*, 765 F.2d 1440, 1448-49 (9th Cir. 1985) (holding that that a letter is not a "record" for purposes of the Privacy Act unless it is about an individual, and it is insufficient if the document reflects "only indirectly on any quality or characteristic" of an individual). "[S]ystem of records" is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). It is undisputed that the information sent from SSA to the Department contained only aggregate data without any personally identifying information. ER12. Thus, the aggregate data could not have met the definition of a "record," or one contained in a "system of records," given that the aggregated data was not about any individual and could not be retrieved by an individual identifier.

The district court concluded that the Privacy Act was violated because the aggregate statistical data sent by SSA to the Department was used to make determinations about individuals and, thus, no exception to the Privacy Act applied. ER23. This conclusion ignores the threshold requirements of the Privacy Act, which only restricts the disclosure of a "record which is contained in a system of records." 5 U.S.C. § 552a(b). Nothing in the Privacy Act prohibits the disclosure of aggregate data that does not include personally identifying information (*i.e.*, is not a "record"). Because the disclosure by SSA did not fall within the restriction imposed by the Privacy Act, the absence of an applicable exemption is wholly beside the point. The

court identified no authority supporting the contrary proposition that exchanges of information that do not include protected personally identifying information nonetheless violate the Privacy Act if that information is used to make determinations about individuals. Such a rule would have sweeping implications across the government and should be rejected.

II. EVEN HAD THE PRIVACY ACT BEEN VIOLATED, THE COURT HAD NO AUTHORITY TO ENJOIN OTHERWISE LAWFUL AGENCY ACTION THAT DOES NOT THREATEN VIOLATIONS OF THE PRIVACY ACT

Even assuming that a Privacy Act violation occurred, the district court had no authority to issue an injunction that enjoins use of the Average Earnings Rule and requires the Department to cease all collection efforts against borrowers who have successfully completed an attestation form. ER1.

The Average Earnings Rule is a methodology for assessing the amount of loan forgiveness that groups of Corinthian borrowers should receive, based on an assessment of the value provided by various Corinthian programs. Nothing in the application of that methodology violates the Privacy Act. Rather, processing claims under the Average Earnings Rule merely involves the Department's fulfillment of its responsibility under the applicable regulation to "notif[y] the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay." 34 C.F.R. § 685.206(c)(2).

The district court nonetheless concluded that use of the Average Earnings Rule should be enjoined because some of the data used by the Department in approximating the value provided by the Corinthian programs was purportedly obtained in violation of the Privacy Act, and the Department thus "violated the APA by implementing a rule, the Average Earnings Rule, that violates the Privacy Act." ER38. But the conclusion that the Average Earnings Rule itself violates the Privacy Act does not follow from the premise that the Privacy Act was at some point violated.

The data at issue was obtained through a single exchange of information between the Department and SSA. There is no allegation that in implementing the Average Earnings Rule prospectively, the Department intends to send additional information about Corinthian borrowers to SSA, or that SSA intends to provide additional aggregated earnings information to the Department. There is also no reason to believe that either agency is currently improperly in possession of any "records"—*i.e.*, documents containing personally identifying information. The Department sent SSA a list containing borrower information, but under the terms of the Exchange Agreement, SSA was to "electronically dispose" of that data after processing the Department's request for aggregate earnings information (ER154), and there is no suggestion that this protocol was not observed here. And while the Department is still in possession of the aggregate data it received from SSA, it is undisputed that this data does not contain any personally identifying information of any Corinthian borrower.

The district court did not explain how, on these facts, continued application of the Average Earnings Rule would either constitute any ongoing violation of the Privacy Act or demonstrate any imminent threat of a future Privacy Act violation. The court also did not explain how, absent an ongoing violation, continued application of the Average Earnings Rule is not "otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), such that it could properly be set aside under the APA. Likewise, a past violation of the Privacy Act does not "taint" the use of an otherwise valid rule. The Supreme Court has long disapproved of a free-ranging "fruit of the poisonous tree" approach to equity that is not tailored to the "specific violation[]" at issue. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977). Instead, "[t]o pursue an injunction . . . plaintiffs must allege a likelihood of future violations of their rights . . . , not simply future effects from past violations." *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) (emphasis omitted); *see also FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) ("As a general rule, past wrongs are not enough for the grant of an injunction; an injunction will issue only if the wrongs are ongoing or likely to recur.") (alteration and quotation marks omitted). Here, plaintiffs complain only of future effects of a completed past wrong.

Plaintiffs insisted in the district court that the alleged Privacy Act violation is ongoing because the Department has not complied with the requirements applicable to matching programs. But even if the district court were correct that the disclosures

here constituted a "matching program" and that the Department acquired data improperly, the Average Earnings Rule merely uses that improperly acquired data as an input in approximating the value of the Corinthian programs. No borrower suffers any adverse consequence as a direct result of the inclusion of her personal information in the supposed matching program. Indeed, under the Average Earnings Rule, Corinthian borrowers who submitted attestation forms *after* the Department compiled borrower lists and sent them to SSA—and who thus never had their information shared with SSA—have their borrower defense claims resolved based on the same methodology as those borrowers whose data was included in the information exchange. For example, all claimants who attended the Pharmacy Technician (Diploma) program get the same discharge regardless of whether their specific information was included in the data sent to SSA. Accordingly, plaintiffs cannot show that any adverse action taken against them would "result" from the fact that their records were used in the supposed matching program, 5 U.S.C. § 552a(p)(1), such that continued application of the methodology to them would constitute an ongoing violation of the Computer Matching Act. The district court's injunction cannot stand.

CONCLUSION

For the foregoing reasons, the preliminary injunction issued by the district court should be vacated.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ALEX G. TSE
United States Attorney

MARK B. STERN
JOSHUA M. SALZMAN
Attorneys, Appellate Staff
Civil Division, Room 7258
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4747

Of Counsel:

CARLOS G. MUÑIZ
General Counsel

CAROLINE HONG
Attorney

Department of Education

September 2018

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

s/ Joshua M. Salzman
Joshua M. Salzman

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,009 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua M. Salzman
Joshua M. Salzman

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system

s/ Joshua M. Salzman
Joshua M. Salzman

ADDENDUM

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5 U.S.C. § 552a

§ 552a. Records maintained on individuals

(a) Definitions.--For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records; or

(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

***

(e) Agency requirements.--Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

***

(o) Matching agreements.--(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2) (A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.--(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A) (i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.--(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

20 U.S.C. § 1087a

§ 1087a. Program Authority

(a) In general

There are hereby made available, in accordance with the provisions of this part, such sums as may be necessary (1) to make loans to all eligible students (and the eligible parents of such students) in attendance at participating institutions of higher education selected by the Secretary, to enable such students to pursue their courses of study at such institutions during the period beginning July 1, 1994; and (2) for purchasing loans under section 1087i-1 of this title. Loans made under this part shall be made by participating institutions, or consortia thereof, that have agreements with the Secretary to originate loans, or by alternative originators designated by the Secretary to make loans for students in attendance at participating institutions (and their parents).

(b) Designation

(1) Program

The program established under this part shall be referred to as the "William D. Ford Federal Direct Loan Program".

(2) Direct loans

Notwithstanding any other provision of this part, loans made to borrowers under this part that, except as otherwise specified in this part, have the same terms, conditions, and benefits as loans made to borrowers under section 1078 of this title, shall be known as "Federal Direct Stafford/Ford Loans".

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20 U.S.C. § 1087e

§ 1087e. Terms and conditions of loans

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(h) Borrower defenses

Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

20 C.F.R. § 668.405

§ 685.206 Issuing and challenging D/E rates.

(a) Overview. For each award year, the Secretary determines the D/E rates for a GE program at an institution by—

(1) Creating a list of the students who completed the program during the cohort period and providing the list to the institution, as provided in paragraph (b) of this section;

(2) Allowing the institution to correct the information about the students on the list, as provided in paragraph (c) of this section;

(3) Obtaining from SSA the mean and median annual earnings of the students on the list, as provided in paragraph (d) of this section;

(4) Calculating draft D/E rates and providing them to the institution, as provided in paragraph (e) of this section;

(5) Allowing the institution to challenge the median loan debt used to calculate the draft D/E rates, as provided in paragraph (f) of this section;

(6) Calculating final D/E rates and providing them to the institution, as provided in paragraph (g) of this section; and

(7) Allowing the institution to appeal the final D/E rates as provided in § 668.406.

(b) Creating the list of students.

(1) The Secretary selects the students to be included on the list by—

(i) Identifying the students who completed the program during the cohort period from the data provided by the institution under § 668.411; and

(ii) Indicating which students would be removed from the list under § 668.404(e) and the specific reason for the exclusion.

(2) The Secretary provides the list to the institution and states which cohort period was used to select the students.

(c) Institutional corrections to the list.

(1) The Secretary presumes that the list of students and the identity information for those students are correct unless, as set forth in procedures established by the Secretary, the institution provides evidence to the contrary satisfactory to the Secretary. The institution bears the burden of proof that the list is incorrect.

(2) No later than 45 days after the date the Secretary provides the list to the institution, the institution may—

(i) Provide evidence showing that a student should be included on or removed from the list pursuant to § 668.404(e); or

(ii) Correct or update a student's identity information and the student's program attendance information.

(3) After the 45–day period expires, the institution may no longer seek to correct the list of students or revise the identity or program information of those students included on the list.

(4) The Secretary considers the evidence provided by the institution and either accepts the correction or notifies the institution of the reasons for not accepting the correction. If the Secretary accepts the correction, the Secretary uses the corrected information to create the final list. The Secretary provides the institution with the final list and indicates the cohort period or cohort periods used to create the final list.

(d) Obtaining earnings data. The Secretary submits the final list to SSA. For the purposes of this section, SSA returns to the Secretary—

(1) The mean and median annual earnings of the students on the list whom SSA has matched to SSA earnings data, in aggregate and not in individual form; and

(2) The number, but not the identities, of students on the list that SSA could not match.

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20 C.F.R. § 685.206

§ 685.206 Borrower responsibilities and defenses.

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(c) Borrower defenses.

(1) In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law. These proceedings include, but are not limited to, the following:

(i) Tax refund offset proceedings under 34 CFR 30.33.

(ii) Wage garnishment proceedings under section 488A of the Act.

(iii) Salary offset proceedings for Federal employees under 34 CFR part 31.

(iv) Consumer reporting agency reporting proceedings under 31 U.S.C. 3711(f).

(2) If the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to, the following:

(i) Reimbursing the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(ii) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(iii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies. However, the Secretary does not initiate such a proceeding after the period for the retention of records described in § 685.309(c) unless the school received actual notice of the claim during that period.