DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 668

RIN 1845–AA08

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

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: We amend the regulations that govern institutional eligibility for and participation in the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (Title IV, HEA programs). These programs include the Federal Pell Grant Program, the campus-based programs (Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) Programs), the William D. Ford Federal Direct Loan (Direct Loan) Program, the Federal Family Education Loan (FFEL) programs, and the Leveraging Educational Assistance Partnership (LEAP) Program (formerly known as the State Student Incentive Grant (SSIG) Program).

These final regulations implement statutory changes made to the Higher Education Act of 1965, as amended (HEA), by the Higher Education Amendments of 1998 (1998 Amendments). Many of the final regulatory changes merely conform current regulatory provisions to the statutory changes.

DATES: *Effective Date:* These final regulations are effective July 1, 2000.

Implementation Date: The Secretary has determined, in accordance with section 482(c)(2)(A) of the HEA (20 U.S.C. 1089(c)(2)(A)), at their discretion institutions can choose to implement the provisions of certain sections of these regulations on or after October 29, 1999. For further information see ''Implementation Date of These Regulations'' under the **SUPPLEMENTARY INFORMATION** section of this preamble.

FOR FURTHER INFORMATION CONTACT: Cheryl Leibovitz, U.S. Department of Education, 400 Maryland Avenue, SW., ROB–3, room 3045, Washington, DC 20202–5344. Telephone: (202) 708–9900. If you use a telecommunications device for the deaf (TDD), you may call the Federal information Relay Service (FIRS) at 1–800–877–8339.

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SUPPLEMENTARY INFORMATION:

Background

On July 15, 1999, we published a notice of proposed rulemaking (NPRM) in the **Federal Register** (64 FR 38272–38282) proposing to amend the regulations governing institutional eligibility for and participation in the Title IV, HEA Programs. In the preamble to the NPRM, we discussed the following proposed changes:

- Amending § 600.2, the definition of ''State'' to include the ''Freely Associated States,'' which are the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.
- Amending §§ 600.4(c), 600.5(h), and 600.6(d) to require an institution to agree to submit any dispute involving the final denial, withdrawal, or termination of accreditation to ''initial'' rather than ''binding'' arbitration.
- Amending § 600.5(a)(8) to conform the provisions previously referred to as the ''85/15 rule'' to the new ''90/10 rule''.
- Amending § 600.5(d) to make explicit that institutions must use the cash basis of accounting in determining whether they satisfy the 90/10 rule, and by clarifying how institutional loans and scholarships must be treated under the cash basis of accounting.
- Amending § 600.5(e) to provide that an institution could presume that a student's institutional charges were not paid with Title IV, HEA program funds if they were paid with funds received from a prepaid State tuition plan.
- Amending § 600.7(c) to expand the waiver provision for an institution whose enrollment of incarcerated students exceeds 25 percent to include a nonprofit institution that provides a two- or four-year program for which it awards a ''postsecondary diploma.''
- Amending § 600.8, as well as §§ 600.5(b)(3)(i) and 600.6(b)(3)(iii) to clarify that a branch campus must exist as a branch campus for at least two years after the Secretary certifies it as a branch campus before seeking to be certified as a main or free-standing campus.
- Amending §§ 600.31 and 668.12 to allow an institution undergoing a change in ownership that results in a change in control to continue to participate in the Title IV, HEA programs on a provisional basis if the institution meets certain requirements.
- Amending § 600.55(a)(5)(i)(A) to provide criteria for determining the comparability of foreign graduate medical schools to domestic graduate medical schools.
- Amending § 600.56 to subject foreign veterinary schools to many, but not all, of the special eligibility requirements that the statute previously applied to foreign medical schools.
- Amending § 668.13 to expand the maximum period of time that an institution may be certified to participate in the Title IV, HEA programs from four years to six years.
- Amending § 668.14 to exempt an institution that has undergone a change in ownership/control from the requirement that it use a Default Management Plan during the first two years of its participation in the FFEL or Direct Loan programs if certain conditions are met.
- Amending § 668.14 by removing §§ 668.14(d) and (e), which govern collection and reporting of information concerning athletically-related aid, because those requirements will be revised and incorporated in § 668.47.
- Amending § 668.14(b)(24) to clarify that an institution agrees to comply with the requirements of § 668.22, which relates to refunds and the return of Title IV, HEA program funds.
- Amending § 668.14(d) to require that an institution make a good faith effort to distribute mail voter registration forms to its students. (The 1998 Amendments included this requirement but prohibited any officer of the Executive Branch from instructing an institution in the manner in which this provision is to be carried out. Therefore, proposed § 668.14(d) incorporated the provisions of section 487(a)(23) of the HEA *verbatim* into § 668.14(d) with minor changes to incorporate plain language requirements.)
- Amending § 668.27 to allow for a waiver for up to three years of the requirement that an institution submit annually, a compliance audit and audited financial statement if certain conditions are met.
- Amending § 668.92 to reflect that an individual who exercises substantial control over an institution and willfully fails to pay refunds on student loans is subject to the penalty established under section 6672(a) of the Internal Revenue Code of l986 with respect to nonpayment of taxes.
- Amending §§ 668.95 and 668.113 to allow an institution to correct or cure an error that results from an administrative, accounting, or recordkeeping error, if that error was not part of a pattern of errors and there is no evidence of fraud or misconduct related to the error, and to clarify that the Secretary will not

limit, suspend, terminate, or fine the institution if such an error is cured.

There are no significant differences between the NPRM and these final regulations.

Implementation Date of These Regulations

Section 482(c) of the HEA, 20 U.S.C. 1089(c), provides that if we publish these regulations before November 1, 1999, the regulations will become effective on July 1, 2000. However, that section also permits us to designate any of these regulations as one that an entity subject to the regulation may choose to implement earlier. If we designate a regulation for early implementation, we may specify when and under what conditions the entity may implement it. Under this authority, we have designated the following regulations for early implementation:

Upon publication, institutions have the discretion to implement §§ 600.4(c), 600.5(h), 600.6(d), 600.55, and § 600.56.

Upon publication, institutions have the discretion to implement the provisions of §§ 600.5(d) and (e). However, if an institution chooses to implement any of the provisions in those sections, it must implement all of them.

Upon publication, institutions have the discretion to implement the provisions dealing with a change of ownership that results in a change in control in §§ 600.20, 600.31, and 668.12.

Note: The changes to §§ 600.2, 600.5(a), 600.5(b)(3)(i), 600.6(b)(3)(iii), 600.7(a)(1)(iii) and (iv), 600.7(c), 600.8, 668.13, 668.14(b)(24), 668.14(d), and 668.92 reflect statutory provisions that already are in effect. Institutions may use these regulations prior to July 1, 2000 as guidance in complying with those statutory provisions.

The changes to §§ 668.95 and 668.13 merely clarify our current practices with regard to initiating compliance actions and assessing liabilities.

Section 668.27 will not become effective until July 1, 2000. However, we will begin to accept applications for waivers from institutions as of January 3, 2000 so that we can begin to grant waivers on July 1, 2000.

Discussion of Student Financial Assistance Regulations Development Process

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

These regulations were published in proposed form on July 15, 1999. With the exception of provisions relating to the ''90/10 rule'' in the definition of ''proprietary institution of higher education'' at § 600.5, the proposed regulations reflected the consensus of the negotiated rulemaking committee. Under the committee's protocols, consensus meant that no member of the committee dissented from the agreed-upon language. The Secretary invited comments on the proposed regulations by September 13, 1999 and approximately 60 comments were received. An analysis of the comments and of the changes in the proposed regulations follows.

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

Analysis of Comments and Changes

Part 600—Institutional Eligibility Under the Higher Education Act of 1965, as amended

Section 600.5 Proprietary Institution of Higher Education

Comments: A number of commenters registered support of the Secretary's proposals for implementing the 90/10 rule as reasonable and compliant with the HEA.

Discussion: We appreciate the support for these changes.

Changes: None.

Comments: Several commenters disagreed with the requirement contained in proposed § 600.5(d)(2) that a proprietary institution of higher education must use the cash basis of accounting in determining whether it satisfies the 90/10 rule. These commenters believed that all revenue should be recognized when earned (accrual basis of accounting), and not when received (cash basis of accounting.)

Discussion: We set forth in the preamble to the proposed regulations at 64 FR 38272, 38275 the history and rationale for the decision to use the cash basis of accounting in reporting revenue for the purpose of the 85/15 and now 90/10 rule. In summary an institution must report and account for its expenditure of Title IV, HEA program funds on the cash basis of accounting, and therefore, it must report all its revenues on that basis in order to make a meaningful determination of compliance with the 90/10 requirement.

Changes: None.

Comments: Two commenters requested clarification on the treatment of institutional loans in proposed § 600.5(d)(3)(i). That section provided that under the cash basis of accounting, when calculating the amount of revenue generated by the institution from institutional loans, an institution may include only loan repayments received during the relevant fiscal year.

Discussion: An institution may not count in the denominator of the fraction in § 600.5(d)(1) the loan proceeds from institutional loans that were disbursed to students; it may include only loan repayments it received during the relevant fiscal year for previously disbursed institutional loans.

Changes: None.

Comments: A number of commenters objected to the treatment of ''institutional scholarships'' as proposed in § 600.5(d)(3)(ii). That section provided that under the cash basis of accounting, when calculating the amount of revenue generated by the institution from institutional scholarships, an institution may include only the amount of funds it disbursed during the fiscal year from an established restricted account, and only to the extent that the funds in the account represent designated funds from an outside source or from fund earnings.

Commenters who objected to our treatment of institutional scholarships indicated that contributions to proprietary institutions are not tax deductible, and therefore proprietary institutions generally do not receive funds from outside sources for scholarship funds. Other commenters indicated that the tax laws preclude a proprietary institution from setting up a tax exempt entity for that purpose. Thus, the commenters noted that scholarship endowments are virtually non-existent in the proprietary sector.

The commenters noted that it would take years to amass the principal necessary to create a substantial endowment program. They also believed it would take even longer to earn enough interest to make tangible scholarship distributions to students. In addition, the commenters said that as a result of this proposed requirement, many institutions would have no choice but to limit or forgo making scholarships to deserving students.

On the other hand, several other commenters supported our treatment of institutional scholarship funds under the cash basis of accounting.

Discussion: We understand that the tax laws preclude individuals and entities from making tax deductible contributions to proprietary institutions, and therefore it would be unlikely that these institutions would have restricted funds to make scholarship awards. However, this result is consistent with our view, as expressed in the NPRM preamble, that institutional scholarships are not revenue generated by the institution but are expenses of the institution, and should not be included, except in unusual circumstances, in the denominator of the fraction in § 600.5(d)(1).

We specified in the initial NPRM on this topic in 1994 (59 FR 6446, February 10, 1994) that we wished to encourage proprietary institutions to obtain support from sources outside of and independent of the institution. Accordingly, funds donated to the institution by related parties may not count for purposes of the 90/10 calculation. An institution could, however, use such donations to create restricted accounts for institutional scholarships. Those scholarships would count in the 90/10 calculation, but only to the extent of earnings on the restricted account.

We disagree with the commenter's assertion that proprietary institutions will reduce the funding of institutional scholarships to their students. We believe that institutions award these scholarships to benefit their students, not as an artifice to avoid the consequences of the 90/10 rule.

Changes: None.

Comments: Some commenters stated that Federal Work-Study (FWS) program funds that an institution uses to pay institutional charges should be included in the 90/10 formula.

Discussion: Prior the 1998 Amendments, we did not include FWS funds in the 90/10 formula because the institution was required to pay those funds directly to the student; the institution was not permitted to use those funds to pay the student's institutional charges. The 1998 Amendments now allow an institution to credit FWS funds against a student's institutional charges if the student gives his or her permission. As a result, we believe that FWS funds must now be included in the 90/10 formula to the extent that a student takes advantage of this new authority and authorizes FWS funds to be used to pay his or her institutional charges.

Changes: Section 600.5(e)(1)(i) is revised to include FWS funds that an institution uses to pay a student's tuition, fees, and other institutional charges.

Comments: Several commenters requested that we address how credit balances should be treated with regard to the 90/10 rule.

Discussion: In general, funds held as credit balances in institutional accounts do not get counted in the 90/10 formula in § 600.5(d)(1). However, once funds held as credit balances are used to satisfy institutional charges, they would be counted in both the numerator and denominator of the formula. For example, an institution's fiscal year is a calendar year. On December 30, 1999, the institution disburses $100,000 of Title IV, HEA program funds to students on their accounts, and credit balances occur because the institution has not yet charged those accounts with related tuition and fees. On January 3, 2000, the institution charges tuition and fees to the students' accounts, and uses all of those previously disbursed funds to pay the students' tuition and fee charges.

For purposes of the 90/10 formula in § 600.5(d)(1), none of the $100,000 would be included in the institution's 90/10 calculation for its 1999 fiscal year because none of the funds had been used for tuition, fees, and other institutional charges; all of the $100,000 would be included in the institution's 90/10 calculation for its 2000 fiscal year calculation, when the funds were used to satisfy tuition, fees, and other institutional charges.

A similar result would apply if the institution drew down $100,000 of Title IV, HEA program funds from the Department on December 30, 1999 but did not pay those funds to students for institutional charges until January 3, 2000.

We note that under an extremely literal interpretation of the principles underlying the cash basis of accounting, it would be possible to determine that none of the $100,000 in the above example would be included in the numerator or denominator for any year because the regulation applies to cash received used to satisfy tuition, fees and other institutional charges. Under this interpretation, an institution would count only the funds it received in a particular fiscal year used to satisfy institutional charges for that fiscal year's determination of the 90/10 rule. In the above example, the $100,000 was received by the institution in fiscal year 1999. Therefore, when the institution used those funds to pay institutional charges in fiscal year 2000, it did not use any funds it received in fiscal year 2000 to pay institutional charges in that fiscal year.

We believe that this extremely literal interpretation is an impermissible interpretation of the principles governing the cash basis of accounting because it ignores the context of the 90/10 rule and produces an absurd result where the funds would never be counted.

Changes: None.

Comments: One commenter asked how the Secretary would treat the sale of institutional loans for the purpose of the 90/10 calculation.

Discussion: Revenue generated from the sale of non-recourse institutional loans to unrelated parties would be counted as revenue in the denominator of the 90/10 calculation to the extent of actual proceeds.

The sale of institutional loan receivables is distinguishable from the sale of an institution's other assets because the receivables from institutional loans were produced by a transaction that generates tuition revenue. Tuition revenue represents income from the major service provided by an institution. That would not be true in the case of the sale of other institutional assets.

An institution may use the proceeds from the sale of other assets in the creation of a restricted account and awarding of institutional scholarships. However, for 90/10 purposes, only the portion of proceeds that represents a gain on the sale of the asset counts as institutional scholarships. An institution may use the amount of the proceeds that equal the historical cost of the asset to establish the restricted account.

Changes: None.

Comments: Several commenters expressed concern at the provision contained in proposed § 600.5(e)(2) that presumes that all Title IV, HEA program funds disbursed or delivered to students are used to pay tuition, fees, or other institutional charges, regardless of whether those funds are paid directly to students or credited to their institutional accounts. These commenters believed that this presumption ignored the cash contributions made by students and their families toward the student's educational costs. These commenters further indicated that the exceptions to the presumption in proposed § 600.5(e)(3) should be expanded to include certain savings vehicles, such as educational IRAs.

Discussion: From the very first attempts to develop regulations to implement the 85/15 rule in 1993 and 1994, we and the regulation negotiators recognized the necessity of this presumption, in order, as stated by the Secretary in the preamble to the NPRM that was issued for the 85/15 rule, ''[t]o avoid inappropriate manipulation of information under the 85 percent rule.'' 59 FR 6446, 6449 (Feb. 10, 1994). For example, without the presumption, an institution could disburse Title IV, HEA programs funds directly to students and then have the students write checks to the institution for tuition, fees, and other institutional charges. Under this approach, an institution could contend that none of the Title IV, HEA program funds were used to pay institutional charges.

On the other hand, we agree with the commenters that in certain instances, the presumption would not take into account cash contributions made by students and their parents toward the student's educational costs. However, we believe that these instances are ameliorated by the fact that an institution can obtain up to 90 percent of its tuition and fee revenue from Title IV, HEA program funds, and by the exceptions provided in § 600.5(e)(3).

When we created the presumption, we also created exceptions. Thus, in the original 85/15 rule, we provided that the presumption should not apply to the extent that a student's tuition and fee charges were paid with grant funds provided by third parties, or to the extent that those charges were paid under contracts with governmental agencies. In the proposed rule for these final regulations, the Secretary added another exemption—tuition and fee charges that were paid from a State prepaid tuition plan.

These three exceptions are consistent in that funds come to the institution directly from an outside third party source and are easily accounted for. The commenter's suggestions for additional exceptions would satisfy neither condition, because the suggested additions would not come from an outside third party source, and an institution would not be able to document that a payment came from such a source. In addition, the proposed additional sources of funds, including education IRA funds, can be used to pay non-institutional charges as well as an institutional charges.

Changes: None.

Section 600.7 Conditions of Institutional Ineligibility

Comments: Several commenters requested that the Secretary define the term ''postsecondary diploma'' in proposed § 600.7(c)(1). That section provides that an institution whose enrollment of incarcerated students exceeds 25 percent will not become ineligible for that reason if the institution offers a two or four-year program of study for which it awards a * * * ''postsecondary diploma.''

Discussion: This change reflects a statutory change to the HEA that was enacted at the behest of institutions in the State of Louisiana. The term ''postsecondary diploma'' has a specific meaning in that State for those institutions, and as a result, we do not believe that it is useful to define that term for purposes of this section. Consequently, we recognize that if a nonprofit institution in another State offer a two or four year program that leads to a credential specifically called a ''postsecondary diploma,'' that institution may be eligible for a waiver of the incarcerated student limitation.

Changes: None.

Section 600.30 Institutional Notification Requirements

Comments: One commenter asks that we change the 10 day notice requirement in § 600.30(a) to 10 business days because § 668.12(f) gives an institution undergoing a change in ownership/control 10 business days after the sale date to submit a ''materially complete application.''

Discussion: The 10 business day deadline date for submitting a ''materially complete application is required by statute. The notice requirements in § 600.30 refer to calendar days and we see no need to change them merely because of the special statutory rule for the change of ownership situation.

For institutions undergoing a change in ownership/control that wish to continue participating in the Title IV, HEA programs, the critical deadline is, of course, the one requiring the submission of the materially complete application under § 668.12(f). The deadline in § 600.30 would be relevant only if the institution did not wish to continue participating in those programs.

Changes: None.

Section 668.12 Application Procedures

Comments: Several commenters asked whether the documents which are required as part of an institution's ''materially complete application'' must be submitted ''promptly'' (as indicated in the preamble to the NPRM) or prior to the expiration date of the provisional PPA as reflected in the proposed regulatory language.

Discussion: The commenters have confused our statement in the preamble and the proposed regulations. As indicated in § 668.12(f)(1) in both its proposed and final form, documents that must be submitted as part of a ''materially complete application'' must be submitted to the Department no later than 10 business days after the change in ownership/control takes place. These documents are described in § 668.12(f)(2).

The preamble reference to ''promptly'' refers to the documents that are described in § 668.12(g)(3), which are, for example, ''same day'' balance sheets, that an institution must submit to have its provisional Program Participation Agreement (PPA) extended and its change of ownership/control application fully approved.

Changes: None.

Comments: Several commenters asked if a ''materially complete application'' has to be submitted before or after the change of ownership takes place.

Discussion: With the deletion of § 600.31(f), institutions now have the option of submitting materially complete applications before the date of sale. If an institution submits a materially complete application before the date of sale, the institution must then notify the Department of the date the sale actually took place. We need that date because, if the institution's materially complete application is approved, the sale date is used in determining the expiration date of the provisional PPA.

We will also allow an institution to submit an application for a change in ownership/control before the change occurs without the documents required to make the application an official ''materially complete application.'' We will review these applications if they are submitted no later than 45 days before the expected sale date. We consider our review of this application to be a ''preacquisition review''.

As part of our preacquisition review, we will determine whether the institution has answered all the questions on the application completely and accurately, and will notify the institution of the results of that review. In this way, if some questions have not been answered or have not been adequately answered, the institution would have an opportunity to correct its application before the actual date of the change in ownership/control. Thus, our response in a preacquisition review will not be an official approval or denial of the application; it will notify the institution that its application is approvable, or it will alert the institution of any problems that need to be addressed before the application can be approvable.

Changes: None.

Comments: One commenter asked if all institutions undergoing a change of ownership/control must provide a same-day balance sheet to the Secretary, either to ''continue'' uninterrupted participation in Title IV, HEA programs by satisfying the requirements of §§ 668.12(f) and (g), or to ''resume'' participation in Title IV programs after a loss of eligibility resulting from the ownership change.

Discussion: Yes, it must.

Changes: None.

Comments: Several commenters asked exactly which audited financial statements would a new owner be required to provide. The commenters also asked for clarification as to what constitutes ''equivalent information'' for a new owner as a substitute for the audited financial statements. The commenters asked whether the new owner has the option of providing ''equivalent information'' or if that determination is up to the Department.

Discussion: One of the conditions that we have to evaluate when deciding whether to approve a materially complete application is whether the institution under its new ownership will be financially responsible. To make that determination, it is necessary to evaluate the financial condition of the purchaser.

Corporate purchasers will submit audited financial statements of their two most recently completed fiscal years. Similarly, if the new owner is a partnership or a single individual, the partnership and individual must submit those audited financial statements.

However, we realize that there may be situations where a new owner does not have two years of audited financial statements. For example, the new corporate owner may not have been in business for two years or a single individual or partnership may not have had these audits performed. Under these circumstances, we require the new ownership to provide equivalent documentation that would allow us to evaluate the new owners' financial strength.

This equivalent documentation could take the form of an audited personal financial status report that would show the new owners' net worth. It could include letters of reference or personal guarantees. In many instances, we will request the new owners to suggest the equivalent documentation.

Finally, as noted above, it is not the new owner's option to provide equivalent documentation. That option is available only if the two required audited financial statements are not available. Moreover, we make the final determination as to whether equivalent documentation proposed by an owner is acceptable.

Changes: None.

Comments: One commenter suggested that we make conforming changes to §§ 600.20 and 600.31 to reflect the continued eligibility of an institution that changed ownership/control to participate in the Title IV, HEA programs.

Discussion: We concur with the commenters' suggestions.

Changes: We added § 600.20(c)(8) and amended § 600.31(a).

Comments: One commenter questioned if the Secretary considered the potential impact of the new institutional waiver provisions regarding annual audit submission requirements on the change of ownership provisional certification requirements.

Discussion: The audit waiver provisions in § 668.27 generally do not have an impact on the change of ownership/control certification requirements in § 668.12(f). Under the regulatory scheme of § 668.27, an institution may not receive a waiver if it has undergone a change in ownership/control within three years of its application for a waiver. Moreover, if an institution received a waiver, that waiver is rescinded if the institution undergoes that ownership/control change.

There is, however, a facial conflict between §§ 668.12(f) and 668.27 involving the submission of audited financial statements. Under the former provision, an applicant institution for a change of ownership must submit audited financial statements for its two most recently completed fiscal years even though the latter provision may have provided the institution with a waiver of that submission requirement. However, if the institution changes ownership/control and wants to keep participating in the Title IV, HEA programs, it must follow the requirements of § 668.12(f). Consequently, if an institution received a waiver and is then sold, and the new owners wish to continue the institution's participation in the Title IV, HEA programs, the new owners must submit audited financial statements of the institution's last two completed fiscal years as part of a ''materially complete application,'' even though the institution may not have had to submit those audited financial statements under § 668.27.

We believe that this requirement is consistent with normal business practice, because we believe that an institution's potential purchaser would require the seller to provide such audits, as well as compliance audits of the institution's administration of the Title IV, HEA programs, before buying the institution.

Changes: None.

Section 668.14 Program Participation Agreement.

Comments: One commenter noted that an institution that has undergone a change in ownership/control does not have to implement an approved default management plan if ''The owner of the institution does not, and has not, owned any other institution with a cohort default rate in excess of 10 percent.'' The commenter wanted to know when the Secretary makes this determination, which cohort default rate will be used for the institution that the owner just purchased and which will be used for any of the other institutions the owner owns or owned.

Discussion: For the institution being purchased, we will use the latest published cohort default rate. For any other institution that the new owner owns or owned, we will use all published cohort default rates for the period that coincides with the period that the institution was owned by that individual.

Changes: None.

Comments: Some institutions with cohort default rates under the FFEL or Direct Loan programs that exceed 25 percent are not subject to the default management plan requirements provided in appendix D of Part 668, but are subject to a separate set of the default management plans that will be contained in § 668.17(k). One commenter suggested that this section be expanded to reflect that fact.

Discussion: Section 668.14 generally includes all the provisions that section 487(a) of the HEA requires to be included in a program participation agreement, and does not include other requirements outside of section 487(a) that an institution may have to undertake.

Changes: None.

Comments: Several commenters opposed the requirement in proposed § 668.14(d) that institutions make a good faith effort to distribute mail voter registration forms to its students. These commenters indicated that this requirement would place a tremendous burden on institutions. Commenters also suggested that the Secretary provide guidance on acceptable methods for distributing the voter registration materials.

Discussion: The language provided in this section is copied from the statute. Moreover, the statute (section 487(b)(2) of the HEA) specifically prohibits the Secretary from instructing institutions in the manner in which this provision is carried out.

Changes: None.

Section 668.27 Waiver of Annual Audit Submission Requirement.

Comments: Commenters generally supported our proposed rules dealing with waivers of the annual audit submission requirement. Some commenters indicated there was some confusion regarding the timelines involved in these procedures, particularly with regard to the fiscal years that may be included in a waiver.

Discussion: We recognize that the proposed regulation did not specifically identify which fiscal year could be included in a waiver request. We are rectifying that omission by providing that an institution's waiver request may include the fiscal year in which that request is made, plus the next two fiscal years. That request may not include an already completed fiscal year.

For example, if an institution's fiscal year is based upon an award year (July 1–June 30), and the institution requests a waiver on May 1, 2000, that waiver request may include its 1999–2000 fiscal year (July 1, 1999 through June 30, 2000) plus its 2000–2001 and 2001–2002 fiscal years. If that institution's fiscal year was a calendar year, the institution's waiver request could include its calendar 2000 fiscal year plus its 2001 and 2002 fiscal years. In the latter example, the waiver would not include the institution's 1999 fiscal year, and therefore, it would be required to submit its compliance audit and audited financial statement to the Department by June 30, 2000.

Changes: Section 668.27(a)(3) is added to provide that the first fiscal year that may be included in a waiver request is the fiscal year in which the institution submits that waiver.

Comments: One commenter asked about liabilities that might accrue to an institution for a fiscal year if that fiscal year was one of the fiscal years included in a waiver.

Discussion: An institution is liable to repay title IV, HEA program funds because it improperly expends those funds. A compliance audit is the vehicle for discovering that improper expenditure.

These regulations do not waive the requirement that an institution audit its administration of the title IV, HEA programs; they waive the requirement that these audits be performed and submitted on an annual basis. Thus, the institution will pay that liability when the institution eventually submits a compliance audit for the fiscal year in which it made an improper expenditure, we resolve that audit, and request that payment.

Changes: None.

Comments: One commenter requested clarification of the reporting requirements for institutions granted a waiver of the requirement that an institution submit annually, a compliance audit and audited financial statement with regard to the 90/10 rule and the institutional ineligibility requirements of § 600.7.

Discussion: Under the 90/10 rule and § 600.7, at the end of each fiscal year, an institution must report to the Department if it fails to satisfy the 90/10 rule or if it fails one of the ineligibility provisions in § 600.7 for that year. An institution is still required to make these annual determinations even if it is not required to submit audits annually. This also means, of course, that if an institution fails to comply with the 90/10 rule or one of the ineligibility provisions in § 600.7 it immediately loses its eligibility. The institution would be liable for any funds it disbursed subsequent to the end of the fiscal year in which it failed to meet one of these requirements.

If an institution determines that it satisfies those requirements, its auditor is required to indicate agreement with that determination and report that agreement when the auditor submits that fiscal year's audited financial statement. The auditor may also indicate agreement with the institution's determination of eligibility under § 600.7 with the institution's compliance audit.

If an institution receives a waiver, it need not submit a statement from its auditor regarding its compliance with the 90/10 rule or the provisions of § 600.7 until its audited financial statement and compliance audit are submitted. When those audits are submitted, the auditor must note his or her agreement with the institution's determinations of eligibility for each of the fiscal years covered by the audits. For example, if the institution received a waiver and did not have to submit an audit for the 2000–2001 and 2001–2002 fiscal years, when the next audits are submitted on December 31, 2003, the auditor must indicate agreement with the institution's eligibility determinations for the 2000–2001 fiscal year, the 2001–2002 fiscal year, and the 2002–2003 fiscal year.

The auditor must indicate agreement with the institution's 90/10 determination for each of those three years even though the auditor need only submit an audited financial statement for the 2002–2003 fiscal year.

Changes: None.

Comment: One commenter wondered whether the criteria for a waiver renewal were the same as the criteria for the initial waiver.

Discussion: The criteria we use to grant waivers applies equally to requests for initial and renewal waivers.

Changes: None.

Comments: Several commenters wanted clarification on whether the Secretary would base an action to grant or rescind a waiver on a limitation, suspension, fine, or termination action that had only been initiated and was not final.

Discussion: We will not grant a waiver and we will rescind a waiver based upon the initiation of a limitation, suspension, fine, or termination action. We initiate one of those actions because we receive information that the subject institution has not been properly administering the Title IV, HEA programs. We believe that an institution under those circumstances should not have its audit requirements waived. Moreover, under the procedures available to an institution, a final decision in such an action may take a long period of time, and a hearing official or the Secretary may decide not impose the sanction requested even though the institution has been improperly administering the Title IV, HEA programs.

Changes: None.

Comments: Two commenters noted a difference in wording on the monetary threshold for granting a waiver. At § 668.27(c)(2) the regulation states the institution ''did not disburse $200,000 or more of Title IV.'' At § 668.27(e)(1), the criteria for rescinding the waiver, the regulation states the institution ''disburses more than $200,000.'' The commenters recommended that the two sections be made parallel.

Discussion: We agree.

Changes: Section 668.27(e)(1) is changed to read ''Disburses $200,000 or more of Title IV, HEA program funds for an award year.''

Comments: One commenter wanted to know if two waivers for three years each were granted one after the other whether this meant that the institution would only need one audit for the six-year period.

Discussion: No, the institution would need two sets of audits to cover the six-year period. However, since the institution has up to six months after the last fiscal year to be covered to submit the second set of audits, the second set of audits would not have to be received by the Department until six months after the expiration of the six year period.

Changes: None.

Comments: One commenter wanted to know whether the requirement that ''no individual audit disclosed liabilities in excess of $10,000'' referred to the final audit liability. The commenter based his comment on the new statutory provision that allows an institution to cure administrative, accounting, and recordkeeping errors, and the proposed regulations in § 668.113, that provides that the Department will not charge an institution a liability for such an error if it cures the error and the cure eliminates the basis of the liability.

Discussion: We will use the best information available to us when making a decision on whether to grant a waiver. Therefore, if the latest information is the audit report submitted by the institution's auditor, we will use that report in our waiver determination. However, if an institution requests a waiver and its request is denied because of audit findings that show a liability in excess of $10,000, and those findings are subsequently revised to show liabilities of $10,000 or less for any reason, including a cure of the error, the institution can reapply for the waiver.

Changes: None.

Comments: One commenter asked whether the commenter was correct in assuming that the Secretary was not going to consider an institution's administrative capability in determining whether to grant an audit waiver.

Discussion: We believe that the criteria we proposed for granting waivers is a proxy for administrative capability.

Changes: None.

Discussion: In the course of responding to the commenter's question, we realized that we did not provide any rules in the proposed regulations that address the situation when an institution's waiver is rescinded, *vis a vis* when the institution must submit audits, and what years must be covered by the audits. Accordingly, we have revised § 668.27 to provide that if an institution has its waiver rescinded in a fiscal year, the effective date of the rescission is the last day of that fiscal year.

Under this approach, the institution must submit compliance audits for the fiscal year(s) that were completed and unaudited, and an audited financial statement of the last completed fiscal year. The institution must submit these audits no later than six months after the end of the fiscal year in which its waiver was rescinded. We chose this approach to save the institution money, because the institution will not have to enter into more than one engagement agreement with an auditor to perform all the required audit work.

To illustrate this new provision, we use the example given in the preamble of the NPRM for § 668.12(f). An institution's fiscal year coincides with an award year (July 1–June 30). It submits its compliance and financial statement audit for the 1999–2000 award year, applies for a waiver, and receives that waiver so that its next compliance audit and audited financial statement must be submitted six months after the end of its 2002–2003 fiscal year.

If the institution's waiver is rescinded during the 2000–2001 fiscal year, the first fiscal year of its waiver period, it has not completed any fiscal year for which the audit requirement was waived. Therefore, it must submit its compliance audit and audited financial statement for that fiscal year in the regular course, *i.e.,* no later than six months after the end of that fiscal year, December 31, 2001.

If the institution's waiver was rescinded during the 2001–2002 fiscal year, the waiver applied to its submission of audits for the 2000–2001 fiscal year. Therefore, it must submit a compliance audit for the 2000–2001 and 2001–2002 fiscal years, and must submit an audited financial statement only for the 2001–2002 fiscal year. These audits must be submitted no later than December 31, 2002, six months after the end of its 2001–2002 fiscal year.

If the institution's waiver was rescinded during the 2002–2003 fiscal year, the waiver applied to its submission of audits for the 2000–2001 and 2001–2002 fiscal years. Therefore, it must submit a compliance audit for the 2000–2001, 2001–2002, and 2002–2003 fiscal years, and an audited financial statement only for the 2002–2003 fiscal year. These audits must be submitted no later than December 31, 2003, six months after the end of its 2002–2003 fiscal year.

Changes: As indicated above, we have revised § 668.27 to provide that if an institution has its waiver rescinded in a fiscal year, the effective date of the rescission is the last day of that fiscal year.

Executive Order 12866

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

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

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations 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 summarized the potential costs and benefits of these final regulations in the preamble to the NPRM at 64 FR 38276–38277.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Assessment of Educational Impact

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

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

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(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Consolidation Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program;

84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 LEAP; 84.268 William D. Ford Federal Direct Loan Programs; and 84.272 National Early Intervention Scholarship and Partnership Program.)

List of Subjects

34 CFR Part 600

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

34 CFR 668

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

Dated: October 21, 1999.

Richard W. Riley,

Secretary of Education.

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

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

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

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

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

§ 600.2 Definitions.

* * * * *

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

* * * * *

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

§ 600.4 Institution of higher education.

* * * * *

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

* * * * *

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

§ 600.5 Proprietary institution of higher education.

(a) * * *

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

(b) * * *

(3) * * *

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

* * * * *

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

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

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

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

(3) Under the cash basis of accounting—

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

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

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

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

(i) The amount of funds it received under the Federal Work-Study (FWS) Program, unless the institution used those funds to pay a student's institutional charges in which case the FWS program funds used to pay those charges would be included in the numerator and denominator.

(ii) The amount of funds it received under the Leveraging Educational Assistance Partnership (LEAP) Program. (The LEAP Program was formerly called the State Student Incentive Grant or SSIG Program.);

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

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

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

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

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

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

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

(iii) Funds provided by State prepaid tuition plans.

(4) With regard to the denominator, revenue generated by the institution from activities it conducts, that are

necessary for its students' education or training, includes only revenue from those activities that—

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

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

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

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

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

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

* * * * *

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

§ 600.6 Postsecondary vocational institution.

* * * * *

(b) * * *

(3) * * *

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

* * * * *

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

* * * * *

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

§ 600.7 Conditions of institutional ineligibility.

(a) * * *

(1) * * *

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

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

* * * * *

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

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

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

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

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

* * * * *

7. Section 600.8 is revised to read as follows:

§ 600.8 Treatment of a branch campus.

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

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

8. Section 600.20 is amended by adding a new paragraph (c)(8) to read as follows:

§ 600.20 Application procedures.

* * * * *

(c) * * *

(8) Continue to be eligible following a change in ownership that results in a change in control according to the provisions of § 668.12(f).

* * * * *

9. In § 600.31, paragraph (a)(1) is revised to read as follows:

§ 600.31 Change of ownership resulting in a change in control.

(a)(1) Except as provided in § 668.12(f), an institution that undergoes a change in ownership that results in a change of control ceases to qualify as an eligible institution upon the change in ownership and control. A change in 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 this institution or the parent corporation of that entity, acquires or loses the ability to control the institution.

* * * * *

§ 600.31 [Amended]

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

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

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

(a) * * *

(5) * * *

(i) * * *

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

* * * * *

§ 600.56 [Redesignated as § 600.57]

12. Section 600.56 is redesignated as § 600.57.

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

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

(a) The Secretary considers a foreign veterinary school to be eligible to apply to participate in the FFEL programs if, in addition to satisfying the criteria in § 600.54 (except the criterion that the institution be public or private nonprofit), the school satisfies all of the following criteria:

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

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

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

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

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

(4) Either—

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

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

(b) [Reserved]

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

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

14. The authority citation for part 668 is revised to read as follows:

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

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

§ 668.12 Application procedures.

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

§ 668.13 [Amended]

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

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

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

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

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

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

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

(A) The institution, including its main campus and any branch campus, does not have a cohort default rate in excess of 10 percent; and

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

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

* * * * *

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

* * * * *

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

* * * * *

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

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

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

* * * * *

18. A new § 668.27 is added to subpart B to read as follows:

§ 668.27 Waiver of annual audit submission requirement.

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

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

(3) The first fiscal year for which an institution may request a waiver is the fiscal year in which it submits its waiver request to the Secretary.

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

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

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

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

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

(i) The institution must submit a compliance audit that covers the institution's administration of the title IV, HEA programs for the period for each fiscal year for which an audit did not have to be submitted as a result of the waiver, and an audited financial statement for its last fiscal year; and

(ii) The auditor who conducts the audit must audit the institution's annual determinations for the period subject to the waiver that it satisfied the 90/10 rule in § 600.5 and the other conditions of institutional eligibility in § 600.7 and § 668.8(e)(2), and disclose the results of the audit of the 90/10 rule for each year in accordance with § 668.23(d)(4).

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

(1) Is not a foreign institution;

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

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

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

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

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

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

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

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

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

(e) *Rescission of the waiver.* (1) The Secretary rescinds the waiver if the institution—

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

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

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

(2) If the Secretary rescinds a waiver, the rescission is effective on the last day of the fiscal year in which the rescission takes place.

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

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

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

§ 668.92 Fines.

* * * * *

(d)(1) Notwithstanding any other provision of statute or regulation, any individual described in paragraph (d)(2) of this section, in addition to other penalties provided by law, is liable to the Secretary for amounts that should have been refunded or returned under § 668.22 of the title IV program funds not returned, to the same extent with respect to those funds that such an individual would be liable as a responsible person for a penalty under section 6672(a) of Internal Revenue Code of 1986 with respect to the nonpayment of taxes.

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

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

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

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

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

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

§ 668.95 Reimbursements, refunds and offsets.

* * * * *

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

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

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

§ 668.113 Request for review.

* * * * *

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

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

* * * * *

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

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