DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1845–AA04

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the loan default reduction and prevention measures in the Student Assistance General Provisions regulations in 34 CFR part 668. This notice of proposed rulemaking (NPRM) reflects changes made by the Higher Education Amendments of 1998 to the Higher Education Act of 1965, as amended (HEA).

DATES: We must receive your comments on or before September 15, 1999.

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

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

FOR FURTHER INFORMATION CONTACT: Kenneth Smith. Telephone: (202) 708–8242. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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

SUPPLEMENTARY INFORMATION:

Invitation To Comment

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

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

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

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

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

Background

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

Negotiated Rulemaking Process

Section 492 of the HEA requires that, before publishing any proposed regulations to implement programs under Title IV of the Act, the Secretary obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations, the Secretary must conduct a negotiated rulemaking process to develop the proposed regulations. All published proposed regulations must conform to agreements resulting from the negotiated rulemaking process unless the Secretary reopens the negotiated rulemaking process or provides a written explanation to the participants in that process why the Secretary has decided to depart from the agreements.

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

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

We then published a second notice in the **Federal Register** (63 FR 71206, December 23, 1998) to announce the Department's intention to establish four negotiated rulemaking committees to draft proposed regulations implementing Title IV of the HEA. The notice announced the organizations or groups believed to represent the interests that should participate in the negotiated rulemaking process and announced that the Department would select participants for the process from nominees of those organizations or groups. We requested nominations for additional participants from anyone who believed that the organizations or groups listed did not adequately represent the list of interests outlined in section 492 of the HEA. Once the four committees were established, they met to develop proposed regulations over the course of several months, beginning in January.

The proposed regulations contained in this NPRM reflect the final consensus of the negotiating committee, which was made up of the following members:

American Association of Community Colleges

American Association of Cosmetology Schools

American Association of State Colleges and Universities

American Council on Education
Career College Association
Coalition of Associations of Schools of the Health Professions
Coalition of Higher Education Assistance Organizations
Consumer Bankers Association
Education Financial Council
Education Loan Management Resources
Legal Services Counsel (a coalition)
National Association of College and University Business Officers
National Association for Equal Opportunity in Higher Education
National Association of Graduate/Professional Students
National Association of Independent Colleges and Universities
National Association of State Student Grant and Aid Programs
National Association of State Universities and Land-Grant Colleges
National Association of Student Financial Aid Administrators
National Association of Student Loan Administrators
National Council of Higher Education Loan Programs
National Direct Student Loan Coalition
Sallie Mae, Inc
Student Loan Servicing Alliance
The College Board
The College Fund/United Negro College Fund
United States Department of Education
United States Student Association
US Public Interest Research Group

As stated in the committee protocols, consensus means that there must be no dissent by any member in order for the committee to be considered to have reached agreement. Consensus was reached on all of the proposed regulations in this document

Proposed Regulatory Changes

To help readers understand the proposed regulatory changes, we believe it is appropriate to provide a brief description of the processes available for schools to challenge or appeal their FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates. To avoid confusion in this NPRM, we use the word ''rate'' by itself to refer to FFEL Program cohort default rates, Direct Loan Program cohort rates, and weighted average cohort rates. We use the complete term if we are referring to another type of ''rate'': an ''economically disadvantaged rate,'' a ''completion rate,'' a ''placement rate,'' or a ''participation rate.''

Each school receives only one of the three types of rates each year: an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or a weighted average cohort rate. However, unless specifically stated in the regulations, the rules and processes for submitting appeals and making challenges apply regardless of which rate a school receives. For example, under the proposed regulations, a school must notify us within 30 calendar days of its intent to appeal a rate on the grounds of exceptional mitigating circumstances, regardless of whether the school's rate is an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or a weighted average cohort rate.

The rate process begins when we send draft rates to schools participating in the FFEL or Direct Loan Program. The rates are accompanied by supporting data, giving detailed information on the loans included in the calculation of the rate. A school may challenge the calculation of a draft rate by following the process outlined in the regulations. In this NPRM we refer to this process as the ''challenge'' process.

After the completion of the draft rate challenge process, we notify each school of its official rate and publish a listing of all the rates. This NPRM refers to these rates as ''published rates.'' A school may file an appeal of any sanctions resulting from published rates by following the procedures outlined in the regulations. We refer to the process for contesting published rates as an ''appeal.''

A discussion of each substantive proposed change follows.

1. Challenges and Adjustments to Inaccurate Data Used to Calculate FFEL Cohort Default Rates, Direct Loan Program Cohort Rates, or Weighted Average Cohort Rates (§§ 668.17(a)(1) and 668.17(j))

Why are changes proposed?

Amendments to section 428G of the HEA provide reduced administrative requirements for schools with FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates that are less than 5 or 10 percent. To help implement these new provisions, we are proposing to change the process that schools use to identify and challenge incorrect data.

Before describing the proposed changes, we will describe the current process used to identify and challenge incorrect data.

If a school is not subject to loss of participation, how does it currently correct data used to calculate its rate?

The current process for correcting data has two steps:

- *Challenging draft data.* Any school may challenge the accuracy of any data used to calculate its draft rate. We send supporting data to schools with draft rates of 20 percent or more, and any school that does not receive supporting data may request it. The supporting data reflect the basis for the calculation of a school's rate. A school compares the information in the supporting data with its own records and with information obtained from outside sources to identify possible inaccuracies. A school must challenge any inaccurate draft data within 30 calendar days of receiving the supporting data.
- *Adjustments to published rates.* We send supporting data to schools with published rates of 20 percent or more. Any school that does not receive supporting data may request it. If corrections identified during the draft challenge process are not reflected in a school's published rate, the school may request that its rate be adjusted to reflect those corrections. Adjustment requests must be made within 10 working days of receiving the supporting data. A school may not request an adjustment that is based on data that were changed or added after the draft rate was calculated. Between the calculation of the draft and official rates, data may be corrected, changed, or added by a guaranty agency (for FFEL loans) or the Direct Loan Servicing Center (for Direct Loans).

How would this process be changed under these proposed regulations?

The proposed regulations would retain the two current steps, with the following improvements:

- *Challenging draft data.* We would provide supporting data to all schools when we notify the schools of their draft rates, and we would lengthen the period during which a school may challenge the accuracy of its draft rate from 30 to 45 calendar days.
- *Adjustments to published rates.* We would provide supporting data with the notification of published rates sent to all schools having rates of 10 percent or more. Schools with rates lower than 10 percent would be able to request supporting data separately.

Will there be other changes to this process?

Yes, we will also make some administrative changes to the process for reviewing and challenging rates. Since these are administrative changes, they are not included in these proposed regulations.

The most significant administrative changes will be to the process for requesting adjustments to a published rate. The period during which a school may request an adjustment to its published rate will be extended from 10 working days to 30 calendar days. Also, upon receiving its published rate, a school will be able to request an adjustment to any incorrect new data

that were included after the draft rate was calculated. This ''new data adjustment'' will be available to schools beginning with receipt of FY 1998 rates, which will be released before September 30, 2000. This new administrative process will be explained more fully in the FY 1998 Official Cohort Default Rate Guide, which will be sent to a school with the notification of its published rate for FY 1998.

We will also make the following additional administrative improvements to this process:

- *Electronic supporting data.* We will make supporting data available to schools upon request in an electronic format. This will help schools prepare their challenges and appeals more quickly and with less work. We plan to begin this service with the publication of rates for FY 1998. Initially, it is unlikely that we will be able to send electronic data with the notifications of the rates themselves. Instead, we plan to make electronic data available to requesting schools after the notifications are issued, and for subsequent draft and published rates.
- *Real-time data.* Schools will be able to view, year-round, the loan repayment and default data that will be used to calculate their rates. By having access to this ''real-time'' data, schools will be able to identify errors and to correct them, by working with the data's provider, on a schedule that is compatible with the schools' ongoing workload. We plan to begin this service by the end of 1999.

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

What happens if the deadline is missed?

The 1998 Amendments adds a new section 435(m)(4)(D) to the HEA, which directs the Secretary to issue cohort default rates by September 30 each year. During the negotiated rulemaking process, some negotiators expressed a concern about the possible consequences for schools if we issued rates after that date. Under section 435(a)(2) of the HEA, a school's loss of participation in the loan programs based on excessive rates continues for the fiscal year (FY) for which the determination of the loss is made and for the 2 succeeding fiscal years. Some negotiators were concerned that schools might be subject to an additional year of ineligibility if we issued rates after September 30.

The committee discussed an example in which a determination issued before this year's deadline of September 30, 1999, would subject a school to loss of participation for the remainder of this fiscal year (FY 1999) and for the 2 following fiscal years (FY 2000 and FY 2001). By contrast, if the determination was issued after September 30, 1999, the committee asked whether the school would be subject to loss of participation for the remainder of that fiscal year (FY 2000) and for the 2 following fiscal years (FY 2001 and FY 2002).

The Department expects to meet the goal of issuing rates by September 30 each year. If, however, rates are not issued until after that date, a school's loss of eligibility in that case would continue only for the remainder of the fiscal year in which the rates are issued and for the following fiscal year. As this procedure would be administrative, it is not reflected in these proposed regulations.

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

How does a school's rate affect its eligibility to participate in the Pell program?

These provisions reflect amendments to section 401(j) of the HEA. Under the amendments, a school becomes ineligible to participate in the Federal Pell Grant Program when it becomes ineligible to participate in the FFEL or Direct Loan Program due to excessive rates. A school that was not participating in the FFEL or Direct Loan Program on October 7, 1998 (the date on which the 1998 Amendments was enacted), is not subject to this provision unless it subsequently participates in either of those programs.

What criteria would be used to determine that a school was not participating in the FFEL or Direct Loan Program on or after October 7, 1998?

Under the proposed regulations, a school would not be considered to have been participating in the FFEL or Direct Loan Program on or after October 7, 1998, if the school—

- Was ineligible to participate in those programs before October 7, 1998, and the school did not regain eligibility;
- Requested in writing, before October 7, 1998, to withdraw its participation in those programs and did not subsequently re-apply to participate; or
- Has not certified an FFEL loan or originated a Direct Loan on or after July 7, 1998.

The deadline date of July 7, 1998, was selected as a compromise and agreed to by the committee. The Department believes this date is appropriate because it provides some protection for a school that had stopped certifying or originating loans, intending to end its participation in these loan programs, but had not sent a written request to withdraw its participation. At the same time, we also believe that this date is appropriate because it provides a sufficient period of time before the date of enactment to verify the school's intent not to participate.

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

What liability would a school assume for loans made while appealing a loss of participation?

These provisions reflect amendments to section 435(a)(2)(A) of the HEA that are intended to reduce the likelihood of frivolous appeals by schools that are subject to loss of eligibility due to excessive rates. A school that certifies and delivers FFEL Program loans or originates and disburses Direct Loan Program loans during its appeal would be required to reimburse the Secretary for an amount equal to the amount of interest, special allowance, reinsurance, and any related or similar payments the Secretary makes, or will be obligated to make, on those loans.

How will the Department determine a school's liability for loans made during an unsuccessful appeal?

We intend to determine a school's liability using the Department's ''Estimated Loss Formula.'' We currently use this formula to calculate schools' liabilities in other circumstances related to the loan programs. In this instance, the formula would use the school's most recent published rate to estimate the principal amount of the loans that would be expected to default. In addition, the formula would be used to estimate costs to the Secretary for interest, special allowance, and other losses on these loans, using timeframes appropriate for the type of school.

For example, an estimate of a 2-year public school's liability would be based on average timeframes for 2-year public schools. To calculate an estimate of the—

- *Interest subsidy,* the Department would project the interest that would accrue on the total principal amount of the subsidized student loans, during the average number of days, for a 2-year public school, between the date the loans were disbursed and the date they entered repayment.
- *Special allowance,* the Department would project the special allowance that would accrue on the total principal amount of the subsidized and unsubsidized student loans and PLUS loans, during the average number of days, for a 2-year public school, between the date the loans enter repayment and either the date they default or the date on which they are paid in full.

How could a school appeal its loss of participation without incurring a liability?

Any school may stop certifying and delivering FFEL Program loans or originating and disbursing Direct Loan Program loans by ending its participation in the program. Also, under the proposed regulations, a school could prevent the possibility of incurring a liability during an appeal by temporarily not certifying and delivering FFEL Program loans and originating and disbursing Direct Loan Program loans during the appeal. This suspension would be at the discretion of the school, and the school would not be required to notify or seek the approval of the Secretary.

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

What changes would be made to a school's ability to appeal on the basis of its participation rate index (PRI)?

The proposed regulations reflect the provisions of section 435(a)(6) of the HEA. These provisions are similar in many respects to the Department's regulatory requirements for an appeal on the basis of a school's PRI under 34 CFR 668.17(c)(1)(ii)(A). However, unlike those regulatory requirements, under which a school files a PRI appeal after it receives its published rate, the 1998 Amendments provides for a PRI challenge that is made after a school receives its draft rate. Also, the provisions of the 1998 Amendments allow a school to base its PRI calculation on the fiscal year of the school's draft rate or either of its two most recent published rates, rather than the school's most recent published rate only.

What if a school's published rate isn't the same as its draft rate, and the newly published rate would make its PRI lower than 0.0375?

The proposed regulations retain the opportunity for a school to appeal its published rate on the basis of a PRI lower than 0.0375. (The process that occurs after the draft rate is a ''challenge,'' but the process that occurs after the published rate is an ''appeal.'') Because a school's draft rate is not always the same as its published rate, there may be cases in which a school's challenge based on its draft rate would be denied, but an appeal based on the school's published rate would be accepted.

For example, a school with a draft rate of 38 percent and with 10 percent of its students receiving loans would have a PRI of .0380 (0.38 multiplied by 0.10 is .0380). Since the school's PRI would be greater than .0375, its challenge would be denied. However, if the school's published rate were calculated 1 percent lower, as 37 percent, the same school would then have a PRI of .0370 (0.37 multiplied by 0.10 is .0370). Since this PRI meets the criterion, the school's appeal would be accepted.

Once a school's PRI challenge or appeal is accepted, would the school need to challenge or appeal again the following year?

A school's successful PRI challenge to the draft rate or appeal of the published rate would not apply to a future loss of participation unless the rate upon which the challenge or appeal was originally based was a rate that could also be used as a basis for the subsequent challenge or appeal. For example, a school that is subject to a loss of participation based on its rates for FY 1999, FY 1998, and FY 1997 may challenge or appeal the loss using a PRI based on any of the following rates:

Upon receipt of...	PRI based on rate for...		
	FY 1999	FY 1998	FY 1997
Draft rate	Draft	Published	Published
Published rate	Published	Published	Published

The school files a successful challenge or appeal but is again subject to loss of participation the following year, based on its rates for FY 2000, FY 1999, and FY 1998. At that time, the school may challenge or appeal using a PRI based on any of the following rates:

Upon receipt of...	PRI based on rate for...		
	FY 2000	FY 1999	FY 1998
Draft rate	Draft	Published	Published
Published rate	Published	Published	Published

The only rates that appear in both tables are the school's published rates for FY 1999 and FY 1998. If the school's successful original challenge or appeal was based on the—

- Published rate for FY 1999 or FY 1998, then the school *would not* need to file another challenge or appeal in order to continue participating.
- Draft rate for FY 1999 or the published rate for FY 1997, then the school *would* need to file another successful PRI, or other type of appeal, in order to continue participating.

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

What changes would there be to appeals made on the basis of mitigating circumstances?

These provisions reflect the amendments to section 435(a)(2)(A)(ii) of the HEA and add the provisions of new section 435(a)(4) of the HEA. The amended and new provisions are similar to the current regulatory requirements for an appeal due to mitigating circumstances (see 34 CFR 668.17(c)(1)(ii)(B)). However, the 1998 Amendments makes several substantive modifications to the regulatory requirements:

- The criterion based on a school's economically disadvantaged rate is reduced from a minimum of 70 percent to a minimum of two-thirds.
- The criterion based on a school's placement rate is reduced from a minimum of 50 percent to a minimum of 44 percent.
- The groups of students used in the calculations that determine the school's appeal are re-defined.
- An independent auditor must agree, in a written opinion included with the appeal, that the school meets the appeal's criteria.

How would the modified requirement for an independent auditor's opinion be implemented under the proposed regulations?

The following process is proposed to incorporate the modified requirement for an auditor's opinion:

- Within 30 days of being notified that its participation will end due to excessive FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates, or that a prior loss of participation will be extended, the school must notify us that it is appealing under these provisions.
- Within 60 days of being notified that its participation will end due to excessive rates, or that a prior loss of participation will be extended, the school must send us the independent auditor's report. The report must include the school's written assertions and be in a format prescribed by us.
- We consider the auditor's report and compare the assertions in the report with the information we maintain.
- If the independent auditor's opinion supports the school's position, and the report's documentation or our data do not contradict the opinion, then the appeal is approved.
- If the independent auditor's opinion does not support the school's assertion, or if the report's documentation or our data contradict the opinion, the appeal is denied.

We rely upon the opinion of the independent auditor in determining whether a school meets the mitigating circumstance criteria. However, it would not be appropriate for us to decide that a school meets the criteria if an auditor's opinion is contradicted by data in the report itself or by data that we maintain.

As agreed during negotiated rulemaking, the data that we would use to evaluate a report's acceptability would be limited to data that the school has supplied to us for other reasons or data that is otherwise available to the school. For example, when making a determination, we may compare data in the report to the data maintained in the Federal Pell Grant Program payment systems, the National Student Loan Data System (NSLDS), the Integrated Postsecondary Education Data System (IPEDS), or other data sources.

We would not typically investigate a school's assertions in making our determination. For example, we would not routinely contact the employers of the school's former students to gather additional information to use in evaluating their placement rate assertions. If improprieties are suspected in a school's appeal, an investigation would be pursued under other legal authority.

How would the groups of students used to calculate economically disadvantaged, completion, and placement rates be re-defined?

The 1998 Amendments changes the definitions of the groups of students used to calculate economically disadvantaged rates, completion rates, and placement rates:

- A student is considered economically disadvantaged if the student is eligible to receive a Federal Pell Grant award that is at least equal to one-half the maximum Federal Pell Grant award for which the student would be eligible based on the student's enrollment status. The previous regulatory criterion considered a student with an expected family contribution (EFC) of zero to be economically disadvantaged.
- A student is considered to have completed a program or to have been placed if the student enters active duty in the Armed Forces of the United States.

Additional changes are included in these proposed regulations. Currently, the economically disadvantaged rates, completion rates, and placement rates used to determine a school's eligibility for this type of appeal are calculated as percentages of all of the school's regular students. The proposed regulations limit the groups of students for whom the percentages are calculated to include only students who are enrolled in programs eligible for Title IV aid.

This change is proposed at the request of some of the non-Federal negotiators, in consideration of the types of student records needed by a school to calculate its eligibility for this appeal and of the likelihood that these records may not be maintained by schools for students who were not enrolled in Title IV eligible programs. We especially request comments on the benefit or harm that this proposed change might cause schools.

7. Other Mitigating Circumstances Appeals (§§ 668.17(c)(1)(ii)(A), (C), and (D))

Why are additional mitigating circumstances proposed?

These provisions are based on the authority given to the Secretary under new section 435(a)(2)(iii) of the HEA. Under this section, the Secretary may identify mitigating circumstances, in addition to those identified in the HEA, that make the consequences of FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates inequitable. Schools meeting the criteria for these additional mitigating circumstances may be allowed to continue participating in the FFEL and Direct Loan programs.

What additional mitigating circumstances are proposed?

The proposed regulations include the following additional mitigating circumstances for a school to use in appealing a loss of participation based on three consecutive rates of 25 percent or greater:

- A successful appeal, based on a school's participation rate index, that is made upon receipt of the school's published rate rather than its draft rate. The proposed regulations retain and modify previous regulatory requirements. (See the previous discussion of ''Participation Rate Index.'')
- The total number of a school's borrowers entering repayment in the 3 most recent fiscal years for which data are available is 30 or fewer. For example, if the number of a school's borrowers entering repayment in FY 1996 was 6, in FY 1997 was 10, and in FY 1998 was 8, then the total number of a school's borrowers entering repayment during those 3 fiscal years is 24 (6+10+8=24). The school in the example would be eligible for an appeal of a loss of participation based on the rates for those 3 fiscal years, because the total number of its borrowers entering repayment (24) is 30 or fewer.

This additional mitigating circumstance was developed by the committee and based on the reasoning that schools that make very few loans only pose a minimal financial risk to the taxpayers. The aggregate amount of the funds used to make these few loans is small. The committee was of the view that it was inequitable to subject these schools to loss of participation in the FFEL and Direct Loan programs, and especially to loss of participation in the Federal Pell Grant Program.

- At least two of the three rates upon which a school's loss of participation is based are calculated as ''average'' rates (''average'' rates are calculated for schools with fewer than 30 borrowers in a fiscal year, on the basis of combined data for 3 fiscal years) and would be less than 25 percent if calculated using data specific to each fiscal year.

As an example of this appeal, data for a sample school are provided below:

FY	Students	Default	Rate based on . . .	
			3 years of data (percent)	1 year of data (percent)
FY 1994	25	7	.....	28.0
FY 1995	25	6	.....	24.0
FY 1996	25	10	30.7	40.0
FY 1997	25	4	26.7	16.0
FY 1998	25	5	25.3	20.0

In the example, a school's rates for FY 1996, FY 1997, and FY 1998, as calculated under 34 CFR 668.17(d)(1)(i)(B) (in the ''3 Years of Data'' column), are 30.7 percent, 26.7 percent, and 25.3 percent. Since calculations for FY 1997 and FY 1998, using data unique to each of those fiscal years (in the ''1 Year of Data'' column), are both less than 25 percent, the school in the example would meet the criteria for this mitigating circumstance.

The proposed regulations include this mitigating circumstance because we believe such an approach is consistent with the legislative intent of section 435(m)(1)(C) of the HEA, which provides for the calculation of ''average'' rates, the rates that are applicable to schools with fewer than 30 borrowers entering repayment during a fiscal year. In providing for a calculation based on an ''average'' rate, we believe that the legislative intent of the HEA is to reduce the effects of volatile rates on schools with fewer than 30 borrowers entering repayment in a fiscal year. However, as shown in the preceding example, using an ''average'' rate may have the opposite effect in some cases: data for a single fiscal year (in the example, FY 1996) may raise a school's subsequent rates and, absent this proposed mitigating circumstance, could cause the school to lose its eligibility to participate.

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

Why are changes to the definition of ''default'' included in these proposed regulations?

These provisions would conform 34 CFR 668.17 to an amendment to section 435(l) of the HEA, which changes the definition of ''default'' from 180 days to 270 days for borrowers who first became delinquent on or after October 7, 1998.

How would the change in the definition of ''default'' affect a school's rate?

For purposes of calculating a school's rate, an FFEL Program borrower is generally considered to be in default if a claim for insurance is paid on the borrower's loan before the end of the fiscal year that immediately follows the fiscal year in which the loan entered repayment. For Direct Loan Program loans, specific timeframes are included in regulations to determine whether a Direct Loan is considered to be in default for purposes of the Direct Loan Program cohort rate or weighted average cohort rate.

Since there is generally a 90-day delay between the date that an FFEL Program loan defaults and the date that an insurance claim is paid, a corresponding 90-day period is provided in the timeframe used for Direct Loans. Thus, since the timeframe for considering a borrower in default on an FFEL Program loan is changing from 270 days to 360 days, the proposed regulations would change, from 270 days to 360 days—

- The number of days of delinquency after which a borrower would be considered in default on a Direct Loan, if the borrower's delinquency began on or after October 7, 1998; and
- The number of days of repayment on a Direct Loan, under the income-contingent repayment plan, after which a borrower would be included in a school's rate under § 668.17 (e) or (f).

9. Loan Servicing Calculation (§ 668.17(h)(2)(ii))

What changes would there be to the calculation of a school's rate after a loan servicing appeal?

These provisions reflect amendments to section 435(m)(1)(B) of the HEA. The section specifies that a loan is removed from both the numerator and denominator of a rate's calculation if the loan is determined to have been improperly serviced or collected. This is not a change from the current method used to calculate a school's rate for this purpose. The new language in the proposed regulations is included only to reflect the changes to the statute.

10. Definition of ''Loan Servicing Records'' (§§ 668.17(h)(3)(ii)(B) and 668.17(h)(3)(iii)(B))

Why is the definition of ''loan servicing records'' changing?

These provisions reflect amendments to section 435(a)(3) of the HEA. The section clarifies the definition of the loan servicing records that guaranty agencies and the Direct Loan Servicer provide to schools during appeals on the basis of improper loan servicing or collection.

How would the definition of ''loan servicing records'' change?

The definition of ''loan servicing records'' would remain essentially the same for both the FFEL and Direct Loan programs:

- *FFEL Program* loan servicing records are the collection and payment history records used by a guaranty agency to determine whether to pay a claim on a defaulted loan.
- *Direct Loan Program* loan servicing records are the collection and payment history records that we use to determine a school's Direct Loan Program cohort rate or weighted average cohort rate.

These revisions do not reflect a change in our current procedures. The proposed regulations provide clarification to reflect more closely the language in the 1998 Amendments.

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

How would a special institution's eligibility to participate be affected by the proposed regulations?

These provisions reflect amendments to section 435(a)(2)(C) of the HEA and add the provisions of the new section 435(a)(5) of the HEA. The 1998 Amendments extends, from July 1, 1998, to July 1, 1999, the date on which the consequences of excessive rates are applicable to historically black colleges or universities, tribally controlled community colleges, and Navajo community colleges. In certain cases, the Secretary may treat one of these special institutions that is subject to loss of participation due to excessive rates as an eligible institution during the 1-year periods beginning on July 1, 1999, 2000, and 2001. The proposed regulations include the requirements under which these schools may maintain eligibility during the 1-year periods.

During negotiations, the committee had extensive discussions about the amount of procedural detail needed in these regulations for special institutions. The Department's initial position was that these regulations should provide only the most general requirements, so

that the process would be flexible enough to account for changes in circumstances and for experiences gained in administering the requirements. Negotiators for special institutions were of the view that it was more important to emphasize the consequences of the requirements and to ensure stricter, more consistent requirements throughout the process, so that schools could devote appropriate resources to the task of reducing rates and would not be subject to changing requirements. The committee came to consensus on this proposed draft.

We note that proposed § 668.17(k)(2)(iii) and the introduction to proposed Appendix H use the word ''should'' rather than the word ''must,'' which is used throughout the rest of this NPRM. The word ''should'' was included by agreement during the negotiated rulemaking process, and we chose not to change it at this stage of the process. Although the meaning of this word may differ in different circumstances, we want to emphasize that the term ''should'' in this particular case is intended to mean ''must,'' and commenters should use this interpretation in developing their comments. We intend to change this section in the final regulations to use the word ''must,'' instead of ''should,'' unless commenters indicate a substantial reason to keep the word ''should.''

Executive Order 12866

1. Potential Costs and Benefits

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

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined to be necessary for the effective and efficient administration of the Title IV programs.

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

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

We note that, as these proposed regulations were subject to negotiated rulemaking, the costs and benefits of the various requirements were discussed thoroughly by negotiators. The resultant consensus reached on a particular requirement generally reflected agreement on the best possible approach to that requirement in terms of cost and benefit.

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

2. Clarity of the Regulations

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

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, § 668.17 *Default reduction and prevention measures*.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

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

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Entities affected by these regulations are institutions of higher education that participate in the title IV, HEA programs and individual recipients of title IV, HEA program funds. Institutions are defined as small entities, according to the U.S. Small Business Administration, if they are for-profit or nonprofit entities with total revenue of $5,000,000 or less, or entities controlled by governmental entities with populations of 50,000 or less. Individuals are not considered small entities for this purpose. These proposed regulations, which generally reduce operational burden and offer institutions additional ways to maintain their eligibility to participate in the Title IV aid programs, would not have a significant economic impact on small institutions.

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

Paperwork Reduction Act of 1995

Section 668.17 contains an information collection requirement. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Student Assistance General Provisions—668.17—Default reduction and prevention measures.

Under the proposed regulations, a historically black college or university, tribally controlled community college, or Navajo community college may continue to participate in the FFEL or Direct Loan Program even though it is subject to loss of participation due to excessive rates. This continued participation may only occur during the 1-year periods beginning on July 1, 1999, 2000, and 2001, and depends upon the Secretary's determination of the school's compliance with the proposed regulations.

To make this determination, we need to collect information from schools. Each school is required to submit a default management plan on or before July 1, 1999. On or before July 1, 2000 and 2001, each school is required to submit evidence of the implementation of its plan and of improvement in the preceding 1-year period. Some schools may be required to submit revised default management plans.

Fourteen schools submitted this collection in 1999. We estimate that 8 schools will submit this collection in 2000 and 4 schools will submit this collection in 2001. We estimate a burden of 200 hours per school to create/revise a default management plan, and an additional burden of 200 hours per school to submit evidence of their plan's implementation and of improvement in the preceding 1-year period.

As calculated in the table below, the annual burden is estimated to be 2534 hours:

Year	Number of schools	Default plan hours (Schools × 200 hrs)	Evidence hours (Schools × 200 hrs)	Total hours (Default plan + evidence)
1999	14	2800	N/A	2800
2000	8	1600	1600	3200
2001	4	800	800	1600
Total (2800+3200+1600) =				7600
Average (Total/3) =				2534

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

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

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

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

Intergovernmental Review

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

This document provides early notification of our specific plans and actions for these programs.

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

Assessment of Educational Impact

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

Electronic Access to This Document

You may view this document in text or Adobe Portable Document Format (PDF) on the Internet at the following sites:

http://ocfo.ed.gov/fedreg.htm
http://ifap.ed.gov/csb__html/fedlreg.htm
http://www.ed.gov/legislation/HEA/rulemaking/

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

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

List of Subjects in 34 CFR Part 668

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

Dated: July 27, 1999.

Richard W. Riley,

Secretary of Education.

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

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

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

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

A. Revising paragraph (a)(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U. Adding a new paragraph (k).

§ 668.17 Default reduction and prevention measures.

(a) * * *

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

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

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

* * * * *

(b) * * *

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

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

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

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

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

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

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

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

(6)(i) An institution may, notwithstanding 34 CFR 668.26, continue to participate in the FFEL, Direct Loan, and Federal Pell Grant programs until the Secretary issues a decision on the institution's appeal if the Secretary receives an appeal that is complete, accurate, and timely in accordance with paragraph (c) of this section; or it may suspend its participation during the appeal.

(ii) If an institution continues to participate in the FFEL or Direct Loan Program under paragraph (b)(6)(i) of this section, and the institution's appeal of its loss of participation is unsuccessful—

(A) The Secretary estimates the amount of interest, special allowance, reinsurance, and any related or similar payments made by the Secretary (or which the Secretary is obligated to make) on any FFEL or Direct Loan Program loan for which the institution certified and delivered or originated and disbursed funds during the period in which the institution would have been otherwise ineligible to certify and deliver or originate and disburse those funds, if it had not appealed;

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

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

(*1*) The institution files an appeal under the procedures established in subpart H of this part; or

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

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

(c) * * *

(1) * * *

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

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

(*2*) For the purpose of (c)(1)(ii)(A)(*1*) of this section, an institution's participation rate index for a fiscal year is determined by multiplying its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate for that fiscal year by the percentage of its regular students, as defined in 34 CFR 600.2, who—

(*i*) Were enrolled on at least a half-time basis during any part of a 12-month period ending during the 6 months immediately preceding the fiscal year for which the cohort of borrowers (used to calculate the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate) is determined; and

(*ii*) Received an FFEL or Direct Loan for attendance at the institution for a loan period that coincides with any part of the same 12-month period.

(B)(*1*) If in the opinion of an independent auditor, as submitted under paragraph (c)(7) of this section, the institution's economically disadvantaged rate is two-thirds or more, as determined under paragraph (c)(1)(ii)(B)(2) of this section; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

(A) Within 30 calendar days of the date that it was notified of its loss of

participation, notice of its intent to appeal under that paragraph, in a format prescribed by the Secretary; and

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

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

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

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

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

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

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

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

* * * * *

(j) * * *

(1) * * *

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

* * * * *

(4)(i) Within 30 calendar days of receiving the draft default rate information from the Secretary, an institution may challenge an anticipated loss of participation under (a)(3), (b)(1), or (b)(2) of this section using the criteria in § 668.17(c)(1)(ii)(A).

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

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

(k) *Special institutions.* (1) *Applicability of requirements.* For each 1-year period beginning on July 1 of 1999, 2000, or 2001, the Secretary may determine that the provisions of paragraph (a)(3), (b)(1), or (b)(2) of this section and the provisions of 34 CFR 668.16(m) do not apply to a historically black college or university within the meaning of section 322(2) of the HEA, a tribally controlled community college within the meaning of section 2(a)(4) of the Tribally Controlled Community College Assistance Act of 1978, or a Navajo community college under the Navajo Community College Act if the institution submits to the Secretary—

(i) By July 1, 1999—

(A) A default management plan; and

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

(ii) By July 1, 2000 and 2001—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) *Substantial improvement.*

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) *Secretary's determination.* (i) If the Secretary determines that an institution is in compliance with paragraph (k) of this section, then the provisions of paragraph (a)(3), (b)(1), or (b)(2) of this section and the provisions of 34 CFR 668.16(m) do not apply to the institution for that 1-year period, beginning on July 1 of 1999, 2000, or 2001.

(ii) If the Secretary determines that an institution is not in compliance with paragraph (k) of this section, the institution is subject to the provisions of paragraph (a)(3), (b)(1), or (b)(2) of this section and the provisions of 34 CFR 668.16(m). The institution's participation in the FFEL and Direct Loan programs ends on the date that the institution receives notice of the Secretary's determination.

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

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

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

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

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

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

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

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

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

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

Additional Default Reduction Strategies

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

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

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

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

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

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

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

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

Defining the Roles and Responsibilities of Independent Third Party

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

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

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

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

Statistics for Measuring Progress

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

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

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

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

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

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

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

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

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