UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 1: Ability to Benefit
Session 1: January 18-21, 2022

Issue: Ability to Benefit

Statutory cites: §484(d) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 668.2, 668.32, 668.156, 668.157

Summary of issues:

Section 484(d) of the Higher Education Act of 1965, as amended (HEA), requires that in order to gain eligibility for title IV Federal student aid (title IV aid), a student without a high school diploma (or its recognized equivalent) must fulfill one of the ability to benefit (ATB) alternatives:

1. Pass an independently administered, Department of Education (Department) approved ATB test.
2. Complete at least six credit hours, or the equivalent coursework (225 clock hours), that are applicable toward a degree or certificate offered by the postsecondary institution.
3. Participate in a State process approved by the Department.

A student who meets one of the ATB alternatives may use that alternative to establish title IV aid eligibility at any eligible institution where the student enrolls in an eligible career pathway program (ECPP).

Proposal:

The Department seeks to clarify how (1) institutions demonstrate they are offering an ECPP, and (2) States demonstrate that their “State process” application meets the statutory requirements. The Department is aware of compliance and program integrity concerns with programs that claim to offer an ECPP but do not offer all the required components, State process applications that have not provided robust data on student success, and confusion as to how to craft a successful State process.

1. **Provide clarity as to what is required to demonstrate to the Department that a program qualifies as an ECPP for the purposes of ability to benefit.** We propose codifying the definition of an ECPP from the statute and clarifying how a program meets the standards of an ECPP by establishing an eligibility certification process and providing more detail on the documentation required to demonstrate that a program meets the definition of an ECPP.
2. **Eliminate the requirement that first-time applicants for the State process must demonstrate past performance metrics and clarify quality controls for the initial approval period.** First, the Department recommends a maximum of two years for an initial trial period as States gather data but seeks input from negotiators on the length of time that the initial State process application should receive approval for. Second, the Department proposes requiring States to verify in their applications that all new students served in the State process will be enrolled in an ECPP, and the Secretary shall verify that a sample of the proposed ECPPs are eligible. Third, the

Department proposes setting a maximum number of students to be allowed in this initial approval period or limiting an institution to one ECPP for students eligible via State process; we seek feedback from negotiators on the best approach. Fourth, we propose removing the requirement that States demonstrate past success rates for the initial trial period, given that a State will not have prior award year data. However, we are proposing to replace that requirement with initial quality metrics that would allow us to assess the effectiveness of the programs participating under the State process in the initial trial period; we seek feedback from negotiators on what those quality metrics should be. Finally, we propose requiring States to describe in their application the enrollment or admission criteria for students accessing title IV aid through the State process ATB alternative.

3. **Provide clarity on the requirements for States that are re-applying for subsequent approval of their State process.** When a State reapplies for subsequent approval of its State process, the Department proposes to require additional data and proof of success to meet the statutory requirement to demonstrate effectiveness. First, as in the initial application, the Department proposes requiring States to verify in their applications that all students served in the State process will be enrolled in an ECPP, and the Secretary shall verify that a sample of the proposed ECPPs are eligible. Second, as in the initial application, States will have to provide the criteria used to determine that students have the ability to benefit. Unlike in the initial application process, we propose to require States reapplying to provide all of the data necessary for the Secretary to make a determination based on the statutory criteria. We propose that States must demonstrate the "cultural diversity, economic circumstances, and education preparation of populations" by reporting to ED on race, gender, age, economic circumstances, and educational attainment (e.g., 10th grade) by program, which will enable ED equity audits. Finally, we propose that States demonstrate the effectiveness of their State process by meeting certain quality indicator thresholds.
4. **Ensure that the success rate that States must demonstrate is appropriate.** In order to demonstrate the effectiveness of a State process, the current regulation requires that the completion rate for participating students without a high school diploma, or its recognized equivalent, must be within 95% of the completion rate for students with high school diplomas. We welcome input on whether this is the most appropriate indicator and comparison population. Other alternative performance indicators to be considered include earnings, employment, credentials, credits, and postsecondary transitions. We also seek feedback on the most appropriate mechanism to hold States accountable when participating institutions do not meet success rate thresholds.
5. **Establish the reporting needed to retain access to title IV.** Ensure that States report institutional-level data to the Department when such data are not already available to the Department through standard title IV reporting.

Proposed Regulations Redline

34 CFR § 668.2 General definitions.

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(b)

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Eligible career pathway program: A program that combines rigorous and high-quality education, training, and other services that--

(1) Aligns with the skill needs of industries in the economy of the State or regional economy involved;

(2) Prepares an individual to be successful in any of a full range of secondary or postsecondary

education options, including apprenticeships registered under the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.);

(3) Includes counseling to support an individual in achieving the individual's education and career goals;

(4) Includes, as appropriate, education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;

(5) Organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;

(6) Enables an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and

(7) Helps an individual enter or advance within a specific occupation or occupational cluster.

Commented [A1]: The Department highlights that while this would be new to regulation, this definition is drawn from the statute.

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§ 668.32 Student eligibility - general.

* * * * *

(e)(1) Has a high school diploma or its recognized equivalent;

(2) Has obtained a passing score specified by the Secretary on an independently administered test in accordance with subpart J of this part, and either--

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2 of this part;

(3) Is enrolled in an eligible institution that participates in a State "process" approved by the Secretary under subpart J of this part, and either--

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2 of this part;

(4) Was home-schooled, and either--

(i) Obtained a secondary school completion credential for home school (other than a high school diploma or its recognized equivalent) provided for under State law; or

(ii) If State law does not require a home-schooled student to obtain the credential described in paragraph (e)(4)(i) of this section, has completed a secondary school education in a home school setting that qualifies as an exemption from compulsory attendance requirements under State law; or

(5) Has been determined by the institution to have the ability to benefit from the education or training offered by the institution based on the satisfactory completion of 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution, and either--

(i) Was first enrolled in an eligible program before July 1, 2012; or

(ii) Is enrolled in an eligible career pathway program as defined in § 668.2 of this part.

* * * * *

§ 668.156 Approved State process.

(a)

(1) A State that wishes the Secretary to consider its State process as an alternative to achieving a passing score on an approved, independently administered test or satisfactory completion of at least six credit hours or its recognized equivalent coursework for the purpose of determining a student's eligibility for title IV, HEA program funds must apply to the Secretary for approval of that process.

(2) A State's application for approval of its State process must include--

(i) The institutions located in the State included in the proposed process, which need not be all of the institutions located in the State;

(ii) The requirements that participating institutions must meet to offer eligible career pathway programs through the State process;

(iii) A certification that, as of the date of the application, each proposed career pathway program intended for use through the State process constitutes an "eligible career pathway program" under § 668.2 of this part; and

(iv) The criteria used to determine student eligibility for participation in the State process.

(3) Before approving the State process, the Secretary will verify that a sample of the proposed eligible career pathway programs comply with the definition of an "eligible career pathway program" under §668.2 of this part.

(b) ~~The Secretary approves a State's process if~~ For a State applying for approval for the first time, the Secretary may approve the State process for a two-year initial period if--

(1) The State administering the process can demonstrate that the students it admits under that process without a high school diploma or its recognized equivalent, and who enroll in participating institutions, have a success rate ~~as determined under paragraph (h) of this section that is within 95 percent of the success rate of students with high school diplomas~~; and

(2) The State's process satisfies the requirements contained in paragraphs (a), (c), and (d) of this section.

~~**(1)** The State administering the process can demonstrate that the students it admits under that process without a high school diploma or its equivalent, who enroll in participating institutions have a success rate as determined under paragraph (h) of this section that is within 95 percent of the success rate of students with high school diplomas; and~~

~~**(2)** The State's process satisfies the requirements contained in paragraphs (c) and (d) of this section.~~

(c) A State process must~~require institutions participating in the process to provide each student they admit without a high school diploma or its recognized equivalent with the following services~~—

(1) Allow the participation of only those students eligible under § 668.32(e)(3) of this part;

(2) Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process;

(3) Require corrective action if an institution is found to be in noncompliance with the State process requirements; and

(4) Terminate an institution's participation in the State process if the institution refuses or fails to comply with the State process requirements.

~~**(1)** Orientation regarding the institution's academic standards and requirements, and student rights.~~

~~**(2)** Assessment of each student's existing capabilities through means other than a single standardized test.~~

~~**(3)** Tutoring in basic verbal and quantitative skills, if appropriate.~~

~~**(4)** Assistance in developing educational goals.~~

~~**(5)** Counseling, including counseling regarding the appropriate class level for that student given the student's individual's capabilities.~~

~~**(6)** Follow-up by teachers and counselors regarding the student's classroom performance and satisfactory progress toward program completion.~~

~~**(d)** A State process must~~

Commented [A2]: The Department proposes removing this requirement and replacing it with upfront quality metrics that better align with the data programs and states will be able to provide.

Specifically, the Department seeks feedback as to the quality metrics we should consider for initial applications to demonstrate "effectiveness." Because states will not be able to show that the program is yet effective for students enrolled through an ATB state process, we are considering metrics such as:

--Whether the median earnings for students who have a high school degree or equivalent and are already enrolled in the program at the institution exceed those of the typical high school graduate in the state; or

--Whether the withdrawal rate exceeds the rate required of initial institutions by administration capability regulations (34 CFR 668.1), or 33 percent, for students who have a high school degree or equivalent and are already enrolled in the program.

Additionally, the Department proposes setting an appropriate maximum number of students to be allowed in this initial approval period or limiting to one ECPP per institution for students eligible via the state process; we seek feedback on this approach.

~~**(1)** Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process;~~

~~**(2)** Require corrective action if an institution is found to be in noncompliance with the State process requirements; and~~

~~**(3)** Terminate an institution from the State process if the institution refuses or fails to comply with the State process requirements.~~

(~~e~~d)(1) The Secretary responds to a State's request for approval of its State process within six months after the Secretary's receipt of that request. If the Secretary does not respond by the end of six months, the State's process is deemed to be approved.

(2) An approved State process becomes effective for purposes of determining student eligibility for title IV, HEA program funds under this subpart--

(i) On the date the Secretary approves the process; or

(ii) Six months after the date on which the State submits the process to the Secretary for approval, if the Secretary neither approves nor disapproves the process during that six-month period.

(e) After the initial two-year period described in paragraph (b) of this section, the State must reapply for continued participation and, in its application—

(1) Demonstrate that the students it admits under that process have a success rate as determined under paragraph (g) of this section that is within 95 percent of the success rate of students with high school diplomas;

(2) Demonstrate that the State's process continues to satisfy the requirements in paragraphs (a), (c), and (d) of this section; and

(3) Report information to the Department on the enrollment and success of participating students by program and by race, gender, age, economic circumstances, and educational attainment, to the extent available.

(f) The State must calculate the success rates as referenced in paragraph ~~(b)~~(e)(1) of this section by-

(1) Determining the number of students with high school diplomas who, during the applicable award year described in paragraph (~~g~~~~i~~)(1) of this section, enrolled in participating institutions and---

(i) Successfully completed education or training programs;

(ii) Remained enrolled in education or training programs at the end of that award year; or

(iii) Successfully transferred to and remained enrolled in another institution at the end of that award year;

Commented [A3]: The Department seeks feedback as to whether the current threshold in regulation is the right threshold for success.

Commented [A4]: The Department seeks feedback on whether completion rates are the right indicator to measure program effectiveness. Alternatives may include earnings, employments, credits earned, or others.

(2) Determining the number of students with high school diplomas who enrolled in education or training programs in participating institutions during that award year;

(3) Determining the number of students calculated in paragraph (~~h~~f)(2) of this section who remained enrolled after subtracting the number of students who subsequently withdrew or were expelled from participating institutions and received a 100 percent refund of their tuition under the institutions' refund policies;

(4) Dividing the number of students determined in paragraph (~~h~~f)(1) of this section by the number of students determined in paragraph (~~h~~f)(3) of this section; and

(5) Making the calculations described in paragraphs (~~h~~f)(1) through (f~~h~~)(4) of this section for students without a high school diploma or its recognized equivalent who enrolled in participating institutions.

(~~i~~g)(1) For purposes of paragraph (f) of this section, the applicable award year is the latest complete award year for which information is available that immediately precedes the date on which the State requests the Secretary to approve its State process, except that the award year selected must be one of the latest two completed award years preceding that application date.

(2) If no students are enrolled in an eligible career pathway program through a State process, then success rate reporting will not be required in the subsequent application as described in paragraph (f) of this section.

(h) A State must submit reports on its State process, in accordance with deadlines and procedures established and published by the Secretary in the *Federal Register*, with such information as the Secretary requires.

(i) The Secretary approves a State process as described in paragraph (e) of this section for a period not to exceed five years.

(j)(1) The Secretary withdraws approval of a State process if the Secretary determines that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(2) The Secretary provides a State with the opportunity to contest a finding that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

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§ 668.157 Eligible Career Pathway Program.

(a) An institution demonstrates to the Secretary that a student is enrolled in an eligible career pathway program, as required under 668.156(a)(3) of this part, by documenting that--

(1) The student has enrolled in or is receiving both--

(i) An eligible postsecondary program as defined in § 668.8 of this part; and

Commented [A5]: The Department seeks feedback on whether success should be measured in comparison to 1) all other students not participating in Title IV through an ability to benefit provision; 2) all other students participating in Title IV through an ability to benefit provision; 3) to all postsecondary students with their high school equivalency, or 4) to those with no postsecondary education, but with a high school degree or equivalency.

The Department notes that the relevance of the comparison population will depend on the indicator used.

(ii) Coursework, training, or other support services that enable an individual to attain a secondary school diploma or its recognized equivalent;

(2) The program aligns with the skill needs of industries in the State or regional labor market in which the institution is located, based on research the institution has conducted, including--

(i) Government reports identifying occupations with the greatest hiring demand in the State or regional labor market; or

(ii) Surveys, interviews, meetings, or other information obtained by the institution regarding the hiring needs of employers in the State or regional labor market.

(3) The skill needs described in paragraph (a)(2) of this section align with the specific coursework and postsecondary credential provided by the postsecondary program or other required training;

(4) The program provides career counseling services that assist students in obtaining jobs aligned with skill needs described in paragraph (a)(2) of this section, and identifying the individuals providing the career counseling services;

(5) The education is offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster; and

(6) The program is designed to lead to a valid high school diploma as defined in § 668.16(p) of this part or its recognized equivalent.

(b) For eligible career pathway programs that do not enroll students through a State process as defined in § 668.156 of this part, the Department will verify the eligibility of eligible career pathway programs for title IV, HEA program purposes. The Secretary provides an institution with the opportunity to appeal any adverse eligibility decision.

Commented [A6]: Other proposed changes to the Administrative Capability regulations would renumber this section as § 668.16(t).

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 2: Standards of Administrative Capability
Session 1: January 18-21, 2022

Issue: Standards of Administrative Capability

Statutory cites: §498(a) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 668.16

Summary of issues:

The statute requires that institutions of higher education (institutions) be administratively capable in order to retain eligibility for Title IV federal financial aid. However, while current administrative capability regulations include a host of requirements, the Department is aware of some compliance concerns and activities that are not reflected in those rules. Accordingly, we propose to revise the administrative capability regulations.

Proposal:

We propose to include several additional standards in the administrative capability rules to ensure that they provide the capacity for appropriate response to ongoing problems the Department observes within institutions.

The additional proposed administrative capability standards would require an institution to:

1. **Provide adequate career services to eligible students who receive Title IV, HEA program assistance.** Determination of adequacy would be made based on the share of students enrolled in programs designed to prepare students for gainful employment in a recognized occupation, the number and distribution of career services staff, and the presence of institutional partnerships with recruiters and employers who regularly hire graduates of the institution. It is important that institutions help students identify career opportunities and access well-paying jobs after completing their programs; however, some institutions do not provide adequate support. Thus, the Department proposes to establish these requirements for adequate career services.
2. **Make a reasonable effort to provide students with clinical or externship opportunities required for completion of a credential or licensure in the recognized occupation**, as applicable, within 45 days after the completion of required coursework. Although many recognized occupations require the completion of clinicals or externships, some institutions do not make adequate arrangements broadly accessible to students, even when these are required to earn a degree or certificate. Thus, students may be left to identify their own externships, are only offered externships that are geographically distant and/or do not meet the credential or licensure requirements, or, in some cases, are not provided with any externship opportunities for extended periods of time.
3. **Disburse funds to students in a timely manner consistent with the students' needs.** Some institutions substantially delay disbursements to students. In some cases, this results in students

not receiving funding until long after tuition payments are due and living costs are incurred, which may affect students' ability to remain in school, and ultimately graduate. Thus, the Department proposes that an institution shall not be considered administratively capable if the Secretary determines that it failed to make timely disbursements in ways that "best meet the student's needs," as is already required for delaying disbursements under the Pell, SEOG, and TEACH Grant programs (34 CFR 690.76(a), 676.16(a)(3), and 686.33(a)). Violations may be determined based on student complaints, high rates of withdrawals attributable to delays in disbursements, disbursements being delayed until after the withdrawal date requirements established in 34 CFR 668.22(b) and (c), disbursements being delayed with the effect of ensuring an institution passes the 90/10 ratio, or other information available to the Secretary.

4. **Not engage in misrepresentations as defined in 34 CFR Subpart F or aggressive recruitment as defined in proposed 34 CFR Subpart [R].** Because both misrepresentation and aggressive recruitment increase risk to students and taxpayers, particularly with respect to borrower defense claims, the Department proposed in recent negotiations to further define each of these terms, and we propose to incorporate them as a requirement prohibited into the standards of administrative capability.
5. **Develop and follow procedures to evaluate the validity of a student's high school completion**, including the collection and maintenance of appropriate documentation of such completion. While institutions are currently required to verify high school completion status for students they suspect may not have the appropriate credential, some institutions have avoided verifying high school completion even when they had suspicions and the Department later determined the student did not have the appropriate credentials. The Department proposes to strengthen this requirement by specifying the types of documentation that will be required.

Proposed Regulations Redline

§ 668.16 Standards of administrative capability.

To begin and to continue to participate in any Title IV, HEA program, an institution ~~shall~~ must demonstrate to the Secretary that the institution is capable of adequately administering that program under each of the standards established in this section. The Secretary considers an institution to have that administrative capability if the institution -

* * *

(h) Provides adequate financial aid counseling to eligible students who apply for Title IV, HEA program assistance. In determining whether an institution provides adequate counseling, the Secretary considers whether its counseling includes information regarding -

(1) The source and amount of each type of aid offered;

(2) The method by which aid is determined and disbursed, delivered, or applied to a student's account; and

(3) The rights and responsibilities of the student with respect to enrollment at the institution and receipt of financial aid. This information includes the institution's refund policy, the requirements for the treatment of title IV, HEA program funds when a student withdraws under § 668.22, its standards of satisfactory progress, and other conditions that may alter the student's aid package;

(i) Provides adequate career services to eligible students who receive Title IV, HEA program assistance. In determining whether an institution provides adequate career services, the Secretary considers –

(1) The share of students enrolled in programs designed to prepare students for gainful employment in a recognized occupation;

(2) The number and distribution of career services staff; and

(3) The presence of institutional partnerships with recruiters and employers who regularly hire graduates of the institution.

(j) Makes a reasonable effort to provide students with clinical or externship opportunities required for completion of the credential or licensure in a recognized occupation within 45 days of the completion of required coursework.

(k) Disburses funds to students in a timely manner consistent with the student's needs, violations of which may be assessed using student complaints, high rates of withdrawals attributable to delays in disbursements, disbursements delayed until after the withdrawal date requirements in 34 CFR 668.22(b) and (c), disbursements delayed with the effect of ensuring an institution passes the 90/10 ratio, or other methods.

(j~~i~~) Has provided all program and fiscal reports and financial statements required for compliance with the provisions of this part and the individual program regulations in a timely manner;

(m) Does not engage in misrepresentations as defined in subpart F of this part or aggressive recruitment as defined in subpart R of this part.

(~~j~~n) Shows no evidence of significant problems that affect, as determined by the Secretary, the institution's ability to administer a Title IV, HEA program and that are identified in -

(1) Reviews of the institution conducted by the Secretary, the Department of Education's Office of Inspector General, nationally recognized accrediting agencies, guaranty agencies as defined in 34 CFR part 682, the State agency or official by whose authority the institution is legally authorized to provide postsecondary education, or any other law enforcement agency; or

(2) Any findings made in any criminal, civil, or administrative proceeding;

(~~k~~o) Is not, and does not have any principal or affiliate of the institution (as those terms are defined in 2 CFR parts 180 and 3485) that is -

(1) Debarred or suspended under Executive Order 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulations (FAR), 48 CFR part 9, subpart 9.4; or

(2) Engaging in any activity that is a cause under 2 CFR 180.700 or 180.800, as adopted at 2 CFR 3485.12, for debarment or suspension under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4;

(~~l~~p) For an institution that seeks initial participation in a Title IV, HEA program, does not have more than 33 percent of its undergraduate regular students withdraw from the institution during the institution's latest completed award year. The institution must count all regular students who are enrolled during the latest completed award year, except those students who, during that period -

(1) Withdrew from, dropped out of, or were expelled from the institution;

(2) Were entitled to and actually received in a timely manner, a refund of 100 percent of their tuition and fees;

(q~~m~~)

(1) Has a cohort default rate -

(i) That is less than 25 percent for each of the three most recent fiscal years during which rates have been issued, to the extent those rates are calculated under subpart M of this part;

(ii) On or after 2014, that is less than 30 percent for at least two of the three most recent fiscal years during which the Secretary has issued rates for the institution under subpart N of this part; and

(iii) As defined in 34 CFR 674.5, on loans made under the Federal Perkins Loan Program to students for attendance at that institution that does not exceed 15 percent.

(2)

(i) However, if the Secretary determines that an institution's administrative capability is impaired solely because the institution fails to comply with paragraph (m)(1) of this section, and the institution is not subject to a loss of eligibility under §§ 668.187(a) or 668.206(a), the Secretary allows the institution to continue to participate in the Title IV, HEA programs. In such a case, the Secretary may provisionally certify the institution in accordance with § 668.13(c) except as provided in paragraphs (~~m~~q)(2)(ii), (q~~m~~)(2)(iii), (~~m~~q)(2)(iv), and (~~m~~q)(2)(v) of this section.

(ii) An institution that fails to meet the standard of administrative capability under paragraph (m)(1)(ii) based on two cohort default rates that are greater than or equal to 30 percent but less than or equal to 40 percent is not placed on provisional certification under paragraph (m)(2)(i) of this section -

(A) If it has timely filed a request for adjustment or appeal under §§ 668.209, 668.210, or 668.212 with respect to the second such rate, and the request for adjustment or appeal is either pending or succeeds in reducing the rate below 30 percent; or

(B) If it has timely filed an appeal under § 668.213 after receiving the second such rate, and the appeal is either pending or successful; or

(C)(1) If it has timely filed a participation rate index challenge or appeal under § 668.204(c) or § 668.214 from either or both of the two rates, and the challenge or appeal is either pending or successful; or

(2) If the second rate is the most recent draft rate, and the institution has timely filed a participation rate challenge to that draft rate that is either pending or successful.

(iii) The institution may appeal the loss of full participation in a Title IV, HEA program under paragraph (m)(2)(i) of this section by submitting an erroneous data appeal in writing to the

Secretary in accordance with and on the grounds specified in §§ 668.192 or 668.211 as applicable;

(iv) If the institution has 30 or fewer borrowers in the three most recent cohorts of borrowers used to calculate its cohort default rate under subpart N of this part, we will not provisionally certify it solely based on cohort default rates;

(v) If a rate that would otherwise potentially subject the institution to provisional certification under paragraphs (m)(1)(ii) and (m)(2)(i) of this section is calculated as an average rate, we will not provisionally certify it solely based on cohort default rates;

(r~~n~~) Does not otherwise appear to lack the ability to administer the Title IV, HEA programs competently;

(s~~o~~) Participates in the electronic processes that the Secretary -

(1) Provides at no substantial charge to the institution; and

(2) Identifies through a notice published in the *Federal Register*; and

(t~~p~~) Develops and follows adequate procedures to evaluate the validity of a student's high school completion if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

(1) Adequate procedures to evaluate the validity of a student's high school completion must include--

(i) Obtaining documentation from the high school that confirms the validity of the high school diploma, including at least one of the following—

(A) Transcripts;

(B) Written descriptions of course requirements; or

(C) Written and signed statements by principals or executive officers at the high school attesting to the rigor and quality of coursework at the high school; and

(ii) If the high school is regulated or overseen by a State agency, confirming with or receiving documentation from that agency that the high school is recognized or meets requirements established by that agency.

(2) A high school diploma is not valid if it—

(i) Is not recognized or does not meet the requirements established by the appropriate State agency in which the high school is located;

(ii) Has been determined to be invalid by the Department, the appropriate State agency in which the high school was located, or through a court proceeding; or

(iii) Was obtained from an entity that requires little or no education or coursework to obtain a high school diploma, including through a test that does not meet the requirements for a recognized equivalent of a high school diploma under 34 CFR 600.2.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 3: Gainful Employment
Session 1: January 18-21, 2022

Issue: Gainful Employment

Statutory cites: §101(b)(1), 102(b)(1)(A)(i), and 102(c)(1)(A) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR Subpart Q

Summary of issues:

The Higher Education Act (HEA) requires some programs and institutions (generally all programs at proprietary institutions and any non-degree programs at public or private nonprofit institutions) to "prepare students for gainful employment in a recognized occupation" to access Title IV federal financial aid. However, for many years the standards by which institutions could demonstrate compliance with those requirements were largely undefined. In 2011, the Department of Education (Department) conducted a rulemaking and issued a regulation that established such standards for gainful employment (GE) programs, based in part on the debt that graduates incurred in attending the program, relative to the earnings they received after completion. The regulation was reissued in 2014 following a court challenge, based on a similar debt-to-earnings structure for GE programs. When the data were first released in January 2017, over 800 programs, collectively enrolling hundreds of thousands of students, did not pass the GE standards.

In summer 2019, the Department rescinded the 2014 rule nearly in its entirety. However, the Department remains concerned about the prevalence of programs that fail to help students obtain sufficiently remunerative employment to justify the investment of their time and resources, and often leave students too deeply in debt relative to their earnings to afford to repay.

A growing body of academic research has identified persistent problems in GE programs (defined by the HEA as certificate programs and degree programs at proprietary institutions), including poor labor market outcomes, high levels of borrowing, and low loan repayment rates. For example, research has found that some postsecondary certificates have very low or even negative labor market returns for their graduates. This finding is echoed in the most recent College Scorecard data, which show that roughly 19 percent of undergraduate certificate programs have median earnings among working graduates that are less than 150 percent of the poverty line. Multiple studies show that for-profit college students, in particular, see much lower employment and earnings gains than students in programs at non-profit colleges.

Additionally, the most recently available data published via the College Scorecard show that the median cumulative loan debt of students in many programs is high relative to the amounts that students earn, especially in programs offered by proprietary institutions. For example, median cumulative borrowing levels exceed median annual earnings at about 12 percent of undergraduate degree programs (among those where data are available), or 9 percent among public and nonprofit undergraduate degree programs. Among programs at proprietary schools, however, the analogous figures are 28 percent for associate's and 42 percent for bachelor's degree programs. Multiple studies have found that, accounting for differences in student characteristics, borrower outcomes like repayment rates and the likelihood of default are worse in the proprietary sector. Finally, research indicates that federal accountability efforts can be effective in driving improved student outcomes, particularly for students at (or who would have attended) for-profit colleges.

We seek feedback on the overall state of the GE sector of higher education, including the greatest problems that students who enroll in GE programs currently face. We also seek feedback on the appropriate framework for the GE standards, including the metrics that should be utilized to assess programmatic outcomes; the sanctions that should be applied; and the reporting requirements that should be instituted to assess GE programs. Finally, we request feedback on the need for improved consumer information about the outcomes of institutions of higher education, as well as GE programs' failure to meet required standards, so that prospective and enrolled students are aware of those outcomes and the potential for loss of eligibility of federal financial aid.

Discussion Questions:

The Department is interested in reestablishing criteria to define how an applicable program can demonstrate it prepares students for "gainful employment in a recognized occupation," as required by the statute. The Department seeks to promulgate regulations that promote better labor market outcomes, create value for students' investments in higher education, protect students from acquiring debts they cannot afford to repay, and safeguard the interests of taxpayers.

1) What metric(s), and what threshold(s) (pass/fail cutoff points) in those metric(s), best distinguish between programs that prepare students for gainful employment versus those that do not, including at different credential levels? For instance, we seek feedback on the use of repayment rates; debt-to-earnings rates; earnings thresholds; and other measures.

    a. Should the Department include non-completers in any of the metrics? How would the Department assign non-completers to programs and what metrics would be most suitable?

2) How should the Department address programs with low earnings outcomes, even when they might have relatively low median debt levels (and thus may have passed the 2014 gainful employment rule)?

3) What are the benefits of using a combination of metrics versus a single metric in considering whether a program prepares students for gainful employment in a recognized occupation? What are the pros and cons of using multiple metrics versus a single metric for this purpose?

4) What are the benefits of allowing institutions multiple consecutive years of failing a metric based on post-college earnings? What are the risks of allowing multiple consecutive years? What factors should the Department consider in specifying how passing and failing metrics in consecutive years are related to the trigger of sanctions?

5) How should the Department balance the burden of institutional reporting requirements with collecting data as detailed as was required under the 2014 gainful employment metric? For instance:

a. The cap of median debt at the tuition, fees, books, and supplies of the student required institutions to report that figure for each student. What was the benefit of the inclusion of that cap?

b. The inclusion of institutional and private loan debt required institutions to report additional debt amounts for each student. What was the benefit of the inclusion of those types of loan debt?

c. If the Department did not include the additional reporting of institutional and private loan debt, might institutions have an incentive to increase non-Federal borrowing? How might the Department mitigate such concerns?

6) How should the Department address the presence of income that is unreported to the IRS?

7) How should the Department address programs that are too small (i.e., that have too few students complete the program in a given year) to have their program debt or earnings information disclosed?

8) What metrics are most important to be disclosed to prospective and enrolled students? What are the best formats for those disclosures?

9) How should the Department ensure that institutions are not simply shutting down old programs and starting up new, similar programs to avoid the consequences of a GE rule?

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 4: Financial Responsibility
Session 1: January 18-21, 2022

Issue: Financial Responsibility

Statutory cites: §498(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 668.15, 668.23, Subpart L, 668.174

Summary of issues:

The Department is required under the Higher Education Act to monitor institutions' financial responsibility, primarily in an effort to protect students and taxpayers from institutions that are not financially viable. However, standard mechanisms of measuring financial responsibility–namely, through the composite score—do not always suffice to assess the risk of closure or liabilities that an institution may face. The Department proposes regulatory changes that will increase the ability to identify high-risk events and require financial protection as needed. The Department also seeks to streamline the regulations by consolidating the financial responsibility requirements for changes of ownership in Subpart L and reserving the existing regulations at 34 CFR 668.15. The Department is not proposing changes to the composite score calculation at this time.

Proposal:

Under 668.15, Factors of financial responsibility:

1. **Reserve the entirety of 668.15 and instead incorporate components of that section into the financial responsibility requirements in proposed 668.176** of Subpart L of the regulations. This will streamline the regulations to ensure that financial responsibility requirements are all located in Subpart L.

Under 668.23, Compliance audits and audited financial statements:

1. **Ensure that audit reports are submitted in a timely manner**, by the earlier of 30 days after the completion of the report or six months after the end of the fiscal year. By requiring reports to be submitted when they are available, the Department will be able to evaluate the results sooner and on a rolling basis.

Under 668.171(b), General standards of financial responsibility:

1. **Require institutions to demonstrate they are able to meet their financial obligations** by noting additional cases that constitute a failure to do so, including failure to make debt payments for more than 90 days, failure to make payroll obligations, or borrowing from employee retirement plans without authorization.

Under 668.171(c), Mandatory triggering events: The Department proposes to revise the set of conditions that automatically require posting of financial protection if the event occurs as prescribed in the regulations. These triggers are designed to measure external events or financial circumstances that may not appear in the institution's regular financial statements and/or that may not yet be reflected in the composite score.

1. **Revise triggering events for debts, liabilities, and losses.** This includes clarifying that settlements, final judgments, or administrative proceeding determinations will trigger a financial protection requirement pre-appeal if the amount of the liability would cause the composite score to fail. The proposed language also restores a previously eliminated trigger related to lawsuits, and clarifies that State or Federal lawsuits, or qui tam lawsuits in which the Federal government decides to intervene, will be mandatory triggering events. The language also adds a new trigger related to adjudicated borrower defense to repayment claims where the approved loan discharges total more than 5 percent of title IV volume at an institution.
2. **Clarify language related to withdrawal of owner's equity for proprietary institutions** to ensure that withdrawals are accurately captured.
3. **Restore and revise a financial protection trigger for cases where the institution is required to submit a teach-out plan and/or agreement**, pursuant to regulations at 34 CFR 602.24(c)(1), related to auditor concerns, probation or equivalent status by the accrediting agency, or a requirement by the Secretary that an institution on provisional status submit a teach-out plan and/or agreement as a condition of that status.
4. **Move a trigger related to major actions by a state authorizer** from discretionary to mandatory, ensuring financial protection if an institution may be subject to a loss of title IV eligibility and closure due to state actions against the school.
5. **Refine the language for financial protection triggers affecting publicly traded institutions** to better reflect early warning signs of problems with these schools.
6. **Move triggers related to loss of Title IV eligibility due to failure to meet 90/10 requirements or two years of a failed cohort default rate that is not successfully appealed** from discretionary triggers to mandatory triggers. Also clarify that the 90/10 triggering event requires financial protection be held by the Secretary for at least two years, ensuring that proprietary institutions provide adequate financial protection if they may fail again to meet the 90/10 requirements.
7. **Adds a new trigger assessing the impact when institutions make a contribution to the school in the quarter before the end of the fiscal year, and then make a distribution in the first two quarters of the next fiscal year.** The Department is aware of attempts to manipulate financial responsibility scores through this practice, so assessing the effects of those transactions will allow the Department to obtain financial protection where it is required.

Under 668.171(d), Discretionary triggering events: The Department proposes to revise the set of conditions that may, at the discretion of the Secretary, require posting of financial protection if the event occurs as prescribed in the regulations. These triggers are designed to measure external events or financial circumstances that may not appear in the institution's regular financial statements and/or that may not yet be reflected in the composite score.

1. **Refine the language related to accreditor actions** to clarify that probation, show cause, or equivalent statuses may all require financial protection at the discretion of the Secretary.
2. **Restore a trigger that allows the Department to seek financial protection in the event that the institution sees significant fluctuations in title IV volume.** This would allow for financial protection if volume changed significantly in consecutive award years or across a period of award years.

3. **Allow the Secretary to obtain financial protection on the basis of interim financial data** submitted to the Department that show significant concerns with respect to cash flows, liquidity, or withdrawal rates. This will ensure that interim financial data can be used to determine significant problems and request financial protection in a timely manner.
4. **Restores a prior trigger related to pending claims for borrower defense relief** when the Secretary has formed a group process to consider those claims.
5. **Adds two new triggers related to indications of possible future closure.** One relates to the discontinuation of a significant share of academic programs at the institution, which may be an indication that the institution is no longer able to offer the education for which students enrolled. The second relates to the closure of most of an institution's locations, or the closure of ground-based locations while maintaining an online presence.

Under 668.171(e), Recalculating the composite score:

1. **Make technical changes** to adjust the cross-references to the triggering events in (c) and (d), and to more accurately reflect the triggering events as they are revised throughout that section.

Under 668.171(f), Reporting requirements:

1. **Make technical changes** to adjust the reporting requirements to reflect changes to the mandatory and discretionary triggering events.

Under 668.171(h), Audit opinions and disclosures:

1. **Adjust the language regarding an auditor's opinion of doubt about the institution's ability to continue operations** to clarify that the Department may independently assess whether the auditor's concerns have been addressed or whether the opinion of doubt reflects a lack of financial responsibility.

Under 668.174, Past performance:

1. **Clarify the language related to compliance audit or program review findings that lead to a liability of at least 5 percent of Title IV volume** at the institution, so that the language more clearly suggests the reports in question were those issued in the two most recent years, rather than reviews conducted in the two most recent years.

Under 668.175, Alternative standards and requirements:

1. **Make technical changes** to adjust cross-references and clarify the language related to financial surety.

Under 668.176, Change of ownership:

1. **Consolidate financial responsibility requirements for institutions undergoing a change in ownership** into Subpart L through a new proposed section 668.176. This will help to clarify the regulations so that institutions are aware of the requirements that apply in the event of a change in ownership. This includes specifying the requirements for a materially complete application, which include two years of audited financial statements at the level of the change in ownership or a letter of credit requirement. Proposed section 668.176 also specifies conditions for financial responsibility, including not having operating losses, requires positive assets, and requires a

passing composite score and compliance with other requirements of Subpart L. Finally, the proposed language requires institutions to receive a temporary provisional Program Participation Agreement following a change in ownership.

Proposed Regulation Redline:

§ 668.15 ~~Factors of financial responsibility.~~ [Reserved]

~~**(a)** General. To begin and to continue to participate in any Title IV, HEA program, an institution must demonstrate to the Secretary that the institution is financially responsible under the requirements established in this section.~~

~~**(b)** General standards of financial responsibility. In general, the Secretary considers an institution to be financially responsible only if it -~~

~~**(1)** Is providing the services described in its official publications and statements;~~

~~**(2)** Is providing the administrative resources necessary to comply with the requirements of this subpart;~~

~~**(3)** Is meeting all of its financial obligations, including but not limited to -~~

~~**(i)** Refunds that it is required to make; and~~

~~**(ii)** Repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary;~~

~~**(4)** Is current in its debt payments. The institution is not considered current in its debt payments if -~~

~~**(i)** The institution is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statement; or~~

~~**(ii)** the institution fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover those funds;~~

~~**(5)** Except as provided in paragraph (d) of this section, in accordance with procedures established by the Secretary, submits to the Secretary an irrevocable letter of credit, acceptable and payable to the Secretary equal to 25 percent of the total dollar amount of Title IV, HEA program refunds paid by the institution in the previous fiscal year;~~

~~**(6)** Has not had, as part of the audit report for the institution's most recently completed fiscal year -~~

~~**(i)** A statement by the accountant expressing substantial doubt about the institution's ability to continue as a going concern; or~~

~~**(ii)** A disclaimed or adverse opinion by the accountant;~~

~~**(7)** For a for-profit institution -~~

~~**(i)**~~

~~**(A)** Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current~~

~~liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables;~~

~~**(B)** Has not had operating losses in either or both of its two latest fiscal years that in sum result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the two-year period. The Secretary may calculate an operating loss for an institution by excluding from net income: extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and, the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth shall exclude all assets defined as intangible in accordance with generally accepted accounting principles; and~~

~~**(C)** Had, for its latest fiscal year, a positive tangible net worth. In applying this standard, a positive tangible net worth occurs when the institution's tangible assets exceed its liabilities. The calculation of tangible net worth shall exclude all assets classified as intangible in accordance with the generally accepted accounting principles; or~~

~~**(ii)** Demonstrates to the satisfaction of the Secretary that it has currently issued and outstanding debt obligations that are (without insurance, guarantee, or credit enhancement) listed at or above the second highest rating level of credit quality given by a nationally recognized statistical rating organization;~~

~~**(8)** For a nonprofit institution -~~

~~**(i)**~~

~~**(A)** Prepares a classified statement of financial position in accordance with generally accepted accounting principles or provides the required information in notes to the audited financial statements;~~

~~**(B)** Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables.~~

~~**(C)**~~

~~***(1)*** Has, at the end of its latest fiscal year, a positive unrestricted current fund balance or positive unrestricted net assets. In calculating the unrestricted current fund balance or the unrestricted net assets for an institution, the Secretary may include funds that are temporarily restricted in use by the institution's governing body that can be transferred to the current unrestricted fund or added to net unrestricted assets at the discretion of the governing body; or~~

~~***(2)*** Has not had, an excess of current fund expenditures over current fund revenues over both of its 2 latest fiscal years that results in a decrease exceeding 10 percent in either the unrestricted current fund balance or the~~

~~unrestricted net assets at the beginning of the first year of the 2-year period. The Secretary may exclude from net changes in fund balances for the operating loss calculation: Extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and the cumulative effect of changes in accounting principle. In calculating the institution's unrestricted current fund balance or the unrestricted net assets, the Secretary may include funds that are temporarily restricted in use by the institution's governing body that can be transferred to the current unrestricted fund or added to net unrestricted assets at the discretion of the governing body; or~~

~~**(ii)** Demonstrates to the satisfaction of the Secretary that it has currently issued and outstanding debt obligations which are (without insurance, guarantee, or credit enhancement) listed at or above the second highest rating level of credit quality given by a nationally recognized statistical rating organization.~~

~~**(9)** For a public institution -~~

~~**(i)** Has its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity;~~

~~**(ii)** Has a positive current unrestricted fund balance if reporting under the Single Audit Act;~~

~~**(iii)** Has a positive unrestricted current fund in the State's Higher Education Fund, as presented in the general purpose financial statements;~~

~~**(iv)** Submits to the Secretary, a statement from the State Auditor General that the institution has, during the past year, met all of its financial obligations, and that the institution continues to have sufficient resources to meet all of its financial obligations; or~~

~~**(v)** Demonstrates to the satisfaction of the Secretary that it has currently issued and outstanding debt obligations which are (without insurance, guarantee, or credit enhancement) listed at or above the second highest rating level of credit quality given by a nationally recognized statistical rating organization.~~

~~**(c)** Past performance of an institution or persons affiliated with an institution. An institution is not financially responsible if -~~

~~**(1)** A person who exercises substantial control over the institution or any member or members of the person's family alone or together -~~

~~**(i)**~~

~~**(A)** Exercises or exercised substantial control over another institution or a third-party servicer that owes a liability for a violation of a Title IV, HEA program requirement; or~~

~~**(B)** Owes a liability for a violation of a Title IV, HEA program requirement; and~~

~~**(ii)** That person, family member, institution, or servicer does not demonstrate that the liability is being repaid in accordance with an agreement with the Secretary; or~~

~~**(2)** The institution has -~~

~~**(i)** Been limited, suspended, terminated, or entered into a settlement agreement to resolve a limitation, suspension, or termination action initiated by the Secretary or a guaranty agency (as defined in 34 CFR part 682) within the preceding five years;~~

~~**(ii)** Had -~~

~~**(A)** An audit finding, during its two most recent audits of its conduct of the Title IV, HEA programs, that resulted in the institution's being required to repay an amount greater than five percent of the funds that the institution received under the Title IV, HEA programs for any award year covered by the audit; or~~

~~**(B)** A program review finding, during its two most recent program reviews, of its conduct of the Title IV, HEA programs that resulted in the institution's being required to repay an amount greater than five percent of the funds that the institution received under the Title IV, HEA programs for any award year covered by the program review;~~

~~**(iii)** Been cited during the preceding five years for failure to submit acceptable audit reports required under this part or individual Title IV, HEA program regulations in a timely fashion; or~~

~~**(iv)** Failed to resolve satisfactorily any compliance problems identified in program review or audit reports based upon a final decision of the Secretary issued pursuant to subpart G or subpart H of this part.~~

~~**(d)** Exceptions to the general standards of financial responsibility.~~

~~**(1)**~~

~~**(i)** An institution is not required to meet the standard in paragraph (b)(5) of this section if the Secretary determines that the institution -~~

~~**(A)**~~

~~***(1)*** Is located in, and is legally authorized to operate within, a State that has a tuition recovery fund that is acceptable to the Secretary and ensures that the institution is able to pay all required refunds; and~~

~~***(2)*** Contributes to that tuition recovery fund.~~

~~**(B)** Has its liabilities backed by the full faith and credit of the State, or by an equivalent governmental entity; or~~

~~**(C)** As determined under paragraph (g) of this section, demonstrates, to the satisfaction of the Secretary, that for each of the institution's two most recently completed fiscal years, it has made timely refunds to students in accordance with § 668.22(j), and that it has met or exceeded all of the financial responsibility standards in this section that were in effect for the corresponding periods during the two-year period.~~

~~**(ii)** In evaluating an application to approve a State tuition recovery fund to exempt its participating schools from the Federal cash reserve requirements, the Secretary will consider the extent to which the State tuition recovery fund:~~

~~**(A)** Provides refunds to both in-state and out-of-state students;~~

~~**(B)** Allocates all refunds in accordance with the order delineated in § 668.22(i); and~~

~~**(C)** Provides a reliable mechanism for the State to replenish the fund should any claims arise that deplete the funds assets.~~

~~**(2)** The Secretary considers an institution to be financially responsible, even if the institution is not otherwise financially responsible under paragraphs (b)(1) through (4) and (b)(6) through (9) of this section, if the institution -~~

~~**(i)** Submits to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary equal to not less than one-half of the Title IV, HEA program funds received by the institution during the last complete award year for which figures are available; or~~

~~**(ii)** Establishes to the satisfaction of the Secretary, with the support of a financial statement submitted in accordance with paragraph (e) of this section, that the institution has sufficient resources to ensure against its precipitous closure, including the ability to meet all of its financial obligations (including refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary). The Secretary considers the institution to have sufficient resources to ensure against precipitous closure only if -~~

~~**(A)** The institution formerly demonstrated financial responsibility under the standards of financial responsibility in its preceding audited financial statement (or, if no prior audited financial statement was requested by the Secretary, demonstrates in conjunction with its current audit that it would have satisfied this requirement), and that its most recent audited financial statement indicates that -~~

~~***(1)*** All taxes owed by the institution are current;~~

~~***(2)*** The institution's net income, or a change in total net assets, before extraordinary items and discontinued operations, has not decreased by more than 10 percent from the prior fiscal year, unless the institution demonstrates that the decreased net income shown on the current financial statement is a result of downsizing pursuant to a management-approved business plan;~~

~~***(3)*** Loans and other advances to related parties have not increased from the prior fiscal year unless such increases were secured and collateralized, and do not exceed 10 percent of the prior fiscal year's working capital of the institution;~~

~~***(4)*** The equity of a for-profit institution, or the total net assets of a non-profit institution, have not decreased by more than 10 percent of the prior year's total equity;~~

~~***(5)*** Compensation for owners or other related parties (including bonuses, fringe benefits, employee stock option allowances, 401k contributions, deferred compensation allowances) has not increased from the prior year at a rate higher than for all other employees;~~

~~***(6)*** The institution has not materially leveraged its assets or income by becoming a guarantor on any new loan or obligation on behalf of any related party;~~

~~***(7)*** All obligations owed to the institution by related parties are current, and that the institution has demanded and is receiving payment of all funds owed from related parties that are payable upon demand. For purposes of this section, a person does not become a related party by attending an institution as a student;~~

~~**(B)** There have been no material findings in the institution's latest compliance audit of its administration of the Title IV HEA programs; and~~

~~**(C)** There are no pending administrative or legal actions being taken against the institution by the Secretary, any other Federal agency, the institution's nationally recognized accrediting agency, or any State entity.~~

~~**(3)** An institution is not required to meet the acid test ratio in paragraph (b)(7)(i)(A) or (b)(8)(i)(B) of this section if the institution is an institution that provides a 2-year or 4-year educational program for which the institution awards an associate or baccalaureate degree that demonstrates to the satisfaction of the Secretary that -~~

~~**(i)** There is no reasonable doubt as to its continued solvency and ability to deliver quality educational services;~~

~~**(ii)** It is current in its payment of all current liabilities, including student refunds, repayments to the Secretary, payroll, and payment of trade creditors and withholding taxes; and~~

~~**(iii)** It has substantial equity in institution-occupied facilities, the acquisition of which was the direct cause of its failure to meet the acid test ratio requirement.~~

~~**(4)** The Secretary may determine an institution to be financially responsible even if the institution is not otherwise financially responsible under paragraph (c)(1) of this section if -~~

~~**(i)** The institution notifies the Secretary, in accordance with 34 CFR 600.30, that the person referenced in paragraph (c)(1) of this section exercises substantial control over the institution; and~~

~~**(ii)**~~

~~**(A)** The person repaid to the Secretary a portion of the applicable liability, and the portion repaid equals or exceeds the greater of -~~

~~***(1)*** The total percentage of the ownership interest held in the institution or third-party servicer that owes the liability by that person or any member or members of that person's family, either alone or in combination with one another;~~

~~***(2)*** The total percentage of the ownership interest held in the institution or servicer that owes the liability that the person or any member or members of the person's family, either alone or in combination with one another, represents~~

~~or represented under a voting trust, power of attorney, proxy, or similar agreement; or~~

~~***(3)*** Twenty-five percent, if the person or any member of the person's family is or was a member of the board of directors, chief executive officer, or other executive officer of the institution or servicer that owes the liability, or of an entity holding at least a 25 percent ownership interest in the institution that owes the liability;~~

~~**(B)** The applicable liability described in paragraph (c)(1) of this section is currently being repaid in accordance with a written agreement with the Secretary; or~~

~~**(C)** The institution demonstrates why -~~

~~***(1)*** The person who exercises substantial control over the institution should nevertheless be considered to lack that control; or~~

~~***(2)*** The person who exercises substantial control over the institution and each member of that person's family nevertheless does not or did not exercise substantial control over the institution or servicer that owes the liability.~~

~~**(e)** [Reserved]~~

~~**(f)** Definitions and terms. For the purposes of this section -~~

~~**(1)**~~

~~**(i)** An “ownership interest” is a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of the operation of, an institution, institution's parent corporation, a third-party servicer, or a third-party servicer's parent corporation.~~

~~**(ii)** The term “ownership interest” includes, but is not limited to -~~

~~**(A)** An interest as tenant in common, joint tenant, or tenant by the entireties;~~

~~**(B)** A partnership; and~~

~~**(C)** An interest in a trust.~~

~~**(iii)** The term “ownership interest” does not include any share of the ownership or control of, or any right to share in the proceeds of the operation of -~~

~~**(A)** A mutual fund that is regularly and publicly traded;~~

~~**(B)** An institutional investor; or~~

~~**(C)** A profit-sharing plan, provided that all employees are covered by the plan;~~

~~**(2)** The Secretary generally considers a person to exercise substantial control over an institution or third-party servicer, if the person -~~

~~**(i)** Directly or indirectly holds at least a 25 percent ownership interest in the institution or servicer;~~

~~**(ii)** Holds, together with other members of his or her family, at least a 25 percent ownership interest in the institution or servicer;~~

~~**(iii)** Represents, either alone or together with other persons, under a voting trust, power of attorney, proxy, or similar agreement one or more persons who hold, either individually or in combination with the other persons represented or the person representing them, at least a 25 percent ownership in the institution or servicer; or~~

~~**(iv)** Is a member of the board of directors, the chief executive officer, or other executive officer of -~~

~~**(A)** The institution or servicer; or~~

~~**(B)** An entity that holds at least a 25 percent ownership interest in the institution or servicer; and~~

~~**(3)** The Secretary considers a member of a person's family to be a parent, sibling, spouse, child, spouse's parent or sibling, or sibling's or child's spouse.~~

~~**(g)** Two-year performance requirement.~~

~~**(1)** The Secretary considers an institution to have satisfied the requirements in paragraph (d)(1)(C) of this section if the independent certified public accountant, or government auditor who conducted the institution's compliance audits for the institution's two most recently completed fiscal years, or the Secretary or a State or guaranty agency that conducted a review of the institution covering those fiscal years -~~

~~**(i)**~~

~~**(A)** For either of those fiscal years, did not find in the sample of student records audited or reviewed that the institution made late refunds to 5 percent or more of the students in that sample. For purposes of determining the percentage of late refunds under this paragraph, the auditor or reviewer must include in the sample only those title IV, HEA program recipients who received or should have received a refund under § 668.22; or~~

~~**(B)** The Secretary considers the institution to have satisfied the conditions in paragraph (g)(1)(i)(A) of this section if the auditor or reviewer finds in the sample of student records audited or reviewed that the institution made only one late refund to a student in that sample; and~~

~~**(ii)** For either of those fiscal years, did not note a material weakness or a reportable condition in the institution's report on internal controls that is related to refunds.~~

~~**(2)** If the Secretary or a State or guaranty agency finds during a review conducted of the institution that the institution no longer qualifies for an exemption under paragraph (d)(1)(C) of this section, the institution must -~~

~~**(i)** Submit to the Secretary the irrevocable letter of credit required in paragraph (b)(5) of this section no later than 30 days after the Secretary or State or guaranty agency notifies the institution of that finding; and~~

~~**(ii)** Notify the Secretary of the guaranty agency or State that conducted the review.~~

~~**(3)** If the auditor who conducted the institution's compliance audit finds that the institution no longer qualifies for an exemption under paragraph (d)(1)(C) of this section, the institution must submit to the Secretary the irrevocable letter of credit required in paragraph (b)(5) of this section no later than 30 days after the date the institution's compliance audit must be submitted to the Secretary.~~

~~**(h)** Foreign institutions. The Secretary makes a determination of the financial responsibility for a foreign institution on the basis of financial statements submitted under § 668.23(h).~~

§ 668.23 Compliance audits and audited financial statements.

(a) General -

(1) Independent auditor. For purposes of this section, the term "independent auditor" refers to an independent certified public accountant or a government auditor. To conduct an audit under this section, a government auditor must meet the Government Auditing Standards qualification and independence standards, including standards related to organizational independence.

(2) Institutions. An institution that participates in any title IV, HEA program must at least annually have an independent auditor conduct a compliance audit of its administration of that program and an audit of the institution's general purpose financial statements.

(3) Third-party servicers. Except as provided under this part or 34 CFR part 682, with regard to complying with the provisions under this section a third-party servicer must follow the procedures contained in the audit guides developed by and available from the Department of Education's Office of Inspector General. A third-party servicer is defined under § 668.2 and 34 CFR 682.200.

(4) Submission deadline. Except as provided by the Single Audit Act, Chapter 75 of title 31, United States Code, an institution must submit annually to the Secretary its compliance audit and its audited financial statements ~~no later than~~by the earlier of 30 days following the date of the auditor's report or six months after the last day of the institution's fiscal year.

(5) Audit submission requirements. In general, the Secretary considers the compliance audit and audited financial statement submission requirements of this section to be satisfied by an audit conducted in accordance with the Office of Management and Budget Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, or the audit guides developed by and available from the Department of Education's Inspector General, whichever is applicable to the entity, and provided that the Federal student aid functions performed by that entity are covered in the submission. (Both OMB circulars are available by calling OMB's Publication Office at (202) 395-7332, or they can be obtained in electronic form on the OMB Home Page (http://www.whitehouse.gov).

* * *

SUBPART L - FINANCIAL RESPONSIBILITY

§ 668.171 General.

* * *

(b) General standards of financial responsibility. Except as provided under paragraph~~s (c), (d), and~~ (h) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that -

(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;

(2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;

(3) The institution is able to meet all of its financial obligations and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution is not deemed able to meet its financial or administrative obligations if -

> **(i)** It fails to make refunds under its refund policy, ~~or~~ return title IV, HEA program funds for which it is responsible under § 668.22, or pay title IV credit balances as required under §668.164(h)(ii);
>
> **(ii)** It fails to make repayments to the Secretary for any debt or liability arising from the institution's participation in the title IV, HEA programs;
>
> **(iii)** It fails to make a payment in accordance with an existing undisputed financial obligation for more than 90 days;
>
> **(iv)** It fails to make payroll obligations per its published payroll schedule;
>
> **(v)** It borrows funds from retirement plans or restricted funds without authorization; or
>
> **(v~~ii~~i)** It is subject to an action or event described in paragraph (c) of this section (mandatory triggering events), or an action or event that the Secretary determines is likely to have a material adverse effect on the financial condition of the institution under paragraph (d) of this section (discretionary triggering events); and

(4) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).

(c) Mandatory triggering events. An institution is not able to meet its financial or administrative obligations under paragraph (b)(3)(vi~~iii~~) of this section if -

(1) ~~After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, o~~One or more of the following occurs:

> **(i)** *Debts, liabilities, and losses.*
>
> > **(A)** After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, t~~T~~he institution is required to pay any debt or incur~~s~~ any liability from a settlement, final judgment in a judicial proceeding, or ~~final~~ a determination arising from an administrative ~~or judicial action or proceeding initiated by a Federal or State entity~~proceeding, and as a result of the debts, liabilities, or losses that have stemmed from those actions or events, the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (e) of this

section~~. A determination arising from an administrative action or proceeding initiated by a Federal or State entity means the determination was made only after an institution had notice and an opportunity to submit its position before a hearing official. A final determination arising from an administrative action or proceeding initiated by a Federal entity includes a final determination arising from any administrative action or proceeding initiated by the Secretary. For purposes of this section, the liability is the amount stated in the final judgment or final determination. A judgment or determination becomes final when the institution does not appeal or when the judgment or determination is not subject to further appeal~~;

(B) The institution is being sued for financial relief in an action brought on or after July 1, 2023, by a Federal or State authority, or through a qui tam lawsuit in which the Federal government has intervened and the suit has been pending for 120 days; or

(C) The Secretary has adjudicated claims in favor of borrowers under the loan discharge provisions in 34 CFR part 685 and the total amount of the loans discharged since July 1, 2023, is equal to or greater than 5 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.

(~~B~~ii) *Withdrawal of owner's equity.*

(A) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend ~~(e.g., a capital distribution that is the equivalent of wages in a sole proprietorship or partnership, a distribution of dividends or return of capital, or a related party receivable)~~, unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated; or is the equivalent of wages in a sole proprietorship or partnership or a required dividend or return of capital; and

(~~ii~~B) As a result of that liability or withdrawal, the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (e) of this section.

(iii) *Teach-out plans.* The institution is required to submit a teach-out plan and/or agreement, for a reason described in ~~§~~34 CFR 602.24(c)(1), that covers the closing of the institution or any of its branches or additional locations.

(iv) *State actions.* The institution is cited by a State licensing or authorizing agency for failing to meet State or agency requirements and the agency provides notice that it will withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement;

(~~2~~v) *Publicly traded institutions.* A~~For a~~ publicly traded institution is subject to one or more of the following actions or events:

(~~i~~A) *SEC actions.* The U.S. Securities and Exchange Commission (SEC) issues an order suspending or revoking the registration of the institution's securities pursuant to Section 12(j) of the Securities ~~and~~ Exchange Act of 1934 (the "Exchange Act") or suspends trading of the institution's securities on any national securities exchange pursuant to Section 12(k) of the Exchange Act.~~; or~~

(~~ii~~B) *Exchange actions.* The national securities exchange on which the institution's securities are ~~traded~~ listed notifies the institution that it is not in compliance with the exchange's listing requirements ~~and, as a result, the institution's~~or its securities are delisted~~, either voluntarily or involuntarily, pursuant to the rules of the relevant national securities exchange~~.

(~~iii~~C) *SEC reports.* The ~~SEC~~institution failed to file a required annual or quarterly ~~is not in timely receipt of a required~~ report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25.~~and did not issue an extension to file the report.~~

(vi) *Non-Federal educational assistance funds.* For its most recently completed fiscal year, a proprietary institution did not receive at least 10 percent of its revenue from sources other than Federal educational assistance, as provided under § 668.28(c). The surety provided under this requirement will remain in place until the institution passes the 90/10 revenue requirement for two consecutive years~~;~~

(vii) *Cohort default rates.* The institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless -

(A) The institution files a challenge, request for adjustment, or appeal under ~~that~~ subpart N of this part with respect to its rates for one or both of those fiscal years; and

(B) That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both of those years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification; or~~.~~

(viii) *Contributions and distributions.*

(A) An institution made a contribution in the last quarter of the fiscal year, and then made a distribution during the first two quarters of the next fiscal year; and

(B) The removal of such contribution up to the amount of the distribution results in a recalculated composite score of less than 1.0, as determined by the Secretary under paragraph (e) of this section.

(~~3~~2) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score~~For the period described in (c)(1) of this section~~, when the institution is subject to two or more discretionary triggering events, as defined in paragraph (d) of this section, those events become mandatory triggering events, unless a triggering event is resolved before any subsequent event(s) occurs.

(d) Discretionary triggering events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(3)(~~iii~~vi) of this section if any of the following events is likely to have a material adverse effect on the financial condition of the institution -

(1) *Accrediting agency actions.* The institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards~~accrediting agency for the institution issued an order, such as a show cause order or similar action, that, if not satisfied, could result in the withdrawal, revocation or suspension of institutional accreditation for failing to meet one or more of the agency's standards~~;

(2) *Violation of a loan agreement.*

(i) The institution violated a provision or requirement in a security or loan agreement with a creditor; and

(ii) As provided under the terms of that security or loan agreement, a monetary or nonmonetary default or delinquency event occurs, or other events occur, that trigger or enable the creditor to require or impose on the institution, an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees;

~~**(3)** The institution's State licensing or authorizing agency notified the institution that it has violated a State licensing or authorizing agency requirement and that the agency intends to withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement;~~

~~**(4)** For its most recently completed fiscal year, a proprietary institution did not receive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c);~~

(3) *Fluctuations in Title IV volume.* There is a significant fluctuation between consecutive award years, or a period of award years, in the amount of Direct Loan or Pell Grant funds, or a combination of those funds, received by the institution that cannot be accounted for by changes in those programs;

(4~~5~~) *High annual dropout rates.* As calculated by the Secretary, the institution has high annual dropout rates; ~~or~~

~~**(6)** The institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless -~~

~~**(i)** The institution files a challenge, request for adjustment, or appeal under that subpart with respect to its rates for one or both of those fiscal years; and~~

~~**(ii)** That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both of those years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification.~~

(5) *Interim reporting.* For an institution required to provide additional financial reporting to the Department due to a failure to meet the financial responsibility standards in Subpart L or due to a change in ownership, there are negative cash flows, failure of other liquidation ratios, cash flows that significantly miss the projections submitted to the Department, or withdrawal rates that increase significantly;

(6) The Secretary has pending claims for borrower relief discharge under § 685.206 and has formed a group process to consider claims under § 685.402;

(7) The institution discontinues a significant share of its academic programs; or

(8) The institution closes most of its locations, or obtains approval from the Department to close most or all of its ground-based locations while maintaining an online program.

(e) Recalculating the composite score. The Secretary recalculates an institution's most recent composite score by recognizing the actual amount of the liability, or cumulative liabilities, incurred by an institution under paragraph (c)(1)(i)(A) of this section as an expense or accounting for the actual withdrawal, or cumulative withdrawals, of owner's equity under paragraph (c)(1)(ii)~~(B)~~ of this section as a reduction in equity, and accounts for that expense or withdrawal by -

(1) For liabilities incurred by a proprietary institution -

(i) For the primary reserve ratio, increasing expenses and decreasing adjusted equity by that amount;

(ii) For the equity ratio, decreasing modified equity by that amount; and

(iii) For the net income ratio, decreasing income before taxes by that amount;

(2) For liabilities incurred by a non-profit institution -

(i) For the primary reserve ratio, increasing expenses and decreasing expendable net assets by that amount;

(ii) For the equity ratio, decreasing modified net assets by that amount; and

(iii) For the net income ratio, decreasing change in net assets without donor restrictions by that amount; and

(3) For the amount of owner's equity withdrawn from a proprietary institution -

(i) For the primary reserve ratio, decreasing adjusted equity by that amount; and

(ii) For the equity ratio, decreasing modified equity by that amount.

(f) Reporting requirements.

(1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events -

(i) For a liability incurred under paragraph (c)(1)(i)(A) of this section, no later than 10 days after the date of written notification to the institution of the final judgment or ~~final~~ determination;

(ii) For a lawsuit under paragraph (c)(1)(i)(B) of this section, no later than 10 days after the institution is served with the complaint and 10 days after the suit has been pending for 120 days;

(iii) For a withdrawal of owner's equity described in paragraph (c)(1)(ii)~~(B)~~ of this section -

(A) For a capital distribution that is the equivalent of wages in a sole proprietorship or partnership, no later than 10 days after the date the Secretary notifies the institution that its composite score is less than 1.5. In response to that notice, the institution must report the total amount of the wage-equivalent distributions it made during its prior fiscal year and any distributions that were made to pay any taxes related to the operation of the institution. During its current fiscal year and the first six months of its subsequent fiscal year (18-month period), the institution is not required to report any distributions to the Secretary, provided that the institution does not make wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year, less any distributions that were made to pay any taxes related to the operation of the institution. However, if the institution makes wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year less any distributions that were made to pay any taxes related to the operation of the institution at any time during the 18-month period, it must report each of those distributions no later than 10 days after they are made, and the Secretary recalculates the institution's composite score based on the cumulative amount of the distributions made at that time;

(B) For a distribution of dividends or return of capital, no later than 10 days after the dividends are declared or the amount of return of capital is approved; or

(C) For a related party receivable, not later than 10 days after that receivable occurs;

(iv) For a contribution and distribution under paragraph (c)(1)(viii), not later than 10 days following each transaction.

(~~iii~~v) For the provisions relating to a publicly traded institution under paragraph (c)(1~~2~~)(v) of this section, no later than 10 days after the date that -

(A) The SEC issues an order suspending or revoking the registration of the institution's securities pursuant to Section 12(j) of the Exchange Act or suspends trading of the institution's securities on any national securities exchange pursuant to Section 12(k) of the Exchange Act; or

(B) The national securities exchange on which the institution's securities are ~~traded~~ listed ~~warns~~notifies the institution of noncompliance with the rules of the relevant national securities exchange or ~~involuntarily~~ delists its securities, or the institution voluntarily delists its securities~~, pursuant to the rules of the relevant national securities exchange~~;

(~~iv~~vi) For a State or agency~~n~~ action under paragraphs (c)(1)(iii), (c)(1)(iv), or (d)(1) of this section, 10 days after the date on which the institution is notified by its State or accrediting agency of that action;

(vii) For the loan agreement provisions in paragraph (d)(2) of this section, 10 days after a loan violation occurs, the creditor waives the violation, or the creditor imposes sanctions or penalties in exchange or as a result of granting the waiver; ~~and~~

~~**(vi)** For a State agency notice relating to terminating an institution's licensure or authorization under paragraph (d)(3) of this section, 10 days after the date on which the institution receives that notice; and~~

(viii) For the non-title IV revenue provision in paragraph (c)(1)(vi) ~~(d)(4)~~ of this section, no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3); ~~.~~ and

(ix) For the discontinuation of academic programs provision in paragraph (d)(7), no later than 10 days after the discontinuation of programs in the institution's fiscal year affecting at least 25 percent of enrolled students.

(2) The Secretary may take an administrative action under paragraph (i) of this section against an institution, or determine that the institution is not financially responsible, if it fails to provide timely notice to the Secretary as provided under paragraph (f)(1) of this section, or fails to respond, within the timeframe specified by the Secretary, to any determination made, or request for information, by the Secretary under paragraph (f)(3) of this section.

(3)

(i) In its notice to the Secretary under this paragraph, or in its response to a preliminary determination by the Secretary that the institution is not financially responsible because of a triggering event under paragraph (c) or (d) of this section, in accordance with procedures established by the Secretary, the institution may -

(A) Demonstrate that the reported withdrawal of owner's equity under paragraph (c)(1)(ii)~~(B)~~ of this section was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(B) Show that the creditor waived a violation of a loan agreement under paragraph (d)(2) of this section. However, if the creditor imposes additional constraints or requirements as a condition of waiving the violation, or imposes penalties or requirements under paragraph (d)(2)(ii) of this section, the institution must identify and describe those penalties, constraints, or requirements and demonstrate that complying with those actions will not adversely affect the institution's ability to meet its financial obligations;

(C) Show that the triggering event has been resolved, or demonstrate that the institution has insurance that will cover all or part of the liabilities that arise under paragraph (c)(1)(i)(A) of this section; or

(D) Explain or provide information about the conditions or circumstances that precipitated a triggering event under paragraph (c) or (d) of this section that demonstrates that the triggering event has not or will not have a material adverse effect on the institution.

(ii) The Secretary will consider the information provided by the institution in determining whether to issue a final determination that the institution is not financially responsible.

(g) Public institutions.

(1) The Secretary considers a domestic public institution to be financially responsible if the institution -

(i)

(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, T~~t~~ribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution -

(i)

(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

(h) Audit opinions and disclosures. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the institution was required to include ~~financial statements contain~~ a disclosure in the notes to the financial statements that contains information~~there is substantial doubt~~ about the institution's ability to continue operations~~as a going concern as required by accounting standards~~, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition, or that the ~~substantial doubt about the~~ institution's ability to continue ~~as going concern~~operations has been alleviated.

(i) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may -

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs;

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d); or

(3) Deny the institution's application for certification or recertification to participate in the title IV, HEA programs.

* * *

§ 668.174 Past performance.

(a) Past performance of an institution. An institution is not financially responsible if the institution -

(1) Has been limited, suspended, terminated, or entered into a settlement agreement to resolve a limitation, suspension, or termination action initiated by the Secretary or a guaranty agency, as defined in 34 CFR part 682, within the preceding five years;

(2) In either of its two most recent compliance audits had an audit finding, or in a report issued by the Secretary ~~had a program review finding~~ for its current fiscal year or either of its preceding two fiscal years had a program review finding, that resulted in the institution's being required to repay an amount greater than 5 percent of the funds that the institution received under the title IV, HEA programs during the year covered by that audit or program review;

(3) Has been cited during the preceding five years for failure to submit in a timely fashion acceptable compliance and financial statement audits required under this part, or acceptable audit reports required under the individual title IV, HEA program regulations; or

(4) Has failed to resolve satisfactorily any compliance problems identified in audit or program review reports based upon a final decision of the Secretary issued pursuant to subpart G or H of this part.

* * *

§ 668.175 Alternative standards and requirements.

(a) General. An institution that is not financially responsible under the general standards and provisions in § 668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) Letter of c~~C~~redit or surety alternative for new institutions. A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Secretary, or providing other surety described under paragraph (h)(2)(i) of this section, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Financial protection alternative for participating institutions. A participating institution that is not financially responsible, either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b), (c), or (d), or because of an audit opinion or going concern disclosure described under § 668.171(h), qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Secretary, or providing other ~~financial protection~~ surety described under paragraph (h)(2)(i) of this section, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution. For purposes of a failure under § 668.171(b), the institution must also remedy the issue(s) that gave rise to the failure.

(d) Zone alternative.

(1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)

(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary -

(i) Requires the institution to make disbursements to eligible students and parents, and to otherwise comply with the provisions, under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events -

(A) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement; or

(B) Any losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;

(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must -

(i) For any oversight or financial event described in paragraph (d)(2)(ii) of this section for which the institution is required to provide information, in accordance with procedures established by the Secretary, notify the Secretary no later than 10 days after that event occurs; and

(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

(e) [Reserved]

(f) Provisional certification alternative.

(1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if -

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(e) is less than 1.0, it is subject to an action or event under § 668.171(c), or an action or event under paragraph (d) that has an adverse material effect on the institution as determined by the Secretary, or because of an audit opinion or going concern disclosure described in § 668.171(h); or

(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and

(2) Under this alternative, the institution must -

(i) Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or provide other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution that the Secretary determines is backed by the full faith and credit of the State;

(ii) Remedy the issue(s) that gave rise to its failure under § 668.171(b);~~Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3), for its two most recent fiscal years~~; and

(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d)(2) and (3) of this section.

* * *

§ 668.176 Change in Ownership

(a) *Purpose.* To continue participation in the title IV, HEA programs during and following a change in ownership, institutions must meet the financial responsibility requirements in this section.

(b) Materially complete application. To meet the requirements of a materially complete application as required in 34 CFR 600.20(g)(2)(iii) and (iv)-

(1) An institution undergoing a change of ownership and control as provided under 600.31 must submit audited financial statements of its two most recently completed fiscal years, at the level of the change in ownership or the level of financial statements required by the Secretary, that are prepared and audited in accordance with the requirements of §668.23(d);~~.~~

(2) The institution must submit 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 34 CFR 668.23 at the highest level of unfractured ownership or at the level required by the Secretary.

(i) If the institution's new owner does not have two years of acceptable audited financial statements, the institution must provide financial protection in the form of a letter of credit or cash to the Secretary in the amount of 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year; or

(ii) If the institution's new owner only has one year of acceptable financial statements, the institution must provide financial protection in the form of a letter of credit or cash to the Secretary in the amount of 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year~~.~~;

(3) The institution must—

(i) Meet the financial responsibility requirements. In general, the Secretary considers an institution to be financially responsible only if it –

(A) For a for-profit institution -

(*1*) Has not had operating losses in either or both of its two latest fiscal years that in sum result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the two-year period. The Secretary may calculate an operating loss for an institution by excluding~~:~~ prior period adjustment and the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth must exclude all related party accounts receivable/other assets and all assets defined as intangible in accordance with the composite score;

(*2*) Has, for its two most recent fiscal years, a positive tangible net worth. In applying this standard, a positive tangible net worth occurs when the institution's tangible assets exceed its liabilities. The calculation of tangible net worth excludes all related party accounts receivables/other assets and all assets classified as intangible in accordance with the composite score; or

(*3*) Has a passing composite score and meets the other financial requirements of 34 CFR 668 subpart L for its most recently completed fiscal year;

(B) For a nonprofit institution -

(*1*) Has, at the end of its two most recent fiscal years, positive net assets without donor restrictions. The Secretary will exclude all related party receivables/other assets from net assets without donor restrictions and all assets classified as intangibles in accordance with the composite score;

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 5: Changes of Ownership and Change in Control
Session 1: January 18-21, 2022

Issue: Changes of Ownership and Change in Control

Statutory cites: §498(i) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 600.2, 600.4, 600.20, 600.21, 600.31; 668.14 (see Certification Procedures issue paper); Subpart L (see Financial Responsibility issue paper)

Summary of issues:

In recent years, the Education Department has seen an increase in the number of institutions of higher education (institutions) applying for changes in ownership, many of which result in a change in control and some of which also seek a conversion from proprietary to nonprofit or public status. These arrangements are often high-risk. As reported by the Government Accountability Office (GAO), of 59 changes of ownership from a for-profit entity to a nonprofit entity between January 2011 and August 2020 (involving 20 separate transactions), one entire chain (including 13 separate institutions) closed prior to the Department reaching a decision on whether to approve the requested conversion to nonprofit status. Three-fourths were sold to a for-profit entity that had not previously operated an institution of higher education, increasing the risk that students may not get the educational experience for which they are paying. One-third had what GAO termed "insider involvement" in the purchasing nonprofit organization (i.e., someone from the former for-profit owner was involved in the nonprofit purchaser, as well), suggesting greater risk of impermissible benefits to those insiders. Altogether, those institutions totaled more than $2 billion in a single year (Award Year 2018-19) in taxpayer-financed Federal student aid.

The Department has determined, in light of the clear added risk that changes in ownership present, that it is necessary to reevaluate the policies and procedures to accommodate growing numbers of changes in ownership, growing complexity of ownership arrangements, and increased risk to students and to taxpayers if federal requirements for institutions are not appropriately met.

Proposal:

The Department proposes to ensure a clearer, more streamlined process for consideration of changes in ownership, with more robust processes for ensuring that such changes ensure compliance with the Higher Education Act and related regulations. To achieve these broad outcomes, the Department specifically proposes to:

Under § 600.2 Definitions:

1. **Clarify the definitions of additional location, branch campus, distance education locations, and main campus** to address existing confusion.
2. **Clarify the definition of a non-profit institution** by specifying non-exhaustive examples of certain arrangements that are generally not considered to meet that definition, to include an institution that holds related party financing from a former owner of the institution or an

institution that enters into, or maintains, a revenue-based servicing agreement with a former owner.

Under § 600.4 Institution of higher education:

1. **Make a technical adjustment** to the language that ensures regulatory text is reflective of the statutory language in the definition of an institution by specifying that institutions include public and other nonprofit institutions.

Under § 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification, subsection (g), Application for provisional extension of certification:

1. **Require that institutions undergoing a change in ownership provide adequate notice** to the Secretary by submitting materials at least 90 days prior to the date of the transaction. Also clarifies the Secretary's authority not to approve an institution's participation in the Federal aid programs following a change in ownership.
2. **Codifies existing practice related to the submission of a new owner's audited financial statements.** This provision clarifies existing practice of requiring two years of audited financial statements, or—if two years are not available—financial surety in the amount of at least 25 percent of Title IV volume.
3. **Provides that the Secretary may require additional financial surety as needed**, in the amount of at least 10 percent of prior-year Title IV volume.

Under § 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification, subsection (h), Terms of the extension:

1. **Clarify that the Secretary is not required to rely on the same terms and conditions of the institution's Program Participation Agreement (PPA) prior to a change in ownership**. This would provide the Department with leeway to add additional terms and conditions to the provisional PPA with respect to the change in ownership, regardless of the conditions that were applied to the institution prior to the change.
2. **Makes technical adjustments to the regulatory language** to clarify that following a change in ownership, an institution is placed on a temporary program participation agreement (TPPA). This would be a non-substantive change designed to better reflect current practice.

Under 600.21 Updating application information:

1. **Clarify the reporting requirements for a change in ownership** to better reflect the many types of changes in people or entities that may occur and that must be reported to the Department, including clarifying when a "person" (defined in 34 CFR 600.31) refers to a natural person or an entity. As part of these changes, the Department proposes to increase reporting, generally by moving from reporting at a 25 percent change in ownership to a 5 percent change in ownership, to ensure that the Department has greater visibility into voting blocs and other types of corporate changes that may warrant greater scrutiny.

Under § 600.31 Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions, subsection (c), Standards for identifying changes of ownership and control:

1. **Make technical changes to the definition of "ownership or ownership interest,"** already included in the regulations to ensure clearer interpretations of when a change in ownership has and has not occurred.
2. **Revise the standards for identifying changes of ownership and control** for other entities. Many of the reported changes in ownership of at least 25 percent do not result in a change in control. The Department proposes to instead focus on changes that are historically more closely aligned with changes in control, to include changes of at least 50 percent in control or voting interest; changes in a general partner or managing member; and the addition or removal of any person that provides the financial statements to satisfy financial responsibility requirements in the regulations.
3. **Revise "excluded transactions" language** to allow the Department to more easily determine whether a particular type of transaction qualifies as excluded.

The paper also refers to changes included in the Certification Procedures issue paper related to conditions that may be applied to institutions undergoing a change in ownership.

Proposed Regulations Redline

§ 600.2 Definitions.

Additional location: A physical facility that is ~~geographically apart~~separate from the main campus of the institution and within the same ownership structure of the institution, at which the institution offers at least 50 percent of an educational program. An additional location participates in the Title IV programs only through the certification of the main campus ~~and may qualify as a branch campus~~.

* * *

Branch campus: A physical facility that is separate from~~n additional location of an institution that is geographically apart and independent of~~ the main campus of the institution and within the same ownership structure of the institution, and that also~~. The Secretary considers a location of an institution to be independent of the main campus if the location~~ -

(1) Is approved by the Secretary as a branch campus; and

(2) Is independent from the main campus, meaning the location—

(~~1~~i) Is permanent in nature;

(~~2~~ii) Offers courses in educational programs leading to a degree, certificate, or other recognized educational credential;

(~~3~~iii) Has its own faculty and administrative or supervisory organization; and

(~~4~~iv) Has its own budgetary and hiring authority.

* * *

Distance education:

(1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to

support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include -

(i) The internet;

(ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(iii) Audio conference; or

(iv) Other media used in a course in conjunction with any of the technologies listed in paragraphs (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following -

(i) Providing direct instruction;

(ii) Assessing or providing feedback on a student's coursework;

(iii) Providing information or responding to questions about the content of a course or competency;

(iv) Facilitating a group discussion regarding the content of a course or competency; or

(v) Other instructional activities approved by the institution's or program's accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency -

(i) Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and

(ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

(6) For an institution that offers on-campus programs and distance education programs, the distance education programs are associated with the main campus of the institution. For an institution that only offers distance education programs, the institution is located where its administrative offices are located and approved by its accrediting agency.

* * *

Main campus: The primary physical facility at which the institution offers eligible programs, within the same ownership structure of the institution, and certified as the main campus by the Department and the institution's accrediting agency.

* * *

Nonprofit institution: An institution that -

(1)

(i) Is owned and operated by one or more nonprofit corporations or associations and the Secretary has determined that~~,~~ no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); except that

(iv) For purposes of participating in the federal student aid programs, a nonprofit institution is generally not an institution that:

(A) Is an obligor (either directly or through any entity in its ownership chain) on a debt owed to a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution; or

(B) Either directly or through any entity in its ownership chain, enters into, or maintains, a revenue-based servicing agreement with a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution; or

(2) For a foreign institution -

* * *

§ 600.4 Institution of higher education.

(a) An institution of higher education is a public or other private nonprofit educational institution that -

(1) Is in a State, or for purposes of the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and Federal TRIO programs may also be located in the Federated States of Micronesia or the Marshall Islands;

(2) Admits as regular students only persons who -

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is physically located;

(3) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located in accordance with § 600.9;

(4)

(i) Provides an educational program -

(A) For which it awards an associate, baccalaureate, graduate, or professional degree;

(B) That is at least a two-academic-year program acceptable for full credit toward a baccalaureate degree; or

(C) That is at least a one academic year training program that leads to a certificate, or other nondegree recognized credential, and prepares students for gainful employment in a recognized occupation; and

(ii) May provide a comprehensive transition and postsecondary program, as described in 34 CFR part 668, subpart O; and

(5) Is -

(i) Accredited or preaccredited; or

(ii) Approved by a State agency listed in the FEDERAL REGISTER in accordance with 34 CFR part 603, if the institution is a public postsecondary vocational educational institution that seeks to participate only in Federal student assistance programs.

(b) An institution is physically located in a State if it has a campus or other instructional site in that State.

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

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

* * *

(g) ***Application for provisional extension of certification.***

(1) If a private nonprofit institution, a private for-profit institution, or a public institution participating in the title IV, HEA programs undergoes a change in ownership that results in a change of control as described in 34 CFR 600.31, the Secretary may continue the institution's participation in those programs on a provisional basis~~,~~ if—

(i) No later than 90 days prior to the change in ownership the institution notifies the Secretary of the change on a fully completed form designated by the Secretary and supported by the state authorization and accrediting documents identified in paragraph (g)(2)(i) and (ii) of this section, and supported by copies of the financial statements identified in paragraph (g)(2)(iii) and (iv) of this section; and

(ii) 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 day the change occurs.

(iii) Notwithstanding the submission of the items required by paragraphs (g)(1)(i) and (ii) of this section, the Secretary may determine that the participation of the institution should not be approved following the change in ownership.

(2) For purposes of this section, a private nonprofit institution, a private for-profit institution, or a public institution submits a materially complete application if it submits a fully completed application form designated by the Secretary supported by -

(i) A recently updated 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 recently updated 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 any 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 34 CFR 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 34 CFR 668.23, or equivalent information for that owner that is acceptable to the Secretary~~.~~; or, if at least two years of audited financial statements are not available, financial surety in the amount of at least 25 percent of the institution's prior year volume of title IV aid, as required in 34 CFR 668.176; and

(v) If deemed necessary by the Secretary, financial surety in the amount of at least an additional 10 percent of the institution's prior year volume of title IV aid, or a larger amount as determined by the Secretary.

(h) ***Terms of the extension.***

(1) If the Secretary approves the institution's materially complete application, the Secretary provides the institution with a temporary provisional Program Participation Agreement (TPPPA). ~~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 TPPPA ~~provisional PPA~~ expires on the earlier of -

(i) The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (h)(3) of this section apply.~~The date on which the Secretary signs a new provisional program participation agreement (PPPA)~~;

(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 (h)(3) of this section apply.~~ The date on which the Secretary co-signs a new provisional program participation agreement (PPPA).

(3) If the ~~provisional~~ TPPPA will expire under the provisions of paragraph (h)(2)(iii) of this section, the Secretary extends the provisional TPPPA on a month-to-month basis after the expiration date described in paragraph (h)(2)(iii) of this section if, prior to that expiration date, the institution provides the Secretary with the financial information required under 34 CFR 668.176.

~~**(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 Generally Accepted Accounting Principles (GAAP) published by the Financial Accounting Standards Board and audited in~~

~~accordance with Generally Accepted Government Auditing Standards (GAGAS) 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).~~

§ 600.21 Updating application information.

(a) Reporting requirements. Except as provided in paragraph (b) of this section, an eligible institution must report to the Secretary in a manner prescribed by the Secretary no later than 10 days after the change occurs, of any change in the following:

* * *

(6) A natural person or legal entity's ability to affect substantially the actions of the institution if that natural person or legal entity did not previously have this ability. The Secretary considers a natural person or legal entity to have this ability if ~~the person~~ -

(i) The natural person acquires, ~~Holds~~ alone or together with another member or members of ~~his or her~~their family, at least a 25 percent ~~"~~ownership or voting interest~~"~~ in the institution (direct or indirect) as defined in § 600.31(b);

(ii) The entity acquires, alone or together with an affiliated natural person or entity, at least a 25 percent ownership or controlling interest in the institution (director or indirect) as defined in § 600.31(b);

(iii) The natural person or entity acquires~~Represents or holds~~, either alone or together with another natural person or entity, under a voting trust, power of attorney, proxy, or similar agreement at least a 25 percent ~~"~~ownership or controlling interest~~"~~ in the institution (direct or indirect), as defined in § 600.31(b); or

(iv~~ii~~) The natural person becomes~~Is~~ a general partner, managing member, ~~the~~ chief executive officer, or chief financial officer of the institution or of an entity which has at least a 25 percent ownership or controlling interest in the institution (direct or indirect) as defined in § 600.31(b); or

(v) The entity becomes a general partner or managing member of an entity which has at least a 25 percent ownership or controlling interest in the institution (direct or indirect) as defined in § 600.31(b).

* * *

(14) In addition to the reporting required by paragraphs (a)(6) and (b) of this section, any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and subject to the requirements of § 600.20(g) and (h), including the addition or elimination of any entities in the ownership structure, a change of entity from one type of business structure to another, and any excluded transactions under § 600.31(e).

(15) In addition to the reporting required by paragraphs (a)(6), (a)(14) and (b) of this section, any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and subject to the requirements of § 600.20(g) and (h), whereby a natural person or entity acquires at least a 5 percent ownership interest (direct or indirect) of the institution.

§ 600.31 Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions.

(a)

(1) Except as provided in paragraph (a)(2) of this section, a private nonprofit, private for-profit, or public institution that undergoes a change in ownership that results in a change in control ceases to qualify as an eligible institution upon the change in ownership and control. A change of ownership that results in a change in control includes any change by which a person who has or thereby acquires an ownership interest in the entity that owns the institution or the parent of that entity, acquires or loses the ability to control the institution.

(2) If a private nonprofit, private for-profit, or public institution has undergone a change in ownership that results in a change in control, the Secretary may, under the provisions of § 600.20(g) and (h), continue the institution's participation in the title IV, HEA programs on a provisional basis, provided that the institution submits, under the provisions of § 600.20(g), a materially complete application -

> **(i)** No later than 10 business days after the change occurs; or
>
> **(ii)** For an institution owned by a publicly-traded corporation, no later than 10 business days after the institution knew, or should have known of the change based upon SEC filings, that the change occurred.

(3) In order to reestablish eligibility and to resume participation in the title IV, HEA programs, the institution must demonstrate to the Secretary that after the change in ownership and control -

> **(i)** The institution satisfies all the applicable requirements contained in §§ 600.4, 600.5, and 600.6, except that if the institution is a proprietary institution of higher education or postsecondary vocational institution, it need not have been in existence for two years before seeking eligibility; and
>
> **(ii)** The institution qualifies to be certified to participate under 34 CFR part 668, subpart B.

(b) ***Definitions.*** The following definitions apply to terms used in this section:

Closely-held corporation. Closely-held corporation (including the term “close corporation”) means -

(1) A corporation that qualifies under the law of the State of its incorporation or organization as a statutory close~~closely-held~~ corporation; or

(2) If the State of incorporation or organization has no ~~definition of closely-held corporation~~statutory close corporation provision, a corporation the stock of which -

> **(i)** Is held by no more than 30 persons; and

(ii) Has not been and is not planned to be publicly offered.

Control. Control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Ownership or ownership interest.

(1) Ownership or ownership interest means a legal or beneficial interest in an institution or its corporate parent, or a right to share in the profits derived from the operation of an institution or its corporate parent.

(2) For purposes of determining whether a change in ownership has occurred, changes in the ownership of the following are not included - ~~Ownership or ownership interest does not include an ownership interest held by -~~

(i) A mutual fund that is regularly and publicly traded;

(ii) A U.S. institutional investor, as defined in 17 CFR 240.15a-6(b)(7);

(iii) A profit-sharing plan of the institution or its corporate parent, provided that all full-time permanent employees of the institution or its corporate parent are included in the plan; or

(iv) An employee stock ownership plan (ESOP).

Parent. The parent or parent entity is the entity that controls the specified entity directly or indirectly through one or more intermediaries.

Person. Person includes a legal entity or a natural person.

Wholly-owned subsidiary. A wholly-owned subsidiary is one substantially all of whose outstanding voting securities are owned by its parent together with the parent's other wholly-owned subsidiaries.

(c) ***Standards for identifying changes of ownership and control*** -

(1) ***Closely-held corporation.*** A change in ownership and control occurs when -

(i) A person acquires more than 50 percent of the total outstanding voting stock of the corporation;

(ii) A person who holds an ownership interest in the corporation acquires control of more than 50 percent of the outstanding voting stock of the corporation; or

(iii) A person who holds or controls 50 percent or more of the total outstanding stock of the corporation ceases to hold or control that proportion of the stock of the corporation.

(2) ***Publicly traded corporations required to be registered with the Securities and Exchange Commission (SEC).*** A change in ownership and control occurs when -

(i) A person acquires such ownership and control of the corporation so that the corporation is required to file a Form 8K with the SEC notifying that agency of the change in control; or

(ii) (A) A person who is a controlling shareholder of the corporation ceases to be a controlling shareholder. A controlling shareholder is a shareholder who holds or controls through agreement both 25 percent or more of the total outstanding voting stock of the corporation and more shares of voting stock than any other shareholder. A controlling shareholder for this purpose does not include a shareholder whose sole stock ownership is held as a U.S. institutional investor, as defined in 17 CFR 240.15a-6(b)(7), held in mutual funds, held through a profit-sharing plan, or held in an Employee Stock Ownership Plan (ESOP).

(B) When a change of ownership occurs as a result of paragraph (c)(2)(ii)(A) of this section, the institution may submit its most recent quarterly financial statement as filed with the SEC, along with copies of all other SEC filings made after the close of the fiscal year for which a compliance audit has been submitted to the Department of Education, instead of the "same day" balance sheet.

(C) If a publicly-traded institution is provisionally certified due to a change in ownership under paragraph (c)(2)(ii) of this section, and that institution experiences another change of ownership under paragraph (c)(2)(ii) of this section, an approval of the subsequent change in ownership does not extend the original expiration date for the provisional certification provided that any current controlling shareholder was listed on the change of ownership application for which the original provisional approval was granted.

(3) ***Other entities.***

(i) The term "other entities" means any entity which is not closely held nor required to be registered with the SEC, and includes ~~includes~~ limited liability companies, limited liability partnerships, limited partnerships, and similar types of legal entities. ~~A change in ownership and control of an entity that is neither closely-held nor required to be registered with the SEC occurs when--~~

(ii) The Secretary deems the following changes to constitute a change in ownership resulting in a change of control of such an entity:

(A) A person (or combination of persons) acquires at least 50 percent of the total outstanding voting interests in the entity, or otherwise acquires 50 percent control;

(B) A person (or combination of persons) who holds less than a 50 percent voting interest in an entity acquires at least 50 percent of the outstanding voting interests in the entity, or otherwise acquires 50 percent control;

(C) A person (or combination of persons) who holds at least 50 percent of the voting interests in the entity ceases to hold at least 50 percent voting interest in the entity, or otherwise ceases to hold 50 percent control;

(D) A partner in a general partnership acquires or ceases to own at least 50 percent of the voting interests in the general partnership, or otherwise acquires or ceases to hold 50 percent control;

(E) Any change of a general partner of a limited partnership (or similar entity) if that general partner also holds an equity interest;

(F) Any change in a managing member of a limited liability company (or similar entity) if that managing member also holds an equity interest;

(G) A person acquires or ceases to hold a 100 percent or equivalent direct or indirect interest in the institution; or

(H) The addition or removal of any person that provides or will provide the financial statements to meet any of the requirements of 34 CFR 600.20(g), (h) or Subpart L of part 668.

(iii) The Secretary deems the following interests to satisfy the 50 percent thresholds described above:

(A) A combination of persons, although each with less than 50 percent voting or controlling interest in an entity, hold a combined voting interest of at least 50 percent as a result of proxy agreements, voting agreements or other agreements, or by operation of State law;

(B) A combination of persons, although each with less than 50 percent voting or controlling interest in an entity, hold a combined voting or controlling interest of at least 50 percent as a result of common management and control of that entity, either directly or indirectly; or

(C) A combination of individuals who are family members as defined in § 600.21, although each with less than 50 percent voting or controlling interest in an entity, hold a combined voting or controlling interest of at least 50 percent.

(D) Notwithstanding the foregoing-

(1) If a person who alone or in combination with other persons (as described in paragraphs (c)(3)(i)-(iii) of this section) has less than a 50 percent voting or controlling interest in an entity, the Secretary may determine that the person, either alone or in combination with other persons, has actual control over that entity and is subject to the requirements of this section.

(2) Any person who alone or in combination with other persons has the right to appoint a majority of any class of board members of an entity or an institution is deemed to have control.

~~**(i)** A person who has or acquires an ownership interest acquires both control of at least 25 percent of the total of outstanding voting stock of the corporation and control of the corporation; or~~

~~**(ii)** A person who holds both ownership or control of at least 25 percent of the total outstanding voting stock of the corporation and control of the corporation, ceases to own or control that proportion of the stock of the corporation, or to control the corporation.~~

~~**(4)** ***General partnership or sole proprietorship.*** A change in ownership and control occurs when a person who has or acquires an ownership interest acquires or loses control as described in this section.~~

(5) ***Wholly owned subsidiary.*** An entity that is a wholly owned subsidiary changes ownership and control when its parent entity changes ownership and control as described in this section.

(6) ***Nonprofit institution.*** A nonprofit institution changes ownership and control when a change takes place that is described in paragraph (d) of this section.

(7) ***Public institution.*** The Secretary does not consider that a public institution undergoes a change in ownership that results in a change of control if there is a change in governance and the institution after the change remains a public institution, provided -

(i) The new governing authority is in the same State as included in the institution's program participation agreement; and

(ii) The new governing authority has acknowledged the public institution's continued responsibilities under its program participation agreement.

(d) ***Covered transactions.*** For the purposes of this section, a change in ownership of an institution that results in a change of control may include, but is not limited to -

(1) The sale of the institution;

(2) The transfer of the controlling interest of stock of the institution or its parent corporation;

(3) The merger of two or more eligible institutions;

(4) The division of one institution into two or more institutions;

(5) The transfer of the liabilities of an institution to its parent corporation;

(6) A transfer of assets that comprise a substantial portion of the educational business of the institution, except where the transfer consists exclusively in the granting of a security interest in those assets; or

(7) A change in status as a for-profit, nonprofit, or public institution.

(e) ***Excluded transactions.*** A change in ownership and control reported under § 600.21 and otherwise subject to this section does not include a transfer of ownership and control of all or part of an owner's equity or partnership interest in an institution, the institution's parent corporation, or other legal entity that has signed the institution's Program Participation Agreement -

(1) From an owner to a “family member” of that owner as defined in § 600.21(f); ~~or~~

(2) Upon the ~~retirement or~~ death of the owner; or

(3) Upon the resignation from the operation of the institution by an individual owner who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer, to another individual owner ~~person~~ with a direct or indirect ownership interest in the institution who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer.

(2) Has not had an excess of current fund expenditures over current fund revenues over both of its two latest fiscal years that results in a decrease exceeding 10 percent in either the net assets without donor restrictions from the start to the end of the two-year period or the net assets without donor restrictions in either one of the two years. The Secretary may exclude from net changes in fund balances for the operating loss calculation~~:~~ prior period adjustment and the cumulative effect of changes in accounting principle. In calculating the net assets without donor restriction, the Secretary will exclude all related party accounts receivables/other assets and all assets classified as intangible in accordance with the composite score; or

(3) Has a passing composite score and meets the other financial requirements of 34 CFR 668 subpart L for its most recently completed fiscal year; or

(C) For a public institution, has its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity; or

(ii) For a for-profit or nonprofit institution that is not financially responsible under paragraph (b)(3)(i) of this section, provide financial protection in the form of a letter of credit or cash in an amount that is not less than 10 percent of the prior year title IV funding or an amount determined by the Secretary; and must follow the zone requirements of § 668.175(d).

(c) Terms of the extension. To meet the requirements for a temporary provisional Program Participation Agreement following a change in ownership, as described in 34 CFR 600.20(h)(3(i)—

(1)(i) The institution provides the Secretary with—

(A) A "same day" balance sheet for a proprietary institution or a statement of financial position for a nonprofit institution that shows the financial position of the institution under its new owner, as of the day after the change in ownership, at the level required by the Secretary;

(B) The "same day" balance sheet or statement of financial position must be prepared in accordance with Generally Accepted Accounting Principles (GAAP) published by the Financial Accounting Standards Board and audited in accordance with Generally Accepted Government Auditing Standards (GAGAS) published by the U.S. General Accounting Office;

(C) As part of the "same day" financial statement, the institution must include a disclosure that includes all related-party transactions and such details as would enable the Secretary to identify the related party. Such information may include, but is not limited to, the name, location, and description of the related entity, including the nature and amount of any transaction between the related party and the institution, financial or otherwise, regardless of when it occurred; and

(ii) Such financial statement must be a consolidated "same day" financial statement at the level of highest unfractured ownership or at a level determined by the Secretary for an ownership of less than 100 percent~~.~~;

(2) The "same day" financial statement must demonstrate an acid test ratio of at least 1:1. The acid test ratio must be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio must exclude all related party receivables/other assets and all assets classified as intangibles in accordance with the composite score;~~.~~

(3) A proprietary institution's submission must demonstrate a positive tangible net worth the day after the change in ownership. A positive tangible net worth occurs when the financial statements tangible assets exceed its liabilities. The calculation of tangible net worth must exclude all related party accounts receivables or other assets and all assets classified as intangible in accordance with the composite score;

(4) A nonprofit institution's submission must have a positive net assets without donor restrictions the day after the change in ownership. The calculation of net asset without donor restrictions must exclude all related party accounts receivables/other assets and all assets classified as intangible in accordance with the composite score;~~.~~

(5) If an institution fails to meet the standards of paragraphs (c)(2), (3), or (4) of this section, the institution must provide financial protection in the form of a letter of credit or cash to the Secretary in the amount of at least 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, or an amount determined by the Secretary, and must follow the zone requirements of § 668.175(d); and

(6) A public institution must have its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity, or must follow the requirements of this section for a nonprofit or proprietary institution.

§ 668.17~~6~~7 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice will not be affected thereby.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 6: Certification Procedures
Session 1: January 18-21, 2022

Issue: Certification Procedures

Statutory cites: §498 of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 668.13, 668.14, 668.43

Summary of issues:

The regulations at 668.13 spell out the procedures for certification to participate in the federal aid programs; and further regulations at 668.14 include the requirements of a Program Participation Agreement (PPA) that institutions enter into as a condition of participation in the aid programs. However, the Department is concerned that procedures certifying institutions of higher education (institutions) to participate in the federal financial aid programs through a PPA are not sufficiently rigorous to adequately protect students and taxpayers.

Proposal:

The Department proposes changes that will provide for heightened oversight of institutions, particularly those that have engaged in activities that are high risk for students or taxpayers. We believe that these proposed changes will help ensure that students have access to high-quality educational opportunities and are protected from predatory or abusive behaviors.

Specifically, under § 668.13, Certification Procedures, the Department proposes to:

1. **Eliminate the requirement to automatically recertify institutions after one year on a month-to-month status if the Department has not made a decision.** Current regulations require that the Department make a determination to grant or deny certification (provisional or full) within 12 months for any institution's application submitted on or after July 1, 2021. Under that provision, if the Department does not decide to grant or deny certification within 12 months, the institution is automatically be granted renewal of certification, which may be provisional. However, institutions that remain on month-to-month for an extended time are typically those that require the most extensive investigation before reaching a decision. Forcing a decision early could have substantial negative consequences for students and taxpayers. At the same time, the Department is working to improve its administrative processes and expand its resources to support more efficient and timely decision-making where possible.
2. **Provide additional events that will lead to provisional certification,** including when an institution has incurred repeated findings related to the same compliance concern from program reviews or audits, or when the institution or an owner of the institution also owns another institution with liabilities owed to the Department. These are high-risk situations where the Department might need to take further steps to protect students and taxpayers by putting the institution on provisional certification status.

3. **Requires recertification for certain provisionally certified schools after two years.** Namely, this provision applies to schools that were provisionally certified for reasons related to major consumer protection issues, such as pending or approved borrower defense or false certification claims.

Under § 668.14, which addresses PPAs, the Department proposes to:

1. **Ensure that both private colleges and the companies that own them are required to sign PPAs**. This will allow the Department to ensure owner entities with at least a 50 percent interest in the institution are liable for taxpayer losses that may be incurred by the institution.
2. **Add State attorneys general to the list of entities that have the authority to share with each other and the Department any information** pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse. As members of the program integrity triad with oversight of colleges, is important to clarify that State attorneys general are included in information sharing between these entities.
3. **Ensure that all programs that require programmatic accreditation and/or licensure/certification meet those requirements**. Too often students have enrolled in programs without knowing that they will be unable to find employment in the recognized occupation, because the program does not meet the necessary requirements for employment. Institutions will now be required to have those necessary certifications or programmatic accreditation.
4. **Seek feedback from the Committee on the appropriate maximum length of aid eligibility for a program** that prepares students for gainful employment in a recognized occupation. The Department is aware of significant variations in the required lengths of programs that are tied to the same occupations across states. Longer programs result in significantly larger amounts of student loan debt. For instance, an American Institutes for Research (AIR) analysis found that state requirements for cosmetology licenses range from 1,000 hours to more than twice as long, at 2,300 hours, without any evidence of increased pay or better program outcomes associated with those longer programs. We offer multiple options, and seek additional feedback from the Committee on capping the appropriate length of aid eligibility by program type.
5. **Establish additional conditions for use with provisionally certified institutions.** The Department proposes a non-exhaustive list of conditions that may be used as a way to ensure institutions are aware of the requirements that may be applied to their schools. This allows the Department to formalize tools that are available now but are not typically used.

   Specifically, the Department may restrict the addition of new programs or locations, the rate of growth in enrollment of students or of Title IV volume, and the provision of a teach-out on behalf of another institution. Additionally, for an institution potentially at risk of closure, we propose to require submission of the following: a teach-out plan or agreement to the Department and to the institution's recognized accrediting agency, a records retention plan to the Department, and/or the release of some holds on student transcripts. We additionally propose limitations on the owners with respect to approving the purchase of another institution while an institution is provisionally certified. For an institution that may have engaged in misrepresentations to students, exhibited aggressive recruiting practices, or violated incentive compensation rules, we may also require the institution to submit marketing and other recruiting materials for the review and approval of the Secretary.

6. **Specifies the use of provisional conditions that will be applied to a proprietary institution seeking to convert to nonprofit status**. These conditions include continued compliance with 90/10 and gainful employment requirements, and the submission of reports on agreements with the former owner of the institution. For an institution that is certified as a nonprofit institution, or that converts to a nonprofit institution, conditions include reports on accreditor or state authorizer actions and new servicing agreements entered into by the school, as well as updates on IRS communications related to the school's tax-exempt status.

Under § 668.43, Institutional Information, the Department proposes to:

1. **Eliminate a disclosure requirement** regarding licensure or certification prerequisites, to align with and reflect the proposed changes in 34 CFR 668.14 described above, which makes this disclosure requirement no longer necessary.

Proposed Regulations Redline

§ 668.13 Certification.

(a) ***Requirements for certification.***

(1)

(i) The Secretary certifies an institution to participate in the title IV, HEA programs if the institution qualifies as an eligible institution under 34 CFR part 600, meets the standards of this subpart and 34 CFR part 668, subpart L, and satisfies the requirements of paragraph (a)(2) of this section.

(ii) On application from the institution, the Secretary certifies a location of an institution that meets the requirements of § 668.13(a)(1)(i) as a branch if it satisfies the definition of ''branch'' in 34 CFR 600.2.

(2) Except as provided in paragraph (a)(3) of this section, if an institution wishes to participate for the first time in the title IV, HEA programs or has undergone a change in ownership that results in a change in control as described in 34 CFR 600.31, the institution must require the following individuals to complete title IV, HEA program training provided or approved by the Secretary no later than 12 months after the institution executes its program participation agreement under § 668.14:

(i) The individual the institution designates under § 668.16(b)(1) as its title IV, HEA program administrator.

(ii) The institution's chief administrator or a high-level institutional official the chief administrator designates.

(3)

(i) An institution may request the Secretary to waive the training requirement for any individual described in paragraph (a)(2) of this section.

(ii) When the Secretary receives a waiver request under paragraph (a)(3)(i) of this section, the Secretary may grant or deny the waiver, require another institutional official to take the training, or require alternative training.

(b) ***Period of participation.***

Certification Procedures 4

(1) If the Secretary certifies that an institution meets the standards of this subpart, the Secretary also specifies the period for which the institution may participate in a title IV, HEA program. An institution's period of participation expires no more than six years after the date that the Secretary certifies that the institution meets the standards of this subpart, except that -

(i) The period of participation for a private, for profit foreign institution expires three years after the date of the Secretary's certification; and

(ii) The Secretary may specify a shorter period.

(2) Provided that an institution has submitted an application for a renewal of certification that is materially complete at least 90 days prior to the expiration of its current period of participation, the institution's existing certification will be extended on a month to month basis following the expiration of the institution's period of participation until the end of the month in which the Secretary issues a decision on the application for recertification.

~~**(3)** In the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration of its current period of participation, the institution will automatically be granted renewal of certification, which may be provisional.~~

(c) ***Provisional certification.***

(1)(i) The Secretary may provisionally certify an institution if -

(A) The institution seeks initial participation in a Title IV, HEA program;

(B) The institution is an eligible institution that has undergone a change in ownership that results in a change in control according to the provisions of 34 CFR part 600;

(C) The institution is a participating institution -

(1) That is applying for a certification that the institution meets the standards of this subpart;

(2) That the Secretary determines has jeopardized its ability to perform its financial responsibilities by not meeting the factors of financial responsibility under § 668.15 and subpart L of this part or the standards of administrative capability under § 668.16; and

(3) Whose participation has been limited or suspended under subpart G of this part, or voluntarily enters into provisional certification;

(D) The institution seeks a renewal of participation in a Title IV, HEA program after the expiration of a prior period of participation in that program; or

(E) The institution is a participating institution that was accredited or preaccredited by a nationally recognized accrediting agency on the day before the Secretary withdrew the Secretary's recognition of that agency according to the provisions contained in 34 CFR part 602~~3; or~~

~~**(F)** The institution is a participating institution that has been provisionally recertified under the automatic recertification requirement in paragraph (b)(3) of this section.~~ .

(ii) An institution's certification automatically becomes provisional upon notification from the Secretary if—

(A) The institution triggers one of the financial responsibility events under §668.171(c) or (d) and, as a result, the Secretary requires the institution to post financial protection;

(B) The institution has received the same finding of noncompliance on more than one program review or audit; or

(C) The institution or an owner of the institution with control over that institution, as defined in 34 CFR 600.31, also owns another institution with liabilities owed to the Department.

(iii) A proprietary institution's certification automatically becomes provisional at the start of a fiscal year after it did not derive at least 10 percent of its revenue for its preceding fiscal year from sources other than Title IV, HEA program funds, as required under § 668.14(b)(16).

(2) If the Secretary provisionally certifies an institution, the Secretary also specifies the period for which the institution may participate in a Title IV, HEA program. Except as provided in paragraphs (c) (3)~~ and (4)~~ of this section, a provisionally certified institution's period of participation expires -

(i) Not later than the end of the first complete award year following the date on which the Secretary provisionally certified the institution under paragraph (c)(1)(i)(A) of this section;

(ii) Not later than the end of the second complete award year following the date on which the Secretary provisionally certified an institution that had been fully certified for reasons related to substantial liabilities owed or potentially owed to the Department for discharges related to borrower defense to repayment or false certification, or for other consumer protection concerns as identified by the Secretary;

(iii) Not later than the end of the third complete award year following the date on which the Secretary provisionally certified the institution under paragraphs (c)(1)(i)(B), (C), and (D) ~~(iii), (iii), (iv)~~ or (c)(1)(ii)~~(c)(2)~~ of this section; and

(iv~~ii~~) If the Secretary provisionally certified the institution under paragraph (c)(1)(i~~v~~)(E) of this section, not later than 18 months after the date that the Secretary withdrew recognition from the institution’s nationally recognized accrediting agency.

(3) Notwithstanding the maximum periods of participation provided for in paragraph (c)(2) of this section, if the Secretary provisionally certifies an institution, the Secretary may specify a shorter period of participation for that institution.

(4) For the purposes of this section, “provisional certification” means that the Secretary certifies that an institution has demonstrated to the Secretary's satisfaction that the institution -

(i) Is capable of meeting the standards of this subpart within a specified period; and

(ii) Is able to meet the institution's responsibilities under its program participation agreement, including compliance with any additional conditions specified in the institution's program participation agreement that the Secretary requires the institution to meet in order for the institution to participate under provisional certification.

(d) ***Revocation of provisional certification.***

(1) If, before the expiration of a provisionally certified institution's period of participation in a Title IV, HEA program, the Secretary determines that the institution is unable to meet its responsibilities under its program participation agreement, the Secretary may revoke the institution's provisional certification for participation in that program.

(2)

(i) If the Secretary revokes the provisional certification of an institution under paragraph (d)(1) of this section, the Secretary sends the institution a notice by certified mail, return receipt requested. The Secretary also may transmit the notice by other, more expeditious means, if practical.

(ii) The revocation takes effect on the date that the Secretary mails the notice to the institution.

(iii) The notice states the basis for the revocation, the consequences of the revocation to the institution, and that the institution may request the Secretary to reconsider the revocation. The consequences of a revocation are described in § 668.26.

(3)

(i) An institution may request reconsideration of a revocation under this section by submitting to the Secretary, within 20 days of the institution's receipt of the Secretary's notice, written evidence that the revocation is unwarranted. The institution must file the request with the Secretary by hand-delivery, mail, or facsimile transmission.

(ii) The filing date of the request is the date on which the request is -

(A) Hand-delivered;

(B) Mailed; or

(C) Sent by ~~facsimile~~ electronic transmission.

(iii) Documents filed by electronic transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation.

(iv) The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(4)

(i) The designated department official making the decision concerning an institution's request for reconsideration of a revocation is different from, and not subject to supervision by, the official who initiated the revocation of the institution's provisional certification. The deciding official promptly considers an institution's request for reconsideration of a revocation and notifies the institution, by certified mail, return receipt requested, of the final decision. The Secretary also may transmit the notice by other, more expeditious means, if practical.

(ii) If the Secretary determines that the revocation is warranted, the Secretary's notice informs the institution that the institution may apply for reinstatement of participation only after the later of the expiration of -

(A) Eighteen months after the effective date of the revocation; or

(B) A debarment or suspension of the institution under Executive Order (E.O.) 12549 (3 CFR, 1986 comp., p. 189) or the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

(iii) If the Secretary determines that the revocation of the institution's provisional certification is unwarranted, the Secretary's notice informs the institution that the institution's provisional certification is reinstated, effective on the date that the Secretary's original revocation notice was mailed, for a specified period of time.

(5) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service or another service that provides delivery confirmation for that document.

§ 668.14 Program participation agreement.

(a)

(1) An institution may participate in any Title IV, HEA program, other than the LEAP and NEISP programs, only if the institution enters into a written program participation agreement with the Secretary, on a form approved by the Secretary. A program participation agreement conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of this part, the individual program regulations, and any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet.

(2) An institution's program participation agreement applies to each branch campus and other location of the institution that meets the applicable requirements of this part unless otherwise specified by the Secretary.

(3) An institution's program participation agreement must be signed by—

(i**)** An authorized representative of the institution; and

(ii) For a proprietary or private nonprofit institution, by an authorized representative of an entity with direct or indirect ownership of the institution if that entity has the power to exercise control over the institution. The Secretary considers the following as examples of circumstances in which an entity has such power--

(A) If the entity has at least 50 percent control over the institution through direct or indirect ownership, by voting rights, or by its right to appoint board members to the institution or any other entity, whether by itself or in combination with other entities or natural persons with which it is affiliated or related, or pursuant to a proxy or voting or similar agreement;

(B) If the entity has the power to block significant actions;

(C) If the entity is the 100 percent direct or indirect interest holder of the institution; or

(D) If the entity provides or will provide the financial statements to meet any of the requirements of 34 CFR 600.20(g), (h), or Subpart L of this part.

(b) By entering into a program participation agreement, an institution agrees that -

* * *

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, ~~and~~ State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, and State attorneys general have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse;

* * *

(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must -

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed the greater of -

(A) One hundred and fifty percent of the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by any Federal agency; or

(B) The minimum number of clock hours required for training in the recognized occupation for which the program prepares the student as established in a State adjacent to the State in which the institution is located; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student;

* * *

(32) In each State in which the institution is located or in which the institution is otherwise required to obtain State approval under 34 CFR 600.9, the institution must—

(i) Ensure that each program is programmatically accredited, if such accreditation is required by a Federal governmental entity or by a governmental entity in the State; and

(ii) Ensure that each program satisfies the applicable educational prerequisites for professional licensure or certification requirements in the State so that a student who completes the program and seeks employment in that State qualifies to take any licensure or certification exam that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.

* * *

(e) If an institution is provisionally certified, the Secretary may apply such conditions as are determined to be appropriate to the institution, including –

(1) For an institution that the Secretary determines may be at risk of closure—

(i) Submission of a teach-out plan or agreement to the Department and to the institution's recognized accrediting agency;

(ii) Submission of a records retention plan to the Department; and

Commented [A1]: The Department is aware of significant variation across states in the minimum required length of programs tied to licensure in many states in a variety of fields. Otherwise-equivalent programs that require many more hours in one state can lead students in that state to spend more time in school and take on more student loan debt. For instance, an AIR analysis found that state requirements for cosmetology licenses range from 1,000 hours to more than twice as long, at 2,300 hours. [https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/Reddy_PBAExaminationofCosmetologyLicensingIssues_31961.pdf] Requiring students, depending on the state, to spend much longer in equivalent programs results in those students using up more of their lifetime eligibility for Pell Grants or other federal financial aid, possibly making it harder for them to pursue later training.

The Department seeks feedback on the appropriate maximum length of aid for a gainful employment program in these situations where equivalent programs have substantially different lengths. The Department would not limit the discretion of the states to establish program length requirements but is concerned about the costs to the student of providing aid eligibility beyond the minimum state licensing requirements for programs that go far beyond the length that most institutions offer. Options might include, for example capping the length of aid for a program that receives federal aid at:

--The minimum clock hours required in the state, or the minimum plus a tolerance that allows programs to offer one additional course. For example, if a state requires 1,500 hours for cosmetology, capping the aid at 1,500 or 1,650 hours to allow for an additional course equivalent to 3 credit hours.

--The minimum clock hours in a state in the same metropolitan statistical area (MSA) as the institution, if that state's minimum hours are higher than the those in that institution's state. For example, if an institution's home state requires 1,500 hours for cosmetology and it is in the same MSA as a state that requires 1,800 hours, the minimum length would be 1,800.

--The lesser of the minimum number of hours required by the state or of the national median for the number of hours required. For example, if the national median is 1,500 hours, aid at an institution in a state with a minimum of 1,000 hours would still be capped at 1,000 hours, while aid at an institution in a state that requires 2,000 hours would be capped at 1,500 hours.

--Other permutations of the above ideas, such as allowing a tolerance of 125 percent above the minimum.

...

(iii) The release of holds on student transcripts over a de minimis amount, and the release of all holds on student transcripts in the event of a closure;

(2) Restrictions on the addition of new programs or locations;

(3) Restrictions on the rate of growth in enrollment of students or of Title IV volume;

(4) Restrictions on the institution providing a teach-out on behalf of another institution;

(5) Restrictions on the acquisition of another participating institution, which may include the posting of financial surety in an amount determined by the Secretary but not less than 10 percent of the acquired institution's Title IV volume for the prior fiscal year. This surety is in addition to any other required surety;

(6) Additional reporting requirements, which may include, but are not limited to, cash balances, an actual and protected cash flow statement, student rosters, and interim unaudited financial statements;

(7) Limitations on the institution entering into a written arrangement with another eligible institution or an ineligible institution or organization for that other eligible institution or ineligible institution or organization to provide between 25 and 50 percent of the institution's educational program under ~~34 CFR~~ §668.5(a) or (c);

(8) For an institution alleged or found to have engaged in misrepresentations to students, engaged in aggressive recruiting practices, or violated incentive compensation rules, requirements to submit marketing and other recruiting materials for the review and approval of the Secretary; and

(9) Such other conditions as the Secretary deems necessary or appropriate.

(f) If a proprietary institution seeks to convert to nonprofit status following a change in ownership, the following conditions will apply to the institution following the change in ownership, in addition to any other conditions that the Secretary may deem appropriate—

(1) The institution must continue to meet the requirements under §668.28(a) and §668.28(b) until the Department has accepted, reviewed and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years with passing 90/10 reporting under its new ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later;

(2) The institution must continue to meet the gainful employment requirements of Subpart Q of this part until the Department has accepted, reviewed, and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years under its new ownership, or until the Department approves the institution's request to convert to nonprofit status, whichever is later; and

(3) The institution will be required to submit regular and timely reports on agreements entered into with its former for-profit owner or affiliated or related persons or entities, so long as the institution participates as a nonprofit institution

(g) If an institution is initially certified as a nonprofit institution, or if it has undergone a change of ownership and seeks to convert to nonprofit status, the following conditions will apply to the institution upon initial certification or following the change in ownership, in addition to any other conditions that the Secretary may deem appropriate:

(1) The institution will be required to submit regular and timely reports on accreditor and state authorization agency actions and any new servicing agreements until the Department has accepted, reviewed and approved the institution's financial statements and compliance audits that cover two complete consecutive fiscal years following initial certification, or two complete fiscal years under its new ownership or until the Department approves the institution’s request to convert to nonprofit status, whichever is later; and

(2) The institution will be required to submit regular and timely reports on communications from the Internal Revenue Service or any state or foreign country related to tax-exempt or nonprofit status so long as the institution participates as a nonprofit institution.

(h~~e~~)

(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

(i~~f~~)

(1) Except as provided in paragraphs (g) and (h) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(2) An institution may terminate a program participation agreement.

(3) If the Secretary or the institution terminates a program participation agreement under paragraph (f) of this section, the Secretary establishes the termination date.

(j~~g~~) An institution's program participation agreement automatically expires on the date that -

(1) The institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of § 668.26(a) (1), (2), (4), or (7).

(k~~h~~) An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

§ 668.43 Institutional information.

(a) Institutional information that the institution must make readily available to enrolled and prospective students under this subpart includes, but is not limited to -

* * *

(5) The academic program of the institution, including -

(i) The current degree programs and other educational and training programs;

(ii) The instructional, laboratory, and other physical facilities which relate to the academic program;

(iii) The institution's faculty and other instructional personnel; and

(iv) Any plans by the institution for improving the academic program of the institution, upon a determination by the institution that such a plan exists.~~; and~~

~~**(v)** If an educational program is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, or is advertised as meeting such requirements, information regarding whether completion of that program would be sufficient to meet licensure requirements in a State for that occupation, including -~~

~~**(A)** A list of all States for which the institution has determined that its curriculum meets the State educational requirements for licensure or certification;~~

~~**(B)** A list of all States for which the institution has determined that its curriculum does not meet the State educational requirements for licensure or certification; and~~

~~**(C)** A list of all States for which the institution has not made a determination that its curriculum meets the State educational requirements for licensure or certification;~~

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 7: Title IV Revenue and Non-Federal Education Assistance Funds (90/10)
Session 1: January 18-21, 2022

Issue: Title IV Revenue and Non-Federal Education Assistance Funds (90/10)

Statutory cites: §487(a)(24) of the Higher Education Act, as amended

Regulatory cites: 34 CFR 668.28

Summary of issues:

Section 2013 of the American Rescue Plan Act amends the applicable statute to require that at least 10 percent of a proprietary institution's revenue be derived from sources other than Federal educational assistance funds. This change means that the numerator of the revenue calculation, which formerly consisted only of Title IV funds, will now include "Federal funds that are disbursed or delivered to or on behalf of a student" (defined collectively as Federal educational assistance funds).

Proposal:

We propose to amend 34 CFR 668.28 to account for the statutory change requiring that a proprietary institution's revenue be derived from sources other than Federal educational assistance funds. Additionally, we are proposing changes to 34 CFR 668.28 that would close existing loopholes in the 90/10 calculation and provide clarification on the treatment of revenue. Specifically, these changes would:

1. **Designate as Federal educational assistance funds any educational assistance for students sent directly to the institution by the awarding agency, as well as funds that flow directly to students, where the authorizing Federal agency provides funding data to the institution.** As part of implementation the Department would create data sharing arrangements with Federal agencies to provide student-level funding data to institutions, including funds paid directly to students by the awarding agency. The Department would publish an annual notice in the *Federal Register* indicating which agencies have such an arrangement. Mirroring the current requirement in 34 CFR 668.28(a)(4) with respect to Title IV, HEA program funds, Federal educational assistance funds disbursed or delivered to or on behalf of a student would be presumed to pay the student's tuition, fees, or institutional charges, regardless of whether the institution credits the funds to the student's account or pays the funds directly to the student, except to the extent that the student's tuition, fees, or other charges are satisfied by the sources identified in 34 CFR 668.28(a)(4)(i) through (iv) (referred to in the 90/10 calculation as funds received first). This would include those funds paid directly to students by awarding agencies up to the amount of cash payments made to the institution by the student.
2. **Disallow counting the sale of receivables, including from institutional loans, as non-Federal educational assistance revenue**. Section 487(d)(1)(b) of the HEA requires that in performing a 90/10 calculation, an institution may only include as revenue, those funds generated by the institution from tuition, fees, and other institutional charges for students enrolled in programs eligible for assistance under the Title IV programs, activities conducted by the institution that are necessary for the education and training of the institution's students, or certain non-eligible training programs. Revenue that results from the sale of receivables is not derived from tuition, fees, or other institutional charges for students enrolled in programs eligible for Federal

educational assistance and does not indicate a willingness on the part of students to pay cash for a portion of their program.

3. **Require proprietary institutions to award, disburse, and request Title IV funds according to established parameters.** Loss of eligibility under 90/10 occurs only after two consecutive years of failing rates. Because 34 CFR part 668 imposes no timeframe for requesting Federal funds, institutions can avoid a loss of eligibility under 90/10 by deferring drawdowns of Title IV funds from G5 until the subsequent fiscal year. We propose to address this loophole by adding a disbursement rule requiring proprietary institutions to disburse funds to eligible students and request those funds from G5 prior to the end of the institution's fiscal year.
4. **Limit the revenues from activities conducted by the institution to those derived from such activities that are necessary for the education and training of its students**. Under the HEA, institutions may count as revenue activities conducted by the institution that are necessary for the education and training of the institution's students. Only funds generated from services provided by students may count as revenue for 90/10 purposes. Such revenue does not include revenue derived from product sales. Proposed changes to 34 CFR 668.28 would require that institutional accounting records clearly identify the service revenue, not related to product sales, that is unique to service activities performed by students in the program and necessary for the education of those students.
5. **Clarify under what circumstances funds paid by a student, or on behalf of a student by a party other than the institution, for an education or training program that is not an eligible program may count as revenue for 90/10 purposes.** We propose that only the funds generated from non-eligible programs offered at an eligible location of the institution and where the institution itself provides the education be counted as non-Federal educational assistance revenue for the purposes of the 90/10 calculation. This would preclude revenue from programs where the institution merely provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study.

Proposed Regulations Redline

§ 668.28 Non-~~title IV~~Federal revenue (90/10).

(a) ***General*** –

(1) ***Calculating the revenue percentage.*** A proprietary institution meets the requirement in § 668.14(b)(16) that at least 10 percent of its revenue is derived from sources other than ~~Title IV, HEA program~~ Federal funds by using the formula in appendix C of this subpart to calculate its revenue percentage for its latest complete fiscal year. For purposes of this section--

(i) For any annual audit submission for a proprietary institutional fiscal year beginning on or after January 1, 2023, Federal funds used to calculate the revenue percentage include title IV, HEA program funds and any other educational assistance funds provided by a Federal agency directly to an institution or a student. The Secretary identifies the Federal agency and the other educational assistance funds provided by that agency in a notice published in the *Federal Register*.

(ii) For any fiscal year beginning prior to January 1, 2023, Federal funds are limited to title IV, HEA program funds.

(2) ~~***Cash basis accounting.*** Except for institutional loans made to students under paragraph (a)(5)(i) of this section, the institution must use the cash basis of accounting in calculating its revenue percentage.~~ ***Disbursement rule***. An institution must use the cash-basis of accounting in calculating its revenue percentage by —

(i) For each eligible student, counting the amount of non-title IV Federal funds the institution received during its fiscal year—

(A) Directly from an agency identified under paragraph (a)(1)(i) of this section; and

(B) Tuition and fees and other institutional charges paid by a student to whom the Federal agency provided funds.

(ii) For each eligible student, counting the amount of title IV, HEA program funds received during its fiscal year. However, before the end of its fiscal year, the institution must—

(A) Request funds under the advanced payment method in §668.162(b)(2) or the heighted cash monitoring method in §668.162(d)(1) that the students are eligible to receive and make any disbursements to those students by the end of the fiscal year; or

(B) Make disbursements to those students by the end of the fiscal year and report as Federal funds in the revenue calculations the funds that the students are eligible to receive before requesting funds under the reimbursement or heighted cash monitoring methods in §668.162(c) or (d)(2).

(3) ***Revenue generated from programs and activities.*** The institution must consider as revenue only those funds it generates from -

(i) Tuition, fees, and other institutional charges for students enrolled in eligible programs as defined in § 668.8;

(ii) Activities conducted by the institution that are necessary for the education and training of its students provided those activities are -

(A) Conducted on campus or at a facility under the institution's control;

(B) Performed under the supervision of a member of the institution's faculty; ~~and~~

(C) Required to be performed by all students in a specific educational program at the institution; and

(D) Related directly to services performed by students; and~~.~~

(iii) Funds paid by a student, or on behalf of a student by a party unrelated to~~other than~~ the institution, its owners, or affiliates, for an education or training program that is not eligible under § 668.8 and that does not include any courses or coursework offered in an eligible program. The non-eligible education or training ~~if th~~e program must—

(A) Be provided by the institution at one of its approved locations. The institution may not count revenue from a non-eligible education or training program where it merely provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study;

(B~~A~~) ~~Is~~Be approved or licensed by the appropriate State agency;

(C~~B~~) Be ~~Is~~ accredited by an accrediting agency recognized by the Secretary under 34 CFR part 602; or

(D~~C~~) Provide~~s~~ an industry-recognized credential or certification.~~, or prepares students to take an examination for an industry-recognized credential or certification issued by an independent third party;~~

~~**(D)** Provides training needed for students to maintain State licensing requirements; or~~

~~**(E)** Provides training needed for students to meet additional licensing requirements for specialized training for practitioners that already meet the general licensing requirements in that field.~~

(4) ***Application of funds.*** The institution must presume that any ~~Title IV, HEA program~~ Federal funds it disburses, or delivers, to or on behalf of a student will be used to pay the student's tuition, fees, or institutional charges, regardless of whether the institution credits the funds to the student's account or pays the funds directly to the student, except to the extent that the student's tuition, fees, or other charges are satisfied by -

(i) Grant funds provided by—

(A) N~~n~~on-Federal public agencies, provided that those grant funds do not include Federal or institutional funds; or

(B) P~~p~~rivate sources unrelated to~~independent of~~ the institution, its owners, or affiliates;

(ii) Funds provided under a contractual arrangement with the institution and a Federal, State, or local government agency for the purpose of providing job training to low-income individuals who need that training;

(iii) Funds used by a student from a savings plan for educational expenses established by or on behalf of the student if the saving plan qualifies for special tax treatment under the Internal Revenue Code of 1986; or

(iv) Institutional scholarships that meet the requirements in paragraph (a)(5)(iv) of this section.

(5) ***Revenue generated from institutional aid.*** The institution ~~must~~may include the following institutional aid as revenue:

(i) For loans made to students and credited in full to the students' accounts at the institution, ~~on or after July 1, 2008 and prior to July 1, 2012, include as revenue the net present value of the loans made to students during the fiscal year, as calculated under paragraph (b) of this section, if the loans -~~ ~~include as revenue only~~ the amount of payments made on those loans by current or former students that the institution received during the fiscal year, if the loans—

(A) Are bona fide as evidenced by standalone repayment agreements between the students and the institution that are enforceable promissory notes;

(B) Are issued at intervals related to the institution's enrollment periods;

(C) Are subject to regular loan repayments and collections by the institution; and

(D) Are separate from the enrollment contracts signed by the students.

~~**(ii)** For loans made to students before July 1, 2008, include as revenue only the amount of payments made on those loans that the institution received during the fiscal year.~~

~~**(iii)** For loans made to students on or after July 1, 2012, include as revenue only the amount of payments made on those loans that the institution received during the fiscal year.~~

(ii~~v~~) For scholarships provided by the institution in the form of monetary aid ~~or tuition discount~~ and based on the academic achievement or financial need of its students, ~~include as revenue~~ the amount disbursed to students during the fiscal year. The scholarships must be disbursed from an established restricted account and may be included as revenue only to the extent that the funds in that account represent—

(A) D~~d~~esignated funds from an outside source that is unrelated to the institution, its owners, or affiliates; or

(B) I~~i~~ncome earned on those funds.

~~**(6)** *Revenue generated from loan funds in excess of loan limits prior to the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA).* For each student who receives an unsubsidized loan under the FFEL or Direct Loan programs on or after July 1, 2008 and prior to July 1, 2011, the amount of the loan disbursement for a payment period that exceeds the disbursement for which the student would have been eligible for that payment period under the loan limit in effect on the day prior to enactment of the ECASLA is included and deemed to be revenue from a source other than Title IV, HEA program funds but only to the extent that the excess amount pays for tuition, fees, or institutional charges remaining on the student's account after other Title IV, HEA program funds are applied.~~

(6~~7~~) ***Funds excluded from revenues.*** For the fiscal year, the institution does not include -

(i) The amount of Federal Work Study (FWS) wages paid directly to the student. However, if the institution credits the student's account with FWS funds, those funds are included as revenue;

(ii) The amount of funds received by the institution from a State under the LEAP, SLEAP, or GAP programs;

(iii) The amount of institutional funds used to match t~~T~~itle IV, HEA program funds;

(iv) The amount of t~~T~~itle IV, HEA program funds refunded to students or returned to the Secretary under § 668.22~~. If any funds from the loan disbursement used in the return calculation under § 668.22 were counted as non-title IV revenue under paragraph (a)(6) of this section, the amount of Title IV, HEA program funds refunded or returned under § 668.22 is considered to consist of pre-ECASLA loan amounts and loan amounts in excess of the loan limits prior to ECASLA in the same proportion to the loan disbursement~~; ~~or~~

(v) The amount the student is charged for books, supplies, and equipment unless the institution includes that amount as tuition, fees, or other institutional charges; or

(vi) Any amount from the proceeds of the factoring or sale of accounts receivable or institutional loans, regardless of whether the loans were sold with or without recourse.

(b) [Reserved]

(c) ***Sanctions.*** If an institution does not derive at least 10 percent of its revenue from sources other than~~Title IV, HEA program~~ Federal funds -

(1) For two consecutive fiscal years, it loses its eligibility to participate in the Title IV, HEA programs for at least two fiscal years. To regain eligibility, the institution must demonstrate that it complied with the State licensure and accreditation requirements under 34 CFR 600.5(a)(4) and (a)(6), and the financial responsibility requirements under subpart L of this part, for a minimum of two fiscal years after the fiscal year it became ineligible;~~ or~~

(2) For any fiscal year, it becomes provisionally certified under § 668.13(c)(1)(ii) for the two fiscal years after the fiscal year it failed to satisfy the revenue requirement. However, the institution's provisional certification terminates on -

(i) The expiration date of the institution's program participation agreement that was in effect on the date the Secretary determined the institution failed this requirement; or

(ii) The date the institution loses its eligibility to participate under paragraph (c)(1) of this section;~~.; and~~

(3) It must notify the Secretary no later than 45 days after the end of its fiscal year that it failed to meet this requirement; and

(4) It is liable for any title IV, HEA program funds it disburses after the fiscal year it becomes ineligible to participate in the title IV, HEA program under paragraph (c)(1) of this section, excluding any funds the institution was entitled to disburse under §668.26.