DEPARTMENT OF EDUCATION

34 CFR Parts 600, 668, 673, 675, 682, 685, 690, and 694

RIN 1845–AA24

Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions; General Provisions for the Federal Perkins Loan Program, Federal Work-Study Program, and Federal Supplemental Educational Opportunity Grant Program; Federal Work-Study Programs; Federal Family Education Loan Program; William D. Ford Federal Direct Loan Program; Federal Pell Grant Program; and Gaining Early Awareness and Readiness for Undergraduate Programs

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions; General Provisions for the Federal Perkins Loan (Perkins Loan) Program, Federal Work-Study Program, and Federal Supplemental Educational Opportunity Grant (FSEOG) Program; Federal Work-Study (FWS) Programs; Federal Family Education Loan (FFEL) Program; William D. Ford Federal Direct Loan (Direct Loan) Program; Federal Pell Grant (Pell Grant) Program; and Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) regulations. The Secretary is amending these regulations to reduce administrative burden for program participants, to provide benefits to students and borrowers, and to protect taxpayers' interests.

DATES: We must receive your comments on or before October 7, 2002.

ADDRESSES: Address all comments about these proposed regulations to Wendy Macias, U.S. Department of Education, P.O. Box 33076, Washington, DC 20033–3076. We encourage commenters to use e-mail because paper mail to the Washington area may be subject to delay, but please use one method only to provide your comments. If you comment via e-mail, we will send a return e-mail acknowledging our receipt of your comments. If you choose to send your comments through the Internet, use the following address: *ProgramNPRM@ed.gov.*

You must include the term ''Team II Program Issues'' in the subject line of your electronic message.

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: Ms. Wendy Macias Telephone: (202) 502–7526 or via the Internet: *Wendy.Macias@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

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 they are discussed in the Significant Proposed Regulations section of this document.

Section 482(c)(1) of the Higher Education Act of 1965, as amended (HEA) provides that in order for a regulatory change to be effective for the start of an award year on July 1, it must have been published in final form in the **Federal Register** no later than the preceding November 1. The Secretary's intent is to publish final rules resulting from this Notice of Proposed Rulemaking (NPRM) by November 1, 2002, making the new rules effective on July 1, 2003. However, section 482(c)(2) of the HEA allows the Secretary to designate regulatory provisions that an entity subject to the provision may, at its option, choose to implement earlier. Therefore, we are seeking suggestions on which of the proposed regulatory provisions in this NPRM, if finalized, should be so designated.

Section 482 of the HEA does not apply to regulations governing programs other than the Federal student aid programs. Therefore, if the proposed regulations on GEAR UP included in this NPRM are finalized, they would be effective upon the date that the final regulations are published in the **Federal Register**.

We also 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 at 1990 K Street, NW., (8th Floor) Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays. If you want to schedule an appointment to inspect the public comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Negotiated Rulemaking

Section 492 of the HEA requires the Secretary, before publishing any proposed regulations for programs authorized by Title IV of the HEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary must subject all proposed regulations to a negotiated rulemaking process. All proposed regulations that the Department publishes must conform to agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants in that process stating why the Secretary has decided to depart from the agreements.

We developed a list of proposed regulatory changes from advice and recommendations submitted by individuals and organizations in response to a May 24, 2001, request for recommendations on improving the Title IV student assistance programs from Representative Howard P. ''Buck''

McKeon and Representative Patsy Mink, the Chairman and Ranking Member, respectively, of the Subcommittee on 21st Century Competitiveness of the Education and the Workforce Committee of the U.S. House of Representatives.

On December 5, 2001, we published a notice in the **Federal Register** (66 FR 63203) announcing our intent to establish two negotiated rulemaking committees to develop proposed regulations. One committee (Committee I) would address issues related to the Title IV student loan programs. The other committee (Committee II) would address all other Title IV student aid issues. The notice requested nominations of individuals for membership on the committees who represented key stakeholder constituencies that are involved in the student financial assistance programs, with preference given to individuals who are actively involved in administering the Federal student financial assistance programs or whose interests are significantly affected by the regulations. In the notice, we identified the constituencies with interests that are significantly affected by the subject matter of the negotiated rulemaking and announced that we expected that representatives of each of those constituencies would likely be selected as members of one, or both, committees. This NPRM is the result of the deliberations of Committee II.

The members of Committee II were:

- Jo'ie Taylor and Ellynne Bannon (alternate) representing students; including the United States Student Association and State PIRGs (Public Interest Research Groups) Higher Education Project;
- Alan White and Elena Ackel (alternate), representing legal assistance organizations that represent students; including Community Legal Services and the National Consumer Law Center;
- Rachael Lohman and Marty Guthrie (alternate), representing financial aid administrators at institutions of higher education; including the National Association of Student Financial Aid Administrators
- Laurie Quarles and Alisa Abadinsky (alternate), representing business officers and bursars at institutions of higher education, and institutional servicers; including the Coalition of Higher Education Assistance Organizations and the National Association of College and University Business Officers;
- Reginald T. Cureton and William ''Buddy'' Blakey (alternate), representing the American Indian Higher Education Consortium, the United Negro College Fund and the National Association for Equal Opportunity in Higher Education;
- Claire M. Roemer and Patricia Hurley (alternate), representing two-year public colleges and universities; including the American Association of Community Colleges;
- Dawn Mosisa and Jo Ann Yoshida (alternate), representing four-year public colleges and universities; including the National Association of System Heads, the American Association of State Colleges and Universities, and the University Continuing Education Association;
- Lydia MacMillan, Ryan Craig Williams (alternate), and Maureen Budetti (2nd alternate), representing private, not-for-profit colleges and universities; including the National Association of Independent Colleges and Universities, and the Association of Jesuit Colleges and Universities;
- Robert Collins and Nancy Broff (alternate), representing for-profit postsecondary institutions; including the American Association of Cosmetology Schools and the Career College Association;
- Charles Cook and Diane Rogers (alternate), representing accrediting agencies; including the Council for Higher Education Accreditation (12-hour rule only);
- Neal Combs and Carl Buck (alternate), representing guaranty agencies and loan servicers; including the National Council of Higher Education Loan Programs (NCHELP), the CEO caucus of NCHELP, and the National Association of Student Loan Administrators;
- Francine Andrea and Wanda Hall (alternate), representing lenders, secondary markets, and loan servicers; including the Consumer Bankers Association, the Education Finance Council, the Student Loan Servicing Alliance, and the National Council of Higher Education Loan Programs;
- Carney McCullough, representing the U.S. Department of Education.

At its first meeting, Committee II reached agreement on its protocols and agenda. During later meetings, the Committee reviewed and discussed drafts of proposed regulations. The Committee met over the course of several months, beginning in January 2002.

In addition to the proposed regulations discussed under the section of this document called SIGNIFICANT PROPOSED REGULATIONS, Committee II discussed other issues related to the administration of the Title IV student assistance programs. Those issues, which are more comprehensively discussed on the 2002 Negotiated Rulemaking Web site for Team Two at: *http://www.ed.gov/offices/OPE/rulemaking/index2002.html*, include the following—

- Use of electronics in the administration of the Title IV programs,
- Use of electronic signatures on timesheets in the FWS Program,
- The fifty percent grant overpayment protection in the Return of Title IV aid regulations,
- ''90–10'' computations,
- Equity in Athletics Disclosure Act (EADA) reporting requirements,
- FWS community service waiver requirements,
- Inclusion of a computer in a student's cost of attendance,
- Regaining student eligibility,
- Overaward tolerances for the Title IV programs,
- Effect of enrollment of certain home-schooled students on institutional eligibility, and
- The fifty percent requirements for telecommunications and correspondence courses in institutional eligibility.

No regulatory proposals are included in this NPRM for these issues either because the committee concluded that the proposed changes could not be made without statutory amendments or because the committee ultimately agreed to remove the item from the agenda and not to pursue a regulatory change at this time. Instead, we decided to address a number of these issues in a non-regulatory way, such as providing clarifying policy language in the Federal Student Financial Aid Handbook.

Tentative agreement was reached by the committee on all but three of the agenda items. The entire committee did not reach consensus on the proposed changes to §§ 668.2, 668.3, 668.4, 668.8, and 690.75, all of which are related to the proposal to replace the 12-hour rule with the one-day rule, because three of the 13 negotiators objected to the change. The committee also did not reach consensus on the proposed changes to § 668.14, which would have modified the section of the program participation agreement that relates to incentive payment restrictions, because two of the 13 negotiators opposed the proposed changes. Finally, the committee reached conceptual agreement on the issue of timely refunds (§ 668.173), but did not review or agree to the actual text of the regulatory language. Detailed discussions of these issues are provided in the body of this document.

The negotiated rulemaking protocols provide that, unless agreed to otherwise, consensus on all of the amendments in the proposed regulations must be achieved in order for consensus to be reached on the entire NPRM.

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

Branch Campuses (Section 600.8)

Current Regulations: Section 600.8 implements the statutory requirement that a branch campus may request certification as a main campus or as a free-standing institution only after it has been certified by the Secretary for at least two years. However, the regulation does not reflect the statutory distinction that the two-year certification requirement applies only to a branch of a proprietary institution of higher education or of a postsecondary vocational institution.

Suggested Change: We recommended that the regulation clarify that the ''two-year rule'' in § 600.8 applies only to an eligible branch campus of either a proprietary institution of higher education or a postsecondary vocational institution.

Proposed Regulations: The proposed regulation would specifically refer to a branch campus of either an eligible proprietary institution of higher education or an eligible postsecondary vocational institution as the only types of institutions whose branches are covered by the two-year certification requirement.

Reason: Under sections 102(b) and (c) of the HEA, the ''two-year rule'' is applicable only to an eligible branch campus of either a proprietary institution of higher education or a postsecondary vocational institution and is not applicable to an institution of higher education as defined in § 600.4 of the regulations.

However, it should be noted that a single public or non-profit institution can be both an institution of higher education and a postsecondary vocational institution depending upon the programs it offers. In such a case, the ''two year rule'' would apply if the institution wanted a branch campus that offered vocational programs of less than one year to become a free-standing institution.

Change of Ownership (Sections 600.21, 600.31 and 668.174)

Current Regulations: Sections 600.21(f) and 668.174(c)(4) define who is considered a family member for purposes of transfer of institutional ownership and control under the institutional eligibility and financial responsibility regulations.

Section 600.31 provides for the treatment of changes of ownership and establishes that an institution that undergoes a change in ownership resulting in a change of control ceases to qualify as an eligible institution until it establishes that it meets eligibility and certification requirements. Section 600.31(e) provides that a transfer of ownership and control due to the retirement or death of the institution's owner to a member of the owner's family or to an individual with an ownership interest in the institution who has been involved in the management of the institution for two years prior to the transfer is not considered a change of ownership and control for purposes of institutional eligibility.

Suggested Change: A group of institutions suggested that the definition of ''family member'' in the regulations be expanded to include other persons in the owner's family including people who become part of the owner's family as a result of remarriage. They also suggested broadening the list of transactions that are not considered changes in ownership to include situations where an owner who was retiring from operating an institution and transferring ownership to another family member would still perform some duties at the institution.

Proposed Regulations: The proposed changes to §§ 600.21(f) and 668.174(c)(4) would expand the definition of a member of the family to include grandchildren, a spouse's children and grandchildren, and family members as a result of remarriage.

The proposed change to § 600.31(e) would expand the conditions under which transfers of ownership and control to family members are not considered a change of ownership for institutional eligibility purposes. We are proposing to expand the current exception in the regulations to allow an owner to transfer his or her interest in an institution to a member of his or her family, provided that the ownership transfer is reported to the Department under § 600.21(a)(6). The proposed regulations would clarify that the excluded transfer would be only to persons that have held an ownership interest and a management role at the institution for at least two years.

Finally, the proposed regulations would also clarify that the entity covered by the change of ownership requirements and that signs the Program Participation Agreement (PPA) may be the institution signing as a corporation or as a sole proprietorship, the institution's parent corporation, or other entity such as a partnership. The excluded transfer would apply to the owner's equity interest or partnership interest in that entity.

Reason: We agree that the scope of family members in the current exemption for transfers within a family is too narrowly defined, and also agree that the current restriction that transfers of ownership and control of an institution within a family may only be excluded from the change of ownership regulations when made in connection with the death or retirement of the owner is overly restrictive. The proposed regulations would require that the transfer to an owner's family member be reported under § 600.21. The reporting of that transfer is required to keep our records up-to-date.

Definition of Academic Year—''12-Hour Rule'' (Sections 668.2, 668.3, and 668.8)

Current Regulations: The definition of an academic year appears in § 668.2. Section 481(a)(2) of the HEA provides that an academic year, for Title IV, HEA student financial assistance purposes, must contain at least 30 weeks of instructional time. For undergraduate programs, the law requires that over the 30 weeks of instructional time a full-time undergraduate student must be expected to complete at least 24 semester or trimester hours, 36 quarter hours, or 900 clock hours. Section 481(b) of the HEA sets forth minimum lengths of time for certain eligible programs in terms of weeks of instructional time.

Section 668.2 currently defines a week of instructional time for educational programs that measure academic progress using credit hours and standard terms (semesters, trimesters, or quarters) or clock hours, as any week in which one day of regularly scheduled instruction, examination, or preparation for examination is offered—the one-day rule. For educational programs that measure academic progress using credit hours and are either nonterm or nonstandard term programs, the regulations define a week of instructional time as any week in which at least 12 hours of instruction, examination, or preparation for examination is offered. This regulatory requirement for programs using credit hours in non-standard terms or without terms is commonly referred to as ''the 12-hour rule''.

Eligible program requirements are codified in § 668.8 and include the same definitions of a week of instructional time as used in the academic year definition discussed above.

Suggested Change: A large number of institutions and groups, including the bipartisan Web-based Education Commission chartered by the Higher Education Amendments of 1998, suggested that the 12-hour rule be eliminated. Many suggested that the one-day rule be adopted as the definition of a week of instructional time for all types of educational programs, not just those measuring academic progress using standard terms or clock hours.

Proposed Regulation: These proposed regulations would eliminate the 12-hour rule for nonstandard and nonterm educational programs that measure progress in credit hours, and adopt a single regulatory standard for all types of educational programs.

Under the proposed regulation, the current definition that has applied for several years to credit hour, standard term programs would also apply to credit hour nonstandard term and credit hour nonterm programs. Under this longstanding definition, a week of instructional time is a week in which there is at least one day of regularly scheduled instruction or examinations, or after the last day of classes, at least one day of study in preparation for final examinations. Similar changes would be made to § 668.8—Eligible program.

Finally, the proposed regulation would move the definition of academic year from § 668.2, and place the revised definition in a new § 668.3.

Reason: Many institutions are now offering programs in shorter time periods which may also have overlapping terms and rolling starting dates. For many of the new nonstandard or nonterm educational programs, compliance with the 12-hour rule has become increasingly difficult and at odds with the educational advantages such flexible program formats provide for students, especially non-traditional students. The 12-hour rule also results in significant disparities in the amount of Title IV, HEA funding that students receive for the same amount of academic credit, based solely on whether the program that they are enrolled in uses standard academic terms or not.

We, and most of the negotiators, are concerned that a number of the statutory and regulatory provisions that govern the Title IV student assistance programs, including the 12-hour rule, are stifling innovation and creating inequities in the amount of Federal student financial assistance that students receive. During negotiated rulemaking, the proposal to eliminate the 12-hour rule was discussed at length. Nearly all of the negotiators were supportive of the elimination of the 12-hour rule and the adoption of the one-day rule as the definition of a week of instructional time for all types of educational programs.

One negotiator, while recognizing the need for change in this area, felt that we should wait until the reauthorization of the HEA and then address, in a more comprehensive manner, all issues related to providing student financial assistance to students enrolled in nontraditional educational programs. Every negotiator, including those who voiced opposition to the elimination of the 12-hour rule, agreed that the current rule was problematic, limited educational opportunities, and needed to be changed. However, those negotiators who voiced opposition did not propose any alternatives to the one-day rule.

While nearly all of the negotiators agreed with the proposal to replace the 12-hour rule with the one-day rule, the committee was unable to reach complete consensus on the proposal. However, we agree with the vast majority of the negotiators and the constituents whose interests they represent that the 12-hour rule is an unnecessary barrier to flexible and innovative educational programs, and that a week of instructional time should be defined in the same way for all educational programs. We have not experienced any problem with the one-day rule as it has been applied to standard term-based and clock hour programs and believe that it is the appropriate measure to adopt for all programs. In addition, we believe that the clock hour/credit hour conversion regulations (34 CFR 668.8(k) and (l)), provide adequate safeguards. Moreover, the proposed changes to the definition of payment periods provide additional assurance that Title IV program funds will be properly disbursed.

Finally, we note that accrediting agencies are aware of these new educational program formats, and have taken steps to ensure the quality of education offered in these new formats.

Payment Periods (Sections 668.4, 682.603, 685.301, and 690.75)

Current Regulations: Current regulations provide a definition of a payment period for the Title IV student financial assistance programs. In general, the amount of a student's Title IV award and the frequency and timing of its disbursement are determined on a payment period basis (with special rules for disbursements of FFEL and Direct Loans). The regulations provide a separate payment period definition for each of the three types of academic programs: (a) Programs that measure progress in credit hours and have academic terms, (b) programs that measure progress in credit hours and do not have academic terms, and (c) programs that measure progress in clock hours.

In all three types of programs, the main point of having payment periods is to ensure that a student's award is paid in approximately equal increments over the course of the student's program of study, with those payments usually being made at least twice during an academic year. The current regulations do not specifically address how to determine the beginning and end of a payment period when a student who was paid for a payment period withdraws before completing that payment period and returns to the same institution or transfers to another institution. The ambiguity on how the regulations are to be applied in such instances may have resulted in an uneven application of the regulations for these students.

Suggested Change: With the proposed replacement of the 12-hour rule with the one-day rule for determining when an institution is considered to have provided a week of instructional time, we suggested that there should be additional disbursement safeguards for credit hour programs without terms.

Specifically, we suggested that the definition of a payment period for credit hour programs without terms require that, in addition to completing one-half of the academic coursework of the period (e.g., academic year, program, or remainder of the program), the student complete one-half of the required weeks of instruction in that period.

Additionally, for the past several years institutions that offer programs in clock hours and credit hours without terms requested that we clarify how to determine the beginning and end of a payment period when a student who was paid for a payment period withdraws before completing that payment period and returns to the same institution or transfers to another institution.

Proposed Regulations: The proposed regulations would amend the definition of a payment period in § 668.4(b) to require a student to complete the requisite number (usually half) of weeks in that academic year or program, in addition to the clock hours or credit hours.

The proposed regulations would also clarify the definition of a payment period to specifically address the situation when a student withdraws from a clock hour program or a credit hour nonterm program during a payment period, but then returns to school. The proposed regulations provide that, if the student returns to the same program at the same institution within 180 days of the original withdrawal, the student is considered to be in the same payment period he or she was in at the time of the withdrawal. Such a student would retain his or her original eligibility for that payment period. Once the student completes the payment period for which he or she had been paid, he or she becomes eligible for a subsequent Title IV student aid payment.

Additionally, under the proposed regulations, a student who withdraws from a program during a payment period and then returns to that program after 180 days, or transfers, within any time frame, into another program either at the same institution or at another institution would start new payment periods. The institution would calculate these new payment periods using the regular rules in the appropriate part of the definition of a payment period, except that it would consider the length of the program to be equal to the remainder of the program that the student has to complete upon return to the original program or transfer to another one. However, if the remainder of a student's program is one-half of an academic year or less, that remaining period would constitute one payment period.

Reason: We believe that an additional safeguard is needed to prevent institutions from structuring educational programs in such a way as to allow the second payment of Title IV aid for an academic year to be made before half of the academic year (as measured in weeks) actually occurs. This could happen, for example, if a 24 credit hour, nonterm program was offered over a 30 week period, but was structured so that the first 12 credits were earned in the first 10 weeks, with the remaining 12 credits being earned in the last 20 weeks. Under the current payment period definition, an institution would be able to pay a student the second half of a Pell Grant long before the half-way point of the academic year, which under the HEA must be a minimum of 30 weeks long.

Because of this concern, we are proposing to modify the payment period definition for credit hour programs without terms to require that a payment period cover half of the number of weeks of an academic year (or of a program), in addition to covering half the number of credits earned in that period. For example, in the situation discussed above if a student completes the first 12 credits in 10 weeks, the first payment period would not be considered to be completed and the second disbursement could not be made until 15 weeks of instructional time had elapsed in addition to the completion of 12 credit hours.

This addition of ''half of the number of weeks'' in the academic year (or in the program) to the payment period definition is not necessary for term-based, credit hour programs or for clock hour programs. Standard academic terms currently result in payment periods of relatively equal length. Likewise, in clock hour programs, the student's payment periods are based on the completion of actual hours of instruction completed by the student, and not on the scheduled hours offered in the program.

We have proposed two other changes to the definition of a payment period for clock hour programs and for credit hour programs without terms to address situations in which a student withdraws from a program before the completion of the payment period for which he or she was paid and then either returns to the same institution or transfers to another institution.

When a student withdraws from a program during a payment period and returns to the same program at the same institution within 180 days, the student is considered to be in the same payment period he or she was in at the time of the withdrawal. This proposed change is similar to a leave of absence, and the proposed regulation is consistent with the current regulations for students who are granted leaves of absence. The 180-day measure is consistent with the maximum 180 days allowed for an approved leave of absence in the Return of Title IV Aid regulations. The difference, of course, is that with an unauthorized leave of absence the institution would not know that the student would be returning and would have treated the student as a withdrawal. Based upon that withdrawal, the institution would have completed the Return of Title IV Aid calculation, which may have required it and the student to return funds to the Title IV programs. If the student returns within 180 days to his or her original program, the student would have to complete the remaining clock or credit hours before starting a new payment period and receiving Title IV aid for that new payment period. However, the institution would re-disburse any funds that it had previously returned to the Title IV, HEA programs, including any overpayment it had collected from the student as a result of the earlier withdrawal.

If a student withdraws during a payment period and either returns to the same program at the same institution after 180 days, or transfers into another program, we believe that treating the student as if he or she was still in the same payment period would be cumbersome for institutions to administer and for students to understand. Therefore, we have proposed that for such a student the institution start a new series of payment periods.

We believe that it is reasonable to differentiate between situations in which, on the one hand, the student returns to the same program at the same institution within a short period of time (180 days), and, on the other hand, the student either returns to the same program after a longer period of time or transfers into another program (either at the same institution or at another). Because of the continuity in the student's attendance and similarity to a leave of absence in the first situation, we believe it appropriate, and administratively convenient to keep such a student in the same payment period upon his or her return to school. Conversely, because continuity is not present in situations in which a considerable time period (more that 180 days) has passed, or in which the student transfers into a new program, we believe it appropriate to start that student over in terms of the calculation of his or her payment periods.

Program Participation Agreement (Section 668.14)

Current Regulations: Section 668.14(b)(22) of the current regulations implements the statutory restrictions on incentive payments for success in securing enrollment or financial aid. Section 487(a)(20) of the HEA provides that, as part of its program participation agreement, an institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid. The only significant addition to the statutory requirements in the current regulations is a provision that exempts from the incentive payment restrictions token gifts of less than $25.

Suggested Change: Many higher education institutions have made a number of recommendations regarding activities that should be specifically exempt from the current restrictions on incentive payments. These restrictions and our interpretation of the statutory requirements were identified by the Web-based Education Commission as a barrier to students enrolling in distance education and on-line courses.

Institutions and many others requested that the regulations be amended to explicitly identify certain types of payments and compensation plans that do not violate the current statutory restrictions. Another more specific suggestion from institutions and the Web-Based Education Commission was that the regulations should clearly permit an institution to contract with an outside entity that offers enrollment and information services through the World Wide Web and allow the institution to pay for those services based on the number of prospective students visiting the site who ultimately apply to, or enroll at, the institution. Such services are currently not considered to be a violation if they are done through an institution's own Web site.

Another suggestion was that the regulations clarify that the incentive payment restrictions do not extend to revenue-sharing agreements between institutions and third-party service providers as long as the third-party servicers have no decision-making authority for admissions decisions or financial aid awards.

Proposed Regulations: The proposed regulations begin, in § 668.14(b)(22)(i), by re-stating the statutory prohibition against incentive payments.

Paragraph (b)(22)(ii) of the proposed regulations lists 12 types of activities and payment arrangements that an institution may carry out without violating the incentive payment restrictions provision. We believe that these ''safe harbors'' will allow institutions to maintain payment and compensation plans that are in compliance with the HEA and the regulations.

The list of ''safe harbor'' activities is derived from compensation and payment plans that the majority of the negotiators agreed should be included. They provide institutions with specific, concrete examples of payments they can make that do not violate the statutory provision. We have not, however, included in the regulations a complementary listing of payment or compensation plans that are impermissible.

The specific types of payments or compensation plans included in the listing in paragraph (b)(22)(ii) cover the following subjects, which are further discussed below:

- Adjustments to employee compensation
- Enrollments in programs that are not eligible for Title IV, HEA assistance
- Contracts with employers
- Profit-sharing or bonus payments
- Compensation based upon completion of program
- Pre-enrollment activities
- Managerial and supervisory employees
- Token gifts
- Profit distributions
- Internet-based activities
- Payments to third parties for non-recruitment activities
- Payments to third parties for recruitment activities

Reason: As indicated above, section 487(a)(20) of the HEA prohibits an institution that participates in programs authorized under Title IV of the HEA from providing any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid. This provision was enacted as part of the Higher Education Amendments of 1992. While the statutory language noting ''directly or indirectly'' is broad, the conference committee report on the legislation included the following statement to clarify the legislative intent and limits of these restrictions:

''The conferees wish to clarify, however, that the use of the term 'indirectly' does not imply that institutions cannot base employee salaries on merit. It does imply that such compensation cannot solely be a function of the number of students recruited, admitted, enrolled, or awarded financial aid.''

Consistent with this clarification of legislative intent, the proposed regulations are based on a purposive reading of section 487(a)(20) of the HEA.

The list of specifically permitted activities provides a reasonable and workable framework that institutions can use to determine if a payment is a violation of the incentive payment restrictions. Most non-Federal negotiators were supportive of this type of regulatory structure.

What follows is a brief discussion of each of the payment types included in the proposed regulations.

A. Adjustments to Employee Compensation

The inclusion of compensation adjustments under this provision of the proposed regulations recognizes the balance between the need of an institution to base its employees' salaries or wages on merit, and concern that such adjustments do not make the statutory prohibition against the payment of commissions, bonuses and other incentive payments meaningless.

During the deliberations some of the non-Federal negotiators stated that institutions commonly adjust a new employee's salary after a probationary period and then again after the employee completes the first year. In light of this common business practice and using the conference report language as a guide, we believe, as did a majority of the negotiators, that two salary adjustments within a twelve month period is the appropriate balance. As a result, the proposed regulations provide that an institution that makes up to two adjustments (upward or downward) to a covered employee's (one who is involved in recruitment, admissions, enrollment, or financial aid activities) annual salary or fixed hourly wage rate within any twelve month period is not in violation of the restrictions on incentive payments. However, consistent with the conference language the basis for any adjustment may not be solely the number of students recruited, admitted, enrolled, or awarded financial aid.

The proposed regulations also provide that one upward adjustment resulting from a cost of living increase within a twelve month period that is paid to all or substantially all of the institution's employees will not be considered an ''adjustment'' for the purpose of this regulation.

We believe the proposed regulations for compensation adjustments address the concern that such adjustments are not formulated in a way that circumvents the statutory prohibition against incentive payments.

B. Enrollments in Programs That Are Not Eligible for Title IV, HEA Assistance

The program participation agreement established under section 487 of the HEA applies only to programs eligible for Title IV HEA program assistance. Therefore, the proposed regulations do not consider payments to recruiters and others based upon the enrollment of students in programs that are not eligible for Title IV funding to be a violation of the incentive payment restrictions.

C. Contracts With Employers

Many institutions suggested that the development of contractual agreements for training or instruction between an institution and an employer is another area where the incentive payment restrictions should not be applied. They argued that the restrictions on incentive payments should not apply in situations where an individual is paid for successfully obtaining a contract for the institution to provide education and training to a business's employees. We agree that as long as there is no direct contact by the institution's representative with students and because the employer is paying a significant portion (at least 50 percent) of the training costs, such activities are not considered to be ''recruitment'' or the ''securing of enrollments'' under the provisions of section 487(a)(20) of the HEA. Therefore, the proposed regulations provide that incentive payments may be paid to individuals for arranging contracts under which the institution provides education and training to employees provided that the employer pays 50 percent or more of the tuition and fees charged for the training and the payments provided to the individual are not based upon either the number of employees who enroll or on the amount of revenue generated by those employees. The employer may pay the tuition and fees either directly to the institution or by reimbursement to the employee. The institution's representative may not have any contact with the employees.

During the discussion on this issue in the negotiated rulemaking committee much attention was given to how much, if any, of the institutional charges should be paid by the employer for the institution not be in violation of the incentive payment restrictions. Some negotiators suggested that the amount or percentage paid by the employer was irrelevant. Others thought that the payment by the employer of a significant portion of the costs of the training was critical in determining whether the program was a contract training program with the employer rather than simply enrollment of individual employees. They also argued that to the extent the employer pays a significant share of the tuition and fees of the employees' education and training, there would be less likelihood that unqualified students would be enrolled.

D. Profit-Sharing or Bonus Payments

Generally, profit-sharing and bonus payments are not payments based on success in securing enrollments or awarding financial aid unless they are made only to employees who are involved in recruitment, admissions, enrollment, or financial aid. Therefore, the proposed regulations provide that such payments made by an institution are not prohibited as long as those payments are made to all or substantially all of the institution's full-time professional and administrative employees and are substantially the same amount or are based upon the same percentage of salary. During the discussion on this issue several negotiators asked that such payments also be in compliance even if they were not made to all of an institution's employees but to only those at the same organizational level. We agreed with this proposal after restating that such an organizational level could not consist predominantly of recruiters, admissions staff, or financial aid staff.

E. Compensation Based Upon Completion of Program

Completion of an academic program is not ''enrollment'' under the provisions of section 487(a)(20) of the HEA. We believe that one of the reasons for the prohibition against incentive payments for success in recruitment, admissions, enrollment, or securing financial aid, is to prevent institutions from enrolling students into a program without regard to their qualifications or likelihood of completing the program. Most of the negotiators believed that the completion of the program or, in the case of students enrolled in a program longer than one academic year, the completion of the first academic year is a reliable indicator that the student was qualified for the program. Therefore, the proposed regulations allow payments made to an institution's employees based upon students' successful completion of their educational program, or one academic year for a longer program, not to be a violation of the incentive payment restrictions.

F. Pre-Enrollment Activities

Generally, pre-enrollment activities are not considered recruitment. The proposed regulations recognize the ancillary nature of various supportive activities that, while part of the overall recruitment or financial aid process, are somewhat removed from the actual recruitment and admissions of students or the awarding of financial aid. Therefore, individuals whose responsibilities are limited to ''pre-enrollment'' activities that are clerical in nature are outside the scope of the incentive payment restrictions. It is not a violation of the incentive payment restrictions for employees engaged in pre-enrollment activities to be compensated based upon such pre-enrollment activities as long as the number of people who actually enroll is not a factor in determining the compensation. However, soliciting students for interviews is recruitment and not a pre-enrollment activity.

G. Managerial and Supervisory Employees

We believe the incentive payment restrictions apply only to those individuals who perform activities related to recruitment, admissions, enrollment, or the financial aid awarding process and their immediate supervisors. We believe that direct supervisors should be covered because their actions generally have a direct, immediate, and dramatic impact on the individuals who carry out these covered activities. The incentive payment restrictions do not extend to supervisors who do not directly manage or supervise employees who are directly involved in those activities. They also do not apply when an employee, manager or otherwise, occasionally has direct contact with a prospective student. For example, there would be no problem if the president of an institution, who was compensated at least partially on the profitability of the institution, happened, on a very occasional basis, to offer a tour of the institution to a prospective student.

H. Token Gifts

The negotiators indicated support for an increase of the current $25 limit that is allowable for a single gift to a student or an alumnus of the institution. We realize that the cost of a token gift has risen since the inception of the current regulation and therefore propose to increase the maximum cost of a token, non-cash gift that may be provided to an alumnus or student to not more than $100. Moreover, the proposed regulations would also expand the limitation of a single gift provided to a student or alumnus by the institution, to not more than one gift annually.

The cost basis of a token non-cash gift is what the institution paid for it. The value is the fair market value of the item. Some of the negotiators wanted to use ''value'' rather than ''cost'' because they were concerned that an outside source would donate something of great value to an institution, and the institution would give it to a student or alumnus as an incentive to recruit students. One negotiator argued that if a car were donated to the institution, the cost to the institution would be zero, and therefore permitted to be a token gift under the proposed regulations. In addition to pointing out the unlikelihood of that scenario, we noted that the proposed (and current) regulations specifically use the term ''token gift'' and anything of great value, such as a car, would certainly not be considered ''token'' as that term is reasonably understood to mean.

I. Profit Distributions

Profit distributions to owners are not payments based on success in securing enrollments or awarding financial aid. Therefore, the proposed regulations specifically acknowledge that any owner, whether an employee or not, is entitled to a share of the organization's profits. However, any profit distributions under this paragraph are permitted only to the extent they represent a proportionate distribution based upon the employee's ownership interest.

J. Internet-Based Activities

Institutions have indicated their need to utilize and expand the most accessible and cost-effective means possible for recruitment and admission activities. The report of the Web-based Education Commission found that, ''Although not the original intent, the language [of the incentive payment restriction] effectively bars higher education institutions that participate in Title IV from using third-party Web portals to provide prospective students with access to information about many institutions or provide the same services as institutions offer on their own Web sites * * *''. The Commission suggested that the regulations permit an institution to contract, without violating the incentive payment restrictions, with an outside entity that offers services through the World Wide Web.

Moreover, we believe that for purposes of these regulations, the Internet is simply a communications medium, much like the U.S. mail, and direct mail solicitations and advertisements have generally not been considered within the scope of the incentive payment restrictions. Therefore, the proposed regulations do not preclude an institution from compensating a service provider for Internet-based recruitment and admission services.

K. Payments to Third Parties for Non-Recruitment Activities

Section 487(a)(20) applies only to recruiting, admissions, enrollment, or financial aid. Therefore, these proposed regulations would not consider payments to third parties for services to the institution other than recruiting, admissions, enrollment, or financial aid services, to be in violation of the incentive payment restrictions. Under such arrangements, the third party might provide services such as instruction, curricula, and course materials. This provision would clearly establish that payments to third parties, including tuition sharing arrangements, that are not for recruitment, admissions, enrollment, or financial aid services, would not be in violation of the incentive payment restrictions.

L. Payments to Third Parties for Recruitment Activities

Section 487(a)(20) applies both to individuals who work for the institution and to entities outside the institution. We believe that Congress included these outside entities because it did not want an institution to avoid the limitations in that section merely by using an outside entity. On the other hand, we believe that Congress did not intend to limit an institution's ability to contract with outside entities for recruitment, admissions, enrollment, or financial aid services if the outside entity adheres to the same limitations that apply to institutions. Payments made by an institution to a third party would not violate the incentive payment restrictions as long as the individuals performing any activities related to recruitment, admissions, enrollment, or financial aid were compensated in a way that would otherwise be permissible under the standards in this section for covered employees of the institution.

At the conclusion of the discussion on the issue of incentive payment restrictions, all the negotiators agreed that clarification was needed in the area of the incentive payment restrictions and that the issuance of specific guidance in the regulations was preferable to our earlier use of private letter guidance in response to individual inquiries. However, because universal agreement could not be reached on some of the specific proposals presented, the committee was not able to reach consensus on the proposed regulatory language related to the incentive payment restrictions.

Institutions Required to Take Attendance (Section 668.22)

Current Regulations: Section 668.22(b)(3) defines, for purposes of the Return of Title IV Aid calculations, an institution that is ''required to take attendance'' as one that is required to take attendance by an entity outside of the institution, such as the institution's accrediting agency or a State agency.

Suggested Change: Some institutions and the non-Federal negotiators suggested that we provide greater specificity in the definition of when an institution is considered to be one that is required to take attendance. In particular, they wanted the regulations to clearly state that an institution is one that is ''required to take attendance'' only if the outside entity has determined that it requires the institution to take attendance.

Proposed Regulations: Under the proposed regulations in § 668.22(b)(3)(i), for the purposes of determining the withdrawal date of a student, an institution would be considered to be one that is ''required to take attendance'' only when an outside entity determines that it requires that the institution take attendance for some or all of its students. Absent a determination by an outside entity that the institution is required to take attendance, the institution would be considered to be one that is not required to take attendance.

Reason: Several of the negotiators expressed concern with our current interpretation of the definition of an institution that is required to take attendance. We have previously stated that if we determine that the only way that an institution can comply with a requirement of an outside entity is to take attendance, the institution is considered to be ''required to take attendance'' even if the outside entity states that it does not require the institution to take attendance (Dear Colleague Letter GEN–00–24).

Several of the negotiators felt that we should defer to the outside entity to determine when requirements of that entity mean that an institution is required to take attendance. The negotiators believed that the outside entity was in the better position to make that determination, not the Department.

The committee agreed to modify the regulations to make clear that an institution is considered to be ''required to take attendance'' only when an outside entity has determined that the institution must, even for a limited period of time, take attendance for some or all of its students.

Institutions should note that we have not changed the existing regulatory requirement in § 668.22(b)(3)(ii), which provides that if an outside entity specifically requires an institution to take attendance for only a portion of its students, the institution is required to use the attendance records for those students only. The institution would not be required to take attendance for any of its other students unless it is required to take attendance for those students by another entity.

If an outside entity has a requirement, as determined by that entity, for the institution to consistently take attendance for a limited period of time (e.g., up to a census date), the institution meets the definition of an institution required to take attendance for that limited period of time only. If a student ceased enrollment during that limited period, the institution must use its attendance records to determine the student's withdrawal date. However, if an outside entity has a requirement, as determined by the entity, to take attendance for a single day such as attendance for census purposes, that single event would not cause the institution to meet the definition of an institution that is required to take attendance.

Also, as we have previously indicated, when an institution administratively withdraws a student from all of his or her classes the student is considered to have officially withdrawn as of the date of that administrative withdrawal. This guidance applies regardless of whether or not the institution is required to take attendance.

Consistent with that guidance, when, through a census on a certain date or similar process, all of a student's instructors indicate that the student is no longer in attendance, the student is considered to have officially withdrawn as of the census date.

Leaves of Absence (Section 668.22)

Current Regulations: Section 668.22(d)(1)(vi) of the Return of Title IV Aid regulations provides that generally, only one leave of absence that meets certain requirements and does not exceed 180 days in a 12-month period may be granted to a student. However, additional leaves of absence may be granted under exceptions provided in § 668.22(d)(2). One of those exceptions allows an institution to grant an additional leave of absence if the subsequent leave of absence does not exceed 30 days and it is due to unforeseen circumstances. Additionally, other leaves of absence may be granted if the institution documents that the leaves are for jury duty, military reasons, or circumstances covered under the Family and Medical Leave Act of 1993.

Current regulations also provide that a leave of absence for Return of Title IV Aid purposes must have been granted by the institution under its formal leave of absence policy. An institution's leave of absence policy is a formal policy if it is in writing and publicized to students, and it requires students to provide a written request for a leave of absence.

Suggested Change: Some institutions and the non-Federal negotiators recommended that the protection provided by the 180-day maximum timeframe within a 12-month period for an approved leave of absence is sufficient to prevent abuse and that tracking the reasons for requests for subsequent leaves and evaluating them against certain limited exceptions is administratively burdensome. They stated that institutions should have broad flexibility to make the best determination for each student based upon his or her unique needs and situation rather than being limited by the number and type of leaves of absence that they can approve.

Proposed Regulations: The proposed regulations would simplify the approved leave of absence definition by allowing multiple leaves of absence at the discretion of the institution, as long as the total number of days for all leaves does not exceed 180 days within a 12-month period. As a result, we propose to remove the current language that describes the exceptions to the single leave of absence rule.

The requirement that an institution's leave of absence policy require a student to submit a written request would be modified to require that the request must include a reason.

Reason: Some of the non-Federal negotiators indicated that the range of reasons that cause students to need multiple leaves of absence can be outside the scope of the current regulations, but nonetheless important for the students and their families. Also, the restriction in the current regulations that the first subsequent leave of absence, although it may be granted for any unforeseen circumstance, be limited to no more than 30 days, is arbitrary in practice and results in unfair treatment, while not providing any additional protection for either the student or the programs. For example, if a student had taken a leave of absence for 61 days and subsequently needed an additional leave of absence of 31 days for unforeseen circumstances, under the current regulations the second leave could not be an approved leave of absence. The total of 92 days for leaves of absence is significantly less than the maximum of 180 days allowable, but because the second leave of absence for unforeseen circumstances is for more than 30 days, it cannot meet the current definition in § 668.22(d)(2)(i).

We agree that if there is a reasonable expectation that a student will return from a leave of absence, it is better to keep the student enrolled than to have the student withdraw.

The current regulations already provide that an institution must determine, before it grants a leave of absence, that there is a reasonable expectation that the student will return from the leave. In order for the institution to make such a determination, it must know the student's reason for requesting the leave. For this reason, the proposed language would require the institution's formal leave of absence policy to include the requirement that the student provide the reason for the requested leave of absence.

We have been asked to clarify the requirements that an institution must comply with when students return from a leave of absence but, instead of resuming their academic program at the point they began the leave of absence, they repeat prior coursework in preparation for continuing in the original program of study.

One element of an approved leave of absence is that the institution may not impose additional charges when the approved leave of absence ends and the student resumes his or her program of study. The same requirement holds when a student returns for the purpose of repeating prior coursework to enhance his or her skills and knowledge in order to resume the program. That is, a student may return and repeat prior coursework as long as the student does not incur additional institutional charges. As a result, the student would also not be eligible for any additional Title IV program assistance for this preparatory phase, even if the student were to start again at the beginning of the module or course from which he or she took the leave of absence.

Until a student described above has resumed the academic program at the point he or she began the leave of absence, the student is considered to still be on the approved leave of absence, including during the time the prior coursework is being repeated. Since such a student is considered to be on a leave of absence while repeating prior coursework, if the student fails to begin attendance at the point in the academic program where he or she left off at the beginning of the leave of absence, the regulatory requirement that a student who fails to return from an approved leave of absence must be treated as a withdrawal back to the start of the leave of absence applies. The date of the student's withdrawal that must be used in the Return of Title IV Aid calculation is the date that he or she began the leave of absence and not the date the student ceased participation in the repeated courses.

Overpayments (Sections 668.35, 673.5, and 690.79)

Current Regulations: Section 668.35(c) provides that a student who receives a Federal Perkins loan or Title IV grant overpayment of any amount is eligible to receive further Title IV aid only if the student repays the overpayment in full or makes arrangements, satisfactory to the holder of the debt, to repay the overpayment.

Sections 673.5(f) and 690.79 establish student and institutional liability for Perkins loan, FSEOG, and Federal Pell Grant overpayments and specify the repayment and collection of such, as well as the conditions for the referral of

FSEOG and Pell Grant overpayments to the Secretary.

For all three programs, the regulations provide that the student is liable for any overpayment made to the student regardless of the amount. They also provide that the institution is liable for any overpayment that was the result of its failure to comply with the appropriate regulatory requirements. In addition, the regulations provide that, for any overpayment for which it is not liable, the institution must assist the Secretary in recovering that overpayment.

For Perkins and FSEOG overpayments only, the regulations also provide that the institution must promptly send the student a written notice requesting repayment of the overpayment. In contrast, however, the regulations for the Pell Grant program require the institution to make a reasonable effort to contact the student and recover the overpayment.

Also, the Perkins and FSEOG regulations require the institution to consider any objection made by the student that the overpayment determination is erroneous and to determine whether the objection is warranted. The Pell Grant regulations do not specify this step.

For the Perkins program, the institution is responsible for attempting to collect any overpayment and cannot refer the overpayment to the Secretary. Any amount collected must be returned to the institution's Federal Perkins Loan fund. If an FSEOG overpayment is not resolved, the institution must refer it to the Secretary if it is $25 or more. An unresolved Pell Grant overpayment must also be referred to the Secretary, but the regulations are silent on a minimum amount.

Suggested Change: At various conferences and meetings, institutions have suggested that the regulations on the treatment of overpayments be applied consistently to all of the Title IV programs. Further, they suggested that the treatment of overpayments incorporate the de minimis amount concept that currently applies to a grant overpayment under the Return of Title IV Aid requirements. That is, they suggested that a student not lose eligibility for Title IV funds nor be required to repay an overpayment if the original overpayment amount is less than $25. This request was repeated by some of the non-Federal negotiators.

Proposed Regulations: The proposed regulations would revise § 668.35(c) to allow a student to remain eligible to receive additional Title IV aid if the amount of the Perkins Loan or Title IV grant overpayment is less than $25 and is neither a remaining balance nor a result of applying the overaward threshold for the campus-based programs allowed under § 673.5(d).

The proposed regulations would revise §§ 673.5(f) and 690.79 to specify that a student is not liable for a Perkins loan, FSEOG, or Pell Grant overpayment that is less than $25 and is not a remaining balance and, for a Perkins loan or FSEOG overpayment, is not the result of applying the $300 campus-based overaward threshold. The proposed regulations also would specify, for all three programs, that a student is not liable for an overpayment if the institution is liable for it.

The proposed regulations would provide that for purposes of FSEOG overpayments, the provisions apply only to the Federal share of FSEOG awards if the institution meets its matching share by the individual recipient method or the aggregate method. When an FSEOG award is matched under the fund specific method, the entire amount of the award would be subject to the provisions of § 673.5(f).

The proposed regulations would make the collection and referral requirements for a Pell Grant overpayment consistent with current requirements for FSEOG overpayments. They would specify that when attempting to collect a Federal Pell Grant overpayment, the institution must provide written notice of the overpayment to the student, and if a student objects to an overpayment determination on the grounds that it is erroneous, the institution must determine whether the objection is warranted.

For student overpayments that meet the conditions of the proposed de minimis standard, an institution would not be required to attempt recovery of the overpayment, report it to NSLDS, or refer it to the Secretary.

Reason: Institutions have questioned the complexity created by making students ineligible for further Title IV funding due to small overpayments and the cost effectiveness of collecting such small amounts. They thought that the current grant overpayment policies under the Return of Title IV Aid requirements allowed more flexibility and should be adopted for other types of overpayments. They further noted an inconsistency in the treatment of different types of overpayments. The negotiators agreed with the reasons provided by the institutions. The regulatory changes of applying a $25 de minimis standard to other overpayments are proposed for consistency, simplicity, and cost effectiveness.

It is important to note that for all programs the de minimis $25 amount must not be the result of a remaining balance. A remaining balance less than $25 occurs when the overpayment amount for which the student was responsible was originally $25 or more, but is now less than $25 because of payments made. In such cases, even though the balance of the overpayment now owed is less than $25, the de minimis standard would not apply, and the student would still be responsible for fully repaying that remaining balance. The student would also not be eligible for additional Title IV aid until the overpayment is fully paid or satisfactory arrangements to repay are made.

Federal Perkins Loan and FSEOG overpayments that result from the application of the $300 campus-based overaward threshold also would not be subject to the de minimis standard. For example, if an institution discovers that a student with campus-based funds subsequently received additional sources of aid such that the student is now overawarded by $314, the student would have a campus-based overpayment of $14 after the $300 overaward threshold is applied. In this instance, the student would still be responsible for the $14 overpayment and would not be eligible for additional Title IV student aid until the overpayment is resolved.

In order to provide consistent treatment among the programs, the proposed change to the Pell Grant regulations would provide that an institution must promptly send a written notice to the student requesting repayment of an overpayment. (Note that unless specifically indicated otherwise, any written notice requirement can be delivered by electronic means, as well as via paper methods.)

To provide students with the opportunity to object to any overpayment determination that they believe is in error, we are proposing the same requirement for the Pell Grant program that currently exists for the Perkins and FSEOG programs. That is, institutions would be required to allow students to object to a Pell Grant overpayment determination on the grounds that it is erroneous. The institution would be required to consider any information provided by the student and determine whether the objection is warranted.

The proposed regulations would not modify the responsibilities of an institution when it is liable for an overpayment. If the institution is liable for an overpayment of any amount, it must immediately return the amount of the overpayment to the appropriate Title IV student aid account or otherwise return the funds to the Secretary as appropriate. These regulations would not prevent an institution from billing or otherwise holding the student responsible for the amount of the overpayment that the institution returned. However, such a debt is, by definition, not a Title IV debt and cannot be considered as such.

Further, these proposed regulations would not change the current rule that an institution is not required to refer to the Secretary a Federal Perkins loan overpayment, because all payments must be returned to the institution's revolving loan fund.

Finally, the proposed regulations would not change the fact that under the Return of Title IV Aid calculations in § 668.22, Federal Perkins loans are not treated as an overpayment. Rather, unearned Federal Perkins funds for which the student is responsible are repaid according to the terms of the loan.

Expiration of Ability to Benefit Tests (Sections 668.32 and 668.151)

Current Regulations: As provided in § 668.32(e), an otherwise eligible student who does not have a high school diploma or its recognized equivalent and who does not meet the home-schooled standards of the regulation is eligible to receive Title IV, HEA program assistance only if the student has obtained a passing score, as specified by the Secretary, on an approved ability-to-benefit (ATB) test within 12 months before the date the student initially receives Title IV program assistance.

Section 668.151(a)(2) requires an institution to use the results of an approved test to determine a student's eligibility for Title IV assistance if the approved test was independently and properly administered.

Suggested Change: Institutions suggested that the 12-month limitation on the acceptability of an ATB test passing score was not necessary and should be removed from the regulations. They pointed out that one of the alternatives to a passing score on an approved ATB test is either a high school diploma or its equivalent, but neither the diploma nor its equivalent expires after a certain period of time.

During the negotiated rulemaking discussion on ATB testing, we suggested that the regulations should be modified to make it clear that an institution must obtain the results of an approved ATB test directly from either the test publisher or from the assessment center that administered the test.

Proposed Regulations: The proposed regulations would revise § 668.32(e) by eliminating the provision that limits the duration of a passing score on an approved ATB test to 12 months before a student initially receives Title IV, HEA program assistance.

The proposed regulations would make it clear that an institution must obtain the results of an approved ATB test directly from either the test publisher or the assessment center that administered the test.

Reason: We agreed with the non-Federal negotiators that an ATB test score should be valid for as long as the test publisher or the assessment center that administered the test is able to provide the institution with an official report of the original passing score. In other words, an institution may not accept as a valid passing test score a report it received from the student or from another institution (unless it came from a test assessment center at another institution in accordance with the regulations).

Late Disbursements (Section 668.164)

Current Regulations: Section 668.164(g) sets forth the conditions that must be satisfied before an institution may make a late disbursement to an otherwise eligible student (or the student's parent in the case of a PLUS loan) who has become ineligible either because the student is no longer enrolled at the institution or, for FFEL and Direct Loan purposes, is no longer enrolled on at least a half-time basis. One of the conditions is that the institution must have received a SAR or ISIR for the student before the student became ineligible. If all of the conditions are met, an institution has 90 days from the date the student became ineligible to make the late disbursement.

Suggested Change: Institutions suggested that the regulations be modified to reflect our private letter guidance that allows, under limited circumstances, a late disbursement to be made after the 90-day regulatory deadline. Under this guidance, a guaranty agency, or the Department for a Direct Loan, may permit an institution to make a late disbursement of the loan if the reason the disbursement was not made within 90 days was not the fault of the student.

They also suggested that we clarify the circumstances in which an institution must make a late disbursement and those in which it has the option to do so. In particular, the institutions pointed to the Return of Title IV Aid regulations under which an institution must make a late disbursement (referred to as a ''post-withdrawal disbursement'') and a provision of the late disbursement regulations under which an institution appears to have the choice of whether to make the late disbursement.

The third and fourth suggestions deal with the requirement that, as a condition for making a late disbursement an institution must have received a SAR or ISIR with an official EFC before the date a student became ineligible. The non-Federal negotiators suggested that this requirement should not apply to a late disbursement of a PLUS loan because the EFC is not needed by an institution to certify or originate the loan. Moreover, they believed that it was unfair that some students do not qualify for a late disbursement solely because institutions may not be aware (or cannot document) that they received an ISIR before the date the student became ineligible. To make it fair for all students, the non-Federal negotiators suggested that the date the SAR or ISIR was received by the institution be replaced by the date the Secretary processed a SAR or ISIR with an official EFC for the student.

Proposed Regulations: The proposed regulations would increase the timeframe within which an institution may make a late disbursement from 90 to 120 days. In addition, the proposed regulations would provide that, for those cases in which the student is not at fault, we may approve an institution's request to make a late disbursement after 120 days.

With respect to when an institution must make a late disbursement in cases in which a student withdraws and is eligible for a post-withdrawal disbursement, the proposed regulations incorporate directly, rather than by cross reference, the requirement that an institution must make or offer the disbursement, as appropriate. The proposed regulations would also require an institution to offer or make the late disbursement to the student (or the student's parent for a PLUS loan) for a student who completed the payment period or period of enrollment.

These proposed regulations would adopt the suggestions made by the non-Federal negotiators to eliminate the SAR/ISIR requirement for a late disbursement of a PLUS loan.

The proposed regulations would change the requirement that the institution must have received a SAR or ISIR before the student became ineligible to a requirement that a SAR or ISIR, with an official EFC, must have been processed by the Secretary before the student became ineligible.

Finally, the proposed regulations would eliminate the requirement, that in order for an institution to make a late disbursement of a Federal Pell Grant, it must have received a ''valid'' SAR or ISIR before the student became ineligible. Instead, a student's eligibility for a late Pell Grant disbursement would be based upon the rule that the Secretary must have processed a SAR/ISIR with an official EFC while the student was still eligible. Of course, the institution must receive the SAR or ISIR before the actual disbursement can be made.

Reason: We agree with the non-Federal negotiators that the Department's informal guidance allowing institutions to make late disbursements after the established timeframe in limited cases should be made part of the regulations. Doing so would inform all institutions and guaranty agencies (as opposed to only those that received private-letter guidance) that this procedure is available. However, the proposed regulations differ from the current regulations and guidance in two ways. First, we believe that increasing the timeframe from 90 to 120 days would benefit students and institutions by providing sufficient time, in most cases, for a late disbursement to be made without our approval and without regard to the reason for the late disbursement.

Second, for the limited cases in which it is not the fault of the student that a late disbursement was not made within the 120-day period, an institution would seek our approval (not that of the guaranty agency, as provided under current guidance) to make that disbursement. During the discussion on this point, the negotiators representing guaranty agencies, supported by others, suggested that, for FFEL loans, guaranty agencies continue to be allowed to approve a late disbursement based upon receiving information that the reason for the delay was not the fault of the student. For program integrity reasons, we believe it is more appropriate that we determine whether to approve a late disbursement after the established deadline. We offered assurances that, if this proposed rule is made final, we will implement an expedited process for approving late disbursement requests. While details have not been finalized, we expect that we will establish a single point of contact for requests for late disbursements beyond the proposed 120-day limit. An institution would make its request and provide sufficient information showing that the reason for the delay was not the fault of the student or parent.

It was noted during the discussion that there may be situations where, because of administrative constraints, a late disbursement may not be possible even if the request is made within the applicable timeframes. Examples of these constraints include the closing of an award year's disbursement processing for the Pell Grant and campus-based programs or the termination of an FFEL lender's processing for a year. During the negotiations, we were asked to consider what interventions we could take in our processing to minimize the instances in which a student who was otherwise eligible for a late disbursement could not receive the funds because of these administrative limitations. We will provide additional guidance on this issue at a later time.

In the discussions pertaining to late disbursements for students that withdraw from an institution, the non-Federal negotiators pointed to what they viewed as an apparent conflict in the regulations. Under the provisions of § 668.22, an institution may be required to make a late disbursement (post-withdrawal disbursement) to a student who withdraws during a payment period or period of enrollment. However, under the cash management provisions in § 668.164(g)(3)(i), an institution has the option of making a late disbursement to pay for educational costs that a student incurred for the period in which the student was enrolled and eligible. However, it would be contrary to the primary tenet in § 668.22—that a withdrawn student has earned Title IV loan or grant assistance equal to the percent of the payment period or period of enrollment the student completed—for an institution to deny that student a late disbursement. The current late disbursement regulations at § 668.164(g)(1)(ii) specifically require institutions to follow the provisions in § 668.22 for a student who withdraws from the institution. Although, we are not proposing any change to this requirement, we are proposing to redraft the requirement in order to eliminate any confusion regarding this issue.

Along the same lines, the proposed rule would require an institution to pay or offer a late disbursement to a student who completes the payment period or period of enrollment. Under the requirements of § 668.22, a student who completes more than 60 percent of the payment period or period of enrollment has earned 100 percent of his or her Title IV aid and the institution must make or offer, as appropriate, a post-withdrawal disbursement of any of those funds that were not received. A student who completes 100 percent of the payment period or period of enrollment has the same entitlement to all of his or her Title IV funds for the period. Under the proposed regulations, the institution would be permitted to credit the student's account to pay for current and allowable charges in accordance with the current cash management regulations. For example, an institution would have to provide notice to a student, or parent in the case of a PLUS loan, when the institution credits the student's account with Direct Loan, FFEL, or Federal Perkins Loan Program funds in order to give the student or parent an opportunity to cancel all or a portion of the loan disbursement.

The proposed change that allows a student to be considered for a late disbursement when the Secretary has processed a SAR/ISIR with an official EFC rather than when the institution receives the SAR or ISIR, provides the institution with an easy way to document the student's eligibility since each ISIR record includes the date that the Secretary processed the application and created the SAR/ISIR. More importantly, this proposed change would provide equity to students in the consideration of a late disbursement, since eligibility would be based upon the student's action in submitting an application (FAFSA) or correction to the Secretary and not on when an institution happens to draw its ISIRs from its electronic mailbox.

We agree with the reasons noted by the non-Federal negotiators for proposing changes to the regulations regarding the relevance of the institution receiving a SAR/ISIR for a PLUS loan, and the proposed regulations would not require the institution to rely upon a SAR/ISIR for determining if a parent is eligible for a late disbursement of a PLUS loan. However, we wish to make clear that in cases in which an institution does not have a SAR/ISIR, it may not certify or originate a PLUS loan until it documents that the student for whom the loan is intended meets all the applicable eligibility requirements described in § 668.32 (the student is not in default, does not owe an overpayment, is a citizen or eligible non-citizen, etc.).

Finally, while these proposed regulations would eliminate the requirement that for purposes of a Pell Grant an institution must have received a valid SAR or ISIR before the student withdrew, a valid SAR or ISIR would still be required before an institution could actually make the late disbursement of a Pell Grant.

Notices and Authorizations (Section 668.165)

Current Regulations: Whenever an institution credits a student's account with Title IV, HEA loan funds, it must notify the student (or the student's parent in case of a PLUS loan) of his or her right to cancel all or part of the loan. The notice may be provided in writing or sent electronically. If it is sent electronically, the institution must confirm that the notice was received by the student or parent.

Suggested Change: Institutions suggested that the requirement that an institution confirm the receipt of a notice sent electronically be eliminated.

Proposed Regulations: The proposed regulations would adopt the suggested change.

Reason: We no longer believe this requirement is necessary in view of continuing advances in, and more widespread use of, technologies for conducting electronic transactions. Nevertheless, we expect institutions to take seriously the student's right to reconsider his or her loan obligation (the notice may be the student's last chance to cancel the loan) by taking steps that reasonably ensure that the student receives the notice.

Also, the proposed rule would eliminate the apparent distinction between providing the notice in writing or electronically. In keeping with prior guidance on this matter, we wish to emphasize there is generally no difference in the regulations between the terms ''in writing'' and ''electronically.'' Unless a particular regulation requires otherwise, an institution may comply with a requirement that an activity be conducted ''in writing'' by conducting that activity electronically.

Timely Return of Funds (Sections 668.171 and 668.173)

Current Regulations: Under the provisions of Subpart L of the General Provisions regulations, one of the standards that an institution must satisfy to be financially responsible, as provided in Section 498(c)(6)(A) of the HEA, is that it must have sufficient cash reserves to make required refunds. An institution is considered to have sufficient cash reserves if it is a public institution or it is covered by a State's tuition recovery fund. Otherwise, we consider that an institution has sufficient cash reserves if, for its two most recently completed fiscal years, it makes required refunds in a timely manner, as required in § 668.22(j). On the other hand, an institution is not considered to have sufficient cash reserves if an audit or review finding shows that the institution did not make required refunds in a timely manner for 5 percent or more of the students sampled during the audit or review. In this case, an institution must demonstrate that it has sufficient cash reserves by submitting a letter of credit payable to the Secretary. [Note to readers: The financial responsibility regulations in Subpart L were not fully revised when the Department published the regulations under § 668.22 for returning Title IV, HEA program funds. The regulations for returning funds replaced the previous ''refund'' requirements. To avoid confusion over the terms used in the current regulations, from this point forward we will use the phrase ''returning funds.'']

Suggested Change: The non-Federal negotiators suggested that we clarify the timeframe that an institution has to return unearned Title IV funds that it is responsible for returning. The non-Federal negotiators pointed to § 668.22(j), which provides that an institution must return unearned Title IV, HEA program funds no later than 30 days after the date of the institution's determination that a student withdrew. However, the Department's audit guide is more specific, stating that if the funds are returned by check, the check used must clear the institution's bank within the 30-day period. The non-Federal negotiators believed it was unfair to hold an institution responsible for a check clearance process that is beyond its control. They suggested that we clarify that an institution has 30 days to issue a check. They felt this was important since, in the context of the financial responsibility regulations, any ambiguity in the rules could inadvertently result in an institution having to submit a letter of credit.

During the negotiated rulemaking sessions the non-Federal negotiators made several suggestions regarding the letter of credit requirement. They suggested that the regulations provide that an institution that would otherwise be required to submit a letter of credit not have to do so if the reason that funds were not returned in a timely manner was not the institution's fault or was beyond the institution's control.

They also noted that there may be cases where the initial determination that an institution exceeded the 5 percent threshold was in error. Therefore, they wanted the letter of credit to be required only after a preliminary finding, made during a Department or guaranty agency review, is verified or resolved, as noted in the final review report, rather than at an earlier point in the process such as when the draft report was issued. They pointed out that, as a practical matter, it is not worthwhile to require a letter of credit for a small amount of money. The non-Federal negotiators also suggested changes to the 5 percent threshold and the timeframes for submitting the letter of credit.

Finally, they asserted that an audit or review finding citing an institution for not returning funds in a timely manner may prompt an administrative or compliance arm of the institution to require a comprehensive review of, and changes to, its practices and procedures. The non-Federal negotiators believed that the comprehensive review should not be prompted unnecessarily in cases where the finding is for a de minimis number of untimely returns.

Proposed Regulations: Under the proposal, unearned funds must be returned no later than 30 days after the date of the institution's determination that the student withdrew. The proposed regulations would define specifically when we consider the institution to have returned funds depending upon the method it uses to return the funds. Specifically, the regulations would provide that an institution returns funds when it: (1) Deposits or transfers the funds into the bank account it maintains for Federal funds, (2) initiates an EFT to transfer the funds, (3) initiates an electronic transaction that instructs an FFEL lender to adjust a borrower's loan for the amount of the ''returned funds'', or (4) issues a check. However, if a check is used to return unearned funds, the proposed regulations would also require that the check must be received by an FFEL Program lender or the Secretary no later than 45 days after the institution determined the student withdrew.

In response to suggestions made during the negotiating sessions, these proposed regulations would make several other changes. First, in cases in which there are exceptional circumstances beyond an institution's control or when the institution believes that an auditor or reviewer made an error, the regulations would provide that the institution may request the Secretary to reconsider a finding that it failed to return unearned funds in a timely manner. In its request, the institution would need to submit documents showing that it would not have exceeded the 5 percent threshold had it not been for the exceptional circumstance or error. An institution that submits the request would not be required to submit a letter of credit unless the Secretary notifies the institution that its request is denied.

Second, the proposed regulations would establish timeframes for submitting a letter of credit depending on whether the finding triggering the letter of credit was made in a compliance audit, in a program review conducted by the Department or guaranty agency, or an audit conducted by the Department's Office of the Inspector General (OIG).

Third, the proposed regulations would provide that an institution would not be required to submit a letter of credit of less than $5,000. However, to meet the statutory reserve requirement, such an institution would need to demonstrate that it has available at all times cash reserves of at least $5,000 to make required returns.

Finally, in response to general concerns over the threshold requirement and the consequences of a finding that an institution did not return funds in a timely manner, we propose that the Secretary will consider an institution that makes one or two untimely returns to be in compliance with the reserve standard.

Reason: We agree that the regulations should clearly establish the date by which an institution is required to return unearned funds for which it is responsible. We also would like to stress that one of the reasons for the requirement that funds be returned promptly is so that the student's Title IV loan debt can be promptly and properly reduced.

The proposed provision that an institution initiates an electronic transaction for returning unearned funds (as opposed to initiating an electronic transfer of funds) is intended to accommodate the ''hold and release'' process used by some FFEL Program participants. Under this process, an institution and a lender agree that adjustments to FFEL Program loans, including the return of unearned funds, are made when the institution initiates an electronic transaction notifying the lender of the adjustment or return. The lender then makes the adjustment by crediting or otherwise adjusting the borrower's loan account for the amount returned.

Although we adopted most of the approach suggested by the non-Federal negotiators for returning unearned funds by check, we could not incorporate in the regulations their suggestion to separate the requirement that the check must be issued within 30 days from the requirement that it must be received by an FFEL Program lender or the Secretary within 45 days. Doing so would create a conflict in the regulations. For example, under one section of the regulations an institution would comply with the reserve standard by issuing the check within 30 days. However, in another section of the regulations the institution would not comply with the same reserve standard if the check was not received within 45 days. Consequently, the two-part criteria for determining whether an institution satisfies the reserve standard when it uses a check to return unearned funds are contained in one section of the regulations.

We also agreed that changes should be made to the current regulations to account for errors, or unusual circumstances beyond an institution's control, and to otherwise make more certain that an institution has exceeded the 5 percent threshold before it would be required to submit a letter of credit. In this regard, an institution would be required to submit a letter of credit no later than 30 days after the Department, OIG, or guaranty agency issues a preliminary report that the institution did not return unearned funds in a timely manner for 10 percent or more of the sampled students.

If the finding in the preliminary report is less than 10 percent, an institution would not generally be required to submit the letter of credit unless the final report shows that the institution did not return unearned funds in a timely manner for 5 percent or more of its students. If the letter of credit is required, the institution would have to submit it no later than 30 days after the final report is issued

Finally, if the Secretary believes it is necessary, the Secretary could at any time send a notice to the institution requesting the letter of credit.

Federal Work Study at For-Profit Institutions (Sections 675.2 and 675.21)

Current Regulations: The current FWS Program regulations reflect the limitations placed by the HEA on proprietary institutions with regard to the types of non-community service jobs that FWS students may hold when they are employed by the institution itself. The specific statutory restrictions are provided in section 443(b)(8)(A) of the HEA.

The HEA requires, among other things, that FWS jobs for students who are employed in non-community service jobs by a proprietary institution itself must furnish student services that are directly related to the FWS student's education. The HEA specifies that the definition of ''student services'' is to be determined by the Secretary according to regulations. ''Student services'' are defined in § 675.2(b) of the FWS Program regulations as ''Services that are offered to students that are directly related to the work-study student's training or education and that may include, but are not limited to, financial aid, library, peer guidance counseling, and social, health, and tutorial services.''

The statutory requirements for FWS jobs at a proprietary institution are reflected in § 675.21(b) of the regulations. Specifically § 675.21(b)(2) states that if the FWS jobs are not community service jobs they must be on campus, provide student services, complement the student's educational program or vocational goals to the maximum extent possible, and not involve soliciting potential students to enroll at the institution. Section 675.21(b)(2) provides a reference to the definition of ''student services'' in § 675.2 for the previously discussed requirement that the services must be directly related to the FWS student's education.

Suggested Change: Proprietary institutions have suggested at conferences, meetings, and in letters that the current FWS Program regulations in § 675.2(b) that define ''student services'' and our guidance on employment at these institutions be changed to expand employment opportunities for FWS students employed in non-community service jobs by the proprietary institution itself. The proprietary institutions especially urged us to allow FWS students to assist instructors in curriculum-related activities that are prohibited under current policies.

These institutions also suggested that we modify past guidance and state in the regulations that, in furnishing student services, FWS students are not required to provide direct or personal services. The proprietary institutions further suggested that we provide in the regulations examples of FWS jobs that would never be considered student services. In addition, these institutions suggested that the statutory requirement that the non-community service FWS jobs must furnish student services that are directly related to the student's training or education be removed from the definition of ''student services'' and be placed in the same section of the FWS Program regulations (§ 675.21(b)) in which the other requirements for employment at a proprietary institution are located.

Proposed Regulations: The proposed regulations would amend the definition of ''student services'' in § 675.2(b) first by, adding more examples of jobs in which a proprietary institution may employ students on campus to work for the institution itself. The examples that would be added to the definition of student services are job placement, assisting instructors in curriculum-related activities, and security. Second, the proposed changes to the definition of ''student services'' would modify past guidance and indicate that there is no expectation that the FWS job involve direct or personal services. Third, the proposed changes to the definition of ''student services'' would specify that some jobs, such as facility maintenance, cleaning, purchasing, and public relations, are never considered student services. Finally, the statutory requirement that the non-community service job must provide student services that are directly related to the FWS student's training or education would be removed from the definition of ''student services'' in § 675.2 and placed in § 675.21(b)(2) of the FWS regulations.

Reason: Many proprietary institutions informed us that the current definition of ''student services'' in the FWS Program regulations and our current guidance on that definition do not support or address the needs of the student population at most proprietary institutions that offer short-term training in a specific skill. A number of proprietary institutions have also expressed the concern that our current definition and guidance result in students being denied valuable on-the-job experience in their chosen fields of study. The proprietary institutions have asked for more flexibility in establishing FWS jobs on campus to enable students to find FWS work that fits into their academic schedules and to earn money to pay their educational costs. These institutions further stated that some of the types of jobs currently excluded actually do provide a service to students at proprietary institutions, although some jobs provide this more directly than others. The negotiators agreed with the reasons provided by the proprietary institutions.

We agree that many proprietary institutions can offer FWS jobs that provide essential services to students and that the regulations can provide greater flexibility in this area. Therefore, these proposed regulations would expand the definition of ''student services'' in § 675.2(b) of the FWS regulations to broaden the scope of FWS job opportunities for students who attend proprietary institutions. The negotiators welcomed the proposed expansion of the definition of student services and the proposed increase of FWS job opportunities for students attending proprietary institutions.

The proposed change would expand the definition of ''student services'' by adding further examples of acceptable work areas. The new examples are job placement, assisting instructors in curriculum-related activities, and security. For example, an FWS student would be able to work in a proprietary institution's placement office helping students find jobs. Under the proposed regulations, an FWS student would be able to assist an instructor in the lab or in other work related to the instructor's official academic duties at the institution and have such work considered a student service. Also, an FWS student would be able to perform security functions such as being a night watchman or being an institution security officer. These security roles have taken on increased importance and are now considered an essential student service for the protection of students and their property. The list of areas in which FWS employment is authorized is not meant to be exhaustive. However, we believe that they are excellent examples of employment that provide student services.

The proposed regulations would modify guidance issued in the past that stated that the FWS student had to provide direct and personal services to other students. A service would be considered a ''student service'' if the service provides a benefit either directly or indirectly to students. Proprietary institutions would be given more flexibility in establishing what types of jobs performed by FWS students at their institutions provide a direct or indirect benefit to other students. Further, the fact that a job has some operational functions does not preclude it from being an acceptable FWS job as long as it furnishes student services.

Work that does not serve students will still not be permissible. Thus, because facility maintenance, cleaning, purchasing, and public relations jobs primarily benefit the institution, the proposed changes would specify that such jobs are not considered student services under the FWS Program. There are, of course, other jobs that also would not be considered student services.

The proposed regulations would remove from the definition of ''student services'' in § 675.2(b) the requirement that the non-community service job provide student services that are directly related to the FWS student's training or education. This requirement would be made clearer by being moved to § 675.21(b), where the other requirements for employment at a proprietary institution are located. The negotiators agreed with this proposed regulation change for clarity of this requirement.

Even with the expanded opportunities for student services, proprietary institutions should note that the statute and the proposed regulations in § 675.21(b)(2) still require that student services must be directly related to the FWS student's education when the FWS student is employed in a non-community service job by the institution itself. For example, a job that involves working in job placement would be considered directly related to an FWS student's education or training for a student enrolled in the area of human resources, management, or business. In a second example, a job that involves assisting an instructor in academic-related activities of the program in which the student was enrolled would be considered as being directly related to an FWS student's education or training. In a final example, work in security, for an FWS student enrolled in the field of law enforcement or a related field, would also be considered directly related to the student's education.

Institutions are also reminded that the proposed regulations would not change other requirements of the regulations. Students who are employed by the proprietary institution itself may be employed in FWS non-community service jobs only when those jobs are on campus and when they complement and reinforce the education programs and vocational goals of the FWS student to the maximum extent practicable. Finally, work in the admissions or recruitment area of an institution would continue to be prohibited, as this employment is considered to involve soliciting potential students to enroll at the institution.

GEAR UP Program (Section 694.10)

Current Regulations: Section 694.10(e) of the regulations interprets sections 404E(c) and 404C(b)(1)(C) of the HEA to require that GEAR UP scholarship funds not supplant other gift aid that the student would otherwise have been eligible to receive. Specifically, § 694.10(e) requires that a student eligible for a GEAR UP scholarship be awarded financial aid in the following order: Federal Pell Grant; any other public or private grants, scholarships, or tuition discounts; the GEAR UP scholarship; and other financial assistance, such as loans or work-study. An exception to this required awarding order is allowed if the institution documents that there are exceptional circumstances related to the GEAR UP student's aid package that are unique to that GEAR UP student.

Suggested Change: Members of the institutional community suggested that the requirement that an institution award student financial assistance in an established order for GEAR UP scholarship recipients be eliminated.

Proposed Regulations: These proposed regulations would remove the requirement that an institution award student financial assistance in an established order for students who are eligible for a GEAR UP scholarship. The proposed regulations would only specify the statutory requirement in section 404E(c) of the HEA that GEAR UP scholarships not be considered in awarding Title IV grant assistance. As a result, under this proposal, an institution would treat GEAR UP scholarships as they relate to other gift aid (e.g., grants and scholarships) as the institution sees fit, except in the case of Title IV grant assistance, which must be awarded without regard to a student's eligibility for a GEAR UP scholarship.

The requirement of section 404(b)(1)(C) of the HEA, although no longer applicable to individual student aid packages, would continue to apply to States and Partnerships at the program level, meaning that States and Partnerships must include as a part of their participation plan an assurance that GEAR UP funds will supplement and not supplant other funds expended by the States and Partnerships for existing programs.

Section 694.10(c) of the regulations, which implements the portion of section 404E(c) of the HEA that provides that a GEAR UP scholarship, in combination with any Title IV assistance or other grant or scholarship assistance, may not exceed the student's cost of attendance, would remain unchanged.

Reason: Several negotiators expressed concern with the current requirement that an institution award aid to a student eligible for a GEAR UP scholarship in a particular order. These negotiators felt that it was highly inappropriate for the regulations to dictate a packaging policy for institutions. They maintained that institutions are in the best position to determine the financial aid package that will best meet the student's needs.

One negotiator expressed support for the current packaging requirement, noting that the intent in implementing it was to insure that a student who is eligible to receive a GEAR UP scholarship would benefit from as significant a reduction in his or her postsecondary expenses as intended by the statute. The negotiator was concerned that in the absence of the institutional packaging requirement, GEAR UP students might not get the full benefit of their GEAR UP grant. Several of the negotiators opposed to the current requirement argued that the opposite is true. They contended that because institutions are not in a position of ensuring a reduction in gift aid provided by outside entities, GEAR UP scholarship students would have to forego benefiting from additional sources of aid that are required to be used as ''last dollar'' assistance. In addition, those opposed to the current provision believed that because of the concerns that they cited, some institutions would choose not to participate in the GEAR UP scholarship program.

The committee reached tentative agreement to remove the institutional packaging requirements from the regulations. The committee believed that the goal of assuring a significant level of assistance to GEAR UP scholarship recipients could be achieved without mandating a Federal financial aid packaging order. The negotiator who had expressed concern with the removal of the packaging requirements stated a hope that if this change to the regulation is made, institutions would be eager to participate in the GEAR UP program.

Executive Order 12866

1. Potential Costs and Benefits

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

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

Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading Paperwork Reduction Act of 1995.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, 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.

Summary of Potential Costs and Benefits

The Secretary is amending these regulations to reduce administrative burden for program participants, provide benefits to students and borrowers, and to protect the taxpayers' interests. The proposed regulations are fully described elsewhere in this preamble. The Department of Education has estimated that the proposed regulations would have no effect on Federal costs over FY 2002–2006.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential Memorandum 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, § 668.35 Student Debts under the HEA and to the U.S.
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

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

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would affect institutions of higher education, lenders, and guaranty agencies that participate in Title IV, HEA programs, and individual students and loan borrowers. The U.S. Small Business Administration (SBA) Size Standards define for-profit or nonprofit institutions with total annual revenue below $5,000,000 or institutions controlled by governmental entities with populations below 50,000, and lenders with total assets under $100 million, as ''small entities.'' Guaranty agencies are State and private nonprofit entities that act as agents of the Federal government, and as such are not considered ''small entities'' under the Regulatory Flexibility Act. Individuals are also not defined as ''small entities'' under the Regulatory Flexibility Act.

A significant percentage of the over 4,000 lenders participating in the FFEL Program meets the definition of ''small entities.'' While these lenders and a number of institutions fall within the SBA size guidelines, the proposed regulations do not impose significant new costs on these entities.

The Secretary invites comments from small institutions and lenders as to whether they believe the proposed changes would have a significant economic impact on them and if so, requests evidence to support that belief.

Paperwork Reduction Act of 1995

Proposed §§ 600.31, 668.22, 668.165, 668.173, and 673.5 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Institutional Eligibility under the Higher Education Act of 1965, as amended—

Section 600.31—Change in Ownership Resulting in a Change in Control for Private Nonprofit, Private For-Profit and Public Institutions

The proposed regulations expand the conditions under which a change in the ownership of an institution is not considered a change of ownership for institutional eligibility purposes when the transfer is to a family member. The proposed regulations also exclude a transfer of ownership upon the death or retirement of an owner to a member of management who has had an ownership interest during the preceding two years. We expect the decrease in burden to be insignificant because of the small number of institutions who annually report under this regulation and of that number the few instances where a change in ownership would meet the expanded exemption and therefore would not be required to file.

Student Assistance General Provisions—Section 668.22—Treatment of Title IV Funds When a Student Withdraws

The proposed regulations would clarify the definition of ''an institution that is required to attendance''. Also, under the proposed regulations, an institution would only be required to insure that the sum of all leaves of absence that a Title IV aid recipient takes does not exceed 180 days within a 12-month period (as opposed to the current rule where an institution must determine whether subsequent leaves of absence meet certain special terms). There would be no significant impact upon burden associated with this requirement.

Section 668.165—Notices and Authorizations

The proposed regulation would reduce burden under this section by eliminating the ''confirm receipt'' requirement for a notice sent electronically to a student or parent (the notice informs the student or parent of his or her right to cancel a loan or loan disbursement). The proposed changes do not change the burden hours associated with this section of the regulations because there is no burden currently associated with this provision.

Section 668.173—Refund Reserve Standard

The proposed regulations would provide greater flexibility to an institution that is cited in an audit or review report for failing to return unearned Title IV program funds in a timely manner. Under the current regulations, an institution that is cited for this reason must automatically submit a letter of credit to the Secretary. Under this proposal, the institution would be able to demonstrate that circumstances beyond its control inappropriately triggered the audit or review finding or that the finding was erroneously made. If the Secretary determines that the finding was inappropriately or erroneously made, the institution would not have to submit a letter of credit. The proposed regulations would also provide that the Secretary or guaranty agency may delay requiring a letter of credit from the institution until the final audit or review report is issued. In addition, the proposed regulations would not require the institution to submit the letter of credit if the amount of the letter of credit is less than $5,000.

The proposed regulations could marginally increase the burden on some institutions because while institutions that are cited may submit documentation showing that the finding was inappropriately or erroneously made, they would not be required to submit a letter of credit.

General Provisions for the Federal Perkins Loan, FWS, and FSEOG Programs—Section 673.5—Overaward

The proposed regulations would modify the process for referring overpayments by specifying that a student is not liable for certain overpayments less than $25. The proposed regulations would clarify and simplify the current process by providing that an institution only has to refer the Federal portion of certain FSEOG overpayments, and by making consistent the process for reporting overpayments for all the relevant programs. There are no new information collection requirements as a result of changing this section.

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 these proposed collections of information in—

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

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 these proposed collections of information in—

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

Assessment of Educational Impact

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

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(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Education Loan Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.268 William D. Ford Federal Direct Loan Program)

List of Subjects

34 CFR Parts 600 and 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.

34 CFR Parts 673 and 675

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

34 CFR Parts 682 and 685

Administrative practice and procedure, College and universities, Education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 690

Grant programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 694

Colleges and universities, Elementary and secondary education, Grant programs—education, Reporting and recordkeeping requirements, Student aid.

Dated: August 5, 2002.

Rod Paige,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600, 668, 673, 675, 682, 685, 690, and 694 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 1099c, unless otherwise noted.

§ 600.8 [Amended]

2. Section 600.8 is amended by adding ''proprietary institution of higher education or a postsecondary vocational'' after ''eligible''.

3. Section 600.21 is amended by revising paragraph (f) to read as follows:

§ 600.21 Updating application information.

* * * * *

(f) *Definition.* A family member includes a person's—

(1) Parent or stepparent, sibling or step-sibling, spouse, child or stepchild, or grandchild or step-grandchild;

(2) Spouse's parent or stepparent, sibling or step-sibling, child or stepchild, or grandchild or step-grandchild;

(3) Child's spouse; and

(4) Sibling's spouse.

4. Section 600.31 is amended by revising paragraph (e) to read as follows:

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

* * * * *

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

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

(2) Upon the retirement or death of the owner, to a person with an ownership interest in the institution who has been involved in management of the institution for at least two years preceding the transfer and who established and retained the ownership interest for at least two years prior to the transfer.

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

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

§ 668.2 [Amended]

6. Section 668.2(b) is amended by removing the definition of ''Academic year''.

7. Section 668.3 is revised to read as follows:

§ 668.3 Academic year.

(a) *General.* Except as provided in paragraph (c) of this section, an academic year is a period that begins on the first day of classes and ends on the last day of classes or examinations during which—

(1) An institution provides a minimum of 30 weeks of instructional time; and

(2) For an undergraduate educational program, a full-time student is expected to complete at least—

(i) Twenty-four semester or trimester credit hours or 36 quarter credit hours for a program measured in credit hours; or

(ii) 900 clock hours for a program measured in clock hours.

(b) *Definitions.* For purposes of paragraph (a) of this section—

(1) A week is a consecutive seven-day period;

(2) A week of instructional time is any week in which at least one day of regularly scheduled instruction or examinations occurs or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs; and

(3) Instructional time does not include any vacation periods, homework, or periods of orientation or counseling.

(c) Reduction in the length of an academic year.

(1) Upon the written request of an institution, the Secretary may approve, for good cause, an academic year of between 26 and 29 weeks of instructional time for educational programs offered by the institution if the institution offers a two-year program leading to an associate degree or a four-year program leading to a baccalaureate degree.

(2) An institution's written request must—

(i) Identify each educational program for which the institution requests a reduction, and the requested number of weeks of instructional time for that program;

(ii) Demonstrate good cause for the requested reductions; and

(iii) Include any other information that the Secretary may require to determine whether to grant the request.

(3)(i) The Secretary approves the request of an eligible institution for a reduction in the length of its academic year if the institution has demonstrated good cause for granting the request and the institution's accrediting agency and State licensing agency have approved the request.

(ii) If the Secretary approves the request, the approval terminates when the institution's program participation agreement expires. The institution may request an extension of that approval as part of the recertification process.

(Approved by the Office of Management and Budget under control number 1840–0537)

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

8. Section 668.4 is revised to read as follows:

§ 668.4 Payment period.

(a) *Payment periods for an eligible program that measures progress in credit hours and has academic terms.* For a student enrolled in an eligible program that is offered in terms and measures progress in credit hours, the payment period is the academic term.

(b) *Payment periods for an eligible program that measures progress in credit hours and does not have academic terms*—(1) For a student enrolled in an eligible program that is one academic year or less in length—

(i) The first payment period is the period of time in which the student completes half the number of credit hours in the program and half the number of weeks in the program; and

(ii) The second payment period is the period of time in which the student completes the program.

(2) For a student enrolled in an eligible program that is more than one academic year in length—

(i) For the first academic year and any subsequent full academic year—

(A) The first payment period is the period of time in which the student completes half the number of credit hours in the academic year and half the number of weeks in the academic year; and

(B) The second payment period is the period of time in which the student completes the academic year.

(ii) For any remaining portion of an eligible program that is more than one-half an academic year but less than a full academic year in length—

(A) The first payment period is the period of time in which the student completes half the number of credit hours in the remaining portion of the program and half the number of weeks remaining in the program; and

(B) The second payment period is the period of time in which the student completes the remainder of the program.

(iii) For any remaining portion of an eligible program that is not more than half an academic year, the payment period is the remainder of the program.

(3) For purposes of paragraphs (b)(1) and (b)(2) of this section, if an institution is unable to determine when a student has completed half of the credit hours in a program, academic year, or the remainder of a program; the student is considered to begin the second payment period of the program, academic year, or remainder of a program at the later of—

(i) When, as determined by the institution, the student has completed half of the academic coursework in the program, academic year, or the remainder of the program; or

(ii) The calendar midpoint between the first and last scheduled days of class of the program, academic year, or the remainder of the program.

(c) *Payment periods for an eligible program that measures progress in clock hours.* (1) For a student enrolled in an eligible program that is one academic year or less in length—

(i) The first payment period is the period of time in which the student completes half the number of clock hours in the program; and

(ii) The second payment period is the period of time in which the student completes the program.

(2) For a student enrolled in an eligible program that is more than one academic year in length—

(i) For the first academic year and any subsequent full academic year—

(A) The first payment period is the period of time in which the student completes half the number of clock hours in the academic year; and

(B) The second payment period is the period of time in which the student completes the remaining number of clock hours in the academic year.

(ii) For any remaining portion of an eligible program that is more than one-half an academic year but less than a full academic year in length—

(A) The first payment period is the period of time in which the student completes half the number of clock hours in the remaining portion of the program; and

(B) The second payment period is the period of time in which the student completes the remainder of the program.

(iii) For any remaining portion of an eligible program that is not more than one half of an academic year, the payment period is the remainder of the program.

(d) *Number of payment periods.* Notwithstanding paragraphs (b) and (c) of this section, an institution may choose to have more than two payment periods. If an institution so chooses, the regulations in paragraphs (b) and (c) of this section are modified to reflect the increased number of payment periods. For example, if an institution chooses to have three payment periods in an academic year in a program that measures progress in credit hours but does not have academic terms, each payment period must correspond to one-third of the academic year measured in both credit hours and weeks of instruction.

(e) *Re-entry within 180 days.* If a student withdraws from a program described in paragraph (b) or (c) of this section during a payment period and then reenters that program within 180 days, the student remains in that same payment period when he or she returns and, subject to conditions established by the Secretary or by the FFEL lender or guaranty agency, is eligible to receive any title IV student assistance funds for which he or she was eligible prior to withdrawal, including funds that were returned by the institution or student under the provisions of § 668.22.

(f) *Re-entry after 180 days or transfer.* (1) Subject to the conditions of paragraph (f)(2) of this section, an institution calculates new payment periods for the remainder of the student's program based on paragraphs (b) through (d) of this section, for a student who withdraws from a program described in paragraphs (b) or (c) of this section, and—

(i) Reenters that program after 180 days,

(ii) Transfers into another program at the same institution within any time period, or

(iii) Transfers into a program at another institution within any time period.

(2) For a student described in paragraph (f)(1) of this section—

(i) For the purpose of calculating payment periods only, the length of the program is the number of credit hours and the number of weeks, or the number of clock hours, that the student has remaining in the program he or she enters or reenters, and

(ii) If the remaining hours, and weeks, if applicable constitute one-half of an academic year or less, the remaining hours constitute one payment period.

(Authority: 20 U.S.C. *et seq.*)

9. Section 668.8 is amended by:

A. Revising paragraph (b)(3).

B. Removing paragraph (b)(4).

The revision reads as follows:

§ 668.8 Eligible program.

* * * * *

(b) * * *

(3)(i) The Secretary considers that an institution provides one week of instructional time in an academic program during any week the institution provides at least one day of regularly scheduled instruction or examinations, or, after the last scheduled day of classes for a term or a payment period, at least one day of study for final examinations.

(ii) Instructional time does not include any vacation periods, homework, or periods of orientation or counseling.

* * * * *

10. Section 668.14(b)(22) is revised to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(22)(i) It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the awarding of title IV, HEA program funds, except that this limitation does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive title IV, HEA program funds.

(ii) Activities and arrangements that an institution may carry out without violating the provisions of paragraph (b)(22)(i) of this section include, but are not limited to:

(A) The payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all employees is not considered an adjustment.

(B) Compensation to recruiters based upon their recruitment of students who enroll only in programs that are not eligible title IV, HEA programs.

(C) Compensation to recruiters who arrange contracts between the institution and an employer under which the employer's employees enroll in the institution, and the employer pays, directly or by reimbursement, 50 percent or more of the tuition and fees charged to its employees; provided that the compensation is not based upon the number of employees who enroll in the institution, or the revenue they generate, and the recruiters have no contact with the employees.

(D) Compensation paid as part of a profit-sharing or bonus plan, as long as those payments are made to all or substantially all of the institution's full-time professional and administrative staff. Such payments can be limited to all, or substantially all of the full-time employees at one or more organizational level at the institution, except that an organizational level may not consist predominantly of recruiters, admissions staff, or financial aid staff.

(E) Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter. For this purpose, successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours, or has successfully completed at least 900 clock hours of instruction.

(F) Compensation paid to employees who perform ''pre-enrollment'' activities, such as answering telephone calls, referring inquiries, or distributing institutional materials, as long as the compensation is not based on the number of people actually enrolled.

(G) Compensation to managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities, or the awarding of title IV, HEA program funds.

(H) The awarding of token gifts to the institution's students or alumni, provided that the gifts are not in the form of money, no more than one gift is provided annually to an individual, and the cost of the gift is not more than $100.

(I) Profit distributions proportionately based upon an individual's ownership interest in the institution.

(J) Compensation paid for Internet-based recruitment and admission activities that provide information about the institution to prospective students, or permit them to apply for admission on-line.

(K) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution provided that none of the services involve recruiting or admission activities, or the awarding of title IV, HEA program funds.

(L) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, even if one of the services involve recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing the recruitment or admission activities, or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible under paragraph (b)(22) of this section.

* * * * *

11. Section 668.22 is amended by:

A. Revising paragraph (b)(3)(i).

B. Revising paragraph (d)(1)(vi).

C. Removing paragraph (d)(1)(vii).

D. Redesignating paragraphs (d)(1)(viii) and (d)(1)(ix) as (d)(1)(vii) and (d)(1)(viii), respectively.

E. Removing paragraph (d)(2).

F. Redesignating paragraphs (d)(3) and (d)(4) as (d)(2) and (d)(3), respectively.

G. Removing ''on'' and adding in its place ''at'' in newly redesignated paragraph (d)(2).

H. Removing ''are'' and adding in its place ''is'' in newly redesignated paragraph (d)(3)(i).

I. Adding '', that includes the reason for the request,'' after ''request'' in newly redesignated paragraph (d)(3)(iii)(B).

J. Adding ''The timeframe for returning funds is further described in § 668.173(b) and (c)(3).'' at the end of paragraph (j)(1).

The revisions read as follows:

§ 668.22 Treatment of title IV funds when a student withdraws.

* * * * *

(b) * * *

(3)(i) An institution is required to take attendance if an outside entity (such as the institution's accrediting agency or a State agency) has a requirement, as determined by the entity, that the institution take attendance.

* * * * *

(d) * * *

(1) * * *

(vi) The number of days in the approved leave of absence, when added to the number of days in all other approved leaves of absence, does not exceed 180 days in any 12-month period;

* * * * *

§ 668.32 [Amended]

12. Section 668.32(e)(2) is amended by removing ''within 12 months before the date the student initially receives title IV, HEA program assistance,''.

13. Section 668.35(c) is revised to read as follows:

§ 668.35 Student debts under the HEA and to the U.S.

* * * * *

(c) A student who receives an overpayment under the Federal Perkins Loan Program, or under a title IV, HEA grant program may nevertheless be eligible to receive title IV, HEA program assistance if—

(1) The student pays the overpayment in full;

(2) The student makes arrangements satisfactory to the holder of the overpayment debt to pay the overpayment; or

(3) The overpayment amount is less than $25 and is neither a remaining balance nor a result of the application of the overaward threshold in 34 CFR 673.5(d).

* * * * *

§ 668.151 [Amended]

14. Section 668.151(a)(2) is amended by adding the words ''it received from an approved test publisher or assessment center'' after ''an approved test'.

15. Section 668.164(g) is revised to read as follows:

§ 668.164 Disbursing funds.

* * * * *

(g) *Late disbursements*— (1) *Ineligible student.* For purposes of this paragraph, an otherwise eligible student becomes ineligible to receive title IV, HEA program funds on the date that—

(i) For a loan under the FFEL and Direct Loan programs, the student is no longer enrolled at the institution as at least a half-time student for the loan period; or

(ii) For an award under the Federal Pell Grant, FSEOG, and Federal Perkins Loan programs, the student is no longer enrolled at the institution for the award year.

(2) *Conditions for a late disbursement.* Except as limited under paragraph (g)(4) of this section, a student who becomes ineligible (or the student's parent in the case of a PLUS loan) qualifies for a late disbursement if, before the date the student became ineligible—

(i) Except in the case of a PLUS loan, the Secretary processed a SAR or ISIR with an official expected family contribution; and

(ii)(A) For a loan under the FFEL or Direct Loan programs, the institution certified or originated the loan; or

(B) For an award under the Federal Perkins Loan or FSEOG programs, the institution made that award to the student.

(3) *Making a late disbursement.* Provided that the conditions described in paragraph (g)(2) of this section are satisfied—

(i) If the student withdrew from the institution during a payment period or period of enrollment, the institution must make any post-withdrawal disbursement required under § 668.22(a)(3) in accordance with the provisions of § 668.22(a)(4);

(ii) If the student successfully completed the payment period or period of enrollment, the institution must provide the student (or parent) the opportunity to receive the amount of title IV, HEA program funds that the student (or parent) was eligible to receive while the student was enrolled at the institution. For a late disbursement in this circumstance, the institution may credit the student's account to pay for current and allowable charges as described in paragraph (d) of this section, but must pay or offer any remaining amount to the student or parent; or

(iii) If the student did not withdraw but ceased to be enrolled as at least a half-time student, the institution may make the late disbursement of a loan under the FFEL or Direct Loan programs to pay for educational costs that the institution determines the student incurred for the period in which the student was eligible.

(4) *Limitations.* (i) Generally, an institution may not make a late disbursement later than 120 days after the date of the institution's determination that the student withdrew, as provided under § 668.22, or, for a student who did not withdraw, 120 days after the date the student otherwise became ineligible. On an exception basis, and with the approval of the Secretary, an institution may make a late disbursement after the applicable 120-day period, if the reason the late disbursement was not made was not the fault of the student.

(ii) An institution may not make a second or subsequent late disbursement of a loan under the FFEL or Direct Loan programs unless the student successfully completed the period of enrollment for which the loan was intended.

(iii) An institution may not make a late disbursement of a loan under the FFEL or Direct Loan programs if the student was a first-year, first-time borrower unless the student completed the first 30 days of his or her program of study. This limitation does not apply if the institution is exempt from the 30-day delayed disbursement requirements under § 682.604(c)(5)(i), (ii), or (iii) or § 685.303(b)(4)(i)(A), (B), or (C).

16. Section 668.165(a)(3) is revised to read as follows:

§ 668.165 Notices and authorizations.

(a) * * *

(3) The institution must send the notice described in paragraph (a)(2) of this section in writing no earlier than 30 days before, and no later than 30 days after, crediting the student's account at the institution.

* * * * *

§ 668.171 [Amended]

17. Section 668.171(b) is amended by:

A. Removing ''refunds'' and adding, in its place ''returns of unearned title IV HEA program funds'' in paragraph (b)(2).

B. Removing ''and the payment of post-withdrawal disbursements under § 668.22'' in paragraph (b)(4)(i).

18. Section 668.173 is amended by:

A. Revising paragraphs (a) through (c).

B. Redesignating paragraph (d) as (f).

C. Adding new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 668.173 Refund reserve standards.

(a) *General.* The Secretary considers that an institution has sufficient cash reserves, as required under § 668.171(b)(2), if the institution—

(1) Satisfies the requirements for a public institution under § 668.171(c)(1);

(2) Is located in a State that has a tuition recovery fund approved by the Secretary and the institution contributes to that fund; or

(3) Returns, in a timely manner as described in paragraph (b) of this section, unearned title IV, HEA program funds that it is responsible for returning under the provisions of § 668.22 for a student that withdrew from the institution.

(b) *Timely return of title IV, HEA program funds.* In accordance with procedures established by the Secretary or FFEL Program lender, an institution returns unearned title IV, HEA funds timely if—

(1) The institution deposits or transfers the funds into the bank account it maintains under § 668.163 no later than 30 days after the date it determines that the student withdrew;

(2) The institution initiates an electronic funds transfer (EFT) no later than 30 days after the date it determines that the student withdrew;

(3) The institution initiates an electronic transaction, no later than 30 days after the date it determines that the student withdrew, that informs an FFEL lender to adjust the borrower's loan account for the amount returned; or

(4) The institution issues a check no later than 30 days after the date it determines that the student withdrew. However, the Secretary considers that the institution did not satisfy this requirement if—

(i) The institution's records show that the check was issued more than 30 days after the date the institution determined that the student withdrew; or

(ii) The date on the cancelled check shows that the Secretary or FFEL Program lender received that check more than 45 days after the date the institution determined that the student withdrew.

(c) *Compliance thresholds.* (1) An institution does not comply with the reserve standard under § 668.173(a)(3) if, in a compliance audit conducted under § 668.23, an audit conducted by the Office of the Inspector General, or a program review conducted by the Department or guaranty agency, the auditor or reviewer finds—

(i) In the sample of student records audited or reviewed that the institution did not return unearned title IV, HEA program funds within the timeframes described in paragraph (b) of this section for 5% or more of the students in the sample (For purposes of determining this percentage, the sample includes only students for whom the institution was required to return unearned funds during its most recently completed fiscal year.); or

(ii) A material weakness or reportable condition in the institution's report on internal controls relating to the return of unearned title IV, HEA program funds.

(2) The Secretary does not consider an institution to be out of compliance with the reserve standard under § 668.173(a)(3) if the institution is cited in any audit or review report because it did not return unearned funds in timely manner for one or two students, or for less the 5% of the students in the sample referred to in paragraph (c)(1)(i) of this section.

(d) *Letter of credit.* (1) Except as provided under paragraph (e)(1) of this section, an institution that can satisfy the reserve standard only under paragraph (a)(3) of this section, must submit an irrevocable letter of credit acceptable and payable to the Secretary if a finding in an audit or review shows that the institution exceeded the compliance thresholds in paragraph (c) of this section (i.e., the institution did not return unearned funds for 5% or more of its students) for either of its two most recently completed fiscal years.

(2) The amount of the letter of credit required under paragraph (d)(1) of this section is 25 percent of the total amount of unearned title IV, HEA program funds that the institution was required to return under § 668.22 during the institution's most recently completed fiscal year.

(3) An institution that is subject to paragraph (d)(1) of this section must submit to the Secretary a letter of credit no later than 30 days after the earlier of the date that—

(i) The institution is required to submit its compliance audit;

(ii) The Office of the Inspector General, issues a final audit report;

(iii) The designated department official issues a final program review determination;

(iv) The Department, through a program review report or draft audit report, or a guaranty agency issues a preliminary report showing that the institution did not return unearned funds for 10% or more of the sampled students; or

(v) The Secretary sends a written notice to the institution requesting the letter of credit that explains why the institution has failed to return unearned funds in a timely manner.

(e) *Exceptions.* With regard to the letter of credit described in paragraph (d) of this section—

(1) An institution does not have to submit the letter of credit if the amount calculated under paragraph (d)(2) of this section is less than $5,000 and the institution can demonstrate that it has cash reserves of at least $5,000 available at all times.

(2) An institution may delay submitting the letter of credit and request the Secretary to reconsider a finding made in its most recent audit or review report that it failed to return unearned title IV, HEA program funds in a timely manner if—

(i)(A) The institution submits documents showing that the unearned title IV, HEA program funds were not returned in a timely manner solely because of exceptional circumstances beyond the institution's control and that the institution would not have exceeded the compliance thresholds under paragraph (c)(1) of this section had it not been for these exceptional circumstances; or

(B) The institution submits documents showing that it did not fail to make timely refunds as provided under paragraphs (b) and (c) of this section;

(ii) The institution's request, along with the documents described in paragraph (e)(2)(i) of this section, are submitted to the Secretary no later than the date it would otherwise be required to submit a letter of credit under paragraph (d)(3).

(3) If the Secretary denies the institution's request under paragraph (e)(2) of this section, the Secretary notifies the institution of the date it must submit the letter of credit.

* * * * *

19. Section 668.174(c)(4) is revised to read as follows:

§ 668.174 Past performance.

* * * * *

(c) * * *

(4) ''Family member'' is defined in § 600.21(f).

PART 673—GENERAL PROVISIONS FOR THE FEDERAL PERKINS LOAN PROGRAM, FEDERAL WORK-STUDY PROGRAM, AND FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM

20. The authority citation for part 673 continues to read as follows:

Authority: 20 U.S.C. 421–429, 1070b–1070b–3, and 1087aa–1087ii; 42 U.S.C. 2751–2756b, unless otherwise noted.

21. Section 673.5(f) is revised to read as follows:

§ 673.5 Overaward.

* * * * *

(f) *Liability for and recovery of Federal Perkins loans and FSEOG* *overpayments.* (1) Except as provided in paragraphs (f)(2) and (f)(3) of this section, a student is liable for any Federal Perkins loan or FSEOG overpayment made to him or her. An FSEOG overpayment for purposes of this paragraph (f) does not include the non-Federal share of an FSEOG award if an institution meets its FSEOG matching share by the individual recipient method or the aggregate method.

(2) The institution is liable for a Federal Perkins loan or FSEOG overpayment if the overpayment occurred because the institution failed to follow the procedures in this part or 34 CFR parts 668, 674, or 676. The institution shall restore an amount equal to the overpayment and any administrative cost allowance claimed on that amount to its loan fund for a Federal Perkins loan overpayment or to its FSEOG account for an FSEOG overpayment.

(3) A student is not liable for, and the institution is not required to attempt recovery of, a Federal Perkins loan or FSEOG overpayment, nor is the institution required to refer an FSEOG overpayment to the Secretary, if the overpayment—

(i) Is less than $25, and

(ii) Is neither a remaining balance nor a result of the application of the overaward threshold in paragraph (d) of this section.

(4)(i) Except as provided in paragraph (f)(3) of this section, if an institution makes a Federal Perkins loan or FSEOG overpayment for which it is not liable, it shall promptly send a written notice to the student requesting repayment of the overpayment amount. The notice must state that failure to make that repayment, or to make arrangements satisfactory to the holder of the overpayment debt to pay the overpayment, makes the student ineligible for further title IV aid until final resolution of the overpayment.

(ii) If a student objects to the institution's Federal Perkins loan or FSEOG overpayment determination on the grounds that it is erroneous, the institution shall consider any information provided by the student and determine whether the objection is warranted.

(5) Except as provided in paragraph (f)(3) of this section, if a student fails to repay an FSEOG overpayment, or make arrangements satisfactory to the holder of the overpayment debt to repay the FSEOG overpayment, after the institution has taken the action required by paragraph (f)(4) of this section, the institution must refer the FSEOG overpayment to the Secretary for collection purposes, in accordance with procedures required by the Secretary. After referring the FSEOG overpayment to the Secretary under this section, the institution need make no further effort to recover the overpayment.

PART 675—FEDERAL WORK-STUDY PROGRAMS

22. The authority citation for part 675 continues to read as follows:

Authority: 42 U.S.C. 2751–2756b, unless otherwise noted.

23. Section 675.2(b) is amended by revising the definition of ''Student services'' to read as follows:

§ 675.2 Definitions.

* * * * *

(b) * * *

Student services: Services that are offered to students that may include, but are not limited to, financial aid, library, peer guidance counseling, job placement, assisting an instructor with curriculum-related activities, security, and social, health, and tutorial services. Student services do not have to be direct or involve personal interaction with students. For purposes of this definition, facility maintenance, cleaning, purchasing, and public relations are never considered student services.

* * * * *

24. Section 675.21(b)(2)(i) is revised to read as follows:

§ 675.21 Institutional employment.

* * * * *

(b) * * *

(2) * * *

(i) Involve the provision of student services as defined in § 675.2(b) that are directly related to the work-study student's training or education;

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

25. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2, unless otherwise noted.

§ 682.204 [Amended]

26. Section 682.204(l) is revised by changing ''34 CFR 668.2'' to ''34 CFR 668.3''.

§ 682.603 [Amended]

27. Sections 682.603(f)(1)(ii)(B) and (f)(2)(i) are amended by removing ''34 CFR 668.2'' and adding, in its place ''34 CFR 668.3''.

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

28. The authority citation for part 685 continues to read as follows:

Authority: 20 U.S.C. 1087a *et seq.*, unless otherwise noted.

§ 685.203 [Amended]

29. Section 685.203(h) is amended by adding '', as defined in 34 CFR 668.3'' after ''year''.

§ 685.301 [Amended]

30. Sections 685.301(a)(9)(i)(B)(*2*) and (a)(9)(ii)(A) are amended by removing ''34 CFR 668.2'' and adding, in its place ''34 CFR 668.3''.

PART 690—FEDERAL PELL GRANT PROGRAM

31. The authority citation for part 690 continues to read as follows:

Authority: 20 U.S.C. 1070a, unless otherwise noted.

32. Section 690.75(a) is revised to read as follows:

§ 690.75 Determination of eligibility for payment.

(a) For each payment period, an institution may pay a Federal Pell Grant to an eligible student only after it determines that the student—

(1) Qualifies as an eligible student under 34 CFR part 668, subpart C;

(2) Is enrolled in an eligible program as an undergraduate student; and

(3) If enrolled in a credit hour program without terms or a clock hour program, has completed the payment period as defined in § 668.4 for which he or she has been paid a Federal Pell Grant.

* * * * *

33. Section 690.79 is revised to read as follows:

§ 690.79 Liability for and recovery of Federal Pell Grant overpayments.

(a)(1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, a student is liable for any Federal Pell Grant overpayment made to him or her.

(2) The institution is liable for a Federal Pell Grant overpayment if the overpayment occurred because the institution failed to follow the procedures set forth in this part or 34 CFR Part 668. The institution must restore an amount equal to the overpayment to its Federal Pell Grant account.

(3) A student is not liable for, and the institution is not required to attempt recovery of or refer to the Secretary, a Federal Pell Grant overpayment if the

amount of the overpayment is less than $25 and is not a remaining balance.

(b)(1) Except as provided in paragraph (a)(3) of this section, if an institution makes a Federal Pell Grant overpayment for which it is not liable, it must promptly send a written notice to the student requesting repayment of the overpayment amount. The notice must state that failure to make that repayment, or to make arrangements satisfactory to the holder of the overpayment debt to repay the overpayment, makes the student ineligible for further title IV aid until final resolution of the Federal Pell Grant overpayment.

(2) If a student objects to the institution's Federal Pell Grant overpayment determination on the grounds that it is erroneous, the institution must consider any information provided by the student and determine whether the objection is warranted.

(c) Except as provided in paragraph (a)(3) of this section, if the student fails to repay a Federal Pell Grant overpayment, or make arrangements satisfactory to the holder of the overpayment debt to repay the Federal Pell Grant overpayment, after the institution has taken the action required by paragraph (b) of this section, the institution must refer the overpayment to the Secretary for collection purposes, in accordance with procedures required by the Secretary. After referring the Federal Pell Grant overpayment to the Secretary under this section, the institution need make no further efforts to recover the overpayment.

(Authority: 20 U.S.C. 1070a)

PART 694—GAINING EARLY AWARENESS AND READINESS FOR UNDERGRADUATE PROGRAMS (GEAR UP)

34. The authority citation for part 694 continues to read as follows:

Authority: 20 U.S.C. 1070a–21 to 1070a–28.

35. Section 694.10(e) is revised to read as follows:

§ 694.10 What are the requirements for awards under the program's scholarship component under section 404E of the HEA?

* * * * *

(e) *Other grant assistance.* A GEAR UP scholarship may not be considered in the determination of a student's eligibility for other grant assistance provided under title IV of the HEA.

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