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34 CFR Parts 600 and 668

Institutional Eligibility Under the Higher Education Act of 1965, as Amended and Student Assistance General Provisions; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 668

RIN 1840–AC75

Institutional Eligibility Under the Higher Education Act of l965, as Amended and Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed regulations amend the regulations that govern institutional eligibility for and participation in the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (title IV, HEA programs). These programs include the Campus-based programs (Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) Programs), the William D. Ford Federal Direct Loan (Direct Loan) Program, the Federal Family Education Loan (FFEL) programs, the Federal Pell Grant Program, and the Leveraging Educational Assistance Partnership (LEAP) Program (formerly known as the State Student Incentive Grant (SSIG) Program). These proposed regulations implement statutory changes made to the Higher Education Act of 1965, as amended (HEA), by the Higher Education Amendments of 1998 (1998 Amendments). Many of the proposed regulatory changes merely conform current regulatory provisions to the statutory changes.

DATES: We must receive your comments on or before September 13, 1999.

ADDRESSES: Address all comments about these proposed regulations to Cheryl Leibovitz, U.S. Department of Education, P.O. Box 23272, Washington, DC 20026–3272. If you prefer to send your comments through the Internet, use the following address: *IENPRM@ed.gov*

If you want to comment on the information collection requirements you must send your comments to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. You may also send a copy of these comments to the Department representative named in this section.

FOR FURTHER INFORMATION CONTACT: Cheryl Leibovitz. Telephone: (202) 708–9900. If you use a telecommunications device for the deaf (TDD), you may call the Federal information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the programs.

During and after the comment period, you may inspect all public comments about these proposed regulations in Room 3045, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, you may call (202) 205–8113 or (202) 260–9895. If you use a TDD, you may call the Federal Information Relay Service at 1–800–877–8339.

General

The proposed regulations revise the current Institutional Eligibility regulations, 34 CFR part 600, and the Student Assistance General Provisions regulations, 34 CFR part 668, which govern institutional eligibility for, and participation in, the title IV, HEA programs. The revisions implement the 1998 Amendments, Pub. L. 105–244, enacted October 7, 1998.

Negotiated Rulemaking Process

Section 492 of the HEA 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 published proposed regulations must conform to agreements resulting from the negotiated rulemaking process unless the Secretary reopens the negotiated rulemaking process or provides a written explanation to the participants in that process of why the Secretary has decided to depart from the agreements.

To obtain public involvement in the development of the proposed regulations, we published a notice in the **Federal Register** (63 FR 59922, November 6, 1998) requesting advice and recommendations from interested parties concerning what regulations were necessary to implement title IV of the HEA. We also invited advice and recommendations concerning which regulated issues should be subjected to a negotiated rulemaking process. We further requested advice and recommendations concerning ways to prioritize the numerous issues in title IV, in order to meet statutory deadlines. Additionally, we requested advice and recommendations concerning how to conduct the negotiated rulemaking process, given the time available and the number of regulations that needed to be developed.

In addition to soliciting written comments, we held three public hearings and several informal meetings to give interested parties an opportunity to share advice and recommendations with the Department. The hearings were held in Washington, DC, Chicago, and Los Angeles, and we posted transcripts of those hearings to the Department's Information for Financial Aid Professionals website (http://ifap.ed.gov).

We then published a second notice in the **Federal Register** (63 FR 71206, December 23, 1998) to announce the Department's intention to establish four negotiated rulemaking committees to draft proposed regulations implementing title IV of the HEA. The notice announced the organizations or groups believed to represent the interests that should participate in the negotiated rulemaking process and announced that the Department would select participants for the process from nominees of those organizations or

groups. We requested nominations for additional participants from anyone who believed that the organizations or groups listed did not adequately represent the list of interests outlined in section 492 of the HEA. Once the four committees were established, they met to develop proposed regulations over the course of several months beginning in January. Except as noted elsewhere in this preamble, the proposed regulations contained in this notice of proposed rulemaking (NPRM) reflect the final consensus of Committee IV on the issues addressed in this notice of proposed rulemaking (NPRM). Committee IV was made up of the following members:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of Cosmetology Schools
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Jesuit Colleges and Universities
Career College Association
Council for Higher Education Accreditation
Council of Recognized National Accrediting Agencies
Council for Regional Accrediting Commissions
Education Finance Council
Legal Services Counsel (a coalition)
National Association of College and University Business Officers
National Association for Equal Opportunity in Higher Education
National Association of Independent Colleges and Universities
National Association of State Student Grant and Aid Programs/National Council of Higher Education Loan Programs (a coalition)
National Association of State Universities and Land-Grant Colleges
National Association of Student Financial Aid Administrators
National Direct Student Loan Coalition
National Women's Law Center
State Higher Education Executive Officers Association
The College Board
The College Fund/United Negro College Fund
United States Department of Education
United States Student Association
U.S. Public Interest Research Group

As stated in the committee protocols, consensus means that there must be no dissent by any member in order for the committee to be considered to have reached agreement. Consensus was reached on all the proposed regulations contained in this NPRM except for the regulations governing the implementation of the ''90/10 rule,'' which is part of the definition of an eligible ''proprietary institution of higher education'' that can be found in § 600.5.

Discussion of the proposed regulations will first cover those areas on which the negotiators reached a consensus, and will then cover the proposed regulations implementing the 90/10 rule.

Section 600.2 Definitions

Prior to the 1998 Amendments, a State was defined to include the ''Trust Territory of the Pacific Islands.'' Now, instead of that term, a State includes the ''Freely Associated States.'' The Freely Associated States include the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. The proposed regulations would amend the definition of the term ''State'' to reflect those changes.

Section 600.4 Institution of Higher Education; § 600.5 Proprietary Institution of Higher Education; and § 600.6 Postsecondary Vocational Institution

Each of these sections has a provision that states that the Secretary does not currently recognize the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to ''binding'' arbitration. The proposed regulations would change these provisions to require an institution to agree to submit any such dispute to ''initial'' arbitration to conform them to the literal language of the statute imposing that requirement (section 496(e) of the HEA).

Section 600.7 Conditions of Institutional Ineligibility

The proposed regulations would amend § 600.7(a) to make technical changes to § 600.7(a)(1) (iii) and (iv) to more accurately reflect the statute (section 102(a)(3) (C) and (D) of the HEA). Section 600.7(a)(1)(iii) currently provides that an educational institution does not qualify as an eligible institution if twenty-five percent or more of the institution's regular enrolled students were incarcerated. Section 600.7(a)(1)(iv) provides that an educational institution does not qualify as an eligible institution if fifty-percent or more of its regularly enrolled students had neither a high school diploma nor the recognized equivalent of a high school diploma. The proposed regulations would change these provisions to read ''more than twenty-five percent'' and ''more than fifty percent,'' respectively, to reflect the wording of the statute (sections 102(a)(3)(C) and (D) of the HEA).

The proposed regulations would amend § 600.7(c) to reflect a change made by the 1998 Amendments that expands the waiver provision for institutions whose enrollment of incarcerated students exceeds 25 percent. Prior to the 1998 Amendments, a public or nonprofit private institution could obtain a waiver of this limitation only if it provided a two- or four-year program for which it awarded an associate degree or bachelor's degree. As amended, the institution could also obtain a waiver if it provides a two- or four-year program for which it awards a ''postsecondary diploma.''

Section 600.8 Treatment of a Branch Campus

The proposed regulations would amend this section to reflect a change made by the 1998 Amendments that clarifies that a branch campus must exist as a branch campus for at least two years after the Secretary certifies it as a branch campus before seeking to be certified as a main or free-standing campus. The proposed regulations would also conform changes in § 600.5(b)(3)(i) and § 600.6(b)(3)(iii).

Section 600.31 Change in Ownership Resulting in a Change of Control

As amended by the 1998 Amendments, section 498(i)(4) of the HEA authorizes the Secretary to permit an institution undergoing a change in ownership that results in a change in control to continue to participate in the title IV, HEA programs on a provisional basis if the institution meets certain requirements. Those requirements include submitting a materially complete application that is received by the Department within 10 business days of the date on which the change of ownership takes place.

The proposed regulations would amend § 600.31 by deleting § 600.31(f), which prohibits an institution from submitting a materially complete application before the change of ownership takes place. Because section 498(i)(4) of the HEA supersedes the limitation in § 600.31(f), the revised regulations would permit institutions to submit applications before a change in ownership takes place.

Section 600.55 Additional Criteria for Determining Whether a Foreign Medical School is Eligible To Apply To Participate in the FFEL Programs

Section 600.55(a)(5)(i)(A) is amended to reflect the amendment to section 484(a)(5) of the HEA made by the 1998 Amendments. Section 484(a)(5) contains

citizenship and residency requirements that the Secretary is required to reference under section 102(a)(2)(A)(i)(I) of the HEA in fashioning criteria to determine the comparability of foreign graduate medical schools to domestic graduate medical schools.

Section 600.56 Additional Criteria for Determining Whether a Foreign Veterinary School is Eligible To Apply To Participate in the FFEL Programs

The 1998 Amendments added special eligibility provisions for foreign veterinary schools. Those schools are now subject to many, but not all, of the same special eligibility requirements that the statute previously applied to foreign medical schools. Most notably, a foreign veterinary school is now ineligible to apply to participate in the FFEL Program unless either its clinical training program has been approved by a State continuously since 1992, or its students complete clinical training at an approved veterinary school located in the United States. The proposed regulation follows the amendments, treating foreign veterinary schools and foreign medical schools identically for eligibility purposes to the extent indicated by the statute.

Section 668.12 Application Procedures

As previously noted with regard to § 600.31, amended section 498(i)(4) of the HEA authorizes the Secretary to permit an institution seeking approval of a change in ownership to continue to participate in the title IV, HEA programs on a provisional basis if the institution meets certain requirements. One of those requirements is the submission of a materially complete application that is received by the Department within 10 business days of the date on which the change of ownership takes place.

If an institution submits a materially complete application in a timely manner, the institution may continue to participate in the title IV, HEA programs on a provisional basis until the earlier of (1) the date the Secretary approves or disapproves the application, or (2) the end of the month following the month in which the change in ownership occurred. However, if the Secretary has not issued a decision on the application within that period, the institution may continue to participate provisionally on a month-to-month basis until the Secretary issues a decision on the institution's application, provided the institution submits any additional documentation requested by the Department promptly.

The proposed regulations would implement these provisions in § 668.12(f) and (g). In particular, proposed § 668.12(f) specifies the documents that must be submitted to be considered a ''materially complete application.'' Proposed § 668.12(g) contains the terms and conditions under which the institution may continue to participate in the title IV, HEA programs while its application is being reviewed. This paragraph also includes the additional documents that must be submitted before the Secretary will issue a decision on the application or extend the institution's participation on a month-to-month basis. The Secretary wishes to clarify that all institutions that undergo a change of ownership must submit a ''same day'' balance sheet showing the financial position of the institution, as of the date of the ownership change, in order to continue participation in the Title IV, HEA programs.

Section 668.13 Certification Procedures

The proposed regulation would change the maximum period of time that an institution may be certified to participate in the Title IV, HEA programs from four years to six years. This change implements a statutory change in the HEA made by the 1998 Amendments.

Section 668.14 Program Participation Agreement

As a result of a statutory change to the HEA by the 1998 Amendments, an institution that has undergone a change in ownership that results in a change in control does not have to use a Default Management Plan during the first two years of its participation in the FFEL or Direct Loan Programs if certain conditions are met. These conditions are (1) that the institution, including any branch campus, does not have a cohort default rate in excess of 10 percent, and (2) that the institution's owners do not own and have not owned an institution with a cohort default rate in excess of 10 percent. The proposed regulations would amend § 668.14 to reflect that change.

The proposed regulations would combine the provisions requiring Default Management Plans currently included in § 668.14(b)(15) and (b)(16) into a single paragraph, § 668.14(b)(15), and remove and reserve § 668.14(b)(16).

The proposed regulations would revise § 668.14(b)(20) to require that a co-educational institution that has an intercollegiate athletic program agree to comply with the provisions of § 668.48. This change conforms the regulations to changes made to the HEA by the l998 Amendments.

The proposed regulations would simplify the regulations by removing § 668.14(d) and (e), which govern collection and reporting of information concerning athletically-related aid, because those requirements also are contained in § 668.48. In a separate NPRM, the proposed amendments to § 668.48 would implement statutory changes made to the HEA by the l998 Amendments on that issue.

The proposed regulations would amend § 668.14(b)(24) to clarify that the institution is agreeing to comply with the requirements of § 668.22, currently titled ''Institutional Refunds and Repayments.'' Another NPRM proposes to incorporate into § 668.22 the new statutory requirements for the return of Title IV, HEA program funds.

The proposed regulations would add a new § 668.14(d) to reflect the addition of section 487(a)(23) to the HEA. That new section requires an institution to make a good faith effort to distribute mail voter registration forms to its students. The 1998 Amendments, however, prohibit any officer of the Executive Branch from instructing an institution in the manner in which this provision is carried out. Therefore, the proposed regulations incorporates the provisions of section 487(a)(23) *verbatim* into § 668.14(d) with minor changes to incorporate plain language requirements.

The amended HEA provides that section 487(a)(23) applies only to institutions that are located in States to which section 4(b) of the National Voter Registration Act, 42 U.S.C. 1973gg–2(b) does not apply.

If an institution must comply with § 668.14(d), it must make a good faith effort to distribute mail voter registration forms to its students for elections for governor and for elections defined in section 301(1) of the Federal Election Campaign Act of 1971, 2 U.S.C. 431(1). That section defines the term ''election'' to be ''(A) a general, special, primary, or runoff election; (B) a convention or caucus of a political party which has authority to nominate a candidate; (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.''

Section 668.27 Waiver of Annual Audit Submission Requirement

As amended by the 1998 Amendments, the HEA authorizes the waiver of the requirement that an institution submit on an annual basis a

compliance audit of its administration of the Title IV, HEA programs and audited financial statements. If the waiver is granted, the waiver may extend for up to three fiscal years.

The proposed regulations would add § 668.27 to implement the following waiver requirement. The 1998 Amendments provide that in order to receive a waiver, the institution must have delivered less than $200,000 of Title IV, HEA program funds in each of the two award years preceding the waiver period. The 1998 Amendments further provide that the institution must also post a letter of credit in an amount equal to 50 percent of the institution's ''annual potential liability.''

What is being proposed to be waived under this provision is the annual audit submission requirement for compliance audits. The institution is still required to have its administration of the Title IV, HEA programs audited for the waiver period. Therefore, if an institution is granted a waiver for three years, when the waiver period expires and the institution must submit its next compliance audit, that audit must cover the institution's administration of the Title IV, HEA programs since the end of the period covered by its last submitted compliance audit.

For example, an institution's fiscal year coincides with an award year. It submits a compliance audit for its fiscal year that ends on June 30, 2000, and then receives a waiver so that its next compliance audit is due six months after the end of its 2002–2003 fiscal year. When it submits that audit, the audit must cover its administration of the Title IV, HEA programs for the 2000–2001 and 2001–2002 fiscal years as well as the 2002–2003 fiscal year.

With regard to the audited financial statement, an institution will need to submit an audit only of its latest fiscal year.

However, the auditor who conducts its compliance audit or prepares its audited financial statement must determine that the institution satisfied the conditions of institutional eligibility set forth in § 600.7 (dealing with, for example, correspondence courses and students, and incarcerated students) for each year covered by the waiver. Similarly, if the institution is a proprietary institution of higher education, the auditor must audit the institution's determination that it satisfied the 90/10 rule for each year covered by the waiver.

In implementing this provision, the committee recognized that for this provision to have any practical value, an institution's cost of obtaining a letter of credit in an amount equal to 50 percent of ''annual potential liability'' must be less than the cost of performing the required audits. The committee concluded that a letter of credit in an amount equal to 10 percent of an institution's Title IV, HEA programs disbursements for an award year was the appropriate amount to satisfy that purpose. However, such a low amount is reasonable only for a low-risk institution that is strong financially and has a history of proper administration of the Title IV, HEA programs. Accordingly, the committee agreed to permit waivers only for institutions that met the criteria in § 668.27(c).

Section 668.92 Fines

The 1998 Amendments revised the HEA to provide that an individual who exercises substantial control over an institution and willfully fails to pay refund obligations on student loans must pay those refunds, and is subject to the penalty established under section 6672(a) of the Internal Revenue Code of l986 with respect to nonpayment of taxes. The committee determined that this provision applies to both individuals who fail to pay refunds under the terms of § 668.22 when that section refers to refund obligations, *i.e.*, up to and including June 30, 2000, and to individuals who fail to return Title IV, HEA program funds when that section refers to the return of Title IV, HEA program funds, *i.e.*, on or after July 1, 2000.

Section 668.95 Reimbursements, Refunds and Offsets; Section 668.113 Request for Review

The proposed regulations would add paragraph (d) to § 668.95 to implement the statutory change to the HEA made by the l998 Amendments that allows institutions to correct or cure an error that results from administrative, accounting, or recordkeeping error, if that error was not part of a pattern of error and there is no evidence of fraud or misconduct related to the error. Section 668.92(d) provides that the Secretary will not limit, suspend, terminate, or fine the institution if such an error is cured.

A similar addition has been made to § 668.113(d). That paragraph provides that the Secretary will permit an institution to correct or cure an error and will not impose a liability if the institution eliminates the basis of the liability by curing or correcting the error.

90/10 Rule

Section 600.5 Proprietary Institution of Higher Education

Prior to the 1998 Amendments, an eligible proprietary institution had to derive at least 15 percent of its revenues from non-title IV, HEA sources. The 1998 Amendments reduced that percent to 10 percent. The proposed regulations would amend § 600.5(a)(8) to reflect that change.

Cash Basis of Accounting. Treatment of Institutional Scholarships and Loans

The Committee IV negotiators did not reach consensus on how to implement the statutory provision that requires a proprietary institution of higher education to derive a portion of its revenue from sources outside of the Title IV, HEA programs.

The Higher Education Amendments of 1992 changed the statutory definition of a proprietary institution of higher education to require that such an institution derive at least 15 percent of its revenue from non-Title IV, HEA program funds. The Secretary implemented that provision with the so-called 85/15 rule that is contained primarily in § 600.5(d).

In the notice of proposed rulemaking for the 85/15 rule that was published in the **Federal Register** of February 10, 1994 (59 FR 6446–64675), the Secretary proposed that, in calculating their compliance with the 85/15 rule, institutions could report the amount of Title IV, HEA program funds in the numerator of the 85/15 rule fraction (Title IV revenue over total revenue) using the cash basis of accounting, and total revenue generated in the denominator using the accrual basis of accounting. The Secretary received overwhelming negative comments on that proposal. The commenters pointed out that it did not make sense to calculate the numerator and denominator under different bases of accounting.

The Secretary agreed, and in the final rule required that institutions use the cash basis of accounting to report Title IV revenue in the numerator and total revenue in the denominator. The Secretary chose that method because institutions report and account for their Title IV, HEA program expenditures under that basis of accounting.

After § 600.5(d), which set forth the 85/15 rule, was published as a final regulation in the **Federal Register** of April 29, 1994 (59 FR 22324, 22328), questions arose with regard to the treatment of institutional scholarships and loans under the cash basis of accounting.

Therefore, to remove any apparent or perceived ambiguities that may exist with regard to the current regulations, the Secretary is proposing a number of clarifications regarding compliance with the ''85/15 rule'', including its application to institutional scholarships and loans. These revisions are in addition to those needed to reflect the new statutory minimum percentage of income that such an institution must derive from non-Title IV HEA program funds.

In these proposed regulations, the Secretary makes explicit in § 600.5(d)(2) that an institution must use the cash basis of accounting in reporting Title IV, HEA program funds in the numerator and revenues generated in the denominator of the fraction in § 600.5(d)(1). Further, in § 600.5(d)(3), the Secretary describes the circumstances under which institutional scholarships and loans may be considered as revenue generated by the institution in the denominator of the fraction.

During the course of the regulatory negotiations, some negotiators expressed the view that the circumstances under which the proposed regulations permit institutional scholarships to be included as revenue were too narrow. The Department's negotiator, as well as others disagreed. The Department's position on this matter is based on the following.

It is the Secretary's understanding that, in general, as an accounting matter, revenue is an inflow or other enhancement of assets to an entity, or a reduction of its liabilities, resulting from the delivery or production of goods or services. Under the cash basis of accounting, revenue is recognized by an entity when that entity receives cash, *i.e.*, when there is an inflow of cash to the entity. In contrast, under the accrual basis of accounting, an entity recognizes revenue when it earns that revenue, regardless of whether there is any inflow of cash at the point revenue is recognized.

As a result, in order for an institution to recognize revenue under the cash basis of accounting, that revenue must represent cash received from a source outside the institution. With regard to institutional loans, when an institution makes a loan to a student, it does not receive cash from an outside source; in fact, it does not receive any cash. Accordingly, cash revenue from institutional loans are recognized only when those loans are repaid, because that is when there is an inflow of cash from an outside source.

Similarly, institutional grants and scholarships awarded to students do not generally result in revenue for the institution. In fact, the American Institute of Certified Public Accountants (AICPA) and the National Association of College and University Business Officers (NACUBO) instruct institutions to treat institutional scholarships as a reduction in revenue or as an expense. However, the Secretary proposes to allow institutional grants or scholarships that represent funds that originated from a source outside of the institution, to be considered to be income to the institution. For example, if an alumnus of the institution donated funds to the institution and expressly provided that the funds were to be used for institutional scholarships, scholarships from an account designated for scholarships and made up solely of those funds (and earnings on those funds) would be considered to represent income to the institution.

Institutional grants in the form of tuition waivers do not count as revenue because no new revenue is generated. Similarly, internal transfers of cash among accounts are generally not considered revenue to the institution because they do not represent an inflow of cash to the institution. An exception to this general rule would be a case, like the one noted previously, in which the account in question that is the source of a scholarship is a scholarship account made up of funds that originated from outside of the institution that represent income (and of interest on those funds). The proposed rule would allow an institution to include institutional grants and scholarships in the calculation of compliance with the rule if the institution can demonstrate that those funds represent an increase in cash to the institution that would be counted as income. Examples of cash that does not represent income include borrowing money and using the proceeds from the borrowing to make institutional scholarships or the sale of stock where the institution uses the proceeds to make institutional scholarships.

Treatment of FWS, LEAP and Matching Funds

In proposed § 600.5(e)(1), the Secretary clarifies that, in calculating compliance with the rule, an institution does not count, in the numerator or denominator, funds it receives under the Federal Work Study or LEAP (formerly SSIG) Program, and does not include in the denominator any funds it uses to satisfy a required match in a Title IV, HEA program.

Presumption That Title IV, HEA Program Funds Are Used To Pay Institutional Charges

Some negotiators objected to the current rule contained in § 600.5(d)(v) that provides that Title IV, HEA programs funds disbursed to students must be presumed to be used to pay the students' tuition, fees and other institutional charges so that those funds are included in the numerator of the fraction. These negotiators proposed exceptions to this rule over and above those already included in § 600.5(d)(2)(v)(A) and (B). (In this NPRM, § 600.5(d)(2)(v) is redesignated as § 600.5(e)(2), and § 600.5(d)(2)(v)(A) and (B) is redesignated as § 600.5(e)(3)(i) and (ii)).

The Secretary has agreed to include one additional exception, prepaid State tuition plans, and has included that exception in proposed § 600.5(e)(3)(iii). The rationale for including this exception is that funds from this type of plan are generally transmitted directly from the State to the institution for institutional charges. The Secretary did not agree to include other potential sources of payment of institutional charges because funds from those other sources, such as Education IRAs, are either no different from other types of family investments, or the tracking of those funds would be extremely problematic.

Several other changes have been made to this section that simply remove references that dealt with periods of time that are no longer relevant.

Executive Order 12866

1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits of this regulatory action—both quantitative and qualitative—we have determined that the benefits would justify the costs.

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

We note that, as these proposed regulations were subject to negotiated rulemaking, the costs and benefits of the various requirements were discussed thoroughly by negotiators. The resultant consensus reached on a particular

requirement generally reflected agreement on the best possible approach to that requirement in terms of cost and benefit.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comments on whether there may be further opportunities to reduce any potential costs or to increase any potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the title IV, HEA programs.

Summary of Potential Costs and Benefits

Elsewhere in this preamble we discuss the potential costs and benefits of these proposed regulations under the following headings: *Regulatory Flexibility Act Certification* and *Paperwork Reduction Act of 1995.*

2. Clarity of the Regulations

Executive Order 12866 and the President's Memorandum of June 1, 1998 on ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

- The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:
- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, *§ 600.5 Proprietary institution of higher education*.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

Entities affected by these proposed regulations are institutions of higher education that participate in the Title IV, HEA programs. These institutions are defined as small entities, according to the U.S. Small Business Administration, if they are: for-profit or nonprofit entities with total revenue of $5,000,000 or less; or entities controlled by governmental entities with populations of 50,000 or less. These proposed regulations would not impose a significant economic impact on a substantial number of small entities. These proposed regulations would ease administrative and regulatory burden, without requiring significant changes to current institutional system operations, by: reducing the required percentage of revenue that a proprietary institution must derive from non-Title IV sources; expanding institutional eligibility for the FFEL program to include foreign veterinary schools with clinical training programs that have been approved by a State since January 1, 1992; simplifying application and certification procedures; expanding the timeframe for institutional certification to six years; and providing for a waiver of the annual audit submission requirement.

The Secretary invites comments from small institutions as to whether the proposed changes would have a significant economic impact on them.

Paperwork Reduction Act of 1995

Section 600.7 contains an information collection requirement. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Conditions of Institutional Eligibility

Institutions of higher education must maintain certain conditions and requirements to remain eligible to participate in Title IV, HEA programs. Moreover, an institution may become ineligible if it fails to meet, or exceeds certain thresholds as prescribed in the HEA. This regulation monitors the composition of regular student enrollment in the following areas: telecommunications courses, correspondence courses, ability-to-benefit students and incarcerated students, and also enhances the waiver provisions for institutions whose enrollment of incarcerated students exceeds twenty-five percent. The Department needs and uses this information to gauge continuing eligibility.

Every six years, the institution must collect and report this information to the Department. The questions asked to determine compliance are now affirmatively structured, so that an institution will report to the Department if it does exceed any of the prescribed thresholds. There are approximately 5,800 respondents that we anticipate will be reviewed over the six-year period. We estimate the annual reporting and recordkeeping burden for this collection of information to average two hours per respondent for approximately 1,500 respondents in a given year. This measure includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, we estimate the total annual reporting and recordkeeping burden for this collection to be 3,000 hours.

If you want to comment on the information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education. You may also send a copy of these comments to the Department representative named in the **ADDRESSES** section of this preamble.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

The campus-based programs (Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Opportunity Grant (FSEOG) programs), the William D. Ford Federal Direct Loan (Direct Loan) Program, the Federal Family Education Loan (FFEL) programs, the Federal Pell Grant Program, and the LEAP Program are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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To use the PDF, you must have the Adobe Acrobat Reader Program with Search, which is available free at the first of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office, toll free, at 1–888–293–6498; or in the Washington, DC area, at (202) 512–1530.

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(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Consolidation Program; 84.032 Federal Stafford 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 LEAP; 84.268 William D. Ford Federal Direct Loan Programs; and 84.272 National Early Intervention Scholarship and Partnership Program.)

List of Subjects in

34 CFR Part 600

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

34 CFR Part 668

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

Dated: July 9, 1999.

Richard W. Riley,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600 and 668 of title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

1. The authority citation for part 600 is amended to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099(c), unless otherwise noted.

2. In § 600.2, the definition of the term ''State'' is revised to read as follows:

§ 600.2 Definitions.

* * * * *

State: A State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. The latter three are also know as the Freely Associated States.

* * * * *

3. In § 600.4, paragraph (c) is revised to read as follows:

§ 600.4 Institution of higher education.

* * * * *

(c) The Secretary does not recognize the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration before initiating any other legal action.

* * * * *

4. In § 600.5, paragraph (h) is removed; paragraph (i) is redesignated as paragraph (h); and paragraphs (a)(8), (b)(3)(i), (d), (e), (f), (g), and redesignated paragraph (h) are revised to read as follows:

§ 600.5 Proprietary institution of higher education.

(a) * * *

(8) Has no more than 90 percent of its revenues derived from title IV, HEA program funds, as determined under paragraph (d) of this section.

(b) * * *

(3) * * *

(i) Counts any period during which the applicant institution has been certified as a branch campus; and

* * * * *

(d)(1) An institution satisfies the requirement contained in paragraph (a)(8) of this section by examining its revenues under the following formula for its latest complete fiscal year:

Title IV, HEA program funds the institution used to satisfy its students' tuition, fees, and other institutional charges to students.

The sum of revenues including title IV, HEA program funds generated by the institution from: tuition, fees, and other institutional charges for students enrolled in eligible programs as defined in 34 CFR 668.8; and activities conducted by the institution, to the extent not included in tuition, fees, and other institutional charges, that are necessary for the education or training of its students who are enrolled in those eligible programs.

(2) An institution must use the cash basis of accounting when calculating the amount of title IV, HEA program funds in the numerator and the total amount of revenue generated by the institution in the denominator of the fraction contained in paragraph (d)(1) of this section.

(3) Under the cash basis of accounting—

(i) In calculating the amount of revenue generated by the institution from institutional loans, the institution must include only the amount of loan repayments received by the institution during the fiscal year; and

(ii) In calculating the amount of revenue generated by the institution from institutional scholarships, the institution must include only the amount of funds it disbursed during the fiscal year from an established restricted account and only to the extent that the funds in that account represent designated funds from an outside source or interest accrued on those funds.

(e) With regard to the formula contained in paragraph(d)(1) of this section—

(1) The institution may not include as title IV, HEA program funds in the numerator nor as revenue generated by the institution in the denominator—

(i) The amount of funds it received under the Leveraging Educational Assistance Partnership (LEAP) or Federal Work-Study (FWS) programs. (The LEAP Program was formerly called the State Student Incentive Grant or SSIG Program.);

(ii) The amount of institutional funds it used to match title IV, HEA program funds;

(iii) The amount of title IV, HEA program funds that must be refunded or returned under § 668.22; or

(iv) The amount charged for books, supplies, and equipment unless the institution includes that amount as tuition, fees, or other institutional charges.

(2) In determining the amount of title IV, HEA program funds received by the institution under the cash basis of accounting, except as provided in paragraph (e)(3) of this section, the institution must presume that any title IV, HEA program funds disbursed or delivered to or on behalf of a student will be used to pay the student's tuition, fees, or other institutional charges, regardless of whether the institution credits those funds to the student's account or pays those funds directly to the student, and therefore must include those funds in the numerator and denominator.

(3) In paragraph (e)(2) of this section, the institution may not presume that title IV, HEA program funds were used to pay tuition, fees, and other institutional charges to the extent that those charges were satisfied by—

(i) Grant funds provided by non-Federal public agencies, or private sources independent of the institution;

(ii) Funds provided under a contractual arrangement described in § 600.7(d), or

(iii) Funds provided by State prepaid tuition plans.

(4) With regard to the denominator, revenue generated by the institution from activities it conducts, that are necessary for its students' education or training, includes only revenue from those activities that—

(i) Are conducted on campus or at a facility under the control of the institution;

(ii) Are performed under the supervision of a member of the institution's faculty; and

(iii) Are required to be performed by all students in a specific educational program at the institution.

(f) An institution must notify the Secretary within 90 days following the end of the fiscal year used in paragraph (d)(1) of this section if it fails to satisfy the requirement contained in paragraph (a)(8) of this section.

(g) If an institution loses its eligibility because it failed to satisfy the requirement contained in paragraph (a)(8) of this section, to regain its eligibility it must demonstrate compliance with all eligibility requirements for at least the fiscal year following the fiscal year used in paragraph (d)(1) of this section.

(h) The Secretary does not recognize the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration before initiating any other legal action.

* * * * *

5. In § 600.6, paragraphs (b)(3)(iii) and (c) are revised to read as follows:

§ 600.6 Postsecondary vocational institution.

* * * * *

(b) * * *

(3) * * *

(iii) Counts any period during which the applicant institution has been certified as a branch campus; and

* * * * *

(c) The Secretary does not recognize the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration before initiating any other legal action.

* * * * *

6–7. In § 600.7, paragraphs (a)(1)(iii), (a)(1)(iv), and (c) are revised to read as follows:

§ 600.7 Conditions of institutional ineligibility.

(a) * * *

(1) * * *

(iii) More than twenty-five percent of the institution's regular enrolled students were incarcerated;

(iv) More than fifty percent of its regular enrolled students had neither a high school diploma nor the recognized equivalent of a high school diploma, and the institution does not provide a four-year or two-year educational program for which it awards a bachelor's degree or an associate degree, respectively;

* * * * *

(c) *Special provisions regarding incarcerated students*—(1) *Exception.* The Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section, upon the application of an institution, if the institution is a nonprofit institution that provides four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma.

(2) *Waiver for entire institution.* If the nonprofit institution that applies for a waiver consists solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary waives the prohibition contained in paragraph (a)(1)(iii) of this section for the entire institution.

(3) *Other waivers.* If the nonprofit institution that applies for a waiver does not consist solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary waives the prohibition contained in paragraph (a)(1)(iii) of this section—

(i) For the four-year and two-year programs for which it awards a bachelor's degree, an associate degree or a postsecondary diploma; and

(ii) For the other programs the institution provides, if the incarcerated regular students enrolled in those other programs have a completion rate of 50 percent or greater.

* * * * *

8. Section 600.8 is revised to read as follows:

§ 600.8 Treatment of a branch campus.

A branch campus of an eligible institution must be in existence for at least two years as a branch campus after the branch is certified as a branch campus before seeking to be designated as a main campus or a free-standing institution.

(Authority: 20 U.S.C. 1099c)

9. In § 600.31, paragraph (f) is removed.

10. In § 600.55, paragraph (a)(5)(i)(A) is revised to read as follows:

§ 600.55 Additional criteria for determining whether a foreign graduate medical school is eligible to apply to participate in the FFEL programs.

(a) * * *

(5) * * *

(i) * * *

(A) During the academic year preceding the year for which any of the school's students seeks an FFEL program loan, at least 60 percent of those enrolled as full-time regular students in the school and at least 60 percent of the school's most recent graduating class were persons who did not meet the citizenship and residency criteria contained in section 484(a)(5) of the HEA, 20 U.S.C. 1091(a)(5); and

* * * * *

11. Section 600.56 is redesignated as § 600.57.

12. A new § 600.56 is added to read as follows—

§ 600.56 Additional criteria for determining whether a foreign veterinary school is eligible to apply to participate in the FFEL programs.

(a) The Secretary considers a foreign veterinary school to be eligible to apply to participate in the FFEL programs if,

in addition to satisfying the criteria in § 600.54 (except the criterion that the institution be public or private nonprofit), the school satisfies all of the following criteria:

(1) The school provides, and in the normal course requires its students to complete, a program of clinical and classroom veterinary instruction that is supervised closely by members of the school's faculty, and that is provided either—

(i) Outside the United States, in facilities adequately equipped and staffed to afford students comprehensive clinical and classroom veterinary instruction; or

(ii) In the United States, through a training program for foreign veterinary students that has been approved by all veterinary licensing boards and evaluating bodies whose views are considered relevant by the Secretary.

(2) The school has graduated classes during each of the two twelve-month periods immediately preceding the date the Secretary receives the school's request for an eligibility determination.

(3) The school employs for the program described in paragraph (a)(1) of this section only those faculty members whose academic credentials are the equivalent of credentials required of faculty members teaching the same or similar courses at veterinary schools in the United States.

(4) Either—

(i) The veterinary school's clinical training program was approved by a State as of January 1, 1992, and is currently approved by that State; or

(ii) The veterinary school's students complete their clinical training at an approved veterinary school located in the United States.

(Authority: 20 U.S.C. 1082 and 1088)

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

13. The authority citation for part 668 is amended to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1085, 1088, 1091, 1092, 1094, 1099c, and 1099c–1, unless otherwise noted.

14. In § 668.12, paragraphs (f) and (g) are added and the authority citation is revised to read as follows:

§ 668.12 Application procedures.

* * * * *

(f)(1) *Application for provisional extension of certification.* If an institution participating in the title IV, HEA programs undergoes a change in ownership that results in a change of control as described in § 600.31, the Secretary may continue the institution's participation in those programs on a provisional basis, if the institution under the new ownership submits a ''materially complete application'' that is received by the Secretary no later than 10 business days after the change occurs.

(2) For purposes of this section, an institution submits a materially complete application if it submits a fully completed application form designated by the Secretary supported by—

(i) A copy of the institution's State license or equivalent document that—as of the day before the change in ownership—authorized or will authorize the institution to provide a program of postsecondary education in the State in which it is physically located;

(ii) A copy of the document from the institution's accrediting association that—as of the day before the change in ownership—granted or will grant the institution accreditation status, including approval of the non-degree programs it offers;

(iii) Audited financial statements of the institution's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of § 668.23; and

(iv) Audited financial statements of the institution's new owner's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of § 668.23, or equivalent information for that owner that is acceptable to the Secretary.

(g) *Terms of the extension.* (1) If the Secretary approves the institution's materially complete application, the Secretary provides the institution with a provisional Program Participation Agreement (PPA). The provisional PPA extends the terms and conditions of the program participation agreement that were in effect for the institution before its change of ownership.

(2) The provisional PPA expires on the earlier of—

(i) The date on which the Secretary signs a new program participation agreement;

(ii) The date on which the Secretary notifies the institution that its application is denied; or

(iii) The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (f)(3) of this section apply.

(3) If the provisional PPA will expire under the provisions of paragraph (f)(2)(iii) of this section, the Secretary extends the provisional PPA on a month-to-month basis after the expiration date described in paragraph (f)(2)(iii) of this section if, prior to that expiration date, the institution provides the Secretary with—

(i) A ''same day'' balance sheet showing the financial position of the institution, as of the date of the ownership change, that is prepared in accordance with ''GAAP'' (Generally Accepted Accounting Principles published by the Financial Accounting Standards Board) and audited in accordance with ''GAGAS'' (Generally Accepted Government Auditing Standards published by the U.S. General Accounting Office);

(ii) If not already provided, approval of the change of ownership from the State in which the institution is located by the agency that authorizes the institution to legally provide postsecondary education in that State;

(iii) If not already provided, approval of the change of ownership from the institution's accrediting agency; and

(iv) A default management plan unless the institution is exempt from providing that plan under 34 CFR 668.14(b)(15).

* * * * *

(Authority: 20 U.S.C. 1001, 1002, 1088, and 1099c)

15. In § 668.13, paragraph (b)(1) is amended by removing ''four years'' in the second sentence, and adding, in its place, ''six years''.

16. Section 668.14 is amended by removing paragraphs (d) and (e); by redesignating paragraphs (f), (g), (h), and (i) as paragraphs (e), (f), (g), and (h), respectively; by removing and reserving paragraph (b)(16); by revising paragraphs (b)(15), (b)(20), and (b)(24); and by adding a new paragraph (d), to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(15)(i) Except as provided under paragraph (b)(15)(ii) of this section, the institution will use a default management plan approved by the Secretary with regard to its administration of the FFEL or Direct Loan programs, or both for at least the first two years of its participation in those programs, if the institution—

(A) Is participating in the FFEL or Direct Loan programs for the first time; or

(B) Is an institution that has undergone a change of ownership that results in a change in control and is participating in the FFEL or Direct Loan programs.

(ii) The institution does not have to use an approved default management plan if—

(A) The institution, including its main campus and any branch campus, does

not have a cohort default rate in excess of 10 percent; and

(B) The owner of the institution does not, and has not, owned any other institution with a cohort default rate in excess of 10 percent.

(iii) The Secretary approves any default management plan that incorporates the default reduction measures described in appendix D to this part;

* * * * *

(20) In the case of an institution that is co-educational and has an intercollegiate athletic program, it will comply with the provisions of § 668.48;

* * * * *

(24) It will comply with the requirements of § 668.22;

* * * * *

(d)(1) The institution, if located in a State to which section 4(b) of the National Voter Registration Act (42 U.S.C. 1973gg–2(b)) does not apply, will make a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make those forms widely available to students at the institution.

(2) The institution must request the forms from the State 120 days prior to the deadline for registering to vote within the State. If an institution has not received a sufficient quantity of forms to fulfill this section from the State within 60 days prior to the deadline for registering to vote in the State, the institution is not liable for not meeting the requirements of this section during that election year.

(3) This paragraph applies to elections as defined in section 301(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(1)), and includes the election for Governor or other chief executive within such State.

* * * * *

17. A new § 668.27 is added to read as follows:

§ 668.27 Waiver of annual audit submission requirement.

(a) *General.* (1) At the request of an institution, the Secretary may waive the annual audit submission requirement for the period of time contained in paragraph (b) of this section if the institution satisfies the requirements contained in paragraph (c) of this section and posts a letter of credit in the amount determined in paragraph (d) of this section.

(2) An institution requesting a waiver must submit an application to the Secretary at such time and in such manner as the Secretary prescribes.

(b) *Waiver period.* (1) If the Secretary grants the waiver, the institution need not submit its next annual compliance or audited financial statement until six months after—

(i) The end of the third fiscal year following the fiscal year for which the institution last submitted a compliance audit and audited financial statement; or

(ii) The end of the second fiscal year following the fiscal year for which the institution last submitted compliance and financial statement audits if the award year in which the institution will apply for recertification is part of the third fiscal year.

(2) The Secretary does not grant a waiver if the award year in which the institution will apply for recertification is part of the second fiscal year following the fiscal year for which the institution last submitted compliance and financial statement audits.

(3) When an institution must submit its next compliance and financial statement audits under paragraph (b)(1) of this section—

(i) The institution must submit a compliance audit that covers the institution's administration of the title IV, HEA programs for the period from the last waiver, and an audited financial statement for its last fiscal year; and

(ii) The auditor who conducts the audit must audit the institution's annual determinations for the period subject to the waiver that it satisfied the 90/10 rule in § 600.5(d) and (e) and the other conditions of institutional eligibility in § 600.7, and disclose the results of the audit of the 90/10 rule for each year in accordance with § 668.23(d)(4).

(c) *Criteria for granting the waiver.* The Secretary grants a waiver of the annual audit requirement to an institution if the institution—

(1) Is not a foreign institution;

(2) Did not disburse $200,000 or more of title IV, HEA program funds during each of the two completed award years preceding the institution's waiver request;

(3) Agrees to keep records relating to each award year in the unaudited period for two years after the end of the record retention period in § 668.24(e) for that award year;

(4) Has participated in the title IV, HEA programs under the same ownership for at least three award years preceding the institution's waiver request;

(5) Is financially responsible under § 668.171, and does not rely on the alternative standards of § 668.175 to participate in the title IV, HEA programs;

(6) Is not on the reimbursement or cash monitoring system of payment;

(7) Has not been the subject of a limitation, suspension, fine, or termination proceeding, or emergency action initiated by the Department or a guarantee agency in the three years preceding the institution's waiver request;

(8) Has submitted its compliance audits and audited financial statements for the previous two fiscal years in accordance with and subject to § 668.23, and no individual audit disclosed liabilities in excess of $10,000; and

(9) Submits a letter of credit in the amount determined in paragraph (d) of this section, which must remain in effect until the Secretary has resolved the audit covering the award years subject to the waiver.

(d) *Letter of credit amount.* For purposes of this section, the letter of credit amount equals 10 percent of the amount of title IV, HEA program funds the institution disbursed to or on behalf of its students during the award year preceding the institution's waiver request.

(e) *Rescission of the waiver.* The Secretary rescinds the waiver if the institution—

(1) Disburses more than $200,000 of title IV, HEA program funds for an award year;

(2) Undergoes a change in ownership that results in a change of control; or

(3) Becomes the subject of an emergency action or a limitation, suspension, fine, or termination action initiated by the Department or a guarantee agency.

(f) *Renewal.* An institution may request a renewal of its waiver when it submits its audits under paragraph (b) of this section. The Secretary grants the waiver if the audits and other information available to the Secretary show that the institution continues to satisfy the criteria for receiving that waiver.

(Authority: 20 U.S.C. 1094)

18. In § 668.92, a new paragraph (d) is added and the authority citation is revised to read as follows:

§ 668.92 Fines.

* * * * *

(d)(1) Notwithstanding any other provision of statute or regulation, any individual described in paragraph (d)(2) of this section, in addition to other penalties provided by law, is liable to the Secretary for amounts that should have been refunded or returned under § 668.22 of the title IV program funds not returned, to the same extent with respect to those funds that such an

individual would be liable as a responsible person for a penalty under section 6672(a) of Internal Revenue Code of 1986 with respect to the nonpayment of taxes.

(2) The individual subject to the penalty described in paragraph (d)(1) is any individual who—

(i) The Secretary determines, in accordance with § 668.174(c), exercises substantial control over an institution participating in, or seeking to participate in, a program under this title;

(ii) Is required under § 668.22 to return title IV program funds to a lender or to the Secretary on behalf of a student or borrower, or was required under § 668.22 in effect on June 30, 2000 to return title IV program funds to a lender or to the Secretary on behalf of a student or borrower; and

(iii) Willfully fails to return those funds or willfully attempts in any manner to evade that payment.

(Authority: 20 U.S.C. 1094 and 1099c)

19. In § 668.95, a new paragraph (d) is added and the authority citation is revised to read as follows:

§ 668.95 Reimbursements, refunds and offsets.

* * * * *

(d) If an institution's violation in paragraph (a) of this section results from an administrative, accounting, or recordkeeping error, and that error was not part of a pattern of error, and there is no evidence of fraud or misconduct related to the error, the Secretary permits the institution to correct or cure the error. If the institution corrects or cures the error, the Secretary does not limit, suspend, terminate, or fine the institution for that error.

(Authority: 20 U.S.C. 1094 and 1099c–1)

20. In § 668.113, a new paragraph (d) is added and the authority citation is revised to read as follows:

§ 668.113 Request for review.

* * * * *

(d)(1) If an institution's violation that resulted in the final audit determination or final program review determination in paragraph (a) of this section results from an administrative, accounting, or recordkeeping error, and that error was not part of a pattern of error, and there is no evidence of fraud or misconduct related to the error, the Secretary permits the institution to correct or cure the error.

(2) If the institution is charged with a liability as a result of an error described in paragraph (d)(1) of this section, the institution cures or corrects that error with regard to that liability if the cure or correction eliminates the basis for the liability.

* * * * *

(Authority: 20 U.S.C. 1094 and 1099c–1)

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