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Student Assistance General Provisions; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1845–AA04

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the loan default reduction and prevention measures in the Student Assistance General Provisions regulations in 34 CFR part 668. These regulations reflect changes made by the Higher Education Amendments of 1998 to the Higher Education Act of 1965, as amended (HEA).

DATES: These regulations are effective July 1, 2000.

FOR FURTHER INFORMATION CONTACT: Kenneth Smith, U.S. Department of Education, 400 Maryland Avenue, SW., ROB–3, room 3045, Washington, DC 20202–5447. Telephone: (202) 708–8242. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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SUPPLEMENTARY INFORMATION: The Higher Education Amendments of 1998 (Pub. L. 105–244, enacted October 7, 1998, and referred to in the preamble to these final regulations as the ''1998 Amendments'') changed some requirements relating to the calculation of a school's Federal Family Education Loan (FFEL) Program cohort default rate, William D. Ford Federal Direct Loan (Direct Loan) Program cohort rate, or weighted average cohort rate. The Secretary is revising 34 CFR 668.17 of the Student Assistance General Provisions regulations to reflect these changes.

On July 30, 1999, we published a notice of proposed rulemaking (NPRM) for the Student Assistance General Provisions in the **Federal Register** (64 FR 41752). In the preamble to the NPRM, we discussed on pages 41753 through 41758 the major changes proposed in that document for the loan default reduction and prevention measures in the Student Assistance General Provisions:

- Amending § 668.17(a)(1) and 668.17(j) to change the process that schools use to identify and challenge or request an adjustment to incorrect data.
- Amending § 668.17(b)(4) to reflect the amendment to the HEA that makes a school ineligible to participate in the Federal Pell Grant Program when it becomes ineligible to participate in the FFEL or Direct Loan Program due to excessive rates.
- Amending § 668.17(b)(5)(ii) and 668.17(b)(6) to implement the statutory amendments that make a school liable for the loans it certifies and delivers or originates and disburses while it is appealing a loss of participation.
- Amending § 668.17(c)(1)(ii)(A) and 668.17(j)(4) to reflect the statutory changes that modify the requirements for a school's appeal on the basis of its participation rate index (PRI).
- Amending § 668.17(c)(1)(ii)(B) and 668.17(c)(7) to reflect the amendments that modify requirements for a school's mitigating circumstances appeal based on its economically disadvantaged rate and completion or placement rate.
- Adding § 668.17(c)(1)(ii)(C) and (D) to permit a school to appeal its loss of participation on the basis of two new mitigating circumstances.
- Amending § 668.17(e), 668.17(f), and 668.17(h)(2)(iii) to conform to statutory changes in the definition of ''default.''
- Adding § 668.17(k) and Appendix H to implement the statutory changes relating to the treatment of special institutions.

Except for minor editorial and technical revisions and revisions that provide clarification, there are no differences between the NPRM and these final regulations. As in the NPRM, to avoid confusion in the preamble to these final regulations, we use the word ''rate'' by itself to refer to an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate. We use the complete term if we are referring to another type of ''rate'': an ''economically disadvantaged rate,'' a ''completion rate,'' a ''placement rate,'' or a ''participation rate.''

Discussion of Student Financial Assistance Regulations Development Process

The regulations in this document were developed through the use of negotiated rulemaking. Section 492 of the Higher Education Act requires that, before publishing any proposed regulations to implement programs under Title IV of the Act, the Secretary obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations, the Secretary must conduct a negotiated rulemaking process to develop the proposed regulations. All proposed regulations must conform to agreements resulting from the negotiated rulemaking process unless the Secretary reopens that process or explains any departure from the agreements to the negotiated rulemaking participants.

These regulations were published in proposed form on July 30, 1999, in conformance with the consensus of the negotiated rulemaking committee. Under the committee's protocols, consensus meant that no member of the committee dissented from the agreed-upon language. The Secretary invited comments on the proposed regulations by September 15, 1999, and 23 comments were received. An analysis of the comments follows.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes in the proposed regulations, and we do not respond to comments suggesting changes that the Secretary is not authorized by law to make.

Analysis of Comments and Changes

General

Comments: In general, the commenters supported the proposed regulations and appreciated the Department's responsiveness to the student aid community.

Discussion: We appreciate the commenters' support for the proposed regulations and the work of the members of the negotiated rulemaking committee that resulted in the proposed regulations.

Changes: None.

Challenges and Adjustments to Inaccurate Data Used To Calculate Rates (§ 668.17(a)(1) and 668.17(j))

Comments: The commenters supported the proposed changes to the process for a school to challenge its draft data, especially the extension of the time limit for schools to submit the challenge, from 30 to 45 days. One commenter, while applauding the proposed change, recommended extending the time limit further, to 60 days. The commenter reasoned that this extension is necessary because the data review process usually takes place when schools are beginning their processing for the next academic year and when their State reports are due. The commenter also reasoned that the extension was necessary because formatting or other software changes may be needed to accommodate the electronic supporting data.

Several other commenters noted that the proposed regulations did not include a change to the 30-day timeframe under which a guaranty

agency must respond to a school's challenge. The commenters reasoned that new benefits associated with low cohort default rates may increase the number of challenges to draft rates and that it may be difficult for guaranty agencies to respond to challenges within the current 30-day timeframe. Commenters asked us to revise the regulations to allow the Secretary to extend a guaranty agency's response period if there are extenuating circumstances, acceptable to the Secretary, that will impair the agency's ability to respond within the required timeframe.

Discussion: Because of statutory requirements for the issuance and review of draft data and the issuance of final rates by September 30, the time period for the draft data review process is necessarily short. Extending the period for schools to challenge their draft rates from 30 to 45 days will further shorten the period. Under the process included in the regulations, schools must challenge their draft rates within 45 days, and guaranty agencies will have 30 days to respond to those challenges. An additional 2 months are needed for the guaranty agencies to submit corrected data to the National Student Loan Data System (NSLDS). At least two submission cycles are needed to ensure that NSLDS data has been updated and that any rejected data is corrected. In addition, we use this 2-month period to review guaranty agencies' responses to schools.

We intend to issue draft rates by late March. Final rates must be calculated by late August to ensure that they are published by September 30. Thus, the timeframes for the review process are very tight, and we do not believe it is possible to further extend the deadlines for individual actions. Allowing an option to extend timeframes for guaranty agencies on a case-by-case basis is not a workable alternative. Delayed responses from one or two guaranty agencies could significantly affect the accuracy of many schools' rates.

Changes: None.

Comments: In the preamble to the NPRM, the Department announced administrative changes to the process used by a school to request an adjustment to a published rate: supporting data will be provided to more schools with their published rates, a school will have more time to request an adjustment, and a school will be able to request an adjustment of the data used to calculate its published rate that was not used to calculate its draft rate (''new data''). Commenters generally expressed appreciation for all of these changes. Several commenters asked for clarification in the preamble to these final regulations concerning the types of adjustments to new data that a school would be able to request.

Discussion: The ''new data adjustment,'' which will be available to schools beginning with receipt of the fiscal year (FY) 1998 published rates, will be used only to adjust rates based on incorrect new data. ''New data'' are data that were reported one way in the draft rate and a different way in the published rate. Schools may not use this process to correct data that were used to calculate their draft rates: a school must have challenged its draft rate to correct the data on which the draft rate was based.

For example, if a borrower was included in the denominator of the calculation of a school's draft rate but was not included in the calculation of its final rate, the school may use a new data adjustment to correct the data that resulted in the removal of the borrower, incorrectly, from the calculation of the published rate. However, if a borrower was not included in both the draft and published rates, the school may not use a new data adjustment to correct data that resulted in the borrower's exclusion from its published rate.

Changes: None.

Comments: The NPRM's preamble announced other administrative changes to the process used to challenge and adjust rates. These changes included making supporting data available to schools in an electronic format and allowing schools to view, year round, ''real-time'' loan repayment and default data that will be used to calculate their rates. These changes will affect the process for both draft and published rates and will be implemented under the timelines announced in the preamble to the NPRM.

Several commenters asked for clarification in this preamble concerning the process for providing electronic supporting data and real-time data. Two commenters recommended that we make electronic data available to all schools and guaranty agencies, in a format compatible with schools' software, and that eventually we provide electronic data automatically to all schools. Commenters recommended that we provide real-time data via a system to which schools currently have access, and they suggested the use of the National Student Loan Data System (NSLDS) for this purpose. The commenters reasoned that these provisions would reduce the administrative and financial burden for schools.

Discussion: We intend to meet the implementation timeframes described in the preamble to the NPRM for providing supporting data to schools electronically and for providing data on a real-time basis. After those deadlines are met, we expect eventually to provide supporting data electronically to all schools and to guaranty agencies. We are also working with schools to ensure that the format of the electronic supporting data is compatible with schools' computer hardware and software. In addition, we plan to provide real-time data to schools via NSLDS.

Changes: None.

Deadline for Publishing Rates (§ 668.17(b)(3))

Comments: In the preamble to the NPRM, we addressed the concerns expressed by some non-Federal negotiators during negotiated rulemaking about the possible consequences of our issuing rates after the date required by statute, September 30 of a year. Four commenters noted that the Department's guidance is not currently included in regulations or other guidance issued by the Department and recommended that the guidance be provided more formally. Two commenters reasoned that, without this formal guidance, a school's eligibility may be challenged by a party critical of the guidance. Commenters recommended that the guidance be provided in the Student Financial Aid Handbook and in the Cohort Default Rate Guide. One commenter recommended including the guidance in regulations.

Discussion: We have already published the Department's view of the effect of a later publication of rates in the FY 1997 Official Cohort Default Rate Guide and in the 1999–2000 Student Financial Aid Handbook. It is not appropriate or necessary to include this guidance in regulations because the Department intends to meet the statutory requirements and publish rates by September 30 of each year.

Changes: None.

Loss of Pell Eligibility (§ 668.17(b)(4))

Comments: One commenter stated that the compromise reached during negotiated rulemaking was fair in allowing a school with excessive rates to continue participating in the Federal Pell Grant Program if it had not certified an FFEL loan or originated a Direct Loan on or after July 7, 1998. Several commenters asked us to clarify in this preamble whether a school could meet this criteria if it delivered FFEL funds or disbursed Direct Loan funds after July

7, 1998, for a loan certified or originated before that date.

Another commenter recommended removing this provision entirely. The commenter reasoned that, as the process to develop the statute was lengthy, schools had adequate time to withdraw formally from the FFEL and Direct Loan programs before its enactment. The commenter believed that the basis provided for including this provision was speculative and that its inclusion in regulations would lead to the loss of Federal funds.

Discussion: Under § 668.17(b)(4)(iii), a school with excessive rates would be allowed to continue participating in the Federal Pell Grant Program if it has not certified an FFEL loan or originated a Direct Loan on or after July 7, 1998. Because this criterion is specific to the certification or origination of loans, a school's delivery or disbursement of funds after July 7, 1998, for a loan that was certified or originated before that date does not affect a school's satisfaction of the criterion.

We do not agree with the recommendation that the provision allowing continued participation in the Federal Pell Grant Program be removed from the regulations. The Department is satisfied that there were cases in which schools that intended to withdraw from the FFEL or the Direct Loan Program were not aware that they needed to notify the Department in writing and instead simply stopped certifying or originating loans. The Department believes that these schools should not lose the opportunity to participate in the Federal Pell Grant Program based on their rates.

Changes: None.

Comments: One commenter recommended that a school be allowed to continue participating in the Federal Pell Grant Program, despite loss of participation in the FFEL or Direct Loan Program due to excessive rates, if the school: (1) Is in good standing with the community and its accreditation organization, (2) was not aware of the provisions in the 1998 Amendments for loss of eligibility to participate in the Federal Pell Grant Program, and (3) returns all FFEL Program and Direct Loan Program funds received after the date of enactment of the 1998 Amendments. The commenter reasoned that this provision would allow schools to continue participating in the Federal Pell Grant Program and providing an education to needy students.

Discussion: The commenter's recommendations are inconsistent with statutory requirements. The HEA provides only two exceptions to the loss of participation in the Federal Pell Grant Program based on excessive rates: (1) The school did not have the opportunity to appeal its rate under the appropriate regulations, and (2) the school did not participate in the FFEL or Direct Loan Program on or after the date of enactment.

Changes: None.

Liability for Unsuccessful Appeals (§ 668.17(b)(5)(ii) and 668.17(b)(6))

Comments: Several commenters asked for clarification of the regulations for establishing a school's liability on loans made during an unsuccessful appeal. In particular, the commenters requested that we provide further explanation of—

(1) Whether the liability determination would apply to schools that are subject to loss of participation based on three rates over 25 percent, for schools with one rate over 40 percent, or for special institutions that are continuing to participate by complying with the requirements of § 668.17(k);

(2) The formula that will be used to calculate a school's liability;

(3) The beginning and ending date of the period during which a school would be liable;

(4) Whether a school that suspends its participation to avoid a liability may resume its participation 45 days after the submission of its completed appeal, without incurring a liability, if we have not made a determination on the appeal; and

(5) Whether the repayment terms for a liability will be flexible enough to ensure a school's repayment without causing serious financial problems for the school and its students.

Discussion: Responses to each of the commenters' issues follow:

(1) The liability for loans made during the appeal process only applies to a school with rates of 25 percent or more for 3 consecutive years that is subject to an action under § 668.17 (a)(3), (b)(1), or (b)(2). The 1998 Amendments do not require a similar liability determination for a school subject to termination from all of the Title IV programs based on a rate over 40 percent. In addition, a special institution would only be subject to this type of liability if it is *not* in compliance with § 668.17(k) and its rates for the 3 most recent fiscal years are 25 percent or more. If a special institution is in compliance with § 668.17(k), and thus not subject to an action under § 668.17 (a)(3), (b)(1), or (b)(3), it may challenge its rate without incurring a potential liability.

(2) A more detailed description of the estimated loss formula is available to the public on the Internet at the following site: http://ifap.ed.gov/csb__html/procmemo.htm.

The current guidance on the estimated loss formula is provided on that site, under ''Procedure Memos Sorted by Memo Number,'' in IRB Memo 92–3, which is listed as ''I92–3.''

(3) The period during which a school would be liable begins 30 calendar days after it receives its published rate and ends on the 45th calendar day after the school submits its completed appeal.

(4) The final regulations have been changed to clarify that a school's suspension of its participation need not continue longer than 45 days after it submits its completed appeal to the Department. Like other schools, a school that suspends its participation would not incur this type of liability for funds delivered or disbursed more than 45 calendar days after it submits its completed appeal to the Department.

(5) We will consider a school's request for more time to repay a liability, over a period greater than the 45 days allowed in the regulations, on a case-by-case basis. A determination to extend a school's repayment period may include a consideration of the school's circumstances, its students' circumstances, and the best method to ensure that funds are recovered.

Changes: We have revised § 668.17(b)(6) to clarify that, if a school suspends its participation in order to avoid a liability, the suspension may end 45 days after the school submits its completed appeal. We have also revised the regulations to clarify that a school is subject to a potential liability for loans certified and delivered or originated and disbursed during the appeal process if the school is subject to an action under § 668.17(a)(3), (b)(1), or (b)(2).

Comments: One commenter stated that the use of the Department's ''Estimated Loss Formula'' to determine a school's liability for loans made during an unsuccessful appeal, as described in the NPRM, exaggerates the potential loss to the Government and would make appeals prohibitively expensive. The commenter stated that the intent of Congress was to focus on the amount of interest and special allowance for loans made during the appeals period, rather than on the amounts calculated under the ''Estimated Loss Formula.'' The commenter did not believe that the issue is adequately addressed by allowing a school to avoid a liability by suspending its participation.

Discussion: Under the amendments to section 435(a)(2)(A) of the HEA, a school's liability is not limited to the amount of the interest and special allowance on the loans made during its appeal. Rather, the HEA requires an institution to pay ''an amount equal to

the amount of interest, special allowance, reinsurance, and any related payments.'' Thus, the amount of the Government's costs for reinsurance and any related payments must be included in the calculation of the school's liability.

We also do not agree that the Department's ''Estimated Loss Formula'' exaggerates potential losses to the Government. As described in the NPRM, the formula uses the school's most recent published rate to estimate the principal amount of the loans that would be expected to default and estimates the costs that will be incurred for interest, special allowance, and other losses on the loans. These amounts are equivalent to the amounts that the HEA requires a school to pay. The formula is used by the Department to calculate schools' liabilities in other, similar circumstances, and it has proven to be a reliable and supportable measure of potential losses to the government.

Assessing a liability does not make appeals prohibitively expensive because any school may avoid a liability by suspending its participation in the loan program or programs during the appeal process. If a school has confidence in the basis for its appeal, it will be able to continue to participate during the appeal process with the same confidence. The regulations ensure that the school, rather than the Government, assumes the risk for the cost of the loans made during an unsuccessful appeal.

Changes: None.

Comments: The proposed § 668.17(b)(6)(ii)(C)(*1*) would permit a school to appeal, under subpart H of 34 CFR part 668, a liability calculated for loans made during an unsuccessful appeal. As the provisions in subpart H are used by schools to appeal final audit and program review determinations, one commenter asked for clarification of the procedures that a school would use to file this type of appeal. The commenter did not understand how or why subpart H could be used to appeal the calculation of this liability.

Discussion: In appealing a calculation of a liability for loans under these regulations, under subpart H, the calculation will be treated as a program review determination.

Changes: We have revised § 668.17(b)(6)(ii)(C)(*1*) to clarify the procedures for the appeal of a liability.

Participation Rate Index (PRI) (§ 668.17(c)(1)(ii)(A) and 668.17(j)(4))

Comments: None.

Discussion: On further review, we have determined that the language in § 668.17(c)(1)(ii)(A)(*2*), explaining the method for calculating a PRI, could be misinterpreted. We have modified the language to avoid confusion. The new language does not change the substance of the calculation.

Changes: We have revised § 668.17(c)(1)(ii)(A)(*2*) to more clearly describe the calculation of a school's PRI for a fiscal year.

Comments: Several commenters recommended that the regulations be revised to clarify the procedures that may be used by schools to challenge an anticipated loss of participation, on the basis of a participation rate index (PRI), during the draft rate process. The commenters stated that the proximity of the proposed regulations in § 668.17(j)(4) to the provisions for a challenge of incorrect data may cause confusion. They were especially concerned that schools may send their PRI challenges to guaranty agencies, rather than to the Department.

Discussion: Though the two paragraphs contain separate requirements, we agree that their proximity in the regulations could cause some confusion.

Changes: We have revised § 668.17(j)(4) to distinguish more clearly between the procedures and requirements for a challenge of inaccurate data and those for a PRI challenge.

Comments: One commenter asked us to clarify the consequences of a school's successful PRI appeal based on a draft rate, if the school's published rate for the same fiscal year would not result in a successful PRI appeal. Another commenter noted that under the proposed regulations, if a school successfully challenges an anticipated loss of participation during the draft rate process, the school would have to appeal again the following year to continue participating, even if the draft rate upon which the school based its original challenge is equal to or higher than the same fiscal year's published rate. The commenter stated that this type of second appeal is unnecessarily burdensome and recommended that it be required only if the draft rate upon which a school bases its PRI challenge is lower than the published rate.

Discussion: Since a PRI challenge or appeal may be based on the PRI for any of the 3 most recent fiscal years for which data are available, the same PRI may be a criterion for a school's challenge or appeal in more than one year. A school that successfully challenges or appeals a loss of participation, based on its PRI, does not need to challenge or appeal again in a subsequent year as long as the same, successful PRI could be used as a basis for the subsequent appeal. An example is provided in the preamble to the NPRM.

If a school's PRI challenge based on a draft rate is successful, and the school's published rate for the same fiscal year would not result in a successful appeal, the school has still successfully challenged its loss of participation for that year. However, when rates are published the following year, the prior, successful PRI challenge, based on a draft rate, cannot be used to continue the school's participation, because a prior year's draft rate is not a basis for a challenge or appeal of a school's current loss of participation.

We agree with the comment suggesting that we should not require a school to appeal a second time if it successfully appealed the previous year on the basis of a PRI calculated using its draft rate and its published rate for the same fiscal year was equal to or lower than its draft rate. In that case, there is no need for the school to submit another appeal because we already have enough information to determine that the school's appeal would be successful.

The administrative procedure used to make the determination that the school's appeal would be successful will be similar to the procedure used for the new mitigating circumstances appeals provided in § 668.17(c)(1)(ii)(C) and (D). There is no need to include this procedure in the regulations. If information we maintain can be used to determine that a school's PRI appeal would be successful, we will calculate the results and notify the school. In addition to the circumstances noted by the commenter, this calculation would also be performed if a school's challenge during the draft rate process is unsuccessful, its published rate for the same fiscal year is lower than its draft rate, and an appeal based on the published rate would be successful. In that case, we would also calculate the results of the school's PRI appeal and notify the school.

Changes: None.

Mitigating Circumstances Appeals (§ 668.17(c)(1)(ii)(B) and 668.17(c)(7))

Comments: Previously, the economically disadvantaged rates, completion rates, and placement rates used to determine a school's mitigating circumstances appeal were calculated as percentages of all of the school's regular students. The NPRM proposed to limit the groups of students for whom the percentages are calculated to include only students who are enrolled in programs eligible for Title IV aid. This change was requested by some of the negotiators during negotiated rulemaking because they believed it was

unlikely that the records needed to determine a school's economically disadvantaged rate would be available for students not in Title IV eligible programs.

In general, commenters supported this change. They reasoned that if the change were not made, it would be difficult for schools to obtain the information necessary to determine eligibility for this type of appeal. One commenter stated that this change was also appropriate because it focused on the completion and placement outcomes for students attending classes supported by Title IV funds.

Several other commenters suggested that only the economically disadvantaged rate should be based on students enrolled in programs eligible for Title IV aid and that a school should have an option to base its completion rate or placement rate on either its regular students or on the students in Title IV eligible programs. They reasoned that, as the same problem with records does not apply to completion and placement rates, giving a school this option may provide a small degree of assistance for schools to satisfy the criteria for a successful appeal and to continue to serve economically disadvantaged students.

Discussion: All of the commenters' suggestions were considered and rejected during the negotiated rulemaking process. As one commenter noted, one of the reasons for restricting the calculation to students in Title IV eligible programs was that, in doing so, the calculation would be restricted to the loan programs that are actually serving the low-income population. Basing the economically disadvantaged rate and the completion and placement rates on different populations would not ensure that the benefit shown in the school's completion or placement rate was actually received by economically disadvantaged students.

Changes: None.

Comments: One commenter asked for clarification concerning our intent to explain to a school the reasons that we have determined an independent auditor's report or an institution's management's assertion to be ''contradicted or otherwise refuted.'' Another commenter recommended that we define ''independent auditor'' in these final regulations and that we include provisions for rejecting an auditor's certification that a school meets the criteria for the appeal if the facts demonstrate that the auditor's opinion is fraudulent or inaccurate. The commenter also recommended that we use more than just the information we maintain when making a determination on an appeal. The commenter recommended that these final regulations be revised to allow us to routinely obtain information for making our determinations, reasoning that limiting ourselves to the information that we maintain invites abuses and that we have no reason to believe that auditors will always act honestly and truthfully.

Discussion: If a school's appeal is not accepted because we determine an independent auditor's report or an institution's management's assertion to be ''contradicted or otherwise refuted'' by the information we maintain, the reasons for our determination will be explained in the notification we send to the school.

We agree with the commenter's recommendation that a definition of ''independent auditor'' should be referenced in these regulations. ''Independent auditor'' is already defined in § 668.23(a)(1), and we have incorporated that definition into this section of the regulations.

The additional requirements that the commenter recommends to prevent fraud or inaccuracies are not needed.

The proposed regulations allow us to deny an institution's appeal if we determine that the independent auditor's report does not meet the requirements of § 668.17 or that it is contradicted or otherwise refuted by information that we maintain. The standards for the engagement that forms the basis for an independent auditor's opinion, in § 668.17(c)(7)(ii)(B), include criteria that address an auditor's proficiency and independence. Also, as we noted in the NPRM's preamble, if improprieties are suspected in a school's appeal, an investigation could be pursued under other legal authority.

We also do not agree with the commenter's recommendation that we routinely obtain information to evaluate the validity of the auditor's certification for these appeals. As we discussed in the preamble to the NPRM, it would be inappropriate for us to ignore information we maintain or any contradictions in the data of an independent auditor's report when deciding whether a school meets the appeal's criteria. However, we believe that it would be inconsistent with congressional intent for us to routinely duplicate the work of an independent auditor by conducting investigations to gather additional information.

Changes: We have revised § 668.17(c)(1)(ii)(B)(*1*) to incorporate the definition of ''independent auditor'' from § 668.23.

Other Mitigating Circumstances Appeals (§ 668.17(c)(1)(ii)(C) and (D))

Comments: Many commenters strongly supported the two new mitigating circumstances that were included in the NPRM, which will allow schools to appeal based on the total number of borrowers in the 3 most recent fiscal years and will allow schools with ''average'' rates to appeal based on the rate for a single fiscal year only. The commenters stated that these new mitigating circumstances are a significant improvement toward eliminating sanctions based on statistically insignificant percentages and that they represent movement in a positive direction toward reducing unnecessary regulatory penalties. Commenters asked that the Secretary revisit these and other issues related to schools' rates in future negotiations.

One commenter noted that, under the 1998 Amendments, the Secretary is required to conduct a study of the effectiveness of rates for certain schools at which a small percentage of students receive loans. The commenter asked the Department to further address these schools' circumstances after conducting the required study. The commenter felt that this is necessary because a school's excessive rates may cause it to suffer from public criticism or to be placed on a provisional certification status, regardless of its being allowed to continue its participation in the Title IV programs as the result of a successful appeal.

Discussion: We appreciate the commenters' support for the proposed regulations, and their interest in this issue and in the study of the effectiveness of rates. We will consider these issues and the results of the study during the ongoing review of the regulations for the Title IV programs.

Changes: None.

Comments: Several commenters stated that the language in the preamble to the NPRM and in the proposed regulations was in error when it used the phrase ''30 or fewer.'' They noted that an average rate, as described in § 668.17(d), (e), and (f), is calculated for a school with ''fewer than 30'' borrowers entering repayment in that fiscal year. The commenters asked us to correct the language in the NPRM.

Discussion: There is no error. The phrases ''30 or fewer'' and ''fewer than 30,'' as used in the preamble to the NPRM and in the proposed regulations, apply to separate, unrelated requirements. As the commenters note, an ''average'' rate is calculated for a school with ''fewer than 30'' borrowers entering repayment during a fiscal year.

However, the proposed regulations would add a new mitigating circumstance that allows a school to appeal its loss of participation if the total number of its borrowers entering repayment in the 3 most recent fiscal years for which data are available is ''30 or fewer.'' The former standard is used in determining how a school's rate is calculated. The latter standard is used in determining a school's eligibility to appeal a loss of participation. However, we do recognize the value of making terms in these regulations consistent, and we will reconsider this issue during the ongoing review of the regulations for the Title IV programs.

Changes: None.

Definition of ''Default'' (§ 668.17(e), 668.17(f), and 668.17(h)(2)(iii))

Comments: Several commenters were concerned that readers might be confused by the NPRM's explanation of the date on which a loan is considered to be in default for the purpose of calculating a rate. They stated that some readers might believe, based on the preamble's language, that the actual definition of ''default'' for an FFEL Program loan was changing from 270 days of delinquency to 360 days and asked us to provide clarification in the preamble to these final regulations.

Discussion: The 1998 Amendments changed the definition of a default on an FFEL or a Direct Loan Program loan from 180 days to 270 days past due for a loan that is repayable in monthly installments and from 240 days to 330 days past due for loans repayable in less frequent installments. The definition of ''default'' that is used in § 668.17 for the purpose of calculating rates is *based* on this general definition. It is not the same as the definition provided in the statute for the date of a borrower's default.

For the purposes of calculating an FFEL Program cohort default rate, a default is generally considered to have occurred on the date that a claim for insurance is paid on the loan by a guaranty agency. Since there is generally a 90-day period between the date that a borrower defaults and the date that an insurance claim is paid, an FFEL Program loan would not normally be considered in default for the purposes of calculating a school's rate until it is at least 360 days past due (270 days + 90 days = 360 days). For consistency, because Direct Loans do not go through a claims payment process, these final regulations change from 270 to 360 the number of days past due after which a Direct Loan borrower is considered in default for purposes of calculating a school's rate.

Changes: None.

Comments: Several commenters expressed concerns about the impact of the change in the definition of ''default,'' from 180 days to 270 days, upon the calculation of a school's rate. The commenters were concerned that, using the current method to calculate rates, the change in the timeframe may remove a significant number of defaulted borrowers from the calculation of rates, decreasing their consistency and accuracy as a reflection of the borrowing history of a school and affecting the effectiveness of default prevention activities conducted by schools. Some commenters stated that it is appropriate for the Department to consider the impact of the change in the definition of ''default'' on schools' rates and to communicate its intentions concerning anticipated future changes, if any, to the calculation of rates. One commenter asked the Department to devise a calculation that would address the lengthened default period.

Discussion: The calculation of a school's rate is defined in section 435(m) of the HEA.

Changes: None.

Special Institutions (§ 668.17(k) and Appendix H)

Comments: One commenter stated that historically black colleges or universities, tribally controlled community colleges, and Navajo community colleges (''special institutions'') have already had an adequate length of time to reduce their rates to acceptable levels. The commenter objected to continuing a double standard and asked to either eliminate the provisions that allow special institutions with excessive rates to continue to participate or to apply the same criteria to all schools with excessive rates.

Another commenter questioned the creation of a new Appendix H when Appendix D of 34 CFR part 668 already addresses default management plans. The commenter suggested that, since Appendix D needs to be updated, the two appendices should be combined, updated, and applied to all schools. The commenter also asked that regulations specify whether a special institution would be subject to loss of participation in the Federal Pell Grant Program if it is not in compliance with § 668.17(k).

Discussion: The provisions that provide a different treatment for special institutions with excessive rates are statutory and cannot be changed by regulations. Also, it is not necessary to specify in § 668.17(k) that a school is subject to loss of participation in the Federal Pell Grant Program if it is not in compliance with that paragraph. If any school is subject to a loss of participation in the FFEL or Direct Loan Program under § 668.17, it is also subject to loss of participation in the Federal Pell Grant Program if it meets the criteria in § 668.17(b)(4).

The requirements reflected in § 668.17(k) are limited to a 3-year transition period, after which the consequences of excessive rates will become fully applicable to special institutions. As other schools do not have the same transition period, these criteria are not appropriate for them.

Finally, we believe it would be inappropriate to revise, in these final regulations, the current Appendix D to include some or all of the guidance in Appendix H, because the revision would go beyond the scope of the proposed regulations. However, the updates to Appendix D suggested by the commenter will be considered during the ongoing review of the regulations for the Title IV programs.

Changes: None.

Comments: The criteria for determining whether a special institution has made substantial improvement are listed in paragraphs (A) through (H) of § 668.17(k)(4)(i). One commenter stated that while it is appropriate to use either paragraph (A) or (B), by itself, to determine a school's substantial improvement, the commenter did not believe that any of the remaining criteria, alone, would adequately reduce a school's rate. The commenter suggested that, if a school cannot show that it has met the criterion in either paragraph (A) or (B), a school should be required to meet more than one of the remaining criteria in order for the Secretary to determine that the school has made substantial improvement.

The commenter also suggested the following changes to Appendix H: (1) to include, under ''Core Default Reduction Strategies,'' the design of procedures to reduce a school's rate by identifying and implementing alternative financial aid award policies and developing alternative financial resources; (2) to provide for monthly, rather than annual, targets for reductions in a school's rate; (3) to make item 7 the first item under ''Additional Default Reduction Strategies,'' reasoning that this item is the most effective long-term solution; (4) to remove item 1 under ''Statistics for Measuring Progress;'' and (5) to provide for the tracking of sub-categories of borrowers under items 2 and 7 under ''Additional Default Reduction Strategies.'' The commenter felt that these changes would assist schools in identifying potential problems and

reacting to them more quickly and effectively.

Discussion: The requirements in § 668.17(k) and the sample plan in Appendix H are provided to ensure that a school that is subject to those provisions will, no later than July 1, 2002, have a rate that is less than 25 percent. To regulate the requirements in more detail, as the commenter suggests, or to provide more detailed guidance in the sample plan in Appendix H, may tend to limit a school's choices and make a school less able to devote its resources effectively to the task at hand. Each school needs the flexibility to implement a plan that addresses its individual circumstances.

The same flexibility is needed in making a determination of a school's substantial improvement under § 668.17(k)(4)(i). The criteria in that paragraph are the bases for a determination of substantial improvement, but the criteria will be applied to schools as appropriate to their individual circumstances, as described in § 668.17(k)(4)(ii). If a school's performance under any one of the criteria is adequate to determine that it has made substantial improvement, there is no reason to require the school to meet another criterion under that paragraph.

Changes: None.

Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering these programs effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We summarized the potential costs and benefits of these final regulations in the preamble to the NPRM (64 FR 41752).

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control number assigned to the collection of information in these final regulations at the end of the affected section of the regulations.

Intergovernmental Review

The Federal Supplemental Educational Opportunity Grant Program and the State Student Incentive Grant Program are subject to Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of our specific plans and actions for these programs.

The Federal Family Education Loan, Federal Supplemental Loans for Students, Federal Work-Study, Federal Perkins Loan, Federal Pell Grant, Income Contingent Loan, and William D. Ford Federal Direct Loan programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Education Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.226 Income Contingent Loan Program; and 84.268 William D. Ford Federal Direct Loan Program)

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Dated: October 20, 1999.

Richard W. Riley,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c, and 1141, unless otherwise noted.

2. Section 668.17 is amended to read as follows by—

A. Revising paragraph (a)(1).

B. In the introductory language for paragraph (b)(3), removing the word ''institution's'' and adding, in its place, ''institution whose''; removing the word ''respectively''; and removing the words ''section and continuing'' and adding, in their place, ''section. The loss of participation continues''.

C. Revising paragraphs (b)(4) through (b)(6).

D. In the introductory text for paragraph (c)(1), after ''except that an institution may submit an appeal under'', removing the word ''section'' and adding, in its place, ''paragraph''; removing the words ''the information required by paragraph (c)(7) may be submitted in accordance with that paragraph'' and adding, in their place, ''an institution submits an appeal under paragraph (c)(1)(ii)(B) of this section in accordance with paragraph (c)(7) of this section''; and removing the sentence, ''The additional 30-day period specified

in paragraph (c)(7) of this section is an extension for the submission of the auditor's statement only and does not affect the date by which the appeal data must be submitted.''

E. Revising paragraphs (c)(1)(ii), (c)(2), and (c)(7).

F. In paragraphs (e)(1)(ii)(A), (e)(1)(ii)(B), (f)(1)(ii)(A), and (f)(1)(ii)(B), removing the number ''270'' and adding, in its place, ''360''.

G. In paragraphs (e)(3) and (f)(3), removing ''270 days'' and adding, in its place, ''360 days (or for 270 days, if the borrower's delinquency began before October 7, 1998)''.

H. In paragraph (h)(2)(ii), adding, at the end of the paragraph, ''In excluding loans from the calculations of these rates, the Secretary removes them from both the number of students who entered repayment and the number of students who defaulted.''

I. In paragraph (h)(2)(iii), removing the number ''270'' and adding, in its place, ''360''.

J. In the introductory language for paragraph (h)(3)(ii)(B), removing the words ''with a representative sample'' and adding, in their place, ''with access, for a reasonable period of time not to exceed 30 days, to a representative sample''; and removing the words ''records submitted by the lender to the guaranty agency to support the lender's submission of a default claim and included in the claim file'' and adding, in their place, ''collection and payment history records provided to the guaranty agency by the lender and used by the guaranty agency in determining whether to pay a claim on a defaulted loan''.

K. In the introductory language for paragraph (h)(3)(iii)(B), removing the words ''with a representative sample'' and adding, in their place, ''with access, for a reasonable period of time not to exceed 30 days, to a representative sample''; and removing the words ''records maintained by the Department's Direct Loan Servicer with respect to the servicing and collecting of delinquent loans prior to the default'' and adding, in their place, ''collection and payment history records maintained by the Department's Direct Loan Servicer that are used in determining an institution's Direct Loan Program cohort rate or weighted average cohort rate''.

L. Revising paragraph (j)(1)(ii).

M. Removing paragraph (j)(1)(iii).

N. Redesignating paragraphs (j)(2), (j)(3), (j)(4), (j)(5), and (j)(7) as paragraphs (j)(3)(i), (j)(3)(ii), (j)(3)(iii), (j)(3)(iv), and (j)(3)(v), respectively.

O. Redesignating paragraph (j)(6) as (j)(2).

P. In the redesignated paragraph (j)(2), removing the cross-reference ''(h)(1)'' and adding, in its place, ''(j)(1)''.

Q. In the redesignated paragraph (j)(3)(i), removing the number ''30'' and adding, in its place, ''45''.

R. In the redesignated paragraph (j)(3)(ii), removing the citation ''(h)(2)'' and adding, in its place, ''(j)(3)(i)''.

S. In the redesignated paragraph (j)(3)(v), removing the citation ''(d)(1)'' and adding, in its place, ''(c)(1)(i)''; removing the word ''preliminary'' and adding, in its place, ''draft''; and removing the citation ''(h)'' and adding, in its place, ''(j)(3)''.

T. Adding a new paragraph (j)(4).

U. Adding a new paragraph (k).

V. Revising the OMB control number following the section.

§ 668.17 Default reduction and prevention measures.

(a) * * *

(1)(i) If the Secretary calculates an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate for an institution, the Secretary notifies the institution of that rate.

(ii) If an institution has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate of 10 percent or more, the Secretary includes a copy of the supporting data used in the calculation of the rate with the notice of the rate.

(iii) An institution with an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate of less than 10 percent may request a copy of the supporting data used in the calculation of the rate. The institution's request must be sent to the Secretary within 10 working days of receiving the Secretary's notice. Upon receiving the institution's request, the Secretary sends a copy of the data to the institution.

* * * * *

(b) * * *

(4) If an institution loses eligibility to participate in the FFEL or Direct Loan Program under this section, it also loses eligibility to participate in the Federal Pell Grant Program for the same period of time, except that the institution may continue to participate in the Federal Pell Grant Program if the Secretary determines that the institution—

(i) Was ineligible to participate in the FFEL and Direct Loan programs before October 7, 1998, and the institution's eligibility was not reinstated;

(ii) Requested in writing, before October 7, 1998, to withdraw its participation in the FFEL and Direct Loan programs, and the institution did not subsequently re-apply to participate; or

(iii) Has not certified an FFEL loan or originated a Direct Loan on or after July 7, 1998.

(5) An institution whose participation in the FFEL, Direct Loan, or Federal Pell Grant Program ends under paragraph (a)(3), (b)(1), (b)(2), or (b)(4) of this section may not participate in that program until the institution—

(i) Demonstrates to the Secretary that it meets all requirements for participation in the FFEL, Direct Loan, or Federal Pell Grant Program;

(ii) Has paid any amount owed to the Secretary under paragraph (b)(6)(ii) of this section or is meeting that obligation under an agreement satisfactory to the Secretary; and

(iii) Executes a new agreement with the Secretary for participation in that program following the period described in paragraph (b)(3) of this section.

(6)(i) An institution may, notwithstanding § 668.26, continue to participate in the FFEL, Direct Loan, and Federal Pell Grant programs until the Secretary issues a decision on the institution's appeal if the Secretary receives an appeal that is complete, accurate, and timely in accordance with paragraph (c) of this section.

(ii) If an institution subject to an action under paragraph (a)(3), (b)(1), or (b)(2) of this section files a complete, accurate, and timely appeal under paragraph (c) of this section and the institution's appeal is unsuccessful—

(A) The Secretary estimates the amount of interest, special allowance, reinsurance, and any related or similar payments made by the Secretary (or which the Secretary is obligated to make) on any FFEL or Direct Loan Program loan for which the institution certified and delivered or originated and disbursed funds more than 30 calendar days after the date the institution received its most recent notification under paragraph (a)(1)(i) of this section;

(B) The Secretary excludes from the estimate calculated under paragraph (b)(6)(ii)(A) of this section any amount that is attributable to funds delivered or disbursed by the institution more than 45 calendar days after the date on which the institution submitted its completed appeal to the Secretary; and

(C) The institution must pay the Secretary the amount estimated under paragraph (b)(6)(ii) of this section within 45 days of the date of the Secretary's notification, unless—

(*1*) The institution files an appeal under the procedures established in subpart H of this part, for which the calculation of the institution's liability

is considered a final program review determination; or

(*2*) The Secretary permits a longer repayment period.

(iii) An institution may suspend its participation in the FFEL or Direct Loan Program during the period in which it would otherwise be subject to a liability under paragraph (b)(6)(ii) of this section.

(iv) An institution may also continue to participate in the FFEL Program or Direct Loan Program if it is in compliance with paragraph (k) of this section.

(c) * * *

(1) * * *

(ii) The institution meets one of the following exceptional mitigating circumstances:

(A)(*1*) The institution's participation rate index, as determined under paragraph (c)(1)(ii)(A)(*2*) of this section, is equal to or less than 0.0375 for any of the 3 most recent fiscal years for which data are available.

(*2*) For the purpose of paragraph (c)(1)(ii)(A)(*1*) of this section, an institution's participation rate index for a fiscal year is determined by multiplying its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate for that fiscal year by the percentage that is calculated by dividing—

(*i*) The number of students who received an FFEL or Direct Loan to attend the institution during a loan period that coincided with any part of a 12-month period that ended during the 6 months immediately preceding that fiscal year; by

(*ii*) The number of regular students, as defined in 34 CFR 600.2, who were enrolled at the institution on at least a half-time basis during any part of the same 12-month period.

(B)(*1*) The report of an independent auditor (as defined in § 668.23(a)(1)), submitted under paragraph (c)(*7*) of this section, certifies that the institution's economically disadvantaged rate is two-thirds or more, as determined under paragraph (c)(1)(ii)(B)(*2*) of this section, and—

(*i*) If the institution offers an associate, baccalaureate, graduate or professional degree, the institution's completion rate is 70 percent or more, as determined under paragraph (c)(1)(ii)(B)(*3*) of this section; or

(*ii*) If the institution does not offer an associate, baccalaureate, graduate or professional degree, the institution's placement rate is 44 percent or more, as determined under paragraph (c)(1)(ii)(B)(*4*) of this section.

(*2*) For the purpose of paragraph (c)(1)(ii)(B)(*1*) of this section, an institution's economically disadvantaged rate is the percentage of its students, enrolled on at least a half-time basis in an eligible program at the institution during any part of a 12-month period that ended during the 6 months immediately preceding the fiscal year for which the cohort of borrowers (used to calculate the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate) is determined, who—

(*i*) Are eligible to receive a Federal Pell Grant award of at least one-half the maximum Federal Pell Grant award for which the student would be eligible based on the student's enrollment status; or

(*ii*) Have an adjusted gross income that, if added to the adjusted gross income of the student's parents (unless the student is an independent student), is less than the poverty level as determined by the Department of Health and Human Services.

(*3*) For the purpose of paragraph (c)(1)(ii)(B)(*1*) of this section, an institution's completion rate is the percentage of its regular students, initially enrolled on a full-time basis in an eligible program and scheduled to complete their programs, as described in paragraph (c)(2) of this section, during the same 12-month period used to determine its economically disadvantaged rate under paragraph (c)(1)(ii)(B)(*2*) of this section, who—

(*i*) Completed the educational programs in which they were enrolled;

(*ii*) Transferred from the institution to a higher level educational program;

(*iii*) Remained enrolled and making satisfactory progress toward completion of the student's educational programs at the end of the 12-month period; or

(*iv*) Entered active duty in the Armed Forces of the United States within 1 year after their last day of attendance at the institution.

(*4*)(*i*) Except as provided in paragraph (c)(1)(ii)(B)(*4*)(*ii*) of this section, for the purpose of paragraph (c)(1)(ii)(B)(*1*) of this section, an institution's placement rate is the percentage of its former students, as described in paragraph (c)(1)(ii)(B)(*4*)(*iii*) of this section, who are employed, in an occupation for which the institution provided training, on the date following 1 year after their last date of attendance at the institution; were employed, in an occupation for which the institution provided training, for at least 13 weeks before the date following 1 year after their last date of attendance at the institution; or entered active duty in the Armed Forces of the United States within 1 year after their last date of attendance at the institution.

(*ii*) If a former student's employer is the institution, the student is not considered employed for the purposes of paragraph (c)(1)(ii)(B) of this section.

(*iii*) The former students who are used to determine an institution's placement rate under paragraph (c)(1)(ii)(B)(*4*) of this section include only students who were initially enrolled in eligible programs on at least a half-time basis; were originally scheduled, at the time of enrollment, to complete their educational programs during the same 12-month period used to determine the institution's economically disadvantaged rate under paragraph (c)(1)(ii)(B)(*2*) of this section; and remained in the program beyond the point at which a student would have received a 100 percent tuition refund from the institution. A student is not included in the calculation of the placement rate if that student, on the date that is 1 year after the student's scheduled completion date, remains enrolled in the same program at the institution and is making satisfactory progress.

(C) At least two of the rates that result in a loss of eligibility under paragraph (a)(3), (b)(1), or (b)(2) of this section—

(*1*) Are calculated using data for the 3 most recent fiscal years, pursuant to paragraph (d)(1)(i)(B), (e)(1)(i)(B), (e)(1)(ii)(B), (f)(1)(i)(B), or (f)(1)(ii)(B) of this section; and

(*2*) Would be less than 25 percent if calculated using data for only the fiscal year for which the institution received its rate, pursuant to paragraph (d)(1)(i)(A), (e)(1)(i)(A), (e)(1)(ii)(A), (f)(1)(i)(A), or (f)(1)(ii)(A) of this section, respectively.

(D) During the 3 most recent fiscal years for which the Secretary has determined the institution's rate, a total of 30 or fewer borrowers entered repayment on a loan or loans included in a calculation of the institution's rate.

(2) For the purposes of the completion rate and placement rate described in paragraphs (c)(1)(ii)(B)(*3*) and (*4*) of this section, a student is scheduled to complete an educational program on the date on which—

(i) If the student is initially enrolled full-time, the student will have been enrolled in the program for the amount of time specified in the institution's enrollment contract, catalog, or other materials, for completion of the program by a full-time student; or

(ii) If the student is initially enrolled less than full-time, the student will have been enrolled in the program for the amount of time that it would take the student to complete the program if the

student remained enrolled at that level of enrollment throughout the program.

* * * * *

(7)(i) An institution that appeals on the grounds that it meets the exceptional mitigating circumstances criteria in paragraph (c)(1)(ii)(B) of this section must submit to the Secretary—

(A) Within 30 calendar days of the date that it was notified of its loss of participation, notice of its intent to appeal under that paragraph, in a format prescribed by the Secretary; and

(B) Within 60 calendar days of the date that it was notified of its loss of participation, the independent auditor's compliance attestation report, as described in paragraph (c)(7)(ii) of this section, including the specific institution's management's written assertions for which the independent auditor opines, all in a format prescribed by the Secretary.

(ii)(A) The report of the independent auditor, required for an institution's appeal under paragraph (c)(1)(ii)(B) of this section, must state whether, in the auditor's opinion, the institution's management's assertion met the exceptional mitigating circumstances criteria specified in paragraph (c)(1)(ii)(B) of this section, as provided to the auditor to examine, and is fairly stated in all material respects.

(B) The engagement that forms the basis of the independent auditor's opinion must be an examination-level compliance attestation engagement performed in accordance with the American Institute of Certified Public Accountant's (AICPA) Statement on Standards for Attestation Engagements, Compliance Attestation (AICPA, Professional Standards, vol. 1, AT sec. 500), as amended, and Government Auditing Standards issued by the Comptroller General of the United States.

(iii) The Secretary denies an institution's appeal under paragraph (c)(1)(ii)(B) of this section if—

(A) The independent auditor does not opine that the institution meets the criteria for the appeal; or

(B) The Secretary determines that the independent auditor's report or institution's management's assertion described in paragraph (c)(7)(i) of this section—

(*1*) Demonstrates that the independent auditor's report or examination does not meet the requirements of this section; or

(*2*) Is contradicted or otherwise refuted, to an extent that would render the auditor's report unacceptable, by information maintained by the Secretary.

* * * * *

(j) * * *

(1) * * *

(ii) The Secretary's notice to an institution of its draft cohort default rate includes a copy of the supporting data used in the calculation of that draft rate.

* * * * *

(4)(i) An institution may challenge an anticipated loss of participation under paragraph (a)(3), (b)(1), or (b)(2) of this section using the criteria in § 668.17(c)(1)(ii)(A).

(ii) In meeting the requirements of § 668.17(c)(1)(ii)(A) during a challenge under this paragraph, the institution's draft rate is considered to be its most recent rate.

(iii) An institution's challenge under paragraph (j)(4)(i) of this section must be submitted to the Secretary, in writing, no more than 30 calendar days after the date that the institution receives the draft default rate information from the Secretary.

(iv) The Secretary notifies an institution of the determination on its challenge before the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate is published.

(k) *Special institutions.* (1) *Applicability of requirements.* For each 1-year period beginning on July 1 of 1999, 2000, or 2001, the Secretary may determine that the provisions of paragraph (a)(3), (b)(1), or (b)(2) of this section and the provisions of § 668.16(m) do not apply to a historically black college or university within the meaning of section 322(2) of the HEA, a tribally controlled community college within the meaning of section 2(a)(4) of the Tribally Controlled Community College Assistance Act of 1978, or a Navajo community college under the Navajo Community College Act if the institution submits to the Secretary—

(i) By July 1, 1999—

(A) A default management plan; and

(B) A certification that the institution has engaged an independent third party, as described in paragraph (k)(3) of this section; and

(ii) By July 1, 2000 and 2001—

(A) Evidence that it has implemented its default management plan during the preceding 1-year period;

(B) Evidence that it has made substantial improvement in the preceding 1-year period in the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate; and

(C) A certification that it continues to engage an independent third party, as described in paragraph (k)(3) of this section.

(2) *Default management plan.* (i) An institution's default management plan must provide reasonable assurance that it will, no later than July 1, 2002, have an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that is less than 25 percent. Measures that an institution must take to provide this assurance include but are not limited to—

(A) Establishing a default management team by engaging the chief executive officer and relevant senior executive officials of the institution and enlisting the support of representatives from offices other than the financial aid office;

(B) Identifying and allocating the personnel, administrative, and financial resources appropriate to implement the default management plan;

(C) Defining the roles and responsibilities of the independent third party;

(D) Defining evaluation methods and establishing a data collection system for measuring and verifying relevant default management statistics, including a statistical analysis of the borrowers who default on their loans;

(E) Establishing annual targets for reductions in the institution's rate; and

(F) Establishing a process to ensure the accuracy of the institution's rate.

(ii) An institution's default management plan must be acceptable to the Secretary, after consideration of that institution's history, resources, dollars in default, and targets for default reduction.

(iii) If the Secretary determines that an institution's proposed default management plan is unacceptable, the institution must consult with the Secretary to develop a revised plan, and the institution must submit the revised plan to the Secretary within 30 calendar days of notice from the Secretary that the plan is unacceptable.

(iv) If the Secretary determines, based on evidence submitted under paragraph (k)(1)(ii) of this section, that an institution's default management plan is no longer acceptable, the institution must develop a revised plan in consultation with the Secretary, and it must submit the revised plan to the Secretary within 60 calendar days of notice from the Secretary.

(v) A sample default management plan is provided in appendix H to this part. The sample is included to illustrate additional components of an acceptable default management plan. Because institutions' family income profiles, student borrowing patterns, histories, resources, dollars in default, and targets for default reduction are

different, an institution must consider its own, individual circumstances in developing and submitting its plan.

(3) *Independent third party.* (i) An independent third party may be any individual or entity that—

(A) Provides technical assistance in developing and implementing the institution's default management plan; and

(B) Is not substantially controlled by a person who also exercises substantial control over the institution.

(ii) An independent third party need not be paid by the institution for its services.

(iii) The services of a lender, guaranty agency, or secondary market as an independent third party under paragraph (k) of this section are not considered to be inducements under 34 CFR 682.200 or 682.401(e).

(4) *Substantial improvement.* (i) For purposes of this section, an institution's substantial improvement is determined based upon—

(A) A reduction in the institution's most recent draft or published FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate;

(B) An increase in the percentage of delinquent borrowers who avoid default by using deferments, forbearances, and job placement assistance;

(C) An increase in the academic persistence of student borrowers;

(D) An increase in the percentage of students pursuing graduate or professional study;

(E) An increase in the percentage of borrowers for whom a current address is known;

(F) An increase in the percentage of delinquent borrowers contacted by the institution;

(G) The implementation of alternative financial aid award policies and development of financial resources that reduce the need for student borrowing; or

(H) An increase in the percentage of accurate and timely enrollment status changes submitted by the institution to the National Student Loan Data System (NSLDS) on the Student Status Confirmation Report (SSCR).

(ii) When making a determination of an institution's substantial improvement, the Secretary considers the institution's performance in light of—

(A) Its history, resources, dollars in default, and targets for default reduction;

(B) Its level of effort in meeting the terms of its approved default management plan during the previous 1-year period; and

(C) Any other mitigating circumstance at the institution during the 1-year period.

(5) *Secretary's determination.* (i) If the Secretary determines that an institution is in compliance with paragraph (k) of this section, the provisions of paragraph (a)(3), (b)(1), or (b)(2) of this section and the provisions of § 668.16(m) do not apply to the institution for that 1-year period, beginning on July 1, 1999, 2000, or 2001.

(ii) If the Secretary determines that an institution is not in compliance with paragraph (k) of this section, the institution is subject to the provisions of paragraph (a)(3), (b)(1), or (b)(2) of this section and the provisions of § 668.16(m). The institution's participation in the FFEL and Direct Loan programs ends on the date that the institution receives notice of the Secretary's determination.

(Approved by the Office of Management and Budget under control number 1845–0022)

3. A new appendix H is added to part 668 to read as follows:

Appendix H to Part 668—Default Management Plans for Special Institutions

This appendix is provided as a sample plan for those schools developing a default management plan in accordance with 34 CFR 668.17(k). It describes some measures schools may find helpful in reducing the number of students that default on federally funded loans. These are not the only measures a school could implement when developing a default management plan. In developing a default management plan, each school must consider its own history, resources, dollars in default, and targets for default reduction to determine which activities will result in the most benefit to the students and the school.

Core Default Reduction Strategies (from § 668.17(k)(2)(i))

(1) Establish a default management team by engaging the chief executive officer and relevant senior executive officials of the school and enlisting the support of representatives from offices other than the financial aid office.

(2) Identify and allocate the personnel, administrative, and financial resources appropriate to implement the default management plan.

(3) Define the roles and responsibilities of the independent third party.

(4) Define evaluation methods and establish a data collection system for measuring and verifying relevant default management statistics, including a statistical analysis of the borrowers who default on their loans.

(5) Establish annual targets for reductions in the school's rate.

(6) Establish a process to ensure the accuracy of the school's rate.

Additional Default Reduction Strategies

(1) Enhance the borrower's understanding of his or her loan repayment responsibilities through counseling and debt management activities.

(2) Enhance the enrollment retention and academic persistence of borrowers through counseling and academic assistance.

(3) Maintain contact with the borrower after he or she leaves the school by using activities such as skip-tracing to locate the borrower.

(4) Track the borrower's delinquency status by obtaining reports from lenders and guaranty agencies for FFEL Program loans and from the Secretary for Direct Loan Program loans.

(5) Enhance student loan repayments through counseling the borrower on loan repayment options and facilitating contact between the borrower and lender for FFEL Program loans and the borrower and the Secretary for Direct Loan Program loans.

(6) Assist a borrower who is experiencing difficulty in finding employment through career counseling, job placement assistance, and facilitating unemployment deferments.

(7) Identify and implement alternative financial aid award policies and develop alternative financial resources that will reduce the need for student borrowing in the first 2 years of academic study.

(8) Familiarize the parent, or other adult relative or guardian, with the student's debt profile, repayment obligations, and loan status by increasing, whenever possible, the communication and contact with the parent or adult relative or guardian.

Defining the Roles and Responsibilities of Independent Third Party

(1) Specifically define the role of the independent third party.

(2) Specify the scope of work to be performed by the independent third party.

(3) Tie the receipt of payments, if required, to the performance of specific tasks.

(4) Assure that all the required work is satisfactorily completed.

Statistics for Measuring Progress

(1) The number of students enrolled at the school during each fiscal year.

(2) The average amount borrowed by a student each fiscal year.

(3) The number of borrowers scheduled to enter repayment each fiscal year.

(4) The number of enrolled borrowers that received default prevention counseling services each fiscal year.

(5) The average number of contacts the school or its agent had with a borrower who was in deferment/forbearance or repayment status during each fiscal year.

(6) The number of borrowers at least 60 days delinquent each fiscal year.

(7) The number of borrowers who defaulted in each fiscal year.

(8) The type, frequency, and results of activities performed in accordance with the default management plan.

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