

## § 668.166

(iii) If a student or parent cancels an authorization to hold title IV, HEA program funds under paragraph (b)(1)(ii) of this section, the institution must pay those funds directly to the student or parent as soon as possible but no later than 14 days after the institution receives that notice.

(5) If an institution holds excess student funds under paragraph (b)(1)(ii) of this section, the institution must—

(i) Identify the amount of funds the institution holds for each student or parent in a subsidiary ledger account designed for that purpose;

(ii) Maintain, at all times, cash in its depository account in an amount at least equal to the amount of funds the institution holds on behalf of the student or the parent; and

(iii) Notwithstanding any authorization obtained by the institution under this paragraph, pay any remaining balance on loan funds by the end of the loan period and any remaining other title IV, HEA program funds by the end of the last payment period in the award year for which they were awarded.

[80 FR 67194, Oct. 30, 2015, as amended at 81 FR 20251, Apr. 7, 2016]

### § 668.166 Excess cash.

(a) *General.* The Secretary considers excess cash to be any amount of title IV, HEA program funds, other than Federal Perkins Loan program funds, that an institution does not disburse to students by the end of the third business day following the date the institution—

(1) Received those funds from the Secretary; or

(2) Deposited or transferred to its depository account previously disbursed title IV, HEA program funds, such as those resulting from award adjustments, recoveries, or cancellations.

(b) *Excess cash tolerance.* An institution may maintain for up to seven days an amount of excess cash that does not exceed one percent of the total amount of funds the institution drew down in the prior award year. The institution must return immediately to the Secretary any amount of excess cash over the one-percent tolerance and any amount of excess cash remaining in its account after the seven-day tolerance period.

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(c) *Consequences for maintaining excess cash.* Upon a finding that an institution maintained excess cash for any amount or time over that allowed in the tolerance provisions in paragraph (b) of this section, the actions the Secretary may take include, but are not limited to—

(1) Requiring the institution to reimburse the Secretary for the costs the Federal government incurred in providing that excess cash to the institution; and

(2) Providing funds to the institution under the reimbursement payment method or heightened cash monitoring payment method described in § 668.162(c) and (d), respectively.

[80 FR 67194, Oct. 30, 2015, as amended at 81 FR 20251, Apr. 7, 2016]

### § 668.167 Severability.

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

## Subpart L—Financial Responsibility

SOURCE: 62 FR 62877, Nov. 25, 1997, unless otherwise noted.

### § 668.171 General.

(a) *Purpose.* To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to—

(1) Provide the services described in its official publications and statements;

(2) Administer properly the title IV, HEA programs in which it participates; and

(3) Meet all of its financial obligations.

(b) *General standards of financial responsibility.* Except as provided under paragraphs (c) and (d) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that—

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

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

(3) The institution is current in its debt payments. An institution is not current in its debt payments if—

(i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or

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

(4) The institution is meeting all of its financial obligations, including but not limited to—

(i) Refunds that it is required to make under its refund policy, including the return of title IV, HEA program funds for which it is responsible under § 668.22; and

(ii) Repayments to the Secretary for debts and liabilities arising from the institution's participation in the title IV, HEA programs.

(c) *Public institutions.* (1) The Secretary considers a domestic public institution to be financially responsible if the institution—

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

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

(ii) Is not in violation of any past performance requirement under § 668.174.

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

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

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

(ii) Is not in violation of any past performance requirement under § 668.174.

(d) *Audit opinions and past performance provisions.* Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if—

(1) In the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition; or

(2) As provided under the past performance provisions in § 668.174 (a) and (b)(1), the institution violated a title IV, HEA program requirement, or the persons or entities affiliated with the institution owe a liability for a violation of a title IV, HEA program requirement.

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

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

(2) For an institution that is provisionally certified, take an action

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against the institution under the procedures established in § 668.13(d).

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

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

[62 FR 62877, Nov. 25, 1997, as amended at 63 FR 40348, July 28, 1998; 64 FR 59042, Nov. 1, 1999; 65 FR 65637, Nov. 1, 2000; 67 FR 67074, Nov. 1, 2002; 75 FR 67199, Nov. 1, 2010]

EFFECTIVE DATE NOTE: At 81 FR 76072, Nov. 1, 2016, § 668.171 was revised, effective July 1, 2019. For the convenience of the user, the revised text is set forth as follows:

### § 668.171 General.

(a) *Purpose.* To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to—

(1) Provide the services described in its official publications and statements;

(2) Meet all of its financial obligations; and

(3) Provide the administrative resources necessary to comply with title IV, HEA program requirements.

(b) *General standards of financial responsibility.* Except as provided under paragraphs (e) and (f) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that—

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

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

(3) The institution is able to meet all of its financial obligations and otherwise provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution may not be able to meet its financial or administrative obligations if it is subject to an action or event described in paragraph (c), (d), (e), (f), or (g) of this section. The Secretary considers those actions or events in determining whether the institution is financially responsible only if they occur on or after July 1, 2017; and

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

(c) *Debts, liabilities, and losses.* (1) Except as provided under paragraph (h)(3) of this section, an institution is not able to meet its fi-

ancial or administrative obligations under paragraph (b)(3) of this section if, after the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution is subject to one or more of the following actions or triggering events, and as a result of the actual or potential debts, liabilities, or losses that have stemmed or may stem from those actions or events, the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (c)(2) of this section:

(i) *Debts and borrower defense-related lawsuits.* (A) The institution is required to pay any debt or incur any liability arising from a final judgment in a judicial proceeding or from an administrative proceeding or determination, or from a settlement; or

(B) The institution is being sued in an action brought on or after July 1, 2017 by a Federal or State authority for financial relief on claims related to the making of the Direct Loan for enrollment at the school or the provision of educational services and the suit has been pending for 120 days.

(ii) *Other litigation.* The institution is being sued in an action brought on or after July 1, 2017 that is not described in paragraph (c)(1)(i)(B) of this section and—

(A) The institution has filed a motion for summary judgment or summary disposition and that motion has been denied or the court has issued an order reserving judgment on the motion;

(B) The institution has not filed a motion for summary judgment or summary disposition by the deadline set for such motions by the court or agreement of the parties; or

(C) If the court did not set a deadline for filing a motion for summary judgment and the institution did not file such a motion, the court has set a pretrial conference date or trial date and the case is pending on the earlier of those two dates.

(iii) *Accrediting agency actions.* The institution was required by its accrediting agency to submit a teach-out plan, for a reason described in § 602.24(c)(1), that covers the closing of the institution or any of its branches or additional locations.

(iv) *Gainful employment.* As determined annually by the Secretary, the institution has gainful employment programs that, under § 668.403, could become ineligible based on their final D/E rates for the next award year.

(v) *Withdrawal of owner's equity.* For a proprietary institution whose composite score is less than 1.5, any withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the transfer is to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated.

(2) *Recalculating the composite score—(i) General.* Unless the institution demonstrates to the satisfaction of the Secretary that the

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event or condition has had or will have no effect on the assets and liabilities of the institution under paragraph (g)(3)(iv) of this section, as specified in Appendix C of this subpart, the Secretary recognizes and accounts for the actual or potential losses associated with the actions or events under paragraph (c)(1) of this section and, based on that accounting, recalculates the institution's most recent composite score. The recalculation will occur regularly after associated actions or events are reported to the Secretary. The Secretary recalculates the composite score under this paragraph using the financial statements on which the institution's composite score has been calculated under § 668.172.

(ii) *Calculation of potential loss—debts and borrower defense-related lawsuits.* For a debt or a suit described in paragraph (c)(1)(i) of this section, the amount of loss is—

(A) The amount of debt;

(B) For a suit, the amount set by a court ruling, or, in the absence of a court ruling—

(1) The amount of relief claimed in the complaint;

(2) If the complaint demands no specific amount of relief, the amount stated in any final written demand issued by the agency to the institution prior to the suit or a lesser amount that the agency offers to accept in settlement of any financial demand in the suit; or

(3) If the agency stated no specific demand in the complaint, in a pre-filing demand, or in a written offer of settlement, the amount of tuition and fees received by the institution during the period, and for the program or location, described in the allegations in the complaint.

(iii) *Calculation of potential loss—other litigation.* For any suit described in paragraph (c)(1)(ii) of this section, the amount of loss is the amount set by a court ruling, or, in the absence of a court ruling—

(A) The amount of relief claimed in the complaint;

(B) If the complaint demands no specific amount of relief, the amount stated in any final written demand by the claimant to the institution prior to the suit or a lesser amount that the plaintiff offers to accept in settlement of any financial demand in the suit; or

(C) If the complainant stated no specific demand in the complaint, in a pre-filing demand, or in a written offer of settlement, the amount of the claim as stated in a response to a discovery request, including an expert witness report.

(iv) *Calculation of potential loss—other events.* (A) For a closed location or institution, or the potential loss of eligibility for gainful employment programs, as described in paragraph (c)(1)(iii) or (iv), the amount of loss is the amount of title IV, HEA program funds the institution received in its most re-

cently completed fiscal year for that location or institution, or for those GE programs.

(B) For the withdrawal of owner's equity, described in paragraph (c)(1)(v) of this section, the amount of loss is the amount transferred to any entity other than the institution.

(d) *Non-title IV revenue.* Except as provided under paragraph (h)(3) of this section, a proprietary institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if, for its most recently completed fiscal year, the institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as provided under § 668.28(c).

(e) *Publicly traded institutions.* Except as provided under paragraph (h)(3) of this section, a publicly traded institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if the institution is currently subject to one or more of the following actions or events:

(1) *SEC actions.* The SEC warns the institution that it may suspend trading on the institution's stock.

(2) *SEC reports.* The institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25.

(3) *Exchange actions.* The exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted.

(f) *Cohort default rates.* Except as provided under paragraph (h)(3) of this section, an institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if the institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless—

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

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

(g) *Discretionary factors or events.* Except as provided under paragraph (h)(3) of this section, an institution is not able to meet its financial or administrative obligations under paragraph (b)(3) of this section if the Secretary demonstrates that there is an event or condition that is reasonably likely to

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have a material adverse effect on the financial condition, business, or results of operations of the institution, including but not limited to whether—

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

(2) The institution is cited by a State licensing or authorizing agency for failing State or agency requirements;

(3) The institution fails a financial stress test developed or adopted by the Secretary to evaluate whether the institution has sufficient capital to absorb losses that may be incurred as a result of adverse conditions and continue to meet its financial obligations to the Secretary and students;

(4) As calculated by the Secretary, the institution has high annual dropout rates;

(5) The institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards;

(6)(i) The institution violated a provision or requirement in a loan agreement; and

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

(7) The institution has pending claims for borrower relief discharge under § 685.206 or § 685.222; or

(8) The Secretary expects to receive a significant number of claims for borrower relief discharge under § 685.206 or § 685.222 as a result of a lawsuit, settlement, judgement, or finding from a State or Federal administrative proceeding.

(h) *Reporting requirements.* (1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of any of the following actions or events identified in paragraphs (c) through (g) of this section no later than—

(i) For lawsuits and for other actions or events described in paragraph (c)(1)(i) of this section—

(A) For lawsuits, 10 days after the institution is served with the complaint and 10 days after the suit has been pending for 120 days; and

(B) For debts arising from lawsuits and for other actions or events, 10 days after a pay-

ment was required or a liability was incurred.

(ii) For lawsuits described in paragraph (c)(1)(ii) of this section—

(A) Ten days after the institution is served with the complaint;

(B) Ten days after the court sets the dates for the earliest of the events described in paragraph (c)(1)(ii) of this section, provided that, if the deadline is set by procedural rules, notice of the applicable deadline must be included with notice of the service of the complaint; and

(C) Ten days after the earliest of the applicable events occurs;

(iii) For an accrediting agency action described in paragraph (c)(1)(iii) of this section, 10 days after the institution is notified by its accrediting agency that it must submit a teach-out plan;

(iv) For a withdrawal of owner's equity described in paragraph (c)(1)(v) of this section, 10 days after the withdrawal is made;

(v) For the non-title IV revenue provision in paragraph (d) of this section, 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(3);

(vi) For the SEC and stock exchange provisions for publicly traded institutions in paragraph (e), 10 days after the SEC or exchange warns, notifies, or takes an action against the institution, or 10 days after any extension granted by the SEC;

(vii) For State or agency actions in paragraph (g)(2) of this section, 10 days after the institution is cited for violating a State or agency requirement;

(viii) For probation or show cause actions under paragraph (g)(5) of this section, 10 days after the institution's accrediting agency places the institution on that status; or

(ix) For the loan agreement provisions in paragraph (g)(6) of this section, 10 days after a loan violation occurs, the creditor waives the violation, or the creditor imposes sanctions or penalties in exchange or as a result of the waiver.

(2) The Secretary may take an administrative action under paragraph (k) of this section against the institution if it fails to provide timely notice under this paragraph (h).

(3) In its notice to the Secretary, the institution may demonstrate that—

(i) For a suit by a Federal or State agency described in paragraph (c)(1)(i)(B) of this section, the amount claimed in the complaint or determined under paragraph (c)(2)(i) of this section exceeds the potential recovery because the allegations in the complaint, if accepted as true, and the claims asserted, if fully successful, cannot produce relief in the amount claimed or, if no amount was claimed, the amount deemed under paragraph (c)(2)(ii) because they pertain to a period, program, or location for which the full recovery possible is a lesser amount;

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

(iii) The reported violation of a provision or requirement in a loan agreement under paragraph (g)(6) of this section was waived by the creditor. However, if the creditor imposes additional constraints or requirements as a condition of waiving the violation, or imposes penalties or requirements under paragraph (g)(6)(ii) of this section, the institution must identify and describe those penalties, constraints, or requirements and may demonstrate that complying with those actions will not adversely affect the institution's ability to meet its current and future financial obligations; or

(iv) The action or event reported under this paragraph (h) no longer exists or has been resolved or the institution has insurance that will cover part or all of the debts and liabilities that arise at any time from that action or event.

(i) *Public institutions.* (1) The Secretary considers a domestic public institution to be financially responsible if the institution—

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

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

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

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

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

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

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

(j) *Audit opinions.* Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed

doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not significantly bear on the institution's financial condition.

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

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

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

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95-452, 92 Stat. 1101-1109)

#### § 668.172 Financial ratios.

(a) *Appendices A and B, ratio methodology.* As provided under appendices A and B to this subpart, the Secretary determines an institution's composite score by—

(1) Calculating the result of its Primary Reserve, Equity, and Net Income ratios, as described under paragraph (b) of this section;

(2) Calculating the strength factor score for each of those ratios by using the corresponding algorithm;

(3) Calculating the weighted score for each ratio by multiplying the strength factor score by its corresponding weighting percentage;

(4) Summing the resulting weighted scores to arrive at the composite score; and

(5) Rounding the composite score to one digit after the decimal point.

(b) *Ratios.* The Primary Reserve, Equity, and Net Income ratios are defined under appendix A for proprietary institutions, and under appendix B for private non-profit institutions.

(1) The ratios for proprietary institutions are:

For proprietary institutions: