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For information on briefing in Washington, DC, see announcement on the inside cover of this issue.

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WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC
(two briefings)

WHEN: May 18 at 9:00 am and 1:30 pm
WHERE: Office of the Federal Register Conference Room, 800 North Capitol Street NW, Washington, DC (3 blocks north of Union Station Metro)
RESERVATIONS: 202–523–4538

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Presidential Documents

Title 3—

The President

Proclamation 6678 of April 25, 1994

National Crime Victims' Rights Week, 1994

By the President of the United States of America

A Proclamation

Every day, our Nation's peace is shattered by crime. Violent crime and the fear it provokes are crippling our society, limiting our personal freedom, and fraying the ties that bind us. No corner of America, it often seems, is safe from increasing levels of criminal violence. And more and more, the victims of these crimes are random targets of assaults stemming from a serious breakdown of values in our families and our communities.

National Crime Victims' Rights Week is a time when our Nation pauses to seriously reflect on these innocent victims of crime and on those who are working all across this country in their behalf. Thousands of people—many of them volunteers who have been victims themselves—are tirelessly striving at the Federal, State, and local levels to provide emotional support, guidance, and financial assistance to help crime victims recover from their trauma and to ensure that they are treated equitably and sensitively as their cases progress through the criminal justice system.

My Administration is working to stop the violence today to ensure fewer victims tomorrow. The pending crime bill is tough and smart and fair, with victims' concerns as its centerpiece. It will strengthen programs that combat violence against women, it will impose a life sentence—without possibility of parole—on repeat, violent offenders, and it will amend the Victims of Crime Act to expand Federal resources available for crime victims' services, and it will promote the development of State registries for child abusers. We are encouraging citizens to assume personal responsibility for improving their neighborhoods and to get involved in finding solutions to the violence in their communities.

Those who give of themselves to assist victims are helping immeasurably in this effort. They are there for their neighbors. They are there to provide comfort when someone has lost a child to random gunfire, when the sanctity of someone's home has been invaded by an intruder, when someone has been robbed, brutalized, or beaten. National Crime Victims' Rights Week affords us the opportunity to express our appreciation to these "good neighbors" and to renew our commitment to meeting the needs and ensuring the rights of crime victims.

I encourage communities across the Nation to facilitate the restorative process. Offenders must take responsibility and be held accountable for what they have done. We must encourage victims to cooperate with law enforcement agencies and help them to rebuild their lives and their communities through volunteer efforts and community service projects. And community institutions must afford the same rights to the victim as those given to the accused and to the offender. This includes initiatives such as community policing, community prosecutors, and community action advocates. Members of AmeriCorps promise a source of untapped potential for even more victim service agencies in our cities and towns. In fact, thousands will be making their presence felt this summer in our national service Summer of Safety programs. The problem of violence is a problem for all Americans. It is not a partisan issue. Strong pro-victim measures must be enacted in order to give our children a brighter future.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week of April 24 through April 30, 1994, as National Crime Victims' Rights Week. I urge all Americans to join in remembering the innocent victims of crime and in honoring those who labor selflessly in behalf of these victims and their families. We must recommit ourselves to working with our neighbors to stop the violence and to ensure safer streets, schools, and playgrounds for our Nation's children and for all of our citizens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of April, in the year of our Lord nineteen hundred and ninety-four, and of the Independence of the United States of America the two hundred and eighteenth.

William J. Clinton

[FR Doc. 94–10479
Filed 4–26–94; 4:27 pm]
Billing code 3195–01–P

Editorial note: For the President's remarks at a ceremony honoring the 1994 Victim Service Award recipients, see issue 17 of the *Weekly Compilation of Presidential Documents.*

Rules and Regulations

Federal Register
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Friday, April 29, 1994

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board is amending its practices and procedures to allow administrative judges to retain jurisdiction over cases after the issuance of an initial decision for the purpose of vacating the initial decision to accept a settlement agreement into the record. This change will allow the parties to enter into the record a settlement agreement reached after the issuance of the initial decision without filing a petition for review with the full Board.

EFFECTIVE DATE: April 29, 1994.

FOR FURTHER INFORMATION CONTACT: Robert Taylor, (202) 653–7200.

SUPPLEMENTARY INFORMATION: The amended regulation provides administrative judges the authority to accept settlement agreements into the record after the issuance of the initial decision but before full Board consideration. This allows the parties to enter into the record a settlement agreement reached after the issuance of the initial decision without filing a petition for review thus facilitating the settlement of cases. This amendment does not change the current time limits prescribed in 5 CFR 1201.113 for determining the finality of a Board decision or for filing a petition for review.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Government employees.

Accordingly, the Merit Systems Protection Board amends 5 CFR part 1201 as follows:

PART 1201—[AMENDED]

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, and 7701 unless otherwise noted.

2. Section 1201.112 is revised to read as follows:

1201.112 Jurisdiction of judge.

(a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:

(1) Correct the transcript, when one is obtained;

(2) Rule on motions for exception to the requirement that a party seeking a transcript must pay for it;

(3) Rule on a request by the appellant for attorney fees;

(4) Process any petition for enforcement filed under subpart F of this part;

(5) Vacate an initial decision before that decision becomes final under § 1201.113 in order to accept a settlement agreement into the record.

(b) Nothing is this section affects the time limits prescribed in § 1201.113 regarding the finality of an initial decision or the time allowed for filing a petition for review.

Dated: April 21, 1994.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 94–10137 Filed 4–28–94; 8:45 am]

BILLING CODE 7400–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–NM–33–AD; Amendment 39–8900; AD 94–09–11]

Airworthiness Directives; Raytheon Corporate Jets Model BAe 125–1000A and Hawker 1000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Raytheon Corporate Jets Model BAe 125–1000A and Hawker 1000 series airplanes. This action requires inspections of the thrust reverser system for integrity, and correction of any discrepancy found. This amendment is prompted by a report that there is a possibility of failure of the drive links (or attachments) on the thrust reversers of these airplanes due to the single link design concept of the thrust reverser link and lock system. This condition, if not corrected, could result in inadvertent deployment of a thrust reverser during flight. The actions specified in this AD are intended to prevent a significant reduction in the controllability of the airplane due to an in-flight deployment of a thrust reverser.

DATES: Effective May 16, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 16, 1994.

Comments for inclusion in the Rules Docket must be received on or before June 28, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–33–AD, 1601 Lind Avenue SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Raytheon Corporate Jets, Inc., 3 Bishops Square, St. Albans Road West, Hatfield, Hertfordshire, AL109NE, United Kingdom. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: William Schroeder, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (206) 227–2148; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION: The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain Raytheon Corporate Jets Model BAe 125–1000A and Hawker 1000 series

airplanes. The CAA advises that the manufacturer of the thrust reversers on these airplanes has conducted a reassessment of the failure modes and effects analysis for the thrust reverser system, and has provided to the airplane manufacturer additional recommendations for repetitive inspection intervals of the system. Results of that reassessment revealed that failure of the drive links (or attachments) on the thrust reversers can occur due to the single link design concept of the thrust reverser link and lock system. This condition, if not corrected, can result in inadvertent deployment of a thrust reverser during flight, which could result in a significant reduction in the controllability of the airplane

Raytheon Corporate Jets, Inc., has issued Service Bulletin SB 78–12, dated January 24, 1994, that describes procedures for a detailed visual inspection of the thrust reverser drive mechanism to detect wear and abrasion and to ensure the security of the attachment of the actuator to its drive links, of the drive links to the thrust reverser structure, and of the ends of the drive link and link hinges. The service bulletin also describes procedures for repetitive inspections of the thrust reverser system for structural integrity. Accomplishment of these inspections will ensure the continued structural integrity of the thrust reverser system. The CAA classified this service bulletin as mandatory.

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent deployment of a thrust reverser in flight and subsequent reduced controllability of the airplane. This AD requires repetitive inspections of the thrust reverser system for integrity, and correction of any discrepancy found. The inspections are required to be accomplished in accordance with the service bulletin described previously. Correction of any discrepancy found is required to be accomplished in accordance with procedures described in the airplane maintenance manual.

This is considered interim action. The airplane manufacturer currently is developing a secondary locking feature on the thrust reverser doors. Once this modification is developed, approved, and available, the FAA may consider further rulemaking to require its installation.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–33–AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

94–09–11 Raytheon Corporate Jets, Inc.: Amendment 39–8900. Docket 94–NM–33–AD.

Applicability: Model BAe 125–1000A and Hawker 1000 series airplanes; as listed in Raytheon Corporate Jets Service Bulletin SB 78–12, dated January 24, 1994; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent inadvertent deployment of a thrust reverser during flight, which could result in a significant reduction in the controllability of the airplane, accomplish the following:

(a) Within 60 days or 150 hours time-in-service after the effective date of this AD, whichever occurs first: Perform a detailed visual inspection of the thrust reverser drive mechanism to detect wear and abrasion and to ensure the security of the attachment of the actuator to its drive links, of the drive links to the thrust reverser structure, and of the ends of the drive link and link hinges; in accordance with paragraph 2.B. of Raytheon Corporate Jets Service Bulletin SB 78–12, dated January 24, 1994. Prior to further flight, correct any discrepancy found, in accordance with procedures described in the airplane maintenance manual.

(b) At intervals not to exceed 150 hours time-in-service after accomplishing the inspection required by paragraph (a) of this AD, and whenever any stang fairing is removed for any reason: Perform a detailed visual inspection of the thrust reverser system to ensure its integrity, as specified in paragraphs (b)(1) and (b)(2) of this AD.

(1) If the stang fairing seals are intact: Inspect the visible driver links, idler links, and attachment bolts to the thrust reverser doors, in accordance with paragraph 2.D.(1) of Raytheon Corporate Jets Service Bulletin SB 78–12, dated January 24, 1994. Prior to further flight, correct any discrepancy found during this inspection, in accordance with procedures described in the airplane maintenance manual.

Note 1: The stang fairings need not be removed during this inspection.

(2) If any stang fairing has been disturbed or if the inspection seal is broken: Inspect the appropriate mechanism in accordance with paragraph 2.D.(2) of Raytheon Corporate Jets Service Bulletin SB 78–12, dated January 24, 1994. Prior to further flight, correct any discrepancy found, in accordance with procedures described in the airplane maintenance manual.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(d) Special flight permits may be issued in accordance with Federal Aviation Regulations (FAR) 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) The inspections shall be done in accordance with Raytheon Corporate Jets Service Bulletin SB 78–12, dated January 24, 1994. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Raytheon Corporate Jets Inc., 3 Bishops Square, St. Albans Road West, Hatfield, Hertfordshire, AL109NE, United Kingdom. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on May 16, 1994.

Issued in Renton, Washington, on April 20, 1994.

S.R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–9988 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–46–AD; Amendment 39–8898; AD 94–09–09]

Airworthiness Directives; SAAB Aircraft Model SAAB SF340A and SAAB 340B Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain SAAB Model SAAB SF340A and SAAB 340B airplanes. This action requires installation of a placard in the cockpit that informs the flight crew of the prohibition against moving the power levers below "flight idle" (beta mode) when the airplane is airborne. This amendment is prompted by an incident during which a Model SAAB 340B airplane, that was in "beta mode" for a short duration during descent, lost all engine power. The action specified in this AD is intended to prevent engine overspeed and the resultant loss of engine power.

DATES: Effective May 16, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of May 16, 1994.

Comments for inclusion in the Rules Docket must be received on or before June 28, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No.94–NM–46–AD, 1601 Lind Avenue SW., Renton, Washington 98055–4056. The service information referenced in this AD may be obtained from SAAB Aircraft AB, SAAB Aircraft Product Support, S–581 88, Linköping, Sweden. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mark Quam, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (206) 227–2145; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION: Recently, the FAA has received a report that a SAAB Model SAAB 340B airplane lost all engine power during descent. In this incident, the flight crew managed to land the airplane with no turbine power. However, the airplane ran off the end of the runway and sustained damage in the process. The flight data recorder from this airplane revealed that the power levers were set below "flight idle" (beta mode) for approximately eight seconds during the airplane's descent from 9,200 feet altitude. Further, the FAA has received reports of other incidents in which operators of Model SAAB SF340A and SAAB 340B airplanes have selected "beta mode" either inadvertently or intentionally during flight.

The FAA has determined that if the flight crew moves the power levels below "flight idle" (beta mode) when the airplane is airborne, the propeller will go into a low pitch angle and the propeller speed may increase uncontrollably. This condition, if not corrected, could result in engine overspeed and the resultant loss of engine power.

SAAB Aircraft has issued Service Bulletin 340–76–033, dated March 31, 1994, that describes procedures for installation of a placard in the cockpit of certain Model SAAB SF340A and SAAB 340B airplanes. The placard informs the flight crew of the prohibition against moving the power levers below "flight idle" (beta mode) when the airplane is airborne.

These airplane models are manufactured in Sweden and are type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. The FAA has reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same

type design registered in the United States, this AD is being issued to prevent engine overspeed and the resultant loss of engine power. This AD requires installation of a placard in the cockpit of certain SAAB Model SAAB SF340A and SAAB 340B airplanes. The actions are required to be accomplished in accordance with the service bulletin described previously.

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94–NM–46–AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

94–09–09 SAAB Aircraft AB: Amendment 39–8898. Docket 94–NM–46–AD.

Applicability: Model SAAB SF340A airplanes having serial numbers 004 through 159, inclusive; and SAAB 340B airplanes having serial numbers 160 through 379, inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent engine overspeed and the resultant loss of engine power, accomplish the following:

(a) Within 10 days after the effective date of this AD, install a placard in the cockpit of the airplane to advise the flight crew of the prohibition against moving the power levers below "flight idle" (beta mode) when the airplane is airborne, in accordance with Saab Service Bulletin 340–76–033, dated March 31, 1994.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(c) Special flight permits may be issued in accordance with § 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The installation shall be done in accordance with Saab Service Bulletin 340–76–033, dated March 31, 1994. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Saab Aircraft AB, Saab Aircraft Product Support, S–581 88, Linköping, Sweden. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on May 16,1994.

Issued in Renton, Washington, on April 20, 1994.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–9990 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 73

[Airspace Docket No. 93–ANM–44]

Revocation of Restricted Area R–6707; Queets, WA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes Restricted Area R–6707, Queets, WA. A Federal Aviation Administration (FAA) review of annual utilization data for R–6707 revealed that the area is no longer required for its designated purpose. The Department of the Navy subsequently

submitted a proposal to remove the restricted area.

EFFECTIVE DATE: 0901 u.t.c., June 23, 1994.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Military Operations Program Office (ATM–420), Office of Air Traffic System Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–7686.

SUPPLEMENTARY INFORMATION:

The Rule

This amendment to part 73 of the Federal Aviation Regulations revokes Restricted Area R–6707, Queets, WA. An FAA review of the annual utilization reports revealed that this area received limited use in the past year. After reviewing its operational requirements, the Department of the Navy submitted a proposal to disestablish the area. This action returns restricted airspace to public use; therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor technical amendment in which the public would not be particularly interested. Section 73.67 of part 73 of the Federal Aviation Regulations was republished in FAA Order 7400.8A dated March 3, 1993.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

In accordance with FAA Order 1050.1D, "Policies and Procedures for Considering Environmental Impacts," this action is not subject to environmental assessments and procedures.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510, 1522; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 73.67 [Amended]

2. R–6707 Queets, WA [Removed].

Issued in Washington, DC, on April 15, 1994.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 94–10283 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–P

Coast Guard

33 CFR Part 1

[CGD 92–066]

RIN 2115–AE32

Recreational Vessel Fees

AGENCY: Coast Guard, DOT.

ACTION: Adoption of interim rule as final.

SUMMARY: This rule adopts as final, the changes to Recreational Vessel Fee regulations which were published as an interim final rule on February 17, 1993. The interim final rule changed the length categories of recreational vessels subject to the recreational vessel fee (RVF) for calendar years 1993 and 1994, as required by the High Seas Driftnet Fisheries Enforcement Act of 1992. This final rule also removes Lake Roosevelt, WA, from the listing of specific waters where the Coast Guard has a presence.

EFFECTIVE DATE: April 29, 1994.

ADDRESSES: Unless otherwise indicated, documents referred to in this preamble are available for inspection or copying at the office of the Executive Secretary, Marine Safety Council (G–LRA/3406), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593–0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

Refunds. Written requests for refunds for RVF decals may be mailed to the U.S. Recreational Vessel Fee Program, P.O. Box 11066, Des Moines, IA 50336–1066, until September 30, 1994. After that date, RVF related correspondence should be mailed to Commandant (G–NAB–5), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001.

FOR FURTHER INFORMATION CONTACT: Ms. Nancy Campbell-Jones, Auxiliary, Boating, and Consumer Affairs Division, (202) 267–6717. A copy of this notice may be obtained by calling the Coast Guard's toll-free Boating Safety Hotline, 1–800–368–5647. In Washington, DC, call 267–0780.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are Mr. Carlton Perry, Project Manager, Auxiliary, Boating, and Consumer Affairs Division, and C.G. Green, Project Counsel, Office of Chief Counsel.

Regulatory History

On February 17, 1993, the Coast Guard published an interim final rule entitled "Recreational Vessel Fees" in the **Federal Register** (58 FR 8884). The rule was made effective on October 1, 1992, to coincide with the effective date of the statutory revisions in section 501 of the High Seas Driftnet Fisheries Enforcement Act of 1992 (Pub. L. 102–582). A delay in amending the existing regulations could have resulted in vessel owners or operators paying a fee which was no longer required. The Coast Guard received one letter commenting on the interim final rule; it supported the announced phaseout of the fees. No public hearing was requested and none was held. On March 17, 1994 (59 FR 12549), the Coast Guard published a technical amendment to restore text in the CFR mistakenly removed by the interim final rule.

Background and Purpose

The Omnibus Budget Reconciliation Act of 1990 amended section 2110 of title 46, United States Code, to require the Secretary of Transportation to establish a fee or charge for recreational vessels and to collect it annually in fiscal years (FY) 1991 through 1995 from the vessel owner or operator.

Section 501 of the High Seas Driftnet Fisheries Enforcement Act, enacted October 16, 1992, amends 46 U.S.C. 2110(b)(1) to limit collection of the annual fee to fiscal years 1993 and 1994, to reduce the number of recreational vessels subject to the annual fee by limiting the vessel length categories partially in fiscal year 1993 and even more in 1994, and to rescind the fee in fiscal year 1995.

This rule adopts the interim final rule, as corrected.

This rule also removes Lake Roosevelt (WA) as a specific body of water on which the fee applies. Lake Roosevelt (WA) was originally listed in § 1.30–1(e) due to an actual Coast Guard presence for maintaining aids to navigation. The Coast Guard entered into a memorandum of agreement transferring maintenance of the aids to navigation on Lake Washington to the National Park Service in January 1993. With this transfer, the Coast Guard no longer has an actual presence on Lake Roosevelt and the fees should no longer apply on the Lake. In accordance with 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation and good cause exists for making it effective in less than 30 days after **Federal Register** publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest to relieve owners or operators of vessels on Lake Washington no longer subject to the fees from unnecessarily paying the fees.

Assessment

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 11040; February 26,1979). The Coast Guard expects the economic impact of this rulemaking to be so minimal that a full regulatory evaluation is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), the Coast Guard must consider the economic impact on small entities of a rule for which a general notice of rulemaking is required. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). Since this rule applies only to recreational vessels, the Coast Guard has determined that this rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rulemaking reduces the collection-of-information requirements approved by the Office of Management and Budget (OMB) under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The subpart number is 33 CFR 1.30 and the corresponding OMB approval number is OMB Control Number 2115–0588.

Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under paragraph 2.B.2 of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 1

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Penalties, Fees.

For the reasons set out in the preamble the interim rule published on February 17, 1993 (58 FR 8884) amending 33 CFR Part 1 is confirmed as final with the following change:

PART 1—[AMENDED]

Subpart 1.30—[Amended]

1. The authority citation for 33 CFR subpart 1.30 continues to read as follows:

Authority: 46 U.S.C. 2110; 49 CFR 1.46.

§ 1.30—1 [Removed and Reserved]

2. Paragraph (e)(3) of § 1.30–1 is removed and reserved.

Dated: April 15, 1994.

W.J. Ecker,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 94–10177 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF DEFENSE

48 CFR Parts 219, 226 and 252

Defense Federal Acquisition Regulation Supplement; Small Disadvantaged Business, Historically Black Colleges and Universities, and Minority Institutions

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for public comments.

SUMMARY: The Department of Defense has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement to revise the definitions for historically black colleges (HBCUs) and universities and minority institutions (MIs). The rule also revises the requirement for an offeror to qualify as small disadvantaged business, HBCU, or MI both at time of submission of the offer and at time of award by eliminating the requirement to qualify at time of award.

DATES: *Effective Date:* April 21, 1994. *Comment Date:* Comments on the interim DFARS rule should be submitted in writing to the address shown below on or before June 28, 1994 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to the The Defense Acquisition Regulations Council, ATTN: Mrs. Alyce Sullivan, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 604–5971. Please cite DFARS Case 93–D315 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Mrs. Alyce Sullivan, (703) 604–5929.

SUPPLEMENTARY INFORMATION:

A. Background

Subsections 811(a) and (b), of the FY 1994 Defense Authorization Act (Pub. L. 103–160) revise the definitions for historically black colleges and universities (HBCU) and minority institutions (MI) in 10 U.S.C. 2323(a)(1)(B) and (C). Subsection 811(c) eliminates the requirement for an entity that is seeking a DoD contract and represents itself as small disadvantaged business, HBCU, or MI to maintain its status as such entity at the time of award.

The Director, Defense Procurement, issued Departmental Letter 94–06, April 21, 1994, to implement Subsections 811(a), (b) and (c).

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The sole purpose of this rule is to implement statutory revisions. The impact, if any, would benefit small entities, because the requirement for retaining status as a small disadvantaged business, historically black college or university, or minority institution, at time of award is deleted. Comments from small entities concerning the affected DFARS

subparts will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite DFARS Case 94–610 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the revisions in this rulemaking notice do not contain and/or affect information collection requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this rule as an interim rule. Urgent and compelling reasons exist to promulgate this rule before affording the public an opportunity to comment. This action is necessary because Subsections 811(a), (b), and (c) became effective upon enactment of the Fiscal Year 1994 Defense Authorization Act (Pub. L. 103–160), on November 30, 1993. However, pursuant to Public Law 98–577 and Federal Acquisition Regulation 1.501, public comments received in response to this interim rule will be considered in formulating the final rule.

List of Subjects in 48 CFR Parts 219, 226, and 252

Government procurement.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

1. The authority for 48 CFR parts 219, 226 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR part 1.

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

2. Section 219.301 is amended by revising paragraph (a) introductory text to read as follows:

219.301 Representation by the offeror.

(a) A concern must qualify as a small disadvantaged business (SDB) on the date of submission of its initial offer including price to be eligible for—

* * * * *

PART 226—OTHER SOCIOECONOMIC PROGRAMS

3. Section 226.7005 is amended by revising paragraph (a)(1) to read as follows:

226.7005 Eligibility as an HBCU or MI.

(a) * * *

(1) Be an HBCU or MI, as defined in the clause at 252.226–7000, Notice of Historically Black College or University and Minority Institution Set-Aside, at the time of submission of its initial offer including price; and

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.219–7000 [AMENDED]

4. Section 252.219–7000 is amended by revising the clause date to read "(APR 1994)" in lieu of "(DEC 1991)"; by removing paragraph (d); and by redesignating paragraph (e) as (d).

5. Section 252.219–7003 is amended by revising the clause date to read "(APR 1994)" in lieu of "(APR 1993)", and by revising paragraph (a) to read as follows:

252.219–7003 Small business and small disadvantaged business subcontracting plan (DoD contracts).

* * * * *

(a) *Definitions. Historically black colleges and universities,* as used in this clause, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institutions, as used in this clause, means institutions meeting the requirements of section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)). The term also includes Hispanic-serving institutions as defined in section 316(b)(1) of such Act (20 U.S.C. 1059c (b)(1)).

* * * * *

6. Section 252.219–7006 is amended by revising the clause date to read "(APR 1994)" in lieu of "(DEC 1991)" and by revising paragraph (a) to read as follows:

252.219–7006 Notice of evaluation preference for small disadvantaged business concerns.

* * * * *

(a) *Definitions. Historically black colleges and universities,* as used in this clause, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institutions, as used in this clause, means institutions meeting the requirements of section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)). The term also includes Hispanic-serving institutions as defined in section 316(b)(1) of such Act (20 U.S.C. 1059c(b)(1)).

* * * * *

7. Section 252.226–7000 is amended by revising the clause date to read "(APR 1994)" in lieu of "(DEC 1990)"; and by revising, paragraphs (a) and (b) to read as follows:

252.226–7000 Notice of historically black college or university and minority institution set-aside.

(a) *Definitions. Historically black colleges and universities,* as used in this clause, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institutions, as used in this clause, means institutions meeting the requirements of section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)). The term also includes Hispanic-serving institutions as defined in section 316(b)(1) of such Act (20 U.S.C. 1059c(b)(1)).

(b) *General:* (1) Offers are solicited only from historically black colleges or universities and minority institutions.

(2) Any award resulting from this solicitation will be made only to an offeror which is a historically black college or university or a minority institution at the time of submission of its initial offer including price.

* * * * *

8. Section 252.226–7001 is amended by revising the clause date to read "(APR 1994)" in lieu of "(DEC 1991)"; by revising paragraph (a); and by removing paragraph (c) to read as follows:

252.226–7001 Historically black college or university and minority institution certification.

* * * * *

(a) *Definitions. Historically black colleges and universities,* as used in this provision, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institutions, as used in this provision, means institutions meeting the requirements of section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)). The term also includes Hispanic-serving institutions

as defined in section 316(b)(1) of such Act (20 U.S.C. 1059c(b)(1)).

* * * * *

[FR Doc. 94-10129 Filed 4-28-94; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 107 and 171

[Docket No. HM-208; Notice 94-5]

Hazardous Materials Transportation; Registration and Fee Assessment Program

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of filing requirements.

SUMMARY: The Hazardous Materials Registration Program will enter Registration Year 1994-95 on July 1, 1994. Persons who transport or offer for transportation certain hazardous materials are required to annually file a registration statement and pay a fee to the Department of Transportation. Persons who registered for the 1993-94 Registration Year will be mailed a Registration Statement form and informational brochure in April.

FOR FURTHER INFORMATION CONTACT: David W. Donaldson, Office of Hazardous Materials Planning and Analysis (202-366-4109), Hazardous Materials Safety, 400 Seventh Street SW., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to advise persons who transport or offer for transportation certain hazardous materials of an annual requirement to register with the Department of Transportation. A Final Rule implementing this requirement was published in the **Federal Register** on July 9, 1992 (57 FR 30620-30633), a clarification on July 28, 1992 (57 FR 33416-33417), editorial revisions on August 21, 1992 (57 FR 37900-37902), a formal interpretation of the terms "offeror" and "transporter" on October 28, 1992 (57 FR 48739-48741), and an amendment to the regulation on March 5, 1993 (58 FR 12543-12545). Each person, as defined by the Hazardous Materials Transportation Act, who engages in any of the specified activities relating to the transportation of hazardous materials is required to register annually with the Department of Transportation and pay a fee. Proceeds are used to fund grants to State, local, and Indian tribal governments for emergency response planning and training. The regulations implementing this program are in Title 49, Code of Federal Regulations, Sections 107.601-107.620.

The persons affected by this rule include those who offer or transport in commerce any of the following materials:

A. Any highway route-controlled quantity of a Class 7 (radioactive) material;

B. More than 25 kilograms (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material in a motor vehicle, rail car, or freight container;

C. More than one liter (1.06 quarts) per package of a material extremely toxic by inhalation (Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A);

D. A hazardous material in a bulk packaging having a capacity equal to or greater than 13,248 liters (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids; or

E. A shipment, in other than a bulk packaging, of 2,268 kilograms (5,000 pounds) gross weight or more of a class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required for that class.

The 1993-94 registration year ends on June 30, 1994. The 1994-95 Registration Year will begin on July 1, 1994, and end on June 30, 1995. Any person who engages in any of the specified activities during that period must file a Registration Statement and pay the associated fee of $300.00 before July 1, 1994, or before engaging in any of the activities, whichever is later. All persons who registered for the 1993-94 Registration Year will be mailed a Registration Statement form and an informational brochure in May 1994. Others wishing to obtain the form and any other information relating to this program should contact the program number given above.

RSPA is now accepting 1994-95 registrations. The Registration Statement has not been revised for the 1994-95 Registration Year. Registrants should file a registration statement and pay the associated fee in advance of July 1, 1994, in order to ensure that a 1994-95 Registration Number has been provided by that date to comply with the recordkeeping requirements, including the requirement that the number be made available on board each truck and truck tractor (not including trailers and semi-trailers) used to transport hazardous materials subject to the registration requirements. A Certificate of Registration is generally mailed within three weeks of RSPA's receipt of a Registration Statement.

Persons who engage in any of the specified activities during a Registration Year are required to register for that year. Persons who engaged in these activities during Registration Year 1992-93 (September 16, 1992, through June 30, 1993) or 1993-94 (July 1, 1993, through June 30, 1994) and have not filed a registration statement and paid the associated fee of $300.00 for each year for which registration is required should contact RSPA to obtain the required form (DOT F 5800.2). Persons who fail to register for any registration year in which they engaged in such activities are subject to civil penalties for each day a covered function is performed. The legal obligation to register for a year in which any of the specified activities was conducted does not end with the registration year. Registration after the completion of a registration year may also involve the imposition of a late fee and interest in addition to a civil penalty.

For the 1994-95 Registration Year, RSPA has entered into an agreement with the Public Utilities Commission of Ohio (PUCO) to test an alternative procedure for filing the Federal Registration Statement for motor carriers who are also subject to the State of Ohio's registration program. Ohio Revised Code Section 4905.80 requires that motor carriers transporting in or through Ohio hazardous materials that must be placarded, require the display of vehicle markings, or must be manifested register with PUCO.

Motor carriers who are subject to the Federal 1994-95 Hazardous Materials Registration requirement, may elect to submit a completed Federal Registration Statement DOT Form F 5800.2, through PUCO together with the associated fee of $300.00 payable to the U.S. Department of Transportation. This option for the submittal of the Federal registration documents through PUCO is being offered to certain motor carriers to demonstrate if this procedure is more cost-effective or otherwise less burdensome to industry and government. Since this procedure is optional, a motor carrier subject to Ohio's registration requirement may elect to register in the Federal program directly with the U.S. Department of Transportation, as specified in 49 CFR 107.616. However, PUCO has agreed to verify that all motor carriers required to register with PUCO are registered with DOT if they are subject to the Federal registration requirements.

A motor carrier subject to both the Federal and PUCO registration requirements who elects to register in

the Federal program through PUCO may obtain the required Federal and Ohio forms and related information by contacting the Public Utilities Commission of Ohio, Transportation Department, Hazardous Materials Division, 180 East Broad Street, 5th Floor, Columbus, OH 43215–3793, telephone 614–466–7232.

On April 1, 1994 (59 FR 15602–15605), RSPA published a Notice of Proposed Rulemaking, in which it proposed several additional requirements that may affect persons currently subject to the registration requirements. New provisions proposed in this notice include: (1) A requirement that shippers verify that carriers are registered before using their services and that carriers verify that shippers are registered before accepting a shipment from them; (2) a requirement that vessel operators carry proof of registration on each vessel subject to the registration requirement; and (3) a two-year extension (until July 1, 1996) in the delay in implementation of the registration requirement for foreign offerors of hazardous materials. Persons subject to the registration requirements are advised to watch for further developments in this rulemaking action.

Dated: April 22, 1994.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 94–10208 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 672 and 675

[Docket No. 930954–4110; I.D. 092193A]

RIN 0648–AF54

Groundfish of the Gulf of Alaska; Groundfish Fishery of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues final regulations to change requirements for observer coverage of the groundfish fisheries in the Gulf of Alaska (GOA) and the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to improve management of the groundfish fisheries off Alaska. The intended effect of this action is to increase observer coverage of the groundfish harvests and to promote the fishery management objectives of the Fishery Management Plan (FMP) for Groundfish of the GOA and the FMP for the Groundfish Fishery of the BSAI.

EFFECTIVE DATE: Effective July 1, 1994, except for § 672.27(c)(1)(iii)(F), which will become effective May 31, 1994.

ADDRESSES: Copies of the environmental assessment/regulatory impact review/final regulatory flexibility analysis (EA/RIR/FRFA) and the Observer Plan may be obtained from the Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802 (Attn: Lori Gravel).

FOR FURTHER INFORMATION CONTACT: Susan J. Salveson, Fisheries Management Division, Alaska Region, NMFS at 907–586–7228.

SUPPLEMENTARY INFORMATION:

Background

Fishing for groundfish by vessels in the exclusive economic zone (EEZ) of the GOA and the BSAI is managed by the Secretary of Commerce (Secretary) according to the FMP for Groundfish of the GOA and the FMP for the Groundfish Fishery of the BSAI. The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and are implemented by regulations governing the U.S. groundfish fisheries at 50 CFR parts 620, 672, and 675.

Amendments 13 and 18 to the groundfish FMPs for the BSAI and GOA, respectively, authorize a comprehensive domestic fishery observer program. An Observer Plan to implement the program was prepared by the Secretary in consultation with the Council and issued by NMFS, effective February 7, 1990 (55 FR 4839, February 12, 1990). At its December 1992 meeting, the Council reviewed draft changes to the Observer Plan that were developed by NMFS and a Council-Appointed Industry Oversight Committee. The Council recommended that NMFS make the draft changes and initiate a rulemaking to implement them.

A proposed rule to implement the Council's recommendation was published in the **Federal Register** October 28, 1993 (58 FR 57979). Comments on the proposed rule were invited through November 29, 1993. Two letters of comments were received and are summarized in the "Response to Comments" section of this preamble.

After reviewing the reasons for the draft changes to the Observer Plan and the comments on the proposed rule to implement them, NMFS has determined that this action is necessary for fishery conservation and management and implements the following changes to the Observer Plan and its implementing regulations at §§ 672.27 and 675.25.

(1) Change the definition of a "fishing trip" and base observer coverage requirements on a new definition of "fishing days" instead of "fishing trip days". "Fishing day" is defined as a 24-hour period from 0001 Alaska local time (A.l.t.) through 2400 A.l.t. during which fishing gear is retrieved and groundfish, as defined at 50 CFR 672.2 and 675.2, are retained for further processing.

(2) Increase observer coverage on vessels equal to or greater than 60 feet (ft)(18.3 m) in length overall (LOA) but less than 125 ft (38.1 m) LOA during each calendar quarter, so that vessels in this size category are required to carry an observer 30 percent of the fishing days in each calendar quarter in which the vessels participate for more than 3 fishing days in a directed fishery for groundfish. Each vessel required to carry an observer during a calendar quarter must carry an observer during at least one fishing trip for each of the following fisheries in which the vessel participates: Pollock, Pacific cod, sablefish, rockfish, flatfish, and other species of groundfish.

(3) Increase observer coverage of vessels using hook-and-line gear in the Eastern Regulatory Area of the GOA by requiring operators of catcher/processor and catcher vessels using hook-and-line gear that participate in a directed fishery for groundfish to carry a NMFS-certified observer during at least one fishing trip in the Eastern Regulatory Area during each calendar quarter that they participate in a directed fishery for groundfish in this area;

(4) Revise observer coverage requirements for vessels using pot gear to participate in a directed fishery for groundfish, so that each vessel using pot gear that is equal to or greater than 60 ft (18.3 m) LOA is required to carry an observer during at least 30 percent of its fishing days during each calendar quarter in which it participates for more than 3 days in a directed groundfish pot gear fishery; and

(5) Revise the conflict of interest standards for NMFS-certified observers and observer contractors. Revisions include: (1) Placing restrictions on observers who were employed in the observed fishery within the preceding 12 months; and (2) prohibiting observer contractors from assigning observers in response to requests for or against a specific individual or a specific gender, race, creed, or age of individual.

The intent of these measures is to increase observer coverage of the groundfish harvests and to promote the fishery management objectives of the FMPs. Further descriptions of, and reasons for, these measures are contained in the preamble to the proposed rule (58 FR 57979, October 28, 1993).

With the exception of § 672.27(c)(1)(iii)(F), the effective date of

the final rule is July 1, 1994. This date coincides with the beginning of the third calendar quarter and will facilitate the implementation of new quarterly observer coverage requirements by reducing confusion that would result from a mid-quarter effective date. Section 672.27(c)(1)(iii)(F) reduces observer coverage requirements for vessels 125 ft LOA or longer fishing for groundfish with pot gear, and thus, provides relief to vessel operators in this category. Therefore, NMFS has determined that the effective date for this section should not be delayed until July 1, 1994. The effective date for § 672.27(c)(1)(iii)(F) is May 31, 1994.

Changes in the Final Rule From the Proposed Rule

This final rule includes three changes from the proposed rule. These changes are described as follows:

First, technical changes are made to §§ 672.27 and 675.25 to include minor editorial revisions and metric equivalents for specified lengths of vessels that require different levels of observer coverage.

Second, § 672.27(c)(1)(v)(C) is amended to clarify that a catcher vessel delivering groundfish to a shoreside processor or to a mothership in Alaska State waters during a weekly reporting period will be assigned to a fishery category based on the retained catch composition of all groundfish delivered to processors during that weekly reporting period and reported on Alaska Department of Fish and Game fish tickets.

Finally, the Observer Plan is corrected by removing from Attachment 3 (Standards of Observer Conduct) an inappropriate reference to title 15 CFR subtitle A, part O, of the U.S. Department of Commerce Regulations. These regulations pertained to standards of conduct for employees of the U.S. Department of Commerce. Certified observers are not NMFS employees and therefore cannot be held to these standards. The Observer Plan continues to require certified observers to comply with the conflict of interest standards and general standards of behavior set out in Attachments 3 and 4 of the amended Plan.

Response to Comments

Two letters were received within the comment period that ended November 29, 1993. A summary of comments and NMFS's responses follow.

Comment 1. The proposed action bases observer coverage on fishing days instead of fishing trip days and increases observer coverage on vessels equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA. This action would increase the financial burden on the catcher boat fleet, particularly on those vessels delivering to shoreside facilities that are required to have observer coverage. This results in an inequitable impact on the catcher boat fleet and further aggravates the disproportionate effect of the Observer Program on catcher vessels. Given these effects, implementation of measures to increase observer coverage should be delayed until after the North Pacific Fisheries Research Plan is effective.

Response. NMFS acknowledges that the proposed rule would increase observer costs for vessels equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA that use trawl or hook-and-line gear to participate in a directed fishery for Alaska groundfish. Larger vessels currently are required to have an observer on board at all times and are not affected by the proposed change in coverage requirements. The increased observer coverage for vessels equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA is necessary to obtain more adequate information on which the groundfish fisheries are managed, including better estimates of groundfish catch, discard amounts, and prohibited species bycatch rates. Delay of regulatory action to increase observer coverage until the North Pacific Fisheries Research Plan is effective would neglect identified data requirements necessary for effective management of the Alaska groundfish fisheries.

Comment 2. The increased financial burden to the small boat fleet that will ensue from increased observer coverage is out of proportion to the benefits that might result, particularly if NMFS continues to use observer data primarily as a basis for fishery closures or enforcement, rather than for more effective fishery management.

Response. NMFS's primary responsibility for inseason management of the groundfish resource is to monitor groundfish harvests and prohibited species bycatch rates, so that when a groundfish total allowable catch (TAC) or a prohibited species bycatch allowance is reached, fishery closures can be implemented to prevent specified TACs or bycatch allowances from being exceeded.

Existing observer coverage requirements established for vessels equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA were determined by the Council and its *ad hoc* Observer Committee to be inadequate to meet data needs for effective monitoring of groundfish and prohibited species catch amounts by this segment of the groundfish fleet. NMFS concurs in this determination and has approved the Council's recommended increase in observer coverage for vessels equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA. The increase is intended to improve the level of observer coverage from this size class of vessel without imposing costs that are disproportionate to the benefits that are anticipated to result from better inseason management of the groundfish fisheries.

Use of observer data is not limited to inseason management of the fisheries and compliance monitoring of regulatory programs. Observer data also are used to assess the status of fishery resources and as a basis for assessment and development of management measures. NMFS has released certain observer data to the public under the Freedom of Information Act for purposes of independent industry analyses of prohibited species bycatch rates and operational factors that may reduce bycatch rates of these species. Additional observer data may be disclosed to support industry initiatives to reduce prohibited species bycatch rates under a proposed rule published in the **Federal Register** January 19, 1994 (59 FR 2817). These Federal and private initiatives to use observer data for more effective fishery management will be enhanced to the extent that more observer data are collected from vessels under 125 ft (38.1 m) LOA as set out in this final rule.

Comment 3. The purpose and intent of the proposed rule to correct problems encountered by NMFS in administering observer coverage on vessels equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA are supported. However, given the direction in which the fishery management process is progressing, 30 percent coverage for these vessels likely is inadequate; 100 percent observer coverage on all vessels capable of carrying an observer should be considered.

Response. One hundred percent observer coverage on vessels equal to or greater than 60 ft LOA but less than 125 ft LOA has been required for particular fisheries for specified areas and limited time periods to meet special management needs (59 FR 3000, January 20, 1994, as modified at 59 FR 4009, January 28, 1994, and 59 FR 15346, April 1, 1994). However, the additional costs associated with 100 percent observer coverage on all vessels in the groundfish fishery under 125 ft LOA in all areas at all times would impose disproportionate costs on this sector of the groundfish fleet and, therefore, are

not now justified under the current open access groundfish management program. NMFS will continue to assess the need for increased observer coverage to meet special resource or fishery management needs.

Comment 4. Despite support for the proposed action, concerns remain about the ability of vessels to manipulate observer coverage in certain fisheries and/or in certain areas where prohibited species bycatch rates may be higher. To address these concerns, the final rule should be amended to require a vessel equal to or greater than 60 ft (18.3 m) LOA but less than 125 ft (38.1 m) LOA to carry an observer for 30 percent of the days it engages in any particular fishery during any calendar quarter in which it meets the threshold (3-day) minimum requirement on a fishery-by-fishery basis.

Response. The final rule limits the manipulation of observer coverage by decreasing the number of fishing days in a quarter that trigger observer coverage requirements, basing coverage requirements on fishing days rather than fishing trip days, and requiring observation of at least one trip for each fishery that a vessel participates in during a quarter. These measures should reduce the potential for manipulation of observer coverage and increase the amount of observer data available for the management of specific fisheries. Nonetheless, an opportunity still exists for a vessel operator to manipulate observer coverage to reduce or increase coverage in different fisheries.

The EA/RIR/FRFA prepared for this action considered an alternative for increased observer coverage similar to the one presented in Comment 4. The alternative was more stringent and could provide more observer data of certain fisheries relative to the preferred alternative implemented under this final rule. However, this alternative was not adopted by the Council for several reasons. First, concerns were expressed that some fishermen would have difficulties complying with 30 percent observer coverage in each fishery because fishermen would need to be aware of and plan for the target fishery each trip and keep track of the exact number of fishing days by fishery. Second, 30 percent coverage by fishery would be relatively more expensive for a vessel in the 60–125 ft (18.3 m–38.1 m) LOA category to comply with relative to the preferred alternative. Last, compliance monitoring would be more difficult and associated enforcement costs would be increased relative to the preferred alternative under the final rule due to calculations to check 30 percent observer coverage by fishery.

Comment 5. The proposed action to increase coverage of the longline fisheries in the eastern GOA is inadequate for two reasons. First, the proposed action is subject to manipulation. Second, the overall level of reliable observer-generated data from the hook-and-line gear fleet in the eastern GOA is deplorable. To respond to these inadequacies, the final rule should require all vessels in the 60–125 ft (18.3–38.1 m) LOA category that use hook-and-line gear to carry observers a minimum of 30 percent of the fishing days they operate in the eastern GOA during any particular calendar quarter on a fishery-by-fishery basis. Furthermore, NMFS should make a concerted effort to place observers on vessels under 60 ft (18.3 m) LOA so that data can be gathered about the operating characteristics of the small boat fleet that accounts for most of the hook-and-line harvest in the eastern GOA.

Response. The alternative coverage requirements suggested in Comment 5 for longline vessels in the eastern GOA was considered by the Council, but not adopted for reasons similar to those presented in the response to Comment 4.

The Council considered lowering the size limit for vessels required to carry observers to vessels less than 60 ft (18.3 m) LOA. The Council did not adopt this alternative because of increased costs to industry and increased chance of injury to an observer or crew on small vessels because of limited working space and accommodations. Under the current Observer Plan, NMFS has determined that implementation of changes to the observer coverage requirements for vessels under 60 ft (18.3 m) LOA would require separate regulatory action. Furthermore, staffing and budget constraints prevent NMFS from placing employees onboard small vessels to serve as observers. Given these regulatory and practical constraints, observer coverage requirements for the small boat fleet would best be pursued under the North Pacific Fisheries Research Plan, which is pending approval and implementation by the Secretary.

Comment 6. The proposed action to lower observer coverage on vessels using pot gear is premature and not supported as long as observer data generated from the pot gear fisheries are used for allocative purposes. Data used to support allocative measures should be based on comparable levels of observer coverage. Therefore, observer coverage on vessels using pot gear should remain unchanged until an individual vessel quota system is implemented that will effectively address resource allocation issues.

Response. Since the implementation of the domestic observer program in 1990, observer data collected onboard pot gear vessels participating in a directed fishery for groundfish consistently indicate that relatively low levels of prohibited species bycatch mortality are associated with these operations. The Council recommended that NMFS reduce the observer coverage requirements for pot vessels equal to or greater than 125 ft (38.1 m) LOA from 100 percent to 30 percent because of the very low bycatch mortality associated with these operations and the Council's expressed policy to encourage selective fishing practices that typically experience low prohibited species bycatch mortality rates. Under the final rule, the resulting levels of observer coverage of vessels using pot gear will assure the collection of sufficient observer data to identify any changes in assumed bycatch mortality rates and other factors that may affect future resource allocation issues.

Classification

The FRFA prepared for this rule concluded that it could have significant effects on a substantial number of small entities (i.e., small businesses, small organizations, and small governmental jurisdictions with limited resources). A copy of the EA/RIR/FRFA prepared for this action is available (see **ADDRESSES**).

This final rule has been determined to be not significant for purposes of E.O. 12866.

List of Subjects in 50 CFR Parts 672 and 675

Fisheries, Reporting and recordkeeping requirements.

Dated: April 22, 1994.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 672 and 675 are amended as follows:

PART 672—GROUNDFISH OF THE GULF OF ALASKA

1. The authority citation for part 672 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 672.27, the first sentence of paragraph (a) and paragraphs (b), (c)(1)(ii)(D) and (c)(1)(iii)(C) and (D) are revised and paragraphs (c)(1)(ii)(E), (c)(1)(iii)(E), (c)(1)(iii)(F), (c)(1)(iv) and (c)(1)(v) are added to read as follows:

§ 672.27 Observers.

(a) *Observer Plan.* The operator of a fishing vessel subject to 50 CFR parts 672 and 675, and the manager of a shoreside processing facility that receives groundfish from a vessel subject to 50 CFR parts 672 and 675, must comply with the Observer Plan.

* * *

(b) *Purpose.* The purpose of this section is to allow observers to collect Alaska fisheries data deemed by the Regional Director to be necessary and appropriate for research, management, and compliance monitoring of fisheries for groundfish, as defined at § 672.2 and § 675.2 of this chapter, or for other purposes consistent with the Marine Mammal Protection Act.

(c) * * *

(1) * * *

(ii) * * *

(D) *Fishing trip* means the time period that starts on the day when fishing gear is first deployed and ends on the day the vessel offloads groundfish, returns to an Alaskan port, or leaves the EEZ off Alaska and adjacent waters of the State of Alaska, and during which one or more fishing days, as defined in this section, occur.

(E) *Fishing day* means a 24-hour period, from 0001 A.l.t. through 2400 A.l.t., in which fishing gear is retrieved and groundfish, defined at § 672.2 or § 675.2 of this chapter, are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

(iii) * * *

(C) A catcher/processor or catcher vessel 125 feet (38.1 meters) in length overall or longer must carry a NMFS-certified observer at all times while fishing for groundfish, except for a vessel fishing for groundfish with pot gear as provided for in paragraph (c)(1)(iii)(F) of this section.

(D) A catcher/processor or catcher vessel equal to or greater than 60 feet (18.3 meters) length overall but less than 125 feet (38.1 meters) length overall must carry a NMFS-certified observer during at least 30 percent of its fishing days in each calendar quarter in which the vessel participates for more than 3 fishing days in a directed fishery for groundfish. Each vessel that participates for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter must carry a NMFS-certified observer during at least one fishing trip during that calendar quarter for each of the groundfish fishery categories defined under paragraph (c)(1)(iv)(A) through (F) of this section in which the vessel participates.

(E) A catcher/processor or catcher vessel fishing with hook-and-line gear that is required to carry an observer under paragraph (c)(1)(iii)(D) of this section must carry a NMFS-certified observer during at least one fishing trip in the Eastern Regulatory Area of the Gulf of Alaska during each calendar quarter in which the vessel participates in a directed fishery for groundfish in the Eastern Regulatory Area.

(F) A catcher/processor or catcher vessel equal to or greater than 60 feet (18.3 meters) length overall fishing with pot gear must carry a NMFS-certified observer during at least 30 percent of its fishing days in each calendar quarter in which the vessel participates for more than 3 fishing days in a directed fishery for groundfish. Each vessel that participates for more than 3 fishing days in a directed fishery for groundfish using pot gear must carry a NMFS-certified observer during at least one fishing trip during a calendar quarter for each of the groundfish fishery categories defined under paragraph (c)(1)(iv)(A) through (F) of this section in which it participates.

(iv) *Groundfish fishery categories requiring separate coverage*—(A) *Pollock fishery.* Fishing that results in a retained amount of pollock, during any weekly reporting period, that is greater than the retained amount of any other groundfish species or species group that is specified as a separate groundfish fishery under this paragraph (c)(1)(iv) (A) through (F).

(B) *Pacific cod fishery.* Fishing that results in a retained amount of Pacific cod, during any weekly reporting period, that is greater than the retained amount of any other groundfish species or species group that is specified as a separate groundfish fishery under this paragraph (c)(1)(iv) (A) through (F).

(C) *Sablefish fishery.* Fishing that results in a retained amount of sablefish, during any weekly reporting period, that is greater than the retained amount of any other groundfish species or species group that is specified as a separate groundfish fishery under this paragraph (c)(1)(iv) (A) through (F).

(D) *Rockfish fishery.* Fishing that results in a retained aggregate amount of rockfish of the genera *Sebastes* and *Sebastolobus*, during any weekly reporting period, that is greater than the retained amount of any other groundfish species or species group that is specified as a separate groundfish fishery under this paragraph (c)(1)(iv) (A) through (F).

(E) *Flatfish fishery.* Fishing that results in a retained aggregate amount of all flatfish species, except Pacific halibut, during any weekly reporting period, that is greater than the retained amount of any other groundfish species or species group that is specified as a separate groundfish fishery under this paragraph (c)(1)(iv) (A) through (F).

(F) *Other species fishery.* Fishing that results in a retained amount of groundfish, during any weekly reporting period, that does not qualify as a pollock, Pacific cod, sablefish, rockfish, or flatfish fishery as defined under paragraphs (c)(1)(iv) (A) through (c)(1)(iv)(E) of this section.

(v) *Assignment of vessels to fisheries.* During any weekly reporting period, the retained catch composition of groundfish species or species groups of a vessel for which a TAC has been specified under § 672.20 or § 675.20 of this chapter, in round-weight equivalents, will determine to which of the fishery categories listed under paragraph (c)(1)(iv) (A) through (F) of this section the vessel is assigned.

(A) A catcher/processor vessel will be assigned to fishery categories at the end of each weekly reporting period based on the round-weight equivalent of the retained groundfish catch composition included in the weekly production report for the vessel submitted to the Regional Director under § 672.5(c)(2) or § 675.5(c)(2) of this chapter.

(B) A catcher vessel that delivers to mothership processors in Federal waters during a weekly reporting period will be assigned to fishery categories based on the round-weight equivalent of the retained groundfish catch composition included in the weekly production report for the mothership submitted to the Regional Director for that week under § 672.5(c)(2) or § 675.5(c)(2) of this chapter.

(C) A catcher vessel that delivers groundfish to shoreside processors or to mothership processors in Alaska State waters during a weekly reporting period will be assigned to a fishery category based on the round-weight equivalent of the groundfish delivered to processors during that weekly reporting period and reported on one or more Alaska Department of Fish and Game fish ticket or tickets as required under Alaska State regulations at A.S. 16.05.690.

* * * * *

PART 675—GROUNDFISH OF THE BERING SEA AND ALEUTIAN ISLANDS AREA

3. The authority citation for 50 CFR part 675 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

4. Section 675.25 is revised to read as follows:

§ 675.25 Observers.

Observer requirements authorized under the Observer Plan are set out at § 672.27 of this chapter.

[FR Doc. 94–10195 Filed 4–28–94; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 59, No. 82
Friday, April 29, 1994

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1030, 1065, 1068, 1076, and 1079

[Docket Nos. AO–361–A31; AO–86–A50; AO–178–A48; AO–260–A32; AO–295–A44; DA–92–27]

Milk in the Chicago Regional and Certain Other Marketing Areas; Extension of Time for Filing Briefs

7 CFR part	Marketing area	AO Nos.
1030	Chicago Regional	AO–361–A31
1065	Nebraska-Western Iowa.	AO–86–A50
1068	Upper Midwest	AO–178–A48
1076	Eastern South Dakota.	AO–260–A32
1079	Iowa	AO–295–A44

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Extension of time for filing briefs.

SUMMARY: This document extends the time for filing briefs on the record of the hearing held January 25–27, 1994, in Bloomington, Minnesota, concerning proposals to establish a multiple component pricing plan for pricing producer milk under the orders. Parties involved in the hearing requested more time to review the hearing record and to prepare briefs.

DATES: Briefs are now due on or before May 6, 1994.

ADDRESSES: Briefs (4 copies) should be filed with the Hearing Clerk, room 1083, South Building, U.S. Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Constance M. Brenner, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–7183.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:

Notice of Hearing: Issued December 22, 1993; published January 4, 1994 (59 FR 260).

Notice is hereby given that the time for filing briefs and proposed findings and conclusions on the record of the public hearing held January 25–27, 1994, in Bloomington, Minnesota, with respect to the tentative marketing agreements and to the orders regulating the handling of milk in the Chicago Regional, Nebraska-Western Iowa, Upper Midwest, Eastern South Dakota, and Iowa milk marketing areas pursuant to the notice of hearing issued December 22, 1993, and published January 4, 1994 (59 FR 260), is hereby extended from April 20, 1994, to May 6, 1994. It is not anticipated that any material delay in the issuance of a recommended decision will result from this extension.

This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

Dated: April 22, 1994.

Lon Hatamiya,

Administrator.

[FR Doc. 94–10225 Filed 4–28–94; 8:45]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93–NM–46–AD]

Airworthiness Directives; de Havilland Model DHC–8 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to certain de Havilland Model DHC–8 series airplanes, that would have required repetitive inspections of the passenger service unit (PSU) printed circuit boards and power supply connectors to detect corrosion and evidence of overheating; and repair or replacement of the circuit boards or replacement of connectors, if necessary. That proposal was prompted by reports that certain PSU printed circuit boards and power supply connectors have overheated in service. This action revises the proposed rule by adding a required terminating action for the repetitive inspections. The actions specified by this proposed AD are intended to prevent overheating of the PSU printed circuit board and power supply connectors, which could lead to a fire in the PSU.

DATES: Comments must be received by May 31, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–46–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from de Havilland, Inc., Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, room 202, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Michele Maurer, Aerospace Engineer, Systems and Equipment Branch, ANE–173, FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, room 202, Valley Stream, New York 11581; telephone (516) 791–6428; fax (516) 791–9024.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications

received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 93–NM–46–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–46–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to de Havilland Model DHC–8 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on May 25, 1993 (58 FR 30001). That NPRM would have required repetitive visual inspections of the PSU printed circuit boards and power supply connectors to detect corrosion and evidence of overheating. If any corrosion or evidence of overheating of the circuit board is detected, the proposed AD would have required the repair or replacement of the circuit board. If any corrosion or evidence of overheating of the connectors is detected, the proposed AD would have required replacement of the affected connector. The proposed AD would also have required that all findings of corrosion or overheating be reported to the manufacturer. That NPRM was prompted by reports that certain PSU printed circuit boards and power supply connectors have overheated in service. That condition, if not corrected, could result in overheating of the PSU printed circuit board and power supply connectors, which could lead to a fire in the PSU.

Since the issuance of that NPRM, the manufacturer has developed a design modification that, if installed, would eliminate the need for the proposed repetitive inspections. De Havilland has issued Service Bulletin 8–33–34, dated August 10, 1993, that describes installation of Modification 8/1950. Among other things, this modification entails reworking the PSU to include a new circuit board cover, a modified circuit board mounting, and new wire harnesses. Transport Canada Aviation, which is the airworthiness authority for Canada, has approved the technical content of this service bulletin and has issued revised Canadian AD No. CF–93–01R1, dated December 3, 1993, to include the modification described in the service bulletin as terminating action for that AD.

This airplane model is manufactured in Canada and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, Transport Canada Aviation has kept the FAA informed of the situation described above. The FAA has examined the findings of Transport Canada Aviation, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the FAA has determined that the previously proposed AD must be revised to require the installation of Modification 8/1950 as terminating action for the proposed repetitive inspections of the PSU.

This determination to mandate installation of the modification is based on the FAA's finding that long term continued operational safety will be better assured by design changes to remove the source of the problem, rather than by repetitive inspections. Long term inspections may not be providing the degree of safety assurance necessary for the transport airplane fleet. This, coupled with a better understanding of the human factors associated with numerous continual inspections, has led the FAA to consider placing less emphasis on inspections and more emphasis on design improvements. The proposed modification requirement is in consonance with these considerations.

Since this change expands the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Additionally, due consideration has been given to the following comments received in response to the original notice:

Two commenters suggest that issuance of the proposed rule is unnecessary. The commenters contend that the criteria for issuing a regulation under Federal Aviation Regulations 39.1 (14 CFR 39.1), specifically that the addressed condition "is likely to exist or develop on other airplanes of the same type," has not been met. These commenters also report that their experience to date does not support the need for issuance of this proposed rule. One of these commenters suggests that the occurrences of overheated PSU's appear to have been limited to only a few units and, possibly, to only one non-U.S. operator that is operating in a unique environment. The commenter questions whether there were any other factors that could have effected the failure of these units, such as missing or improperly installed insulation blankets, previous maintenance performed on the subject units, etc.

The FAA does not concur with the commenters' suggestion that this rule is unnecessary. Results of the investigation of the failure scenarios, as performed by de Havilland, revealed that the ingress of moisture through the PSU connectors is a situation that is not unique to a specific airplane or operator; it is a situation that is common to all Model DHC–8 airplanes due to their common design. It is true that the one non-U.S. operator that experienced the failure does operate in a high humidity environment, which may have contributed to creating the worst corrosion/overheat incident reported to date. Operation of any aircraft in that type of environment increases the chance of moisture ingress that could lead to corrosion on the printed circuit board or connectors, and to an excessive overheat condition or a potential fire hazard, should such corrosion go undetected. Although the commenters may not yet have experienced a severe corrosion problem in their current operating environment, there is nothing restricting Model DHC–8 aircraft from being operated in an environment that is more conducive to a moisture ingress and corrosion problem. The FAA concludes that, based on the design of the Model DHC–8, the addressed unsafe condition is likely to exist or develop on other airplanes of this same type.

One commenter requests that the proposed compliance time of 300 hours

time-in-service or 30 days (whichever occurs later) for the initial inspection be extended to at least 600 hours time-in-service. The commenter considers the proposed compliance time to be too stringent, especially in light of the fact that the PSU circuit board overheat problem was first reported four years ago, in 1990. The FAA does not concur. The addressed overheating problem is the result of corrosion of the printed circuit board pins and connector interfaces. Since corrosion is an agent that acts over time, it is important that operators assess the severity of the corrosion on each applicable airplane as expeditiously as possible; therefore, the initial inspection interval of 300 hours time-in-service, as proposed, is appropriate. The FAA does consider that operators who have performed the initial action within the last 12 months should be provided "credit" for such action and has revised the proposed initial compliance time to provide such credit.

Two commenters suggest that the proposed repetitive inspection interval of 600 hours time-in-service is too conservative and should be extended. These commenters request that the interval be changed to at least 12 months. The commenters state that the addressed corrosion situation results from condensation-induced moisture collecting on the connector; however, since a water dispersing dielectric grease (a corrosion inhibiting compound) is applied after the initial inspection, it would serve to protect the area from any further corrosion for some time. One of these commenters considers that any significant changes in the corrosion status of the circuit board would be insignificant at the proposed 600-hour interval (which equates to approximately 60 days for most affected operators). One of these commenters indicates that it already has completed the initial inspection of its fleet of 22 Model DHC–8's and its findings have revealed that the corrosion is minor and is not rapidly generated. The FAA concurs with the commenters' request, based on the information provided. The notice has been revised to specify a repetitive inspection interval of 12 months.

One commenter requests that the proposed rule provide a description of the overheat damage for which inspection is made. The commenter notes that there is a distinction between normal in-service discoloration and overheat damage. The circuit board produces heat through its normal operation, which causes a discoloration of the circuit board's coating. Overheating would cause the board to show exposed fibers and/or melted parts. The FAA concurs with the commenter's request. A note has been added to the proposed rule to describe the appearance of overheat damage.

One commenter states that the economic impact data presented in the preamble to the NPRM was not completely accurate. This commenter notes that the number of work hours necessary to perform the proposed inspections is two work hours per aircraft, not per PSU, as the notice indicated. The FAA acknowledges this correction, and has revised the economic impact information, below, accordingly.

The FAA estimates that 133 Model DHC–8 series airplanes of U.S. registry would be affected by this proposed AD.

The proposed inspections would take approximately 2 work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Based on these figures, the total cost impact of the proposed inspections on U.S. operators is estimated to be $14,630, or $110 per airplane, per inspection.

The proposed modification would require approximately 2.25 work hours per PSU to accomplish, at an average labor cost of $55 per work hour. Required parts would cost approximately $61.50 per PSU. Each airplane is equipped with between 18 and 26 PSU's. Based on these figures, the total cost impact of the proposed modification on U.S. operators is estimated to be $185.25 per PSU, or between $3,334.50 and $4,816.50 per airplane.

The total cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. However, the FAA has been advised that the proposed initial inspection has already been accomplished on approximately 22 airplanes; therefore the future economic impact of this proposed rule is reduced by at least $2,420.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

De Havilland, Inc.: Docket 93–NM–46–AD.

Applicability: Model DHC–8 series airplanes, equipped with passenger service units have part numbers 10–1418–1/2 and 10–1081–3/–4/–5/–6; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent overheating of the passenger service unit (PSU) printed circuit board and power supply connectors, which could lead to a fire in the PSU, accomplish the following:

(a) Within 300 hours time-in-service after the effective date of this AD, or within 30 days after the effective date of this AD, or within 12 months after any previous inspection conducted prior to the effective date in accordance with this paragraph, whichever occurs later: Conduct a visual inspection of all PSU printed circuit boards and power supply connectors to detect corrosion and evidence of overheating, in accordance with paragraph III. of de Havilland Alert Service Bulletin S.B. A8–33–30, Revision 'A', dated December 18, 1992.

Note 1: The overheat condition referred to in this paragraph is the discoloration of the printed circuit board around the connector interfaces, and not the light conformal

coating discoloration resulting from the normal operation of high current devices mounted on the printed circuit board.

(1) If no corrosion or evidence of overheating is detected, repeat the inspection at intervals not to exceed 12 months.

(2) If any corrosion or evidence of overheating of the PSU printed circuit board is detected as a result of any inspection, prior to further flight, either repair or replace the PSU printed circuit board in accordance with the service bulletin. Thereafter, repeat the inspection at intervals not to exceed 12 months.

(3) If any corrosion or evidence of overheating of the power supply connectors is detected as a result of any inspection, prior to further flight, replace the affected power supply connector in accordance with the service bulletin. Thereafter, repeat the inspection at intervals not to exceed 12 months.

(b) Within 10 days after accomplishing each inspection required by paragraph (a) of this AD, notify de Havilland, Inc., of all findings of corrosion or overheating, in accordance with de Havilland Alert Service Bulletin S.B. A8-33-30, Revision 'A', dated December 18, 1992. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120-0056.

(c) Within 24 months after the effective date of this AD, install Modification 8/1950 in accordance with de Havilland Service Bulletin 8-33-34, dated August 10, 1993. Installation of this modification constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office (ACO), FAA, Engine and Propeller Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the New York ACO.

(e) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on April 22, 1994.

S.R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94-10232 Filed 4-28-94; 8:45 am]

BILLING CODE 4910-13-U

14 CFR Part 39

[Docket No. 94-NM-35-AD]

Airworthiness Directives; Raytheon Corporate Jets Model BAe 125-1000A Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Raytheon Corporate Jets Model BAe 125-1000A series airplanes. This proposal would require modification of the control circuit wiring for the engine thrust reversers and of the wiring for annunciation of rudder bias status. This proposal is prompted by a report that a single dormant electrical fault in the control circuit of the thrust reversers could cause a thrust reverser to deploy if the pilot selects reverse thrust during the approach phase of flight; and by reports that if an asymmetric thrust reverser condition occurs, the correct rudder bias may not be annunciated before the flight crew applies high reverse thrust. The actions specified by the proposed AD are intended to prevent adversely affected controllability of the airplane.

DATES: Comments must be received by June 22, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 94-NM-35-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Raytheon Corporate Jets Inc., 3 Bishops Square, St. Albans Road West, Hatfield, Hertfordshire, AL109NE, United Kingdom. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: William Schroeder, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (206) 227-2148; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 94-NM-35-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 94-NM-35-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on certain Raytheon Corporate Jets Model BAe 125-1000A series airplanes. The CAA advises that a single dormant electrical fault in the control circuit of the thrust reversers could cause a thrust reverser to deploy if the pilot selects reverse thrust during the approach phase of flight. The CAA also advises that, currently, a 4-second time delay occurs in the rudder bias annunciation system. This annunciation system provides a warning to the flight crew that an asymmetric thrust reverser condition may exist. If an asymmetric thrust reverser condition occurs, and the flight crew does not receive sufficient warning from the annunciation system,

the flight crew may apply high reverse thrust.

These conditions, if not corrected, could adversely affect the controllability of the airplane.

Raytheon Corporate Jets has issued Service Bulletin SB.78–9–3662B, dated January 7, 1994, that describes procedures for modification of the control circuit wiring of the left and right engine thrust reversers and of the wiring for annunciation of rudder bias status. The modification involves grounding the normally closed contacts of the deploy microswitch to remove possible dormant shorts, wiring new independently signalled contacts in series with the power supply to the deploy valve solenoid, separating the wiring for the rudder bias not inhibited annunciation (warning) from the wiring for the uncommanded hydraulic pressure warning to bypass the 4-second time delay, and other miscellaneous wiring changes to the thrust reverser wiring system. Accomplishment of the modification will improve the integrity of the electrical control circuits of the thrust reversers by eliminating the possibility of single dormant failures in the thrust reverser system. Accomplishment of the modification will also correct the status annunciation of the rudder bias by ensuring that, when an asymmetric thrust reverser condition occurs, the status of the rudder bias system is annunciated to the flight crew before the power settings for high reverse thrust are applied. The CAA classified this service bulletin as mandatory in order to assure the continued airworthiness of these airplanes in the United Kingdom.

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require modification of the control circuit wiring for the engine thrust reversers and of the wiring for annunciation of rudder bias status. The actions would be required to be accomplished in accordance with the service bulletin described previously.

The FAA estimates that 19 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 60 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Required parts would cost approximately $1,000 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $81,700, or $4,300 per airplane.

The total cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Raytheon Corporate Jets, Inc.: Docket 94–NM–35–AD.

Applicability: Model BAe 125–1000A series airplanes; serial numbers 258151, 258159, and 259003 through 259044 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent in-flight deployment of a thrust reverser, which could adversely affect the controllability of the airplane, accomplish the following:

(a) Within 8 months after the effective date of this AD, modify the control circuit wiring for the left and right engine thrust reversers and rudder bias status annunciation, in accordance with Raytheon Corporate Jets Service Bulletin SB.78–9–3662B, dated January 7, 1994.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(c) Special flight permits may be issued in accordance with Federal Aviation Regulations (FAR) 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on April 22, 1994.

S.R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–10231 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 91

[Docket No. 27717; Notice No. 94–16]

RIN 2120–AF35

Notification to ATC of Deviations From ATC Clearances and Instructions in Response to Traffic Alert and Collision Avoidance System Resolution Advisories

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to codify a previously announced policy extended to pilots during the initial testing of TCAS, during the Limited Implementation Plan (LIP) for TCAS, and during the actual implementation of TCAS under the TCAS Transition Plan (TTP) that permitted pilots to deviate from an air traffic control (ATC) clearance or instruction in non-emergency situations in response to a traffic alert and collision avoidance system (TCAS) resolution advisory (RA). The language contained in current regulations suggests that deviation from an ATC clearance is only authorized in an emergency situation. This proposal would add the TCAS RA as a reason to deviate from a clearance. This proposal would require that whenever a pilot deviates from an ATC clearance or instruction, ATC would be advised as soon as practicable. This proposal is intended to clarify and define pilot reporting requirements in the event a pilot deviates from an air traffic control clearance or instruction in response to a TCAS resolution advisory.

DATES: Comments must be received on or before May 31, 1994.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC–200), Docket No. 27717, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. 27717. Comments may be examined in room 915G weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mrs. Ellen Crum, Air Traffic Rules Branch, ATP–230, Airspace Rules and Aeronautical Information Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking action on this proposed rulemaking. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with Federal Aviation Administration (FAA) personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a pre-addressed, stamped postcard on which the following statement is made: "Comment to Docket No. 27717." The postcard will be date stamped and mailed to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–430, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

On December 26, 1989, the FAA published a petition for rulemaking received from the Air Transport Association (ATA) that requested the FAA to amend § 91.75(a) of the Federal Aviation Regulations (FAR) to permit a pilot to deviate from an ATC clearance when responding to a TCAS RA (54 FR 52951). [Effective August 18, 1990, Part 91 of the FAR was revised (54 FR 34284; August 18, 1989) to renumber all of its sections. Section 91.75(a) was renumbered as § 91.123(a).]

Currently, the FAR's do not provide for any deviation from an ATC clearance or instruction except in an emergency situation. However, during the initial trial and implementation of TCAS II, the FAA notified pilots that no enforcement action would be initiated if the pilot deviated from ATC clearances when responding to TCAS RA's. This notification was provided in a letter signed by the former FAA administrator James B. Busey. The letter was published as appendix C to the TCAS Transition Program (TTP) Project Management Plan, dated August 1, 1990. The FAA also provided procedural guidance, including ATC communication requirements, in Advisory Circular 120–55, "Air Carrier Operational Approval and Use of TCAS II" dated October 23, 1991, and later amended as AC 120–55A dated August 27, 1993. The policy and guidance proved successful during the testing and implementation of TCAS II.

The ATA petition states that TCAS is an advisory system and not an emergency system. The ATA felt that pilots should be able to comply with a TCAS RA without exercising emergency authority. The ATA petition mirrors current FAA policy and guidance for use of TCAS II. The petition drew no negative comments and one positive comment, from the Airline Pilots Association (ALPA), in support of the proposal.

Section 91.123 of the FAR states, in pertinent part, that each pilot in command who, in an emergency, deviates from an ATC clearance or instruction shall notify ATC of that deviation as soon as possible. This provision could be interpreted to mean that deviations for non-emergency related reasons are not authorized.

TCAS II is now installed on approximately 6000 aircraft worldwide. Over the past 3 years, more than 15 million flight hours of operational experience have been accumulated.

TCAS Overview

TCAS equipment in an airplane interrogates the ATC transponders of other aircraft nearby. By computer analysis of the replies, TCAS equipment determines which transponder-equipped aircraft are potential collision hazards and provides appropriate advisory information to the flight crew. If a TCAS-equipped airplane interrogates an aircraft that is equipped with a Mode A transponder, range and azimuth information will be provided to the TCAS-equipped aircraft. If the interrogated aircraft is equipped with an altitude encoding transponder (Mode C or Mode S), then relative altitude information will be provided in addition to range and azimuth. TCAS equipment cannot detect the presence of an aircraft that is not equipped with a transponder.

TCAS equipment performs proximity tests on each detected target. If the path of a target is projected to pass within certain horizontal and vertical distance criteria, then that target is declared an intruder. An intruder that is determined to pose an even greater risk of collision is declared a threat. When a threat is

declared, TCAS equipment will determine the appropriate direction that the TCAS-equipped aircraft must move (climb or descent) and the vertical rate that must be maintained to achieve separation from the threat.

There are two classes of advisories provided by TCAS equipment. The first class, traffic advisories (TA's), provides supplemental information to the pilot that aids in visual detection of other aircraft. TA's include the range, bearing, and, if the intruder has altitude-reporting equipment, the altitude of the intruding aircraft relative to the TCAS-equipped aircraft. TA's without altitude may also be provided from non-altitude reporting transponder-equipped intruders. The second class of advisories, resolution advisories (RA's), indicates the vertical direction and rate that must be achieved to prevent insufficient separation.

TCAS I equipment provides TA's that only assist the pilot in visually detecting an intruder aircraft. TCAS II equipment provides TA's and RA's only in the vertical plane. TCAS III, which is still under development, will provide TA's and RA's in both the vertical and horizontal planes.

Related Agency Actions

On January 10, 1989, the FAA published a final rule (54 FR 940), the "TCAS rule," which required airplanes having more than 30 passenger seats and operated under parts 121, 125, or 129 to be equipped with TCAS II by December 30, 1991. The TCAS rule also required airplanes having 10 to 30 passenger seats and operated under parts 129 or 135 to be equipped with TCAS I by February 9, 1995.

On April 9, 1990, the FAA amended the TCAS rule by revising the schedule for the installation of TCAS II equipment in airplanes having more than 30 passenger seats (55 FR 13242). Operators of airplanes having more than 30 passenger seats and operated under part 121 are required to install TCAS II equipment in accordance with a phased-in schedule so that 100% of an operator's covered airplanes will have TCAS II equipment by December 30, 1993. Operations conducted under parts 125 or 129 with airplanes having more than 30 passenger seats are also required to install TCAS II equipment by December 30, 1993.

The Proposal

The FAA believes that most TCAS RA's will involve changes in the rate of descent or climb in order to mitigate potential collision hazards. Such TCAS RA's routinely will not necessitate a pilot deviating from an ATC clearance or instruction. The issue of advising ATC of the receipt of or compliance with a TCAS RA that does not involve a deviation from a clearance or instruction is a matter of pilot judgment and discretion.

The FAA also has determined that the majority of deviations from ATC clearances or instructions in response to TCAS RA's will be appropriate and necessary to resolve potential collision hazards with other transponder-equipped aircraft. In such cases, pilots executing the appropriate maneuvers are expected to advise ATC of the deviations as soon as possible.

The current language of § 91.123(c) provides that a pilot who deviates from an ATC clearance or instruction, in an emergency, shall notify ATC as soon as possible. If a pilot deviates from an assigned altitude in response to a TCAS RA, but does not believe that an emergency exists, that pilot may determine, based on current § 91.123(c), that an advisory to ATC is not required. The proposal would specifically state that a report to ATC is required.

Air traffic controllers base their control and traffic management decisions on the expectation that pilots will comply with ATC-assigned routes, altitudes, and other clearances and instructions. If a pilot must deviate from an ATC clearance or instruction, the controller mut be given timely notification of that deviation so that appropriate instructions and/or advisories can be issued to ensure a safe, orderly, and expeditious flow of traffic. By advising ATC as soon as possible after a deviation, the controller can evaluate the situation, determine the most appropriate and safe course of action, and issue alternate instructions if necessary.

The FAA has concluded that this proposed rule is necessary to codify existing policy for pilots to notify ATC as soon as possible after any deviation from an ATC clearance or instruction in response to a TCAS RA, whether that deviation was emergency-related or not. Further, the FAA has determined that this proposed rule will not add or change any notification or reporting requirements for deviations that are necessary to resolve potential or imminent collision hazards. The FAA has always intended that notification to ATC of a deviation from a clearance or instruction is necessary and required, whether that deviation is emergency-related or not. This action serves only to reinforce and codify that intention.

Accordingly, the FAA proposes to amend § 91.123 of the FAR to authorize deviations from an ATC clearance or instruction when responding to a TCAS RA. In addition, pilots would be required to advise ATC of the TCAS RA deviation from an ATC clearance or instruction whether emergency-related or not.

Economic Evaluation

The FAA has determined that this NPRM is not a "significant regulatory action", as defined by Executive Order 12866 (Regulatory Planning and Review). The anticipated benefits and costs associated with this NPRM are summarized below. (A detailed discussion of costs and benefits is contained in the full evaluation in the docket for this NPRM). The agency has determined that this proposed rule would be cost-beneficial because it imposes no costs and would promote air safety. There would not be any changes in notification or reporting requirements for deviations from ATC clearances that are necessary to avoid potential collision hazards. The proposal would clarify and codify existing policy and guidance requirements that pilots who deviate from their assigned altitudes in response to a TCAS resolution advisory provide timely notice of that deviation to air traffic control in both non-emergency situations and emergency situations. Such notification would give controllers an opportunity to resolve any conflicts resulting from a TCAS II-equipped aircraft being at other than the assigned altitude.

International Trade Impact Statement

This proposed rule would not impose a competitive disadvantage to either U.S. air carriers doing business abroad or foreign air carriers doing business in the United States. This assessment is based on the fact that this proposed rule would not impose additional costs on either U.S. or foreign air carriers.

Regulatory Flexibility Determination

In accordance with the Regulatory Flexibility Act of 1980, the FAA has determined that this proposed rule would not have a significant economic impact, positive or negative, on a substantial number of small entities. This assessment is based on the fact that the proposed rule would not impose any additional cost on aircraft operators.

Paperwork Reduction Act

There are no requirements for information collection associated with this proposed rule that would require approval from the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (Pub. L. 96–511).

Federalism Implications

The regulation proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

International Civil Aviation Organization and Joint Aviation Regulations

In keeping with the U.S. obligations under the Convention on International Civil Aviation (ICAO), it is FAA policy to comply with ICAO Standards and Recommended Practices (SARP) to the maximum extent practicable. The FAA has determined that this NPRM complies with the ICAO SARP.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this proposed regulation is not a "significant regulatory action" under Executive Order 12866. This proposed regulation is not considered significant under DOT Order 2100.5, Policies and Procedures (44 FR 11034; February 26, 1979). In addition, the FAA certifies that this proposed regulation, if adopted, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A regulatory evaluation of the NPRM, including a Regulatory Flexibility Determination and Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Aviation safety.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend § 91.123 of the Federal Aviation Regulations (14 CFR part 91) as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 *et seq.*; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970 Comp., p. 902; 49 U.S.C. 106(g).

2. Section 91.123 is amended by revising paragraphs (a) and (c) as follows:

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory. However, except in Class A airspace, a pilot may cancel an IFR flight plan if the operation is being conducted in VRR weather conditions. When a pilot is uncertain of an ATC clearance, that pilot shall immediately request clarification from ATC.

* * * * *

(c) Each pilot in command who, in an emergency, or in response to a traffic alert and collision avoidance system (TCAS) resolution advisory, deviates from an ATC clearance of instruction shall notify ATC of that deviation as soon as possible.

* * * * *

Issued in Washington, DC on April 21, 1994.

Harold W. Becker,

Manager, Airspace Rules and Aero Information Division, Air Traffic Rules & Procedures Service.

[FR Doc. 94–10167 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

Risk Assessment For Holding Company Systems

AGENCY: Commodity Futures Trading Commission.

ACTION: Extension of comment period.

SUMMARY: On March 1, 1994, the Commodity Futures Trading Commission ("Commission") published in the **Federal Register** a request for public comment on proposed rules to implement the risk assessment provisions of the Futures Trading Practices Act of 1992. The original comment period expires on May 2, 1994. 59 FR 9689 (March 1, 1994). By letter dated April 15, 1994, the Futures Industry Association (FIA) requested a 60-day extension of the comment period. FIA indicated that futures commission merchants which are not part of organizations that have banking or securities entities in particular need to assess the availability of the information being requested under the proposed rules. FIA further indicated that it is working with the securities and banking industries on this matter. In order to ensure that all interested parties have an adequate opportunity to submit meaningful comments, the Commission has determined to extend the comment period for an additional sixty days.

DATES: Written comments must be received on or before July 1, 1994.

ADDRESSES: Comments should be sent to Jean A. Webb, Secretary of the Commission, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581. Reference should be made to "Proposed Risk Assessment Rules."

FOR FURTHER INFORMATION CONTACT: Susan C. Ervin, Deputy Director/Chief Counsel, Lawrence B. Patent, Associate Chief Counsel, or Lawrence T. Eckert, Attorney Adviser, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Telephone: (202) 254–8955.

Issued in Washington, DC on April 22, 1994, by the Commission.

Lynn K. Gilbert,

Deputy Secretary of the Commission.

[FR Doc. 94–10215 Filed 4–28–94; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF EDUCATION

34 CFR Parts 300, 307, 315, 318, 346, 350, 351, 359, 361, 363, 365, 366, 367, 369, 371, 373, 374, 376, 377, 378, 379, 380, 385, 386, 387, 388, and 389

RIN 1820–AB26

Office of Special Education and Rehabilitative Services Programs

AGENCY: Department of Education.

ACTION: Withdrawal of notice of proposed rulemaking; nomenclature changes.

SUMMARY: The Secretary withdraws a notice of proposed rulemaking (NPRM) for revision of certain program regulations administered by the Office of Special Education and Rehabilitative Services (OSERS) to change the term "severe" in all its forms to "significant" in referring to an individual's disability. No final regulations will be issued based on the NPRM. However, the Secretary

does plan to incorporate the change in program regulations implementing Title VII of the Rehabilitation Act of 1973, as amended (Act). These program regulations are currently being developed to implement changes required by the Rehabilitation Act Amendments of 1992 and the Rehabilitation Act Amendments of 1993. The Secretary expects to publish these proposed regulations shortly.

DATES: The NPRM is withdrawn effective April 29, 1994.

FOR FURTHER INFORMATION CONTACT: Gregory March, U.S. Department of Education, 400 Maryland Avenue, SW., room 3124, Mary E. Switzer Building, Washington, DC 20202–2741. Telephone: (202) 205–8441 for voice or TDD services.

SUPPLEMENTARY INFORMATION: On October 27, 1993, the Secretary published an NPRM in the **Federal Register** proposing to revise certain program regulations administered by OSERS to change the term "severe" in all its forms to "significant" in referring to an individual's disability (58 FR 57938) (Nomenclature NPRM). Also on October 27, 1993, the Secretary published a separate NPRM (58 FR 57942) on the indicators of minimum compliance with the evaluation standards under the Centers for Independent Living Program (Indicators NPRM). The Indicators NPRM notified the public of the Nomenclature NPRM and advised the public to direct their comments on the proposed nomenclature change to the Nomenclature NPRM.

The Secretary received 37 comments on the Nomenclature NPRM expressing a wide range of points of view about the proposed change. Commenters favoring the change generally expressed the view that the term "significant" is less pejorative than "severe" in referring to an individual's disability. These comments were generally received from commenters with an interest in the Independent Living Services and Centers for Independent Living programs authorized by Title VII of the Act. Commenters opposing the change raised several issues. Some suggested that the change is technically not accurate and that a change in meaning would result despite departmental assurances to the contrary. Others suggested that the change would be confusing and burdensome to implement and that the change should be made through legislation rather than through rulemaking. These comments were generally received from commenters with an interest in the Vocational Rehabilitation Services programs authorized by Title I of the Act.

The Secretary received 102 comments on the "Indicators NPRM," of which 56 included comments on the proposed change of the term "severe" to "significant." Of these 56 comments, only 4 expressed concern with the proposed change. Approximately 28 commenters specifically approved of the proposed change, and 24 commenters used the new terminology in their own comments, implicitly indicating their approval of the proposed change. That is, these 24 commenters used the term "significant" instead of the term "severe" in their comments, even though they did not specifically approve of the proposed change. The remaining 50 commenters expressed no views on the proposed change and did not use either of the terms "severe" or "significant" in their comments.

Based on the favorable support for the nomenclature change received from the independent living community, the Secretary plans to propose the change in program regulations implementing Title VII of the Act. The proposed Title VII regulations would implement changes to the Act made by the Rehabilitation Act Amendments of 1992 (Pub. L. 102–569) and the Rehabilitation Act Amendments of 1993 (Pub. L. 103–73). The Secretary expects to publish these proposed regulations shortly. The Secretary does not plan to make the nomenclature change in any other program regulations.

Dated: April 25, 1994.

Howard R. Moses,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94–10273 Filed 4–28–94; 8:45 am]

BILLING CODE 4000–01–P

Notices

Federal Register
Vol. 59, No. 82
Friday, April 29, 1994

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forms Under Review by Office of Management and Budget

April 22, 1994.

The Department of Agriculture has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extension, or reinstatements. Each entry contains the following information.

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, room 404–W Admin. Bldg., Washington, DC 20250, (202) 690–2118.

Revision

- *Food and Nutrition Service*
  Commodity Supplemental Food Program Regulation.
  Recordkeeping; Semi-annually; Annually.
  Individuals or households; State or local governments; Federal agencies or employees; Non-profit institutions; 689,684 responses; 350,466 hours.
  Susan Stromberg (703) 305–2710.
- *Farmers Home Administration*
  7 CFR 1924–B, Management Advice of Individual Borrowers and Applicants.
  FmHA 431–2, 4; 432–1, 2, 10; 1924–22, 23, 24, 27.
  Recordkeeping; On occasion.
  Individuals or households; Farms; Businesses or other for-profit; Small businesses or organizations; 232,550 responses; 1,428,012 hours.
  Jack Holston (202) 720–9736.

Extension

- *Animal and Plant Health Inspection Service*
  U.S. Origin Health Certificates.
  VS 17–140.
  On occasion.
  Farms; Businesses or other for-profit; Federal agencies or employees; 42,067 responses; 21,009 hours.
  Dr. Andrea Morgan (301) 436–8383.

New Collection

- *Farmers Home Administration*
  7 CFR 1951–F, Analyzing Credit Needs and Graduation of Borrower—Addendum I.
  On occasion.
  Individuals or households; State or local governments; Farms; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 155,000 responses; 38,750 hours.
  Jack Holston (202) 720–9736.

Larry K. Roberson,
Deputy Department Clearance Officer.
[FR Doc. 94–10221 Filed 4–28–94; 8:45 am]
BILLING CODE 3410–01–M

Office of the Secretary

Agricultural Biotechnology Research Advisory Committee; Renewal

Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that the Secretary of Agriculture is re-establishing the Agricultural Biotechnology Research Advisory Committee (ABRAC). The purpose of the Committee is to advise the Secretary through the Assistant Secretary for Science and Education with respect to policies, programs, operations and activities associated with the conduct of agricultural biotechnology research.

The Secretary has determined that the work of the Committee is in the public interest and is relevant to the duties of the Department of Agriculture.

The Committee, including the Chair and Vice-Chair, will consist of 15 voting members, of whom no more than three will be federal employees. The members of the Committee will have professional or personal qualifications or experience in one or more of the following areas: Recombinant-DNA research in plants, animals and microbes; food science; fisheries science; ecology/environmental science; agricultural; production practices; biological containment and field release; applicable laws and regulations; standards of professional conduct and practice; public attitudes; public health/epidemiology; occupational health and ethics; human medicine; and socioeconomic impacts.

Done at Washington, DC this 21st day of April, 1994.

Wardell Townsend,
Assistant Secretary for Administration.
[FR Doc. 94–10222 Filed 4–28–94; 8:45 am]
BILLING CODE 3410–22–M

Office of the Secretary

[CN 94–005]

Proposal to Reestablish the Advisory Committee on Universal Cotton Standards

AGENCY: Office of the Secretary, USDA.

ACTION: Proposal to reestablish the Advisory Committee on Universal Cotton Standards.

SUMMARY: The U.S. Department of Agriculture (USDA) is proposing to reestablish the advisory committee to review official Universal Standards for American Upland cotton prepared by USDA and make recommendations regarding the establishment or revision of the standards.

DATES: Comments must be received by May 16, 1994.

ADDRESSES: Send written comments to: Mary E. Atienza, Deputy Director, Cotton Division, AMS, USDA, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: Mary E. Atienza (202) 720—3193.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that the Secretary of Agriculture intends to reestablish the Advisory Committee on Universal Cotton Standards composed of foreign and domestic representatives of the cotton industry. The purpose of the committee is to

review official Universal Standards for U.S. Upland cotton prepared by USDA and make recommendations regarding the establishment or revision of the standards.

The Secretary has determined that the work of the committee is in the public interest and is in connection with the duties of the Department of Agriculture. No other advisory committee in existence is capable of advising and assisting the Department on the task assigned, nor does the Department have an alternative means to obtain the technical and practical expertise needed from private industry.

Equal opportunity practices, in line with USDA policies, will be followed in all appointments to the committee. To ensure that the recommendations of the committee have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Balanced committee membership would be attained domestically and internationally through the following committee composition:

Representation by Domestic Industry

The U.S. cotton industry's committee membership will be comprised of 12 producers and ginners, 6 representatives of merchandising firms, and 6 representatives of textile manufacturers. These representatives from the domestic industry will be appointed by the Secretary of Agriculture.

Each member will have one vote. Accordingly, voting privileges will be divided as follows: (1) U.S. cotton producers and ginners—12 votes; (2) U.S. merchandising firms—6 votes; (3) U.S. textile manufacturers—6 votes.

Representation by Foreign Signatory Associations

There will be 2 committee members from each of the foreign signatory associations. These committee members will be designated by the respective associations. Voting privileges will be divided as follows: (1) Foreign signatory merchant associations—6 votes; (2) Foreign signatory spinner associations—6 votes.

Dated: April 18, 1994.

Wardell Townsend,

Assistant Secretary for Administration.

[FR Doc. 94–10223 Filed 4–28–94; 8:45 am]

BILLING CODE 3410–02–M

Forest Service

Hobo Cornwall Project Area Timber Sales, Idaho Panhandle National Forests, St. Maries Ranger District, Shoshone County, ID

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an environmental impact statement.

SUMMARY: In accordance with Forest Service Handbook 1909.15, Chapter 21.2, it is necessary to publish a revised notice of intent in the **Federal Register** regarding any major changes, such as a delay of more than 6 months in filing either the draft or final EIS. Notice is hereby given that the Draft EIS for the Hobo Cornwall Project area should be available for public review in June, 1994 and the Final EIS is scheduled to be completed by January, 1995.

Notice is also hereby given that the purpose and need stated in the initial NOI has been changed to incorporate ecosystem management principles. The revised purpose and need for this project is as follows:

- To achieve goals, objectives, and desired future conditions for the Hobo Cornwall Project Area as described in the Forest Plan (1987) for the Idaho Panhandle National Forests.
- To provide wood products from the National Forest.
- To provide a viable ecosystem management plan within the Hobo Cornwall Project Area consistent with the management of all National Forest lands.

Reference: Federal Register, Volume 57, No. 143, pages 32966–32967, dated Friday, July 24, 1992.

The policy of the USDA Forest Service prohibits discrimination on the basis of race, color, national origin, age, religion, sex disability, familial status, or political affiliation. People believing they have been discriminated against in any Forest Service related activity should write to: Chief, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Tracy J. Gravelle, St. Maries Ranger District, P.O. Box 407, St. Maries, Idaho, 83861. Phone: 208–245–2531.

Dated: April 18, 1994.

Bradley J. Gilbert,

District Ranger, St. Maries Ranger District, Idaho Panhandle National Forests.

[FR Doc. 94–10188 Filed 4–28–94; 8:45 am]

BILLING CODE 3410–11–M

A. M. Timber Sale, Okanogan National Forest, Okanogan County, WA

AGENCY: Forest Service, USDA.

ACTION: Cancellation of an environmental impact statement.

SUMMARY: On November 21, 1991, a notice of intent to prepare an environmental impact statement (EIS) for the A. M. Timber Sale, was published in the **Federal Register** (56 FR 58679). The majority of the analysis area for this timber sale falls in an area identified as both a Key Watershed and Late-Successional Reserve in the Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl. Because of the restrictions on timber harvest activities in Late-Successional Reserves and on road construction in unroaded portions of inventoried roadless areas in Key Watersheds, I have decided to terminate the environmental analysis process. No draft or final environmental impact statement will be issued for the A. M. Timber Sale.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this cancellation to Arlo VanderWoude, Timber Management Assistant, Twisp Ranger District, P.O. Box 188, Twisp, Washington 98856 or telephone (509) 997–2131.

Dated: April 20, 1994.

Billie Hansen,

Acting Forest Supervisor.

[FR Doc. 94–10228 Filed 4–28–94; 8:45 am]

BILLING CODE 3410–11–M

Jackson Creek Timber Sales, Okanogan National Forest, Okanogan County, WA

AGENCY: Forest Service, USDA.

ACTION: Cancellation of an environmental impact statement.

SUMMARY: On March 30, 1992, a notice of intent to prepare an environmental impact statement (EIS) for the Jackson Creek Timber Sales, was published in the **Federal Register** (57 FR 10751). No funding is available for the project at this time. I have decided to terminate the environmental analysis process. No draft or final environmental impact statement will be issued for the Jackson Creek Timber Sales at this time. If planning begins again on this project a new notice of intent will be issued.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this cancellation to Michael Alvarado, Project Coordinator, Tonasket Ranger

District, P.O. Box 466, Tonasket, Washington 98855 or telephone (509) 486–2186.

Dated: April 20, 1994.

Billie Hansen,

Acting Forest Supervisor.

[FR Doc. 94–10229 Filed 4–28–94; 8:45 am]

BILLING CODE 3410–11–M

Ridge Area Timber Sales, Including Ridge and M&M Timber Sales, Okanogan National Forest, Okanogan County, WA

AGENCY: Forest Service, USDA.

ACTION: Cancellation of an environmental impact statement.

SUMMARY: On June 6, 1991, a notice of intent to prepare an environmental impact statement (EIS) for the Ridge Area Timber Sales, which included the Ridge and Milk Timber Sales, was published in the **Federal Register** (56 FR 26048). The notice of intent was revised on July 9, 1992 in the **Federal Register** (57 FR 30463), and the title of the document was revised to "Ridge and M&M Timber Sales." The majority of the analysis area for these timber sales falls in areas identified as Late-Successional Reserves in the Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl. Additionally, the M&M Timber Sale falls within a Key Watershed. Because of the restrictions on timber harvest activities in Late-Successional Reserves, and on road construction in unroaded portions of inventoried roadless areas in Key Watersheds, I have decided to terminate the environmental analysis process. No draft or final environmental impact statement will be issued for the Ridge Area Timber Sales.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this cancellation to Arlo VanderWoude, Timber Management Assistant, Twisp Ranger District, P.O. Box 188, Twisp, Washington 98856 or telephone (509) 997–2131.

Dated: April 20, 1994.

Billie Hansen,

Acting Forest Supervisor.

[FR Doc. 94–10230 Filed 4–28–94; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of application to amend certificate.

SUMMARY: The Office of Export Trading Company Affairs ("OETCA"), International Trade Administration, Department of Commerce, has received an application to amend an Export Trade Certificate of Review. This notice summarizes the proposed amendment and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: W. Dawn Busby, Director, Office of Export Trading Company Affairs, International Trade Administration, 202/482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. An original and five (5) copies should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, room 1800H, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Comments should refer to this application as "Export Trade Certificate of Review, application number 91–2A007."

OETCA has received the following application for an amendment to Export Trade Certificate of Review No. 91–00007, which was issued on January 21, 1992 (57 FR 5133, February 12, 1992). A previous amendment to the Certificate was issued on June 23, 1993 (58 FR 34990, June 30, 1993).

Summary of the Application

Applicant: National Association of Energy Service, Companies ("NAESCO"), 1440 New York Avenue, Washington, DC 20005, Contact: A. John Armstrong, Counsel, Telephone: (703) 356–3100.

Application No.: 91–2A007.

Date Deemed Submitted: April 22, 1994.

Request For Amended Conduct

NAESCO seeks to amend its Certificate to add Heatac Energy Performance Services, Inc. of Lester, Pennsylvania and its Controlling Entity—Eastern Pennsylvania Development Company of Philadelphia, Pennsylvania as "Members" within the meaning of § 325.21 of the Regulations (15 CFR 325.2 (l)).

Dated: April 22, 1994.

W. Dawn Busby,

Director, Office of Export Trading Company Affairs.

[FR Doc. 94–10311 Filed 4–28–94; 8:45 am]

BILLING CODE 3510–DR–P

Minority Business Development Agency

Business Development Center Applications: Las Vegas, Nevada

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Cancellation of notice.

SUMMARY: This notice cancels the advertisement as it appeared in the January 14, 1994, issue for the Minority Business Development Agency (MBDA) announcement that it is soliciting competitive applications under its Minority Business Development Center (MBDC) Program to operate an MBDC in the Las Vegas, Nevada Geographic Service Area.

CLOSING DATE: The closing date for submitting an application was February 18, 1994.

ADDRESS: San Francisco Regional Office, Minority Business Development Agency, U.S. Department of Commerce, 221 Main Street, suite 1280, San Francisco, California 94105, 415/744–3001.

FOR FURTHER INFORMATION CONTACT: Melda Cabrera, Regional Director, San Francisco Regional Office at 415/744–3001.

SUPPLEMENTARY INFORMATION: Questions concerning the preceding information can be obtained by contacting the San Francisco Regional Office.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Dated: April 20, 1994.

Melda Cabrera,

Regional Director, San Francisco Regional Office.

[FR Doc. 94–10191 Filed 4–28–94; 8:45 am]

BILLING CODE 3510–21–M

National Oceanic and Atmospheric Administration

Evaluation of State Coastal Management Programs and National Estuarine Research Reserve

AGENCY: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice of intent to evaluate.

SUMMARY: The NOAA Office of Ocean and Coastal Resource Management (OCRM) announces its intent to evaluate the performance of the Maryland and North Carolina Coastal Management Programs and the Chesapeake Bay (Virginia) National Estuarine Research Reserve Program.

These evaluations will be conducted pursuant to section 312 of the Coastal Zone Management Act of 1972 (CZMA), as amended. The CZMA requires a continuing review of the performance of coastal states with respect to coastal management. Evaluation of Coastal Management Programs requires findings concerning the extent to which a state has met the national coastal management objectives, adhered to its Coastal Management Plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA. The evaluations will include a site visit, consideration of public comments, and consultations with interested Federal, State, and local agencies and members of the public. Public meetings are held as part of the site visits.

Notice is hereby given of the dates of the site visits for the listed evaluations, and the dates, local times, and locations of public meetings during the site visits.

The Maryland Coastal Management Program evaluation site visit will be from June 6 to June 10, 1994. A public meeting will be held on Wednesday, June 8, 1994 at 7 p.m. at the Tawes State Office Building, Annapolis, Maryland.

The North Carolina Coastal Management Program evaluation site visit will be from June 6 to June 10, 1994. A public meeting will be held on Wednesday, June 8, 1994 at 7 p.m., at the Carteret County Courthouse, District Courtroom #1, Beaufort, North Carolina.

The Chesapeake Bay National Estuarine Research Reserve in Virginia site visit will be from June 20 to June 24, 1994. A public meeting will be held on June 22, 1994, at 7 p.m., at Virginia Institute of Marine Science, Waterman's Hall, Route 1208, Gloucester Point, Virginia.

The States will issue notice of the public meeting(s) in a local newspaper(s) at least 45 days prior to the public meeting(s), and will issue other timely notices as appropriate.

Copies of the State's most recent performance reports, as well as OCRM's notifications and supplemental request letters to the States, are available upon request from OCRM. Written comments from interested parties regarding these Programs are encouraged and will be accepted until 15 days after the site visit. Please direct written comments to Vickie A. Allin, Chief, Policy Coordination Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910. When the evaluation is completed, OCRM will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings.

FOR FURTHER INFORMATION CONTACT: Vickie A. Allin, Chief, Policy Coordination Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, (301) 713–3090.

(Federal Domestic Assistance Catalog 11.419, Coastal Zone Management Program Administration)

W. Stanley Wilson,

Assistant Administrator for Ocean Services and Coastal Zone.

[FR Doc. 94–10303 Filed 4–28–94; 8:45 am]

BILLING CODE 3510–08–M

Florida Keys National Marine Sanctuary Advisory Council; Open Meeting

AGENCY: Sanctuaries and Reserves Division (SRD), Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

SUMMARY: The Council was established in December 1991 to advise and assist the Secretary of Commerce in the development and implementation of the comprehensive management plan for the Florida Keys National Marine Sanctuary.

TIME AND PLACE: May 18,1994 from 1 p.m. until adjournment. The meeting location will be at the Monroe County Government Center, Conference Room, 2696 Overseas Highway, Marathon, Florida.

AGENDA: 1. Update on the status of the Draft Environmental Impact Statement and Management Plan for the Florida Keys National Marine Sanctuary.

PUBLIC PARTICIPATION: The meeting will be open to public participation; the time period from 4 p.m. to 5 p.m., will be set aside for oral comments and questions. Seats will be set aside for the public and the media. Seats will be available on a first-come first-served basis.

FOR FURTHER INFORMATION CONTACT: Pamela James at (305) 743–2437 or Ben Haskell at (301) 713–3137.

(Federal Domestic Assistance Catalog Number 11.429, Marine Sanctuary Program)

Dated: April 22, 1994.

W. Stanley Wilson,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 94–10312 Filed 4–28–94; 8:45 am]

BILLING CODE 3510–08–M

[I.D. 042294C]

Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of additional public hearing on scientific research permit application (P557A) and extension of public comment period.

SUMMARY: In response to numerous requests, NMFS will hold an additional public hearing and will extend the public comment period on this application for a scientific research permit to allow harassment of marine mammals and sea turtles by a low frequency sound source and monitor its effects.

DATES: A public hearing will be held in California on May 16, 1994, from 5 p.m. to 10 p.m., at the Santa Cruz Civic Auditorium, 307 Church Street, Santa Cruz, California, co-sponsored with the Monterey Bay National Marine Sanctuary. The period from 5 p.m. to 6 p.m. will be allotted for the applicant to provide a brief description of an updated research program.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, room 13130, Silver Spring, MD 20910 (301/713–2289);

Director, Southwest Region, NMFS, NOAA, 501 West Ocean Boulevard,

suite 4200, Long Beach, CA 90802–4213 (310/980–4016); and

Sanctuary Manager, Monterey Bay National Marine Sanctuary, National Ocean Service, 2560 Garden Road, #101, Monterey, CA 93940 (408/647–4257).

FOR FURTHER INFORMATION CONTACT: All non-Government organizations and scientists who wish to present prepared testimony should contact Aaron King, Monterey Bay National Marine Sanctuary, at the address above or telephone 408/647–4257 or 408/647–4250 (facsimile) at least 48 hours in advance of the hearing so that a general agenda can be prepared. People who are deaf or hearing impaired may place a call through the California Relay Service at 800/735–2922.

A written copy of each testimony to be presented is requested on the day of the hearing. It is advised to use slides or overheads only if absolutely necessary during presentations, and copies of any slides or overheads used are requested to be made available to NMFS on the day of the hearing.

Other people who are interested in making a statement at this hearing should bring a written copy of the statement to the hearing, and will be given an opportunity to make such statements following the prepared testimonies. Anyone who needs additional information or requires special accommodations to attend the public hearing should contact Aaron King at least 7 days in advance of the hearing.

Additional written comments may be sent to the following address: Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, room 13130, Silver Spring, MD 20910, or may be sent by facsimile, if necessary, to 301/713–0376, and must be received by close of business May 31, 1994.

SUPPLEMENTARY INFORMATION: An application for a scientific research permit has been submitted by Scripps Institution of Oceanography, Institute for Geophysics and Planetary Physics, Acoustic Thermometry of Ocean Climate Program, 9500 Gilman Drive, La Jolla, CA 92093–0225.

On February 3, 1994, notice was published in the **Federal Register** (59 FR 5177) that a request for a scientific research permit (P557A) was submitted, to take by incidental harassment several species of marine mammals and sea turtles for purposes of scientific research in waters off the coast of Pt. Sur, California.

On March 10, 1994, notice was published in the **Federal Register** (59 FR 11254) that a public hearing would be held on this scientific research permit application (P557A) and on a related scientific research permit application (P557). This hearing was held in Silver Spring, Maryland, on March 22, 1994.

This permit application is a request to allow harassment of marine mammals and sea turtles by a low frequency (70 Hz) sound source at a depth of 850–900m, and to monitor the effects of the sound on marine mammals and sea turtles. This source is part of the Acoustic Thermometry of Ocean Climate (ATOC) program, and is proposed to be operated from April 1994 through March 1996 off California. The maximum duty cycle will be 8 percent, with a transmission bandwidth of 20 Hz at a level of 195 dB (re 1 uPa at 1m), and with a spectrum level for the peak frequency (70 Hz) at 182 dB.

This permit for the Pt. Sur, California project is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered fish and wildlife (50 CFR part 222), the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*), and fur seal regulations at 50 CFR part 215.

Dated: April 22, 1994.

William W. Fox, Jr.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94–10246 Filed 4–25–94; 12:19 pm]

BILLING CODE 3510–22–P

[I.D. 041894B]

Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application for a public display permit (P565).

SUMMARY: Notice is hereby given that World Safari Company Limited, 2399–1 Kushigamine, Katata, Shirahama-cho, Nishimuro-gun, Wakayama, Japan, has applied in due form for a public display permit to obtain marine mammals.

DATES: Written comments must be received on or before May 31, 1994.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, room 13130, Silver Spring, MD 20910, (301) 713–2289;

Director, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930, (508) 281–9200;

Director, Southwest Region, NMFS, 501 West Ocean Blvd., suite 4200, Long Beach, CA 90802–4213, (310) 980–4016;

Director, Southeast Region, NMFS, 9721 Executive Center Drive, St. Petersburg, FL 33702, (813) 893–3141; and

Director, Northwest Region, NMFS, 7600 Sand Point Way, NE., BIN C15700, Seattle, WA 98155, (206) 526–6150.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, NMFS, 1335 East-West Highway, Silver Spring, Maryland 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries.

Concurrent with the publication of this notice in the **Federal Register**, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

SUPPLEMENTARY INFORMATION: The subject permit is requested to maintain five California sea lions (*Zalophus californianus*) and two elephant seals (*Mirounga leonina*), from unreleasable beached/stranded stock, for purposes of public display, as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et. seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

This application has been submitted in accordance with NMFS policy concerning marine mammals to be maintained in areas outside the jurisdiction of the United States (40 FR 11619, March 12, 1975). In this regard, the certification and statements provided by the Ministry of Agriculture, Forestry and Fisheries, Government of Japan, have been found appropriate and sufficient to allow consideration of the permit application.

The arrangements for transporting and the facilities for maintaining the marine mammals requested have been inspected by a licensed veterinarian, who has certified that such arrangements and facilities are adequate

to provide for the well-being of the marine mammals requested.

Dated: April 21, 1994.

William W. Fox, Jr., Ph.D.

Director, Office of Protected Resources, National Marine Fisheries Service

[FR Doc. 94–10226 Filed 4–28–94; 8:45 am]

BILLING CODE 3510-22-F

Patent and Trademark Office

Public Hearing and Request for Comments on the Standard of Nonobviousness

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of hearing and request for public comments.

SUMMARY: The Patent and Trademark Office (PTO) is conducting a review of the standard of nonobviousness by which inventions are judged to determine whether a more rigorous standard of nonobviousness is needed. As part of this review, the PTO is interested in obtaining public comment on the current standard of nonobviousness both as it is applied by the PTO and as interpreted by the Federal courts, as well as the impact of this standard on promoting the progress of science and useful arts. Interested members of the public are invited to testify and to present written comments on any of the topics of discussion outlined in the supplementary information section of this notice.

DATES: A public hearing will be held on July 20, 1994, at 9 a.m. Those wishing to present oral testimony at the July 20, 1994, hearing must request an opportunity to do so no later than July 8, 1994. Any written comments by those persons offering testimony at the hearings and related to that testimony should be submitted on or before July 8, 1994. Other written comments should be received by the PTO on or before August 31, 1994.

ADDRESSES: Those interested in presenting written comments on the topics contained in the supplementary information section of this notice, or any other related topic, should address their comments to the Commissioner of Patents and Trademarks, marked to the attention of Kathleen G. Dussault, Attorney-Adviser, Office of Legislation and International Affairs. The Hearings will be held in Marriott's Crystal Forum, a part of the Crystal City Marriott Hotel located in The Underground, 1999 Jefferson Davis Highway, Arlington, Virginia. Comments submitted by mail should be sent to Commissioner of Patents and Trademarks, Box 4, Patent and Trademark Office, Washington, DC 20231. Comments can be sent by electronic mail to Internet address comments-obviousness@uspto.gov. Comments may also be submitted by telefax at (703) 305–8885. Written comments should include the following information:

—Name and affiliation of the individual responding;
—An indication of whether comments offered represent the views of the individual's organization or are the respondent's personal views; and
—If applicable, the nature of the respondent's organization (e.g., business, law firm, trade group, university, non-profit organization) and principal areas of business or research activity.

Parties offering testimony or written comments are asked to provide their comments in machine-readable format in one of the following file formats: ASCII text, WordPerfect for DOS or Windows version 4.2 or 5.x, or Word for Macintosh version 4.0 or 5.x.

Persons wishing to testify must notify Kathleen G. Dussault no later than July 8, 1994. Ms. Dussault can be reached by mail sent to her attention addressed to the Commissioner of Patents and Trademarks, Box 4, Washington, DC 20231; by phone at (703) 305–9300; or by telefax at (703) 305–8885. No requests to testify will be accepted through electronic mail.

Written comments and transcripts of the hearings will be available for public inspection in Room 902 of Crystal Park Two, 2121 Crystal Drive, Arlington, Virginia. Persons wishing to obtain a machine-readable copy of the transcripts and public comments should contact Kathleen G. Dussault at the address listed below.

FOR FURTHER INFORMATION CONTACT: Kathleen G. Dussault by telephone at (703) 305–9300; by fax at (703) 305–8885, by electronic mail at dussault@uspto.gov, or by mail marked to her attention addressed to the Commissioner of Patents and Trademarks, Box 4, Washington, DC 20231.

SUPPLEMENTARY INFORMATION:

I. Background

Recent debate has focused on whether United States patent policy is being effectively served by the current standard of nonobviousness both as it is applied by the Patent and Trademark Office during patent examination and as it has been interpreted by the Federal courts. Under 35 U.S.C. 103, a patent may not be obtained "* * * if the differences between the subject matter sought to be patented and the prior art are such the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which subject matter pertains."

In *Graham* v. *John Deere & Co.*, 383 U.S. 1 (1966), the Supreme Court defined a three-part test to be followed to determine the nonobviousness of an invention under 35 U.S.C. 103. Under this test, (1) the scope and content of the prior art are to be determined; (2) the differences between the prior art and the claims at issue are to be ascertained; and (3) the level of ordinary skill in the pertinent art is to be resolved. According to the Court, secondary considerations such as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. The Court noted that as indicia of obviousness or nonobviousness, secondary considerations may have relevancy.

Some critics have charged that the *Graham* v. *John Deere* standard of nonobviousness has been changed by decisions of the Court of Appeals for the Federal Circuit. For example, it is argued that secondary considerations have been given too much weight when determining the nonobviousness of an invention to the extent that an invention with strong commercial success will be found not obvious despite appearing so in light of prior art. Other critics charge that the scope of the prior art to be considered when evaluating the obviousness of an invention has been improperly narrowed, precluding obviousness from being established by combining the teachings of the prior art to produce the claimed invention absent some express teaching or suggestion supporting the combination.

The PTO has the burden of establishing a case of *prima facie* obviousness to support a prior art rejection under 35 U.S.C. 103. This burden can be met when the teachings from the prior art suggest the claimed subject matter to a person of ordinary skill in the art. Once established, the applicant must present evidence or arguments to rebut the Examiner's *prime facie* case. For example, an applicant may argue that there was no teaching or suggestion in the prior art to combine the references in the manner suggested by the Examiner to render the claimed invention obvious. The applicant may also rebut the Examiner's case of *prima facie* obviousness by demonstrating that the references cited by the Examiner teach away from the claimed invention. Some critics argue that more guidance is needed to define

when a *prima facie* case has been established and how it may be successfully rebutted.

It has also suggested that the standard of nonobviousness has been inappropriately lowered. Alleged effects of this "lowered" standard include a decrease in the perceived stature of patented inventions (e.g., patents are being granted on inventions industry views as being trivial, simple or straightforward). Recent debate has also focused on the propriety of the *de novo* standard of review applied by the Court of Appeals for the Federal Circuit and whether greater deference should be given to the obviousness determinations of the PTO and the District Courts on appeal.

To resolve the issues presented, the PTO will conduct a public hearing to examine the issue of nonobviousness in the context of whether or not the current standard of nonobivousness effectively promotes United States patent policy and whether a more rigorous standard for awarding U.S. patents should be pursued.

II. Topics for Discussion

The hearing will address the following topics:

1. Justifications and rationale for and against the nonobviousness standard applied by the PTO and the Federal courts, including:

(a) Is a more rigorous standard of nonobviousness needed? If so, how should the standard be defined?

(b) Should the current standard of nonobviousness be administered differently?

(c) Is the standard of nonobviousness applied differently among the different examining groups within the PTO?

(d) Should the standard of nonobivousness vary according to the field of technology involved?

(e) What role should secondary considerations, such as commercial success, unexpected results, etc., play when determining the nonobviousness of the invention?

(f) Whether a *prima facie* case of obviousness based upon a combination of references should necessarily require "motivation" to combine the teachings of the prior art disclosures? Why or why not? What other standard or standards for evaluating the propriety of combining the teachings of references might be appropriate?

(g) Is the "ordinary level of skill" in the art being interpreted and applied correctly, and if not, what changes are needed?

(h) Whether obviousness determinations should be subject to *de novo* review on appeal to the Court of Appeals for the Federal Circuit? If not, what standard of review should apply?

2. Desirable characteristics of specific guidelines regarding the burden of proof needed to rebut an Examiner's *prima facie* case of obviousness.

(a) Is there a need for more specific guidelines to govern the burden of proof to be followed in determining the nonobviousness of an invention? If so, what should they be?

3. Impact of a more rigorous standard of nonobviousness on promoting industrial and technological progress in the United States and strengthening the national economy.

(a) Would a stricter standard of nonobviousness help or hinder industrial and technological progress in the United States? If so, how?

(b) Is the current standard of nonobviousness applied by the PTO and interpreted by the Federal courts having a positive or negative impact on industrial and technological progress in the United States?

(c) Are problems being experienced in particular areas of technology as a result of the standard of nonobviousness applied by the PTO? If so, what are they?

(d) What would be the effect of a more rigorous standard of nonobviousness on the ability of industry to compete in the international market?

III. Guidelines for Oral Testimony

Individuals wishing to testify must adhere to the following guidelines:

1. Anyone wishing to testify at the hearings must request an opportunity to do so no later than July 8, 1994. No one will be permitted to testify without prior approval.

2. Requests to testify must include the speaker's name, affiliation (if any), phone number, fax number (if available), mailing address, and the questions in each topic that the speaker intends to address in his or her testimony.

3. Time allocated to each speaker will be determined after the final number of speakers has been determined.

4. Speakers must provide a written copy of their testimony for inclusion in the record of the proceedings no later than August 31, 1994.

5. Speakers must adhere to rules established for testimony. These rules will be provided to all speakers no later than July 15, 1994.

A schedule providing approximate times for testimony will be provided to all speakers no later than July 15, 1994. Speakers are advised that the schedule for testimony will be subject to change during the course of the hearing.

Dated: April 21, 1994.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

[FR Doc. 94–10309 Filed 4–28–94; 8:45 am]

BILLING CODE 3510–16–M

COMMODITY FUTURES TRADING COMMISSION

Chicago Mercantile Exchange Futures and Option Contracts on the Nikkei 300 Stock Index and Futures and Options Contracts on Canadian Dollar, Deutsche Mark, Japanese Yen, Pound Sterling, and Swiss Franc Currency Forwards.

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of the terms and conditions of proposed commodity futures and option contracts.

SUMMARY: The Chicago Mercantile Exchange (CME or Exchange) has applied for designation as a contract market for futures and futures option contracts on the Nikkei 300 stock index. In addition, the CME has applied for designation as a contract market for futures and futures option contracts on Canadian Dollar, Deutsche Mark, Japanese Yen, Pound Sterling, and Swiss Franc currency forwards. The CME also has proposed rules providing for the trading of options on currency swaps, *i.e.*, options on spreads between the CME's existing rolling spot currency futures contracts and the proposed currency forward futures contracts. The Acting Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the proposals for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

DATES: Comments must be received on or before May 31, 1994.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Reference should be made to the CME futures and option contracts on the Nikkei 300 stock index or to the CME futures and option contracts on Canadian Dollar, Deutsche Mark, Japanese Yen, Pound Sterling, and Swiss Franc currency forwards.

FOR FURTHER INFORMATION CONTACT: Please contact Stephen Sherrod of the Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581, telephone 202–254–7303.

SUPPLEMENTARY INFORMATION: Copies of the terms and conditions will be

available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 254–6314.

Other materials submitted by the CME in support of the applications for contract market designations may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed terms and conditions, or with respect to other materials submitted by the CME, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581 by the specified date.

Issued in Washington, DC, on April 22, 1994.

Blake Imel

Acting Director.

[FR Doc. 94–10268 Filed 4–28–94; 8:45 am]

BILLING CODE 6351–04–P

DEPARTMENT OF DEFENSE

Department of the Army

Environmental Assessment (EA) and Finding of no Significant Impact (FNSI) For Draft Army Red-Cockaded Woodpecker Management Guidelines

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army has prepared an environmental assessment (EA) and made a finding of no significant impact (FNSI) for draft Army-wide guidelines for the management of the red-cockaded woodpecker (RCW) on federally-owned Army installations. The RCW is a federally listed endangered species found on Army installations in the southeastern United States, extending from North Carolina to Louisiana. Currently, the RCW is found on Fort Bragg, North Carolina; Fort Stewart, Georgia; Fort Jackson, South Carolina; Fort Benning, Georgia; Fort Polk, Louisiana; and Sunny Point Military Ocean Terminal, North Carolina. The following Army installations do not currently have RCWs but have had RCWs historically: Fort Gordon, Georgia; Fort McClellan, Alabama; and Louisiana Army Ammunition Point, Louisiana. The guidelines will be used by Army installations that manage RCW habitat as baseline standards in preparing and revising installation RCW management plans. The purpose of the guidelines is to ensure effective Army-wide RCW management in compliance with the Endangered Species Act of 1973 (ESA). The new guidelines will replace existing guidelines approved in 1984.

As part of the guidelines development process, the Army has prepared an EA and made a FNSI in accordance with the National Environmental Policy Act (NEPA) of 1969. Additionally, the Army has prepared a biological assessment under the ESA to assess the effects of the guidelines on endangered and threatened species. The Army announced commencement of the guidelines development process in the **Federal Register** on February 16, 1993, and invited public participation (58 FR 8588). The EA addresses the comments received from the public and scientific community during the process. The EA concludes that the guidelines will not have a significant effect upon the environment. As a result, the Army has made a FNSI and proposes to approve Army RCW management guidelines, subject to completion of consultation with the U.S. Fish and Wildlife Service in accordance with the ESA.

APPROVAL DATE: The Army will proceed to approve RCW management guidelines 30 days after publication of this notice.

ADDRESSES: Written comments or requests to obtain a copy of the EA and FNSI, with supporting documentation, may be forwarded to the U.S. Army Construction Engineering Research Laboratories (USACERL), ATTN: Mr. Tim Hayden, P.O. Box 9005, Champaign, IL 61826.

FOR FURTHER INFORMATION CONTACT: Questions regarding this action may be directed to USACERL, Mr. Tim Hayden, (217) 373–4420 (extension 609) or Mr. Phil Pierce, Headquarters, Department of the Army, Attn: DAIM–ED–N, Washington, DC 20310–0400, (703) 696–8813.

Lewis D. Walker,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health) OASA (I,L&E).

[FR Doc. 94–10266 Filed 4–28–94; 8:45 am]

BILLING CODE 3710–08–M

Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Proposed Providence River and Harbor Maintenance Dredging Project

AGENCY: U.S. Army Corps of Engineers, New England Division, DOD.

ACTION: Notice of intent.

SUMMARY: A draft and final Environmental Impact Statement (EIS) will be prepared for the proposed maintenance dredging in the Providence River and Harbor in Rhode Island and associated disposal of dredged material. Dredging is required because shoaling in the channel has created unsafe conditions for navigation. The proposed project is intended to restore the navigational efficiency and safety of the Providence River and Harbor for the deep draft vessels using the area. The non-Federal sponsor of this project is the State of Rhode Island. Other Federal and non-Federal dredging projects will also be considered in the EIS.

ADDRESSES: New England Division, U.S. Army Corps of Engineers, Impact Analysis Division, 424 Trapelo Road, Waltham, Massachusetts 02254–9149.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Oliver, Impact Analysis Division, (617) 647–8347.

SUPPLEMENTARY INFORMATION:

Background

The Providence River is formed by the junction of two small streams, the Woonasquatucket and Moshassuck Rivers, which rise in northern Rhode Island. The river flows southerly for one mile to the head of Providence Harbor at Fox Point in Providence, where it is joined by the Seekonk River. The Corps project consists of a 16.8-mile-long channel beginning near the head of Providence Harbor and following the river on a southerly course through the communities of East Providence, Cranston Barrington, Warwick, Bristol, and Portsmouth. Providence River and Harbor together constitute the principal commercial waterway in Rhode Island.

Initial work on the river and harbor began in the 19th century with the construction of a nine-foot-deep channel near the head of the harbor. Subsequent improvements involved the construction of a 5.5 mile-long channel, 25 feet deep and generally 600 feet wide, extending from Fox Point to Bullock Point in east Providence; and extending this channel 5.1 miles southward to North Point (Poppasquash Neck) in Bristol and deepening it to 35 feet through its entire length.

A modification to the project was completed in 1976. This involved extending the channel 6.2 miles southward to the southeasterly side of Prudence Island, and deepening the entire channel to 40 feet. The channel is generally 600 feet wide, except for the stretch between Fields Point (near the Providence-Cranston city line) and Fox Point, where it has varying widths of up to 1700 feet.

Project Description

The proposed maintenance dredging project consists of removing about 3.5 million cubic yards of shoal material between Fox Point in Providence and Conimicut Point in Warwick, Rhode Island to restore the Federal channel to its authorized dimensions. An estimated 400,000 cubic yards of material will be removed by non-Federal interests from the berthing areas served by the Federal channel.

Various public and private entities in Rhode Island have expressed an interest in meeting other dredging needs concurrently with this project. Thus, the disposal site selected for the Providence River project may also be used for material dredged from areas not directly abutting the Providence River channel. The best current estimate is that an additional 1.5 million cubic yards may be added to the Federal Providence River and Harbor portion of this project by these activities, possibly including material from other Federal projects.

Scoping

The Corps will conduct an open scoping and public involvement process with scoping meetings in various locations throughout the State. All interested Federal, State, and local agencies are invited to attend one or more scoping meetings. Interested private and public organizations, affected Indian tribes, and individuals are encouraged to attend the scoping meetings. These meetings will be scheduled for the Spring of 1994.

The alternatives analysis of dredged material disposal sites is expected to be a significant issue that will be addressed in depth in the EIS. The physical, chemical, biological, and economic effects of disposal will be evaluated in the EIS. Scoping will be used to identify any other issues not identified to date.

Other Environmental Review and Consultation Requirements

To the fullest extent possible, the EIS will be integrated with analyses and consultation required by the Endangered Species Act of 1973, as amended (Pub. L. 93–205; 16 U.S.C. 1531, et seq.); the National Historic Preservation Act of 1966, as amended (Pub. L. 89–655; 16 U.S.C. 470, et seq.); the Fish and Wildlife Coordination Act of 1958, as amended (Pub. L. 85–624; 16 U.S.C. 661, et seq.) the Coastal Zone Management Act of 1972, as amended (Pub. L. 92–583; 16 U.S.C. 1451, et seq.); and the Marine Protection, Research and Sanctuaries Act of 1972, as amended (Pub. L. 92–532; 16 U.S.C. 1431, et seq.).

Schedule

The DEIS is anticipated to be available for public review in late Summer of 1994.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 94–10257 Filed 4–28–94; 8:45 am]

BILLING CODE 3710–24–M

DEPARTMENT OF ENERGY

Bonneville Power Administration

DEPARTMENT OF INTERIOR

Bureau of Indian Affairs

Intent To Prepare An Environmental Impact Statement and Floodplain and Wetlands Involvement for the Nez Perce Tribal Hatchery Project

AGENCIES: Bonneville Power Administration (BPA), Department of Energy (DOE) and Bureau of Indian Affairs (BIA), Department of Interior (DOI).

ACTION: Notice of Intent to prepare an Environmental Impact Statement (EIS) under section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321) and Notice of Floodplain and Wetlands Involvement.

SUMMARY: BPA and BIA intend to prepare an EIS on the proposed Nez Perce Tribal Hatchery (NPTH) Project to try and rebuild naturally reproducing salmon runs in the watersheds of the Clearwater and Salmon River sub-basins. BPA and BIA intend to decide whether or not to provide funding to construct, operate, and maintain the NPTH in these sub-basins. BIA, as trustee for Tribal trust resources, will participate as co-lead agency with BPA. The Nez Perce Tribe (NPT) is the primary cooperating agency. The EIS will evaluate the potential environmental effects of the proposed action to construct and operate the NPTH and alternatives to the proposed action. This action may involve floodplains and wetlands located in the State of Idaho and within Nez Perce, Clearwater, and Idaho counties.

In accordance with DOE regulations for compliance with floodplain and wetlands environmental review requirements (10 CFR part 1022), BPA and BIA will prepare a floodplains and wetlands assessment and would perform this proposed action in a manner so as to avoid or minimize potential harm to or within the affected floodplains and wetlands. The assessment and a floodplain statement of findings will be included in the EIS being prepared for the proposed project in accordance with NEPA.

DATES: BPA and BIA have established a 45-day scoping period (beginning April 29, 1994) during which affected landowners, concerned citizens, special interest groups, local governments, fishery and environmental groups, and any other interested parties are invited to comment on the scope of the EIS. Scoping will help BPA and BIA ensure that a full range of issues related to the proposed action and alternatives to the proposed action are addressed in the EIS, and also will identify significant or potentially significant environmental impacts that may result from the proposed action and alternatives. Written comments should be sent to the address below no later than June 13, 1994.

Comments may also be made at two EIS scoping meetings which will be held at: May 24, 1994, 6 to 9 p.m., Red Lion—Downtowner, Teton Room, 1800 Fairview, Boise, Idaho 83702, and May 25, 1994, 6 to 9 p.m., National Park Service, Nez Perce National Historical Park, Highway 95, Spalding, Idaho 83551. At the informal meetings, the NPT, project sponsor and primary developer of the associated NPTH Master Plan, will present information on technical aspects of the NPTH Project. Written information also will be available, and BPA and NPT staff will answer questions and accept oral and written comments.

Subsequently, a draft EIS (DEIS) will be circulated for public review and comment, and BPA and BIA will hold public comment meetings at the locations designated above. BPA and BIA will then prepare a final EIS which will consider and respond to comments received on the DEIS.

ADDRESSES: BPA and BIA invite comments and suggestions on the proposed scope of the DEIS. Send comment letters, requests to be placed on the project mailing list, and/or requests for more information to the Public Involvement Manager, Lynn W. Baker, BPA–ALP, P.O. Box 12999, Portland, Oregon 97212 or to BIA, 911 NE. 11th Avenue, Portland, Oregon 97232–4169. The phone number of BPA's Public Involvement Office is

(503) 230–3478 in Portland, Oregon; toll-free (800) 622–4519 nationwide.

FOR FURTHER INFORMATION, CONTACT: (1) Mr. Roy B. Fox, BPA NEPA Compliance Officer—PG at (503) 230–4261 or Ms. June Boynton, BIA Environmental Coordinator, at (503) 231–6749; (2) Mr. Chuck Korson, BPA Environmental Manager, at (503) 230–5182; (3) Mr. Robert L. Swedo, BPA Upper Columbia Area Office, 707 W. Main Avenue, suite 500, Spokane, WA 99201, (503) 353–2913; (4) Mr. Jim Normandeau, BPA Boise District Office, 304 N. 8th Street, Boise, ID 83702, (208) 334–9137; or (5) Mr. Ed Larson, Nez Perce Fisheries Resource Management, P.O. Box 365, Lapwai, ID 83540, (208) 843–7320.

SUPPLEMENTARY INFORMATION: The proposed Project that is the subject of the EIS consists of several components, including central and auxiliary salmon incubation and rearing facilities, satellite rearing facilities, and monitoring and evaluation facilities located in the Clearwater and Salmon River Basins in central Idaho. The proposed NPTH would be consistent with the Northwest Power Planning Council's (Council) Fish and Wildlife Program Measure 703 (g)(2), calling for construction of low-capital salmon and steelhead propagation facilities adaptable to Columbia River Basin locales. The Council envisioned that the NPTH Production Project would help rebuild or re-establish anadromous salmon runs in the Clearwater and Salmon River sub-basins. The Nez Perce Tribal Government envisioned the NPTH production project as a way of helping to rebuild a fishery resource that is important to the Tribal culture and allowing rights reserved in the 1855 Treaty with the United States to be exercised. Further, this action would provide an opportunity for the Federal government to fulfill its trust responsibility to the NPT. BPA proposes this Project as a means to protect, mitigate, and enhance Columbia River Basin fish and wildlife resources under the authority of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Pub. L. 96–501). If developed, the NPTH will employ state-of-the-art, technologically advanced salmon supplementation techniques in an attempt to rebuild naturally reproducing salmon runs in the watersheds of the Clearwater and Salmon River sub-basins. As requested by the Council, BPA and NPT completed a master plan for the proposed Project. The Council approved the NPTH Master Plan, requesting final design and construction of the NPTH, on May 27, 1992.

A. Proposed Action

The following need statement has been identified for the NPTH EIS:

The need is for naturally reproducing salmon at harvestable populations in the upriver Clearwater and Salmon River sub-basins.

The established purpose(s) for the proposed NPTH project are manyfold:

1. Protect, mitigate, and enhance Columbia River Basin anadromous fish resources.
2. Develop, increase, and reintroduce natural spawning populations of salmon within the Clearwater and Salmon River sub-basins.
3. Provide long-term harvest opportunities for Tribal and non-Tribal anglers within Nez Perce Treaty lands.
4. Sustain long-term fitness and genetic integrity of target fish populations.
5. Keep ecological and genetic impacts to nontarget fish populations within acceptable limits.
6. Provide harvest opportunities for Tribal and non-Tribal anglers within four salmon generations (20 years) following completion of the Project.
7. Promote NPT management of NPTH production facilities and production areas.

To meet the underlying need and purpose statements, the proposed action is for BPA and BIA to fund: (1) Construction, (2) operation and maintenance, and (3) monitoring and evaluation of a NPTH supplementation project within the Clearwater and Salmon River sub-basins. The NPTH supplementation facilities would consist of a central incubation and rearing facility on the Clearwater River at Cherry Lane, Idaho; an auxiliary salmon incubation and rearing facility on Sweetwater Creek near Lewiston, Idaho; 13 satellite juvenile rearing and adult holding facilities located in various tributary watersheds; and monitoring facilities for juvenile and adult salmon in each watershed where satellites are proposed. Species targeted for supplementation are spring, summer, and fall chinook salmon (*Oncorhynchus tshawytscha*).

The central facility would incubate eggs and alevins and rear fry to approximately 50–80 millimeters (2–3 inches) in size to prepare them for final rearing and release at the satellite facilities or in natural stream systems. The Sweetwater Creek holding facility would be constructed to backup the central facility and rear subyearling or yearling smolts and, when needed, to hold adult broodstock.

Satellite facilities used for rearing, acclimation, release, adult holding, monitoring, and evaluation would also be constructed. They would be located in key tributary watersheds of the Clearwater and Salmon River sub-basins. Facility locations in the Clearwater sub-basin would be: Lolo Creek (Mainstem Lolo Creek, Yoosa Creek, and Eldorado Creek); South Fork Clearwater River (Meadow Creek, Mill Creek, Newsome Creek); and the Selway River (Meadow Creek). Facility locations in the Salmon River sub-basin would be: Slate Creek (Mainstem Slate Creek and Little Slate Creek).

Floodplains and wetlands may be involved at the following central and satellite facility sites:

Site name	County	Township	Range	Section
Cherry Lane; 21 miles East of Lewiston, Darrell Kerby Ranch	Nez Perce	37N	3W	35
Sweetwater Sp., Origin W.F. Sweetwater Crk	Nez Perce	33N	4W	4
Mann Lake Headgate, Lewiston Orchards Irr. District, Sweetwater Crk	Nez Perce	34N	47E	21
No. Lapwai Valley, Tribal Allotment 606, Lapwai Crk., Clearwater R	Nez Perce	36N	4W	22, 27
Mouth Lolo Crk., Clearwater R	Clearwater, Idaho	35N	2E	14
Yoosa/Camp Crk. Confluence, Lolo Crk	Idaho	35N	6E	1,12
Crk. at Six-Bit Crk. Confluence, Lolo Crk	Idaho	34N	6E	1
Newsom Crk/Beaver Crk Confluence, S.F. Clearwater River	Idaho	30N	7E	31
Mill Crk, S.F. Clearwater River	Idaho	29N	4E	27
Meadow Crk, S.F. Clearwater River	Idaho	30N	4E	35
Cedar Flats, Selway R	Idaho	32N	7E	23
Meadow Crk, Selway R	Idaho	31N	9E	11
Slate Crk, Hurley Crk Confl., Salmon R	Idaho	27N	2E	34
Slate Crk, Dead Horse Crk Confl., Salmon R	Idaho	26N	3E	3,10

B. Process to Date

BPA and BIA have assumed the co-lead agency role for the NPTH EIS. The NPT Department of Fisheries Resource Management will act as the primary Cooperating Agency. The U.S. Fish and Wildlife Service (USFWS) and U.S. Forest Service (USFS), Nez Perce National Forest, will also participate as Cooperating Agencies in the NEPA process.

The Council's Master Plan process involved close coordination among the NPT, BPA, Idaho Department of Fish and Game, USFWS, and USFS. Several meetings were held by these parties to focus on technical issues that needed resolution and clarification so that preparation of the Master Plan could proceed. Other meetings between the NPT and the State involved discussions of harvest and production issues. Discussions in January 1992, led to a Memorandum of Agreement between the parties on a process for discussing management issues and developing common positions to present in different forums. The NPT has also met numerous times with field staffs of the USFS and others to review technical elements of the Master Plan as it developed. Of particular interest to the land managers is the location of the proposed tributary facilities and constraints that might be needed on current management practices.

C. Alternatives Proposed for Consideration

Alternatives thus far identified for evaluation in the EIS are: (1) the proposed action to construct, operate, and maintain the NPTH Project; and (2) no action (to not undertake action to develop the NPTH Project). Intermediate alternatives that will feature scaled-down versions of the total project will also be evaluated. Other alternatives will be identified through the scoping process and will be considered, if appropriate, in the EIS. Those reasonable alternatives that meet both the stated need and purposes for action will be evaluated in greatest detail.

D. Identification of Environmental Issues

BPA and BIA will prepare a DEIS that addresses and fully discloses the potential environmental effects of the proposed facility and associated operations as well as reasonable alternatives to the proposed action. The principal environmental issues identified through the Council's Master Plan scoping process for the NPTH include the following: (1) Assessment of genetic and ecological risks; (2) direct and cumulative effects of hatchery fish on wild fish, particularly Snake River salmon stocks currently listed as threatened or endangered under the Federal Endangered Species Act; (3) effectiveness of supplementation as a fishery management tool to rebuild weak stocks; (4) effects on non-target resident fish species; (5) water quality effects; (6) effects on cultural resources; and (7) monitoring and evaluation concerns. These, together with any additional issues identified through the scoping process, will be examined in the NPTH EIS.

Issued in Portland, Oregon, on April 19, 1994

John Robertson,

Deputy Asst. Administrator, Bonneville Power Admin.

[FR Doc. 94–10323 Filed 4–28–94; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. CP93–548–000]

Wallkill Transport, L.P.; Availability of The Environmental Assessment For The Proposed Wallkill Pipeline Project

April 22, 1994.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an Environmental Assessment (EA) on the natural gas pipeline facilities proposed by Wallkill Transport Company, L.P. (Wallkill) in Docket No. CP93–548–000.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act. The staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment. However, we are requesting specific comments on one route variation discussed below.

The EA assesses the potential environmental effects of the construction and operation of the proposed Wallkill Pipeline Project, including:

- 23.9 miles of new 10-inch-diameter natural gas pipeline;
- A 6-inch meter run;
- A 6-inch orifice meter; and
- Eight pipeline valve assemblies.

The purpose of the proposed facilities would be to transport up to 30 million cubic feet of natural gas per day from an existing Tennessee Gas Pipeline Company (Tennessee) pipeline to the planned Wallkill Generating Facility. The EA also evaluates alternatives to Wallkill's proposal.

The staff specifically requests comments on the proposed route in the area of Bates Gates Road, near MP 18, versus the I–84 Variation. The discussion of the variation begins on page 39 of the EA. As further discussed in the EA, each of these routes offers advantages and disadvantages which deserve comment.

The EA has been placed in the public files of the FERC and is available for public inspection at: Federal Energy Regulatory Commission, Division of Public Information, 941 North Capitol Street, NE., room 3104, Washington, DC 20426, (202) 208–1371.

Copies have been mailed to Federal, state and local agencies, public interest groups, interested individuals, newspapers, and parties to this proceeding.

A limited number of copies of the EA are available from: Ms. Laura Turner, Environmental Project Manager, Environmental Review and Compliance Branch II, Office of Pipeline Regulation, Room 7312, 825 North Capitol Street, N.E., Washington, DC 20426, (202) 208–0916.

Any person wishing to comment on the EA may do so. Written comments must reference Docket No. CP93–548–000, and be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

Comments should be filed as soon as possible, but must be received no later than May 16, 1994, to ensure consideration prior to a Commission decision on this proposal. A copy of any comments should also be sent to Ms. Laura Turner, Environmental Project Manager.

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a Motion to Intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214).

Additional information about this project is available from Ms. Laura Turner, Environmental Review and Compliance Branch II, Office of Pipeline Regulation, at (202) 208–0916.

Lois D. Cashell,

Secretary.

[FR Doc. 94–10214 Filed 4–28–94, 8:45 am]

BILLING CODE 6717–01–P

[Docket No. RP93-6-000]

Paiute Pipeline Company; Informal Settlement Conference

April 22, 1994.

Take notice that an informal settlement conference will be convened in this proceeding on May 5, 1994, at 10 a.m., at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the above-referenced docket.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined in 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214) (1993).

For additional information, contact Edith Gilmore at (202) 208-2158 or Irene Szopo at (202) 208-1602.

Lois D. Cashell,

Secretary.

[FR Doc. 94-10244 Filed 4-28-94; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP93-106-000, et al.]

Texas Gas Transmission Corp.; Informal Settlement Conference

April 22, 1994.

Take notice that an informal settlement conference will be convened in the above-captioned proceeding at 1:00 p.m. on April 28, 1994, at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE, Washington, DC, for the purpose of exploring the possible settlement of the above-referenced dockets. The conference will resume at 10 a.m. Friday, April 15, 1994, if necessary, and conclude that day.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined in 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information please contact Michael D. Cotleur, (202) 208-1076, or Arnold H. Meltz (202) 208-2161.

Lois D. Cashell,

Secretary.

[FR Doc. 94-10245 Filed 4-28-94; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER94-1084-000]

Tucson Electric Power Co.

April 19, 1994.

Take notice that on March 24, 1994, Tucson Electric Power Company (Tucson) tendered for filing a Letter Agreement dated March 7, 1994 between Tucson and Public Service Company of New Mexico (PNM).

Tucson states that the Agreement is the product of the exercise by PNM of an option to purchase 50 MW of transmission service from Tucson pursuant to Section 7.9 of the San Juan Springerville-Vail Transmission System Participation Agreement.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before May 3, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94-10213 Filed 4-28-94; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-00378; FRL-4773-7]

Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements; Notice of Federal Facility Workshops

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA will hold a series of 3-day workshops for Federal Agencies' personnel on the requirements of Presidential Executive Order (EO) 12856 "Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements." The workshops are targeted at all Federal agency personnel responsible for compliance with the provisions of EO 12856. It consists of a series of presentations covering the requirements of EO 12856 and the applicable sections of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and the Pollution Prevention Act. After an overview of EO 12856 and EPCRA section 302-312 provisions, the course focuses on the EPCRA section 313 Toxic Chemical Release Inventory (TRI). A variety of hands-on exercises using the TRI reporting Form R and associated guidance materials are used to help participants understand the nuances of the TRI reporting process.

DATES: The workshops will be held on the following dates in the following locations:

May 10-12, 1994	Washington, DC
June 1-3, 1994	Atlanta, GA
June 7-9, 1994	Edison, NJ
June 14-16, 1994	Framingham, MA
June 22-24, 1994	Denver, CO
July 13-15, 1994	San Francisco, CA
July 19-21, 1994	Seattle, WA
July 27-28, 1994	Overland Park, KS
August 2-4, 1994	Chicago, IL
August 10-12, 1994	Baltimore, MD
August 16-18, 1994	Dallas, TX

FOR FURTHER INFORMATION CONTACT: Eileen Fesco, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (703) 931-3908, Fax (703) 820-4332.

The Agency's Regional Offices continue to provide training, known as Train-the-Trainer courses to private sector industries covered under EPCRA section 313. For information on these trainings in your area, contact the EPCRA Information Hotline (5101), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: 1-800-535-0202.

SUPPLEMENTARY INFORMATION: Registration for the Federal facilities trainings will be taken on a first-come-first-served basis until 2 weeks prior to the start of each workshop. Persons who should consider attending are Federal facility staff responsible for implementing Executive Order 12856 and consulting firms who may be advising Federal facilities on EPCRA compliance. There is limited space available. To register, contact by either telephone, fax, or in writing, the person listed under FOR FURTHER INFORMATION CONTACT. Notification will be sent to each applicant regarding their acceptance for the training session. There is no registration fee for this training. If there is insufficient interest in any of the

workshops, they may be canceled. The Agency bears no responsibility for attendees' decision to purchase nonrefundable transportation tickets or accommodation reservations.

Dated: April 20, 1994.

Mark Greenwood,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 94–10318 Filed 4–28–94; 8:45 am]

BILLING CODE 6560–50–F

[OPPTS–62138A; FRL–4779–9]

Lead Renovation and Remodeling Guidelines; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: This notice announces the availability of EPA's final renovation and remodeling (R&R) guidelines document entitled "Reducing Lead Hazards When Remodeling Your Home." This document was developed pursuant to Title IV, section 402 (c)(1) of the Toxic Substances Control Act (TSCA). Section 402 (c)(1) specifically mandates that EPA develop guidelines for homeowners and other persons who may engage in renovation and remodeling activities. EPA developed the R&R guidelines in response to Congressional concerns about the public's knowledge of lead hazards when conducting R&R activities in homes.

FOR FURTHER INFORMATION CONTACT: For a copy of the final R&R guidelines document, "Reducing Lead Hazards When Remodeling Your Home," contact: the National Lead Information Center Clearinghouse, at 1–800–424–LEAD or fax your request to 202–659–1192. For technical information, contact Darlene Watford, Office of Pollution Prevention and Toxics, Chemical Management Division, Technical Programs Branch (7404), 401 M St., SW., Washington, DC 20460, Telephone: 202–260–3989.

SUPPLEMENTARY INFORMATION: Under the Congressional mandate in section 402(c)(1) of TSCA, EPA has developed guidance for homeowners and building occupants to alert them to potential lead hazards associated with renovation and remodeling activities. Congress specifically required that these guidelines be developed for homes and buildings constructed prior to 1978.

On March 18, 1994 (59 FR 12913) EPA announced the availability of the draft R&R Guidelines in the **Federal Register**. In the announcement, EPA opened a 30–day public comment period and received comments on the R&R Guidelines document. In addition to soliciting public comment, EPA conducted a series of focus group tests on the draft R&R guidelines document to evaluate the effectiveness of the reading level, content, and graphic presentation. A summary of the focus group's test results, copies of the public comments received and EPA's disposition on the comments, may be viewed in the TSCA Nonconfidential Business Information Center, NE Mall Room B607, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, Telephone 202–260–1595. When requesting to view the comments, refer to TSCA Docket Number OPPTS–62138.

EPA recognizes that this lead hazard information may be important in some communities that may have a limited ability to utilize information provided in English. For that reason, EPA is developing a Spanish-language version of the Guidelines document as well. The Spanish-language R&R guidelines document will be available at a later date.

EPA plans to disseminate the guidelines as mandated under TSCA to State and local government agencies, paint and hardware stores, employee organizations and trade associations. Individual copies of the final R&R guidelines (in English only) is now available from the National Lead Information Center Clearinghouse (1–800–424–LEAD).

Dated: April 22, 1994.

Mark A. Greenwood,

Director, Office for Pollution Prevention and Toxics.

[FR Doc. 94–10317 Filed 4–28–94; 8:45 am]

BILLING CODE 6560–50–F

[OPP–50782; FRL–4778–1]

Receipt of Notification to Conduct Small-Scale Testing of a Genetically Altered Microbial Pesticide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of a notification of intent to conduct small-scale testing of a genetically altered strain of *Bacillus thuringiensis* from the Ciba-Geigy Corporation.

DATES: Written comments must be received by May 31, 1994.

ADDRESSES: Comments, in triplicate, should bear the docket control number OPP–50782 and be submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. Written comments will be available for public inspection in Rm. 1128 at the address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Phillip O. Hutton, Product Manager (PM) 18, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 213, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703)305–7690.

SUPPLEMENTARY INFORMATION: A notification of intent to conduct small-scale field testing pursuant to the EPA's Statement of Policy entitled "Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act," published in the **Federal Register** of June 26, 1986 (51 FR 23313), has been received by Ciba-Geigy Corporation of Greensboro, North Carolina. The purpose of the proposed testing is to determine the biological activity of the microbial pesticide CGB211, a *Bacillus thuringiensis* which has been transconjugated against, *Plutella xylostella* and *Helicaverpa zea* on cole crops. The testing will take place in Florida on less than 1 acre. Plants in the test sites will be plowed into the soil at the termination of the testing.

Following review of the Ciba-Geigy Corporation application and any comments received in response to this Notice, EPA will decide whether or not an experimental use permit is required.

Dated: April 19, 1994.

Stephen L. Johnson,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 94–10313 Filed 4–28–94; 8:45 am]

BILLING CODE 6560–50–F

[OPP–50781; FRL–4777–9]

Receipt of Notification to Conduct Small-Scale Testing of Nonindigenous Microbial Pesticides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of a notification of intent to conduct small-scale testing of 24 nonindigenous strains of *Bacillus thuringiensis* from the Ciba-Geigy Corporation.

DATES: Written comments must be received by May 31, 1994.

ADDRESSES: Comments, in triplicate, should bear the docket control number OPP–50781 and be submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. Written comments will be available for public inspection in Rm. 1128 at the address given above, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Phillip O. Hutton, Product Manager (PM) 18, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 213, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703)305–7690.

SUPPLEMENTARY INFORMATION: A notification of intent to conduct small-scale field testing pursuant to the EPA's Statement of Policy entitled "Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act," published in the **Federal Register** of June 26, 1986 (51 FR 23313), has been received by Ciba-Geigy Corporation of Greensboro, North Carolina. The purpose of the proposed testing is to determine the biological activity of 24 nonindigenous strains of *Bacillus thuringiensis* against the Colorado potato beetle on potatoes. Testing will take place in New York and Wisconsin over a 2–year period with 0.11 acre per year per strain being evaluated. Treated crops will be destroyed subsequent to testing. Following review of the Ciba-Geigy Corporation application and any comments received in response to this Notice, EPA will decide whether or not an experimental use permit is required.

Dated: April 19, 1994.

Stephen L. Johnson,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 94–10314 Filed 4–28–94; 8:45 am]

BILLING CODE 6560–50–F

[OPP–30362; FRL–4772–2]

Certain Companies; Applications to Register Pesticide Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments must be submitted by May 31, 1994.

ADDRESSES: By mail submit comments identified by the document control number [OPP–30362] and the registration/file number, attention Product Manager (PM) named in each application at the following address: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Environmental Protection Agency, Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. All written comments will be available for public inspection in Rm. 1132 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Registration Division (7505C), Attn: (Product Manager (PM) named in each registration), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460.

In person: Contact the PM named in each registration at the following office location/telephone number:

Product Manager	Office location/ telephone number	Address
PM 10 Robert Brennis, (Acting)	Rm. 210, CM #2 (703–305–6788).	Environmental Protection Agency 1921 Jefferson Davis Hwy Arlington, VA 22202
PM 14 Robert Forrest	Rm. 219, CM #2 (703–305–6600).	-Do-

SUPPLEMENTARY INFORMATION: EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Products Containing Active Ingredients Not Included In Any Previously Registered Products

1. File Symbol: 66550–R. Applicant: Dolphin Trust, 420 West Main St., Pullman, WA 99163. Product name: Bird Shield Repellent. Avain Repellent. Active ingredient: Methyl-2-aminobenzoate at 26.4 percent. Proposed classification/Use: None. This product is used to limit feeding by robins, starlings, cedar waxings, and native sparrows on ripening blueberries, cherries, and grapes. (PM 14)

2. File Symbol: 58035–I. Applicant: PMC Specialties Group, 501 Murray Road, Cincinnati, OH 45217. Product

name: ReJeX-iT MA. Avain Repellent. Active ingredient: Methyl anthranilate at 100 percent. Proposed classification/Use: None. For use only by manufacturers of products other than pesticide products in their regular manufacturing process. (PM 14)

3. File Symbol: 58035–T. Applicant: PMC Specialties Group. Product name: ReJeX-iT TP-40. Avain Repellent. Active ingredient: Methyl anthranilate at 40 percent. Proposed classification/Use: None. For the reduction of bird activity on landfills, tailing ponds, and impoundments. (PM 14)

4. File Symbol: 58035–A. Applicant: PMC Specialties Group. Product name: ReJeX-iT AP-50. Avain Repellent. Active ingredient: Methyl anthranilate at 50 percent. Proposed classification/Use: None. For the reduction of bird activity on temporary pools of water on airports. (PM 14)

5. File Symbol: 58035–O. Applicant: PMC Specialties Group. Product name: ReJeX-iT AG-36. Avain Repellent. Active ingredient: Methyl anthranilate at 14.5 percent. Proposed classification/Use: None. Used to repel birds such as Canada geese from golf courses and other turf areas. (PM 14)

6. File Symbol: 707–EGI. Applicant: Rohm and Haas, Independence Mall West, Philadelphia, PA 19105. Product name: Confirm 2F. Insecticide. Active ingredient: Tebufenozide benzoic acid 3,5-dimethyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide at 23.0 percent. Proposed classification/Use: General. For use on walnuts. (PM 10)

7. File Symbol: 707–EGT. Applicant: Rohm and Haas. Product name: RH-5992 Technical. Insecticide. Active ingredient: Tebufenozide benzoic acid 3,5-dimethyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide at 97.1 percent. Proposed classification/Use: General. For repackaging, relabeling, formulation, or processing only. (PM 10)

Notice of approval or denial of an application to register a pesticide product will be announced in the **Federal Register**. The procedure for requesting data will be given in the **Federal Register** if an application is approved.

Comments received within the specified time period will be considered before a final decision is made; comments received after the time specified will be considered only to the extent possible without delaying processing of the application.

Written comments filed pursuant to this notice, will be available in the Public Response and Program Resources Branch, Field Operations Division (FOD) office at the address provided from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays. It is suggested that persons interested in reviewing the application file, telephone the FOD office (703–305–5805), to ensure that the file is available on the date of intended visit.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests, Product registration.

Dated: April 15, 1994.

Stephen L. Johnson,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 94–10315 Filed 4–28–94; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL ELECTION COMMISSION

[Notice 1994–6]

Filing Dates For the Kentucky Special Elections

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for a special election.

SUMMARY: Kentucky has scheduled a special general election on May 24 to fill the vacant U.S. House seat in the Second Congressional District of the late Congressman William Natcher.

Committees required to file reports in connection with the Special General Election should file a 12-day Pre-General Report on May 12 and a Post-General Report on June 23.

FOR FURTHER INFORMATION CONTACT: Ms. Bobby Werfel, Information Division, 999 E Street, NW., Washington, DC 20463, Telephone: (202) 219–3420; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates involved in the Special General Election shall file a 12-day Pre-General Report on May 12, a Post-General Report on June 23 and a July Quarterly Report on July 15. (See the chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Quarterly Filers

All political committees filing on a quarterly basis are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the Kentucky Special General Election by the close of books for the applicable report. (See the chart below for the closing date of each report). The July Quarterly Report is due, regardless of special election activity.

Monthly Filers

Political committees filing on a monthly basis are not required to file pre- and post-election reports; however, these committees may have to file 24-hour reports on independent expenditures. See 11 CFR 104.4(b) and 104.5(g).

REPORTING DATES FOR THE KENTUCKY SPECIAL ELECTION ON MAY 24

Report	Close books [1]	Reg./cert. mailing date [2]	Filing date
Pre-General	5/04/94	5/09/94	5/12/94
Post-General	6/13/94	6/23/94	6/23/94
July Quarterly	6/30/94	7/15/94	7/15/94

[1] The period begins with the close of books of the last report filed by the committee. If the committee has filed no previous reports, the period begins with the date of the committee's first activity.

[2] Reports sent by registered or certified mail must be postmarked by the mailing date; otherwise, they must be received by the filing date.

Dated: April 25, 1994.

Trevor Potter,

Chairman, Federal Election Commission.

[FR Doc. 94–10247 Filed 4–28–94; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 4/4/94 AND 4/15/94

Name of acquiring person, name of acquired person, name of acquired entity	PMN No.	Date terminated
American Telephone and Telegraph Company, USF&G Corporation, Timberland Investments Group, Inc	94–1054	4/4/94
D.R. Horton, Inc., Mr. Joseph M. Miller, Joseph M. Miller Construction, Inc	94–1055	4/4/94
BellSouth Corporation, USF&G Corporation, Timberland Investments Group, Inc	94–1056	4/4/94
Pride Petroleum Services, Inc., Offshore Rigs, L.L.C., Offshore Rigs, L.L.C	94–1002	4/05/94
Doskocil Companies Incorporated, International Multifoods Corporation, International Multifoods Foodservice Corp	94–1035	4/05/94
Provident Mutual Life Insurance Company of Philadelphia, The Covenant Life Insurance Company, The Covenant Life Insurance Company	94–1066	4/05/94
Cubic Corporation, The Titan Corporation, Titan's Application Group	94–0991	4/06/94
Devon Energy Corporation, Alta Energy Corporation, Alta Energy Corporation	94–1034	4/07/94
GFC Financial Corporation, Bell Atlantic Corporation, TriCon Capital Corporation	94–1059	4/08/94
Varlen Corporation, Bostrom Seating, Inc., Bostrom Seating, Inc	94–1024	4/11/94
PacifiCorp, U S West, Inc., U S WEST Communications, Inc	94–1065	4/11/94
GS Capital Partners, L.P., Martin Granoff, Koret, Inc	94–1067	4/11/94
Steelcase Inc., International Business Interiors Corporation, International Business Interiors Corporation	94–1076	4/11/94
Joseph Littlejohn & Levy Fund, L.P., Beck-Ross Communications, Inc., Beck-Ross Communications, Inc	94–1086	4/11/94
Hans-Peter Wild, F&C International, Inc., F&C International, Inc	94–1106	4/11/94
Allied Waste Industries, Inc., Raymond M. Cash, Southern States Environmental Services, Inc	94–1119	4/11/94
ACX Technologies, Inc., Gravure International Capital Corporation, Gravure International Capital Corporation	94–1028	4/12/94
Video Lottery Technologies, Inc., United Wagering Systems, Inc., United Wagering Systems, Inc	94–1051	4/12/94
Time Warner Inc., Atari Corporation, Atari Corporation	94–1074	4/12/94
Lowell W. Paxson, Robert M. Potamkin, Phipps-Potamkin Television Partners (a partnership)	94–1080	4/12/94
Rayrock Yellowknife Resources Inc., Rayrock Yellowknife Resources Inc., Dee Gold Mining Co	94–1081	4/12/94
Lowell W. Paxson, Alan H. Potamkin, Phipps-Potamkin Television Partners (a partnership)	94–1088	4/12/94
Lowell W. Paxson, Colin S. Phipps, Phipps-Potamkin Television Partners (a partnership)	94–1089	4/12/94
Lowell W. Paxson, John E. Phipps, Phipps-Potamkin Television Partners (a partnership)	94–1090	4/12/94
Specialty Foods Acquisition Corporation, Wayne Leshyk, The Bagel Place, Inc	94–1093	4/12/94
Specialty Foods Acquisition Corporation, Fred Walger, The Bagel Place, Inc	94–1094	4/12/94
Masayoshi Son, c/o SOFTBANK Corporation, Phoenix Publishing Systems, Inc., Phoenix Publishing Systems, Inc	94–1123	4/13/94
First Data Corporation, Ceridian Corporation, Ceridian Corporation	94–1047	4/14/94
Madison Dearborn Capital Partners, L.P., Omnipoint Corporation, Omnipoint Corporation	94–1105	4/14/94
Equifax Inc., First Security Corporation, First Security Processing Services, Inc	94–1108	4/14/94
Harvey F. Robbins, Domco Industries Limited (a Canadian company), Domco U.S. Holding Company	94–1113	4/14/94
Domco Industries Limited (a Canadian company), Harvey F. Robbins, National Floor Products Company, Inc	94–1114	4/14/94
Columbia/HCA Healthcare Corporation, Doctors Hospital of Sarasota Ltd., L.P., Doctors Hospital of Sarasota	94–1040	4/15/94
Galey & Lord, Inc., Burlington Industries, Inc., Burlington Industries, Inc	94–1084	4/15/94
Bergen Brunswig Corporation, Southeastern Hospital Supply Corporation, Southeastern Hospital Supply Corporation	94–1120	4/15/94
Hume Industries (Malaysia) BHD, Richard W. Snyder, SnyderGeneral Corporation and SnyderGeneral Holding Co	94–1128	4/15/94
Hong Leong Company (Malaysia) BHD, Richard W. Snyder, SnyderGeneral Corporation and SnyderGeneral Holding Co	94–1129	4/15/94
WMS Industries, Inc., Tradewest, Inc., Tradewest, Inc	94–1140	4/15/94
Julian D. Saul, Leo W. Cook and Ruth Cook, husband and wife, Tuftex Carpet Mills, Inc	94–1141	4/15/94
Julian D. Saul, Robert A. Cook, America West Industries, Inc	94–1142	4/15/94
Boise Cascade Corporation, Merrill Zenner, The Reliable Corporation	94–1156	4/15/94
Jeffrey R. Lurie, Norman Braman, Philadelphia Eagles Football Club, Inc	94–1161	4/15/94

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, or Renee A. Horton, Contact Representatives, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, room

303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 94–10269 Filed 4–28–94; 8:45 am]

BILLING CODE 6750–01–M

[Docket C–3490]

The Keds Corporation; Prohibited Trade Practices and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, that consent order prohibits, among other things, a Massachusetts-based manufacturer and seller of athletic and casual shoes from fixing the resale price at which any dealer may advertise or sell any Keds athletic or casual footware item; coercing or pressuring any dealer to adopt or adhere to any resale price; attempting to secure commitments from any dealer about the resale price at which it will advertise or sell any such product; and requiring or suggesting that dealers report other dealers who advertise or sell any such product below any resale price.

DATES: Complaint and Order issued April 1, 1994.[1]

FOR FURTHER INFORMATION CONTACT: Michael Bloom or Rhonda McLean, FTC/New York Regional Office, 150 William St., suite 1300, New York, N.Y. 10038. (212) 264–1207.

SUPPLEMENTARY INFORMATION: On Tuesday, October 12, 1993, there was published in the **Federal Register**, 58 FR 52767, a proposed consent agreement with analysis In the Matter of The Keds Corporation, for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order

A comment was filed and considered by the Commission. The Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45.

Donald S. Clark,

Secretary.

[FR Doc. 94–10272 Filed 4–28–94; 8:45 am]

BILLING CODE 6750–01–M

[1] Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H–130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

[Docket C–3487]

MACE Security International, Inc., et al.; Prohibited Trade Practices and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order requires, among other things, the Vermont-based marketers to have competent and reliable evidence to support any claims about the efficacy or performance of any chemical self-protection product they sell and to include cautionary disclosures, in their advertisement and with their product, about the limitations of the product on armed, enraged, drugged, or intoxicated assailants. The order also requires the respondents to substantiate any future claims they make about any attribute of any chemical self-protection product they sell, and to send a notice of the settlement to distributors and consumers.

DATES: Complaint and Order issued March 25, 1994.[1]

FOR FURTHER INFORMATION CONTACT: Michael Bloom or Alice Au, FTC/New York Regional Office, 150 Williams St., 13th Floor, New York, NY 10038. (212) 264–1207.

SUPPLEMENTARY INFORMATION: On Thursday, January 20, 1994, there was published in the **Federal Register**, 59 FR 3110, a proposed consent agreement with analysis In the Matter of MACE Security International, Inc., et al., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

[1] Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H–130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

Authority: (Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45).

Donald S. Clark,

Secretary.

[FR Doc. 94–10270 Filed 4–28–94; 8:45 am]

BILLING CODE 6750–01–M

[Docket C–3491]

McLean County Chiropractic Association; Prohibited Trade Practices and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, an association of Illinois chiropractors from entering into any agreement with any chiropractors to set fees for patients, or terms for third-party payor contracts, and requires the association to give members copies of the order.

DATES: Complaint and Order issued April 7, 1994.[1]

FOR FURTHER INFORMATION CONTACT: Mark Horoschak, FTC/S–3115, Washington, DC 20580. (202) 326–2756.

SUPPLEMENTARY INFORMATION: On Thursday, January 20, 1994, there was published in the **Federal Register**, 59 FR 3114, a proposed consent agreement with analysis In the Matter of McLean County Chiropractic Association, for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45.

Donald S. Clark,

Secretary.

[FR Doc. 94–10271 Filed 4–28–94; 8:45 am]

BILLING CODE 6750–01–M

[1] Copies of the Complaint, the Decision and Order, and Commissioner Starek's statement are available from the Commission's Public Reference Branch, H–130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

GENERAL ACCOUNTING OFFICE

Federal Accounting Standards Advisory Board

AGENCY: General Accounting Office.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that the regular monthly meeting of the Federal Accounting Standards Advisory Board will be held on Tuesday, May 10, 1994 from 9 a.m. to 4:30 p.m. in room 7313 of the General Accounting Office, 441 G St., NW., Washington, DC.

The agenda for the meeting includes discussions on: (1) The Liabilities Exposure Draft, (2) the issue paper on Cost, and (3) Physical Property and Land issues of the Capital Expenditures project.

We advise that other items may be added to the agenda; interested parties should contact the Staff Director for more specific information and to confirm the date of the meeting.

Any interested person may attend the meeting as an observer. Board discussions and reviews are open to the public.

FOR FURTHER INFORMATION CONTACT: Ronald S. Young, Executive Staff Director, 750 First St., NE., room 1001, Washington, DC 20002, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. 92–463, Section 10(a)(2), 86 Stat. 770, 774 (1972) (current version at 5 U.S.C. app. section 10(a)(2) (1988); 41 CFR 101–6.1015 (1990).

Dated: April 22, 1994.

Ronald S. Young,

Executive Director.

[FR Doc. 94–10192 Filed 4–28–94; 8:45 am]

BILLING CODE 1610–01–M

GENERAL SERVICES ADMINISTRATION

Intent (NOI) To Prepare an Environmental Impact Statement (EIS) for the Proposed Phoenix Federal Building—United States Courthouse, in Phoenix, AZ

AGENCY: General Services Administration (GSA) Region 9, Public Buildings Service, Planning Department.

ACTION: Pursuant to the Council of Environmental Quality Regulations (40 Code of Federal Regulations 1500–1508) implementing procedural provisions of the National Environmental Policy Act (NEPA), the GSA hereby gives notice that an EIS shall be prepared for the proposed construction of a new Federal Building—U.S. Courthouse (FB–CT) to be located within the Central Business Area (CBA) of the city of Phoenix, Arizona. It is anticipated that the proposed site will be donated to the Federal Government by the city of Phoenix. The proposed site encompasses about four acres and is currently utilized as a parking area by the city of Phoenix. The proposed subject site is bound by Washington Street to the north, 4th Avenue to the east, Jefferson Street to the south, and 6th Avenue to the west.

ALTERNATIVES: The EIS shall examine four project alternatives. Specific alternatives to be evaluated shall include, but not be limited to:

(1) Construction of a proposed FB–CT on a proposed site that includes the closure of the 5th Avenue between Washington an Jefferson Streets;

(2) Construction of a proposed FB–CT on the same proposed site, with closures of both 5th and 6th Avenues;

(3) Construction of a proposed FB–CT at an alternate site within the CBA; and

(4) The "no action" alternative or continued use of the existing Federal Courthouse facility.

PUBLIC INVOLVEMENT: The public is invited to participate in the scoping process, review of the Draft EIS, and a public meeting on the EIS. The scoping meeting is scheduled for May 12, 1994 from 4 p.m. to 7 p.m., at the Phoenix City Council Chambers, 200 West Jefferson Street, Phoenix, AZ. The Draft EIS for public comment and the following public meeting will be announced through the local news media after these dates are established.

POINT OF CONTACT: If you are unable to attend the meeting, written comments can be submitted by May 19 to: U.S. General Services Administration, Region 9, Public Buildings Service, Attn: Ms. Mitra K. Nejad, Planning Staff (9PL), 525 Market Street, San Francisco, California 94105–2799, Phone number: (415)744–5252.

Dated: April 18, 1994.

Aki K. Nakao,

Acting Regional Administrator (9A).

[FR Doc. 94–10260 Filed 4–28–94; 8:45 am]

BILLING CODE 6820–23–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Commission on Childhood Vaccines; Request for Nominations for Voting Members

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is requesting nominations to fill three vacancies on the Advisory Commission on Childhood Vaccines (ACCV). The Commission was established by title XXI of the Public Health Service Act, as enacted by Public Law 99–660 and as subsequently amended, and advises the Secretary, HHS, on issues related to implementation of the National Vaccine Injury Compensation Program.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Johnson, Principal Staff Liaison, Policy and Commission Branch, Division of Vaccine Injury Compensation at (301) 443–1533.

DATES: Nominations are to be submitted by May 31, 1994.

ADDRESSES: All nominations are to be submitted to the Director, Division of Vaccine Injury Compensation, Bureau of Health Professions, Health Resources and Services Administration (HRSA), Parklawn Building, room 8A–35, 5600 Fishers Lane, Rockville, Maryland 20857.

SUPPLEMENTARY INFORMATION: Under the authorities that established the Advisory Commission, viz., the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92–463) and section 2119 of the Public Health Service Act, 42 U.S.C. 300aa–19, as added by Public Law 99–660 and amended, HRSA is requesting nominations for three voting members of the Commission.

The Commission advises the Secretary on the implementation of the National Vaccine Injury Compensation Program; on its own initiative or as the result of the filing of a petition, recommends changes in the Vaccine Injury Table; advises the Secretary in implementing the Secretary's responsibilities under section 2127 regarding the need for childhood vaccination products that result in fewer or no significant adverse reactions; surveys Federal, State, and local programs and activities relating to the gathering of information on injuries associated with the administration of childhood vaccines, including the adverse reaction reporting requirements

of section 2125(b), and advises the Secretary on means to obtain, compile, publish, and use credible data related to the frequency and severity of adverse reactions associated with childhood vaccines; and recommends to the Director, National Vaccine Program, Office of the Assistant Secretary for Health, research related to vaccine injuries which should be conducted to carry out the National Vaccine Injury Compensation Program.

The Commission consists of nine members appointed by the Secretary as follows: Three health professionals, of whom two are pediatricians, who are not employees of the United States, and who have expertise in the health care of children, the epidemiology, etiology, and prevention of childhood diseases, and the adverse reactions associated with vaccines; three members from the general public, of whom two are legal representatives of children who have suffered a vaccine-related injury or death; and three attorneys, of whom at least one shall be an attorney whose specialty includes representation of persons who have suffered a vaccine-related injury or death and one shall be an attorney whose specialty includes representation of vaccine manufacturers. In addition, the Director of the National Institutes of Health, the Assistant Secretary for Health, the Director of the Centers for Disease Control and Prevention, and the Commissioner of Food and Drugs (or the designees of such officials), serve as non-voting ex officio members.

Specifically, HRSA is requesting nominations for three voting members of the Commission representing: (1) A health professional with special experience in childhood diseases; (2) an attorney whose specialty includes representation of vaccine manufacturers; and (3) a member of the general public. The third category requires a total of three members of the general public, of whom at least two are legal representatives (parent or legal guardian) of children who have suffered a vaccine-related injury or death—by this notice, the Department is soliciting nominations for the third general public position. Nominees will be invited to serve 3-year terms beginning January 1, 1995, and ending December 31, 1997.

Interested persons may nominate one or more qualified persons for membership on the Advisory Commission. Nominations shall state that the nominee is willing to serve as a member of the Commission and appears to have no conflict of interest that would preclude Commission membership. Potential candidates will be asked to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts to permit evaluation of possible sources of conflict of interest. A curriculum vitae should be submitted with the nomination.

The Department has special interest in assuring that women, minority groups, and the physically handicapped are adequately represented on advisory bodies and therefore extends particular encouragement to nominations for appropriately qualified female, minority, or physically handicapped candidates.

Dated: April 22, 1994.

John H. Kelso,

Acting Administrator.

[FR Doc. 94–10235 Filed 4–28–94; 8:45 am]

BILLING CODE 4160–15–P

The Ryan White Comprehensive AIDS Resources Emergency Act of 1990; Early Intervention Services

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of pre-application technical assistance workshop.

SUMMARY: The Health Resources and Services Administration will hold a pre-application technical assistance workshop for competing applicants under Title III(b), HIV Early Intervention Services, of the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Public Law 101–381.

Eligible applicants are Migrant and Community Health Centers under sections 329 and 330 of the Public Health Service (PHS) Act; Health Care for the Homeless Program grantees under section 340 of the PHS Act; Comprehensive Hemophilia Diagnostic and Treatment Centers; family planning grantees under section 1001 of the PHS Act (other than States); Federally Qualified Health Centers under section 1905(l)(2)(B) of the Social Security Act and other public and private nonprofit entities that provide comprehensive primary care services to populations at risk of HIV disease.

PURPOSE: The purpose of the technical assistance workshop is to disseminate relevant program information and review HIV Early Intervention Services program expectations. Eligible entities will have an opportunity to review the program guidance and to receive technical assistance pertaining to all aspects of writing and implementing grant applications under Title III(b), HIV Early Intervention Services.

CONTACT: Anyone interested in attending the meeting should contact Ms. Eugenia F. Adams, Division of Programs for Special Populations, Bureau of Primary Health Care, room 9–8D3, 4350 East-West Highway, Bethesda, Maryland 20814 Telephone: (301) 594–4443. Costs of attending are to be borne by prospective applicants.

DATE AND TIME: May 4, 1994, 9 a.m. to 5 p.m.

PLACE: PHS Regional Office IV, room 723, 101 Marietta Tower, Atlanta, GA.

Dated: April 21, 1994.

John H. Kelso,

Acting Administrator.

[FR Doc. 94–10189 Filed 4–28–94; 8:45 am]

BILLING CODE 4160–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N–94–1917; FR–3350–N–81]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

ADDRESSES: For further information, contact Barbara Richards, room 7262, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–4300; TDD number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 56 FR 23789 (May 24, 1991) and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal

property. This notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. Veterans Administration, No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD:

(1) Its intention to make the property available for use to assist the homeless;

(2) Its intention to declare the property excess to the agency's needs; or

(3) A statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 30 days from the date of this Notice. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Judy Britman, Division of Health Facilities Planning, U.S. Public Health Service, HHS, room 17A–10, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program 56 FR 23789 (May 24, 1991).

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a notice showing it as either suitable/available, or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Barbara Richards at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following address: *U.S. Navy:* John J. Kane, Deputy Division Director, Dept of Navy, Real Estate Operations, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332–2300; (703) 325–0474; *GSA:* Leslie Carrington, Federal Property Resources Services, GSA, 18th and F Streets, NW., Washington, DC 20405; (202) 208–0619; *U.S. Army:* Elaine Sims, CECPW–FP, U.S. Army Center for Public Works, 7701 Telegraph Road, Alexandria, VA 22310–3862; (703) 355–3475; *U.S. Air Force:* Bob Menke, Area–MI, Bolling AFB, 172 Luke Avenue, suite 104, Washington, DC 20332–5113; (202) 767–6235; *Dept. of Transportation:* Ronald D. Keefer, Director, Administrative Services & Property Management, DOT, 400 Seventh St. SW., room 10319, Washington, DC 20590; (202) 366–4246; (These are not toll-free numbers)

Dated: April 22, 1994.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

Title V, Federal Surplus Property Program Federal Register Report for 04/29/94

Suitable/Available Properties

Buildings (by State)

Washington

Olympia Federal Building,
801 Capitol Way,
Olympia Co: Thurston WA,
Landholding Agency: GSA,
Property Number: 549420002,
Status: Excess,
Comment: 13,800 sq. ft., 3-story/basement, on Natl Hist. Reg., pres. of lead based paint, city seismic code prohibits residential use, does not meet Federal standards for seismic tests,
GSA Number: G-WA–1040.

Unsuitable Properties

Buildings (by State)

Alaska

Bldg. 1548, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force,
Property Number: 189420001.
Status: Unutilized,
Reason: Floodway, Secured Area, Extensive deterioration.

Bldg. 1568, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force,
Property Number: 189420002,
Status: Unutilized.
Reason: Floodway, Secured Area, Extensive deterioration.

Bldg. 1570, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force,
Property Number: 189420003,
Status: Unutilized,
Reason: Floodway, Secured Area, Extensive deterioration.

Bldg. 1700, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force,
Property Number: 189420004,
Status: Unutilized,
Reason: Floodway, Secured Area, Extensive deterioration.

Bldg. 1832, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force,
Property Number: 189420005,
Status: Unutilized,
Reason: Floodway, Secured Area, Extensive deterioration.

Bldg. 1842, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force.
Property Number: 189420006,
Status: Unutilized,
Reason: Floodway, Secured Area, Extensive deterioration.

Bldg. 1844, Galena Airport,
Elmendorf AFB AK 99506–4420,
Landholding Agency: Air Force,
Property Number: 189420007.
Status: Unutilized.
Reason: Floodway, Secured Area, Extensive deterioration.

California

Bldg. 501,
Vandenberg Air Force Base,
Vandenberg AFB Co: Santa Barbara CA 93437–,
Landholding Agency: Air Force,
Property Number: 189420008,
Status: Unutilized.
Reason: Secured area, Extensive deterioration.

Bldg. 8223,
Vandenberg Air Force Base,
Vandenberg AFB Co: Santa Barbara CA 93437–
Landholding Agency: Air Force,
Property Number: 189420009.
Status: Unutilized,
Reason: Secured area.

Bldg. 11435,
Vandenberg Air Force Base,
Vandenberg AFB Co: Santa Barbara CA 93437–,
Landholding Agency: Air Force,
Property Number: 189420010,
Status: Unutilized,
Reason: Secured area.

Bldg. 13020,
Vandenberg Air Force Base,

Vandenberg AFB Co: Santa Barbara CA 93437–,
Landholding Agency: Air Force,
Property Number: 189420011,
Status: Unutilized,
Reason: Secured area, extensive deterioration.

Colorado

Barn—Tract 103,
Falcon Air Force Base Co: El Paso CO 80912–,
Landholding Agency: Air Force,
Property Number: 189420012,
Status: Unutilized,
Reason: Extensive deterioration.

Maine

Nash Island Light,
U.S. Coast Guard,
Addison Co: Washington ME 04606–,
Landholding Agency: DOT,
Property Number: 879420005,
Status: Unutilized,
Reason: Other,
Comment: Inaccessible.

Bldg.—South Portland Base,
U.S. Coast Guard,
S. Portland Co: Cumberland ME 04106–,
Landholding Agency: DOT,
Property Number: 879420006,
Status: Unutilized,
Reason: Secured area.

Minnesota

Naval Weapons Industrial,
Reserve Plant,
1902 West Minnehaha,
St. Paul Co: Ramsey MN,
Landholding Agency: GSA,
Property Number: 549410004,
Status: Excess,
Reason: Within 2000 ft. of flammable or explosive material
GSA Number: 2–N-MN–559.

New Jersey

Bldg. 24,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420001,
Status: Underutilized,
Reason: Within 2000 ft. of flammable or explosive material Floodway.

Bldg. 31A,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420002,
Status: Underutilized,
Reason: Floodway.

Bldg. 31C,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420003,
Status: Underutilized,
Reason: Floodway.

Bldg. 31E,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420004,
Status: Underutilized,
Reason: Floodway, Extensive deterioration.

Bldg. 31I,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420005,
Status: Unutilized,
Reason: Extensive deterioration.

Bldg. 291,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420006,
Status: Underutilized,
Reason: Secured area, Extensive deterioration.

Bldg. 300,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420007,
Status: Underutilized,
Reason: Extensive deterioration.

Bldg. 735,
Armament Research, Development & Eng. Center,
Picatinny Arsenal Co: Morris NJ 07806–5000,
Landholding Agency: Army,
Property Number: 219420008,
Status: Unutilized,
Reason: Within 2000 ft. of flammable or explosive material, Secured area.

New York

Bldg. 852,
Niagara Falls International Airport,
914th Tactical Airlift Group,
Niagara Falls Co: Niagara NY 14304–5000,
Landholding Agency: Air Force,
Property Number: 189420013,
Status: Unutilized,
Reason: Secured area.

Bldg. 830,
U.S. Coast Guard,
Governors Island Co: Manhattan NY 10004–,
Landholding Agency: DOT,
Property Number: 879420004,
Status: Unutilized,
Reason: Secured area.

North Carolina

Bldg. PT–42,
Marine Corps Base,
Camp Lejeune Co: Onslow NC 28542–0004,
Landholding Agency: Navy,
Property Number: 779420002,
Status: Unutilized,
Reason: Secured area, Extensive deterioration.

Bldg. S–93,
Marine Corps Base,
Camp Lejeune Co: Onslow NC 28542–0004,
Landholding Agency: Navy,
Property Number: 779420003,
Status: Unutilized,
Reason: Secured area.

Bldg. TC–910,
Marine Corps Base,
Camp Lejeune Co: Onslow NC 28542–0004,
Landholding Agency: Navy,
Property Number: 779420004,
Status: Unutilized,
Reason: Extensive deterioration.

Bldg. S–942,
Marine Corps Base,
Camp Lejeune Co: Onslow NC 28542–0004,
Landholding Agency: Navy,
Property Number: 779420005,
Status: Unutilized,
Reason: Extensive deterioration.

Bldg. S–1213,
Marine Corps Base,
Camp Lejeune Co: Onslow NC 28542–0004,
Landholding Agency: Navy,
Property Number: 779420006,
Status: Unutilized,
Reason: Extensive deterioration.

Texas

Bldg. 40,
Laughlin Air Force Base Co: Val Verde TX 78843–5000,
Landholding Agency: Air Force,
Property Number: 189420014,
Status: Unutilized,
Reason: Extensive deterioration.

Bldg. 107,
Laughlin Air Force Base Co: Val Verde TX 78843–5000,
Landholding Agency: Air Force,
Property Number: 189420015,
Status: Unutilized,
Reason: Extensive deterioration.

Bldg. 119,
Laughlin Air Force Base Co: Val Verde TX 78843–5000,
Landholding Agency: Air Force,
Property Number: 189420016,
Status: Unutilized,
Reason: Extensive deterioration.

Wyoming

Bldg. 362,
Warren Air Force Base,
Cheyenne Co: Laramie WY 82005,
Landholding Agency: Air Force,
Property Number: 189420017,
Status: Unutilized,
Reason: Secured area.

Bldg. 342,
Warren Air Force Base,
Cheyenne Co: Laramie WY 82005,
Landholding Agency: Air Force,
Property Number: 189420018,
Status: Unutilized,
Reason: Secured area.

[FR Doc. 94–10148 Filed 4–28–94; 8:45 am]
BILLING CODE 4210–29–P

Office of the Secretary—Office of Lead-Based Paint Abatement and Poisoning Prevention

[Docket No. N–94–3735; FR–3643–N–02]

NOFA for Lead-Based Paint Hazard Control in Priority Housing: Correction

AGENCY: Office of the Secretary—Office of Lead-Based Paint Abatement and Poisoning Prevention, HUD.

ACTION: Correction of deadline date.

SUMMARY: This notice corrects the deadline date announced for submission of applications under the NOFA for Lead-Based Paint Hazard Control in Priority Housing published on April 21, 1994 (59 FR 19080). The corrected deadline date will be Wednesday, July 6, 1994, in order to allow an additional day for delivery following the Federal holiday.

DATES: An original and two copies of the completed application must be submitted no later than 3 p.m. (Eastern Time) on Wednesday, July 6, 1994. The application deadline is firm as to date and hour. In the interest of fairness to all competing applicants, the Department will treat as ineligible for consideration any application that is received after its deadline. Applicants should take this factor into account and make early submission of their materials to avoid loss of eligibility brought about by unanticipated delays or other delivery-related problems.

ADDRESSES: Application kits may be obtained from the Office of Lead-Based Paint Abatement and Poisoning Prevention, Department of Housing and Urban Development, room B–133, 451 Seventh Street, SW., Washington, DC 20410, or by phoning 1–800–RID-LEAD (1–800–743–5323). Completed applications should be submitted to this same address, and may not be faxed.

FOR FURTHER INFORMATION CONTACT: Ellis G. Goldman, Director, Program Management Division, Office of Lead-Based Paint Abatement and Poisoning Prevention, room B–133, 451 Seventh Street SW., Washington, DC 20410, telephone 1–800–RID-LEAD (1–800–743–5323). TDD numbers for the hearing-impaired are: (202) 708–9300 (not a toll-free number), or 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Accordingly, FR Doc. 94–9690, published at 59 FR 19080 (April 21, 1994), is corrected as follows:

1. On page 19080, in the first column, the first sentence after the heading **DATES** is corrected to read as follows:

An original and two copies of the completed application must be submitted no later than 3 p.m.. (Eastern Time) on July 6, 1994.

* * * * *

2. On page 19085, in the second column, the first sentence after the heading "4.1 Submitting Applications for Grants" is corrected to read as follows:

To be considered for funding an original and two copies of the application must be physically received in the Office of Lead-Based Paint Abatement and Poisoning Prevention (OLBPAPP), Department of Housing and Urban Development, room B–133, 451 Seventh Street, SW., Washington, DC 20410, no later than 3 p.m. (Eastern Time) on July 6, 1994. * * *

Authority: 42 U.S.C. 4821–4846; 42 U.S.C. 3535(d).

Dated: April 22, 1994.

Myra L. Ransick,

Assistant General Counsel for Regulations.

[FR Doc. 94–10306 Filed 4–28–94; 8:45 am]

BILLING CODE 4210–32–P

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N–94–3690; FR–3628–N–03]

Innovative Project Funding Under the Innovative Homeless Initiatives Demonstration Program: Announcement of Funding Awards for FY 1994

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding award decisions made by the Department for the Innovative Project Funding under Innovative Homeless Initiatives Demonstration Program. The announcement contains the names and addresses of the award winners and the amount of the awards.

FOR FURTHER INFORMATION CONTACT: David Pollack, Director, Program Development Division, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, room 7260, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 708–1234 (voice) or 708–2565 (TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: Innovative Project Funding is part of the Innovative Homeless Initiatives Demonstration Program, which is authorized under section 2 of the HUD Demonstration Act of 1993 (Pub. L. 103–120, approved October 27, 1993).

In a notice of funding availability (NOFA) published on December 21, 1993 (58 FR 21064), the Department announced the availability of $25 million in funding for applications for Innovative Project Funding under the Innovative Homeless Initiatives Demonstration Program. The NOFA announced that the funds would be awarded competitively for activities which are components of an innovative approach toward providing a "continuum of care" system designed to assist homeless persons and prevent homelessness. The NOFA also announced that the funds would be awarded to fill gaps within the context of developing a seamless system to combat homelessness.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, the Department is publishing the names and addresses of the nonprofit organizations which received funding under this NOFA, and the amount of funds awarded to each. This information is provided in appendix A to this document.

Dated: April 25, 1994.

Andrew Cuomo,

Assistant Secretary for Community Planning and Development.

APPENDIX A.—RECIPIENTS OF INNOVATIVE AWARDS FOR FY 1994

Applicant name	City	Amount of award
Diocesan Council	Phoenix, AZ	$300,000
St. Vincent dePaul Village, Inc.	San Diego, CA	1,000,000
Little Tokyo Service Center, Inc.	Los Angeles, CA	15,750
Bar Association of San Francisco	San Francisco, CA	250,000
Los Angeles Men's Place (LAMP)	Los Angeles, CA	112,080
Covenant House	Los Angeles, CA	170,968
Volunteers of America	Sacramento, CA	233,993
Skid Row Housing Trust	Los Angeles, CA	311,850
Hollywood Community Housing	Hollywood, CA	250,000

APPENDIX A.—RECIPIENTS OF INNOVATIVE AWARDS FOR FY 1994—Continued

Applicant name	City	Amount of award
The Salvation Army	Los Angeles, CA	336,000
City of New Haven	New Haven, CT	770,350
Another Way, Inc.	Archer, FL	98,280
Metro Atlanta Task Force	Atlanta, GA	997,500
The Turning Point, Inc.	Canyon County, ID	423,570
City of Chicago	Chicago, IL	1,100,875
Chicago Health Outreach, Inc.	Chicago, IL	647,684
UNITY for the Homeless, Inc.	New Orleans, LA	1,050,000
Friends of the Shattuck Shelter	Jamaica Plain, MA	567,735
Greater Boston, MA Adult Shelter	Boston, MA	415,748
Trustees of Health & Hospitals	Boston, MA	336,000
Action for Boston, MA Community	Boston, MA	437,409
Vietnam Veterans Workshop, Inc.	Boston, MA	371,657
City of Baltimore	Baltimore, MD	997,500
State of Maine	Augusta, ME	302,610
City of Detroit	Detroit, MI	999,412
Minnesota Dept. of Jobs & Training	St. Paul, MN	724,000
Economic Security Corporation of SW Area	Joplin, MO	328,268
Greensboro Urban Ministry	Greensboro, NC	984,843
Newark Emergency Services for Families, Inc.	Newark, NJ	997,380
St. Mary's Hospital	Rochester, NY	724,872
New York, NY State Office of Mental Health	New York, NY	500,000
Grand Central Partnership	New York, NY	547,300
Goddard-Riverside Community Center	New York, NY	250,092
Utica Community Action, Inc.	Utica, NY	30,000
The Bridge, Inc.	New York, NY	453,250
The Salvation Army	Buffalo, NY	992,019
Volunteers of America	Cleveland, OH	364,467
Oregon Housing & Community Services, Inc.	Salem, OR	578,340
Drueding Center—Project Rainbow	Philadelphia, PA	157,500
North Hills Affordable Housing Task Force	Pittsburgh, PA	320,964
S.H.A.R.E.	Greenville, SC	298,462
Ministerial Association Temporary	Morristown, TN	290,000
Harris County	Houston, TX	998,214
City of San Antonio	San Antonio, TX	1,000,000
The Champlain Valley Office of Economic Opportunity	Burlington, VT	985,049
Yakima County Coalition for the Homeless	Yakima, WA	183,750
City of Seattle	Seattle, WA	643,172
Menominee Indian Tribe of Wisconsin	Gresham, WI	200,688

[FR Doc. 94–10304 Filed 4–28–94; 8:45 am]
BILLING CODE 4210–29–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–050–01–4333–24]

Interlakes Special Recreation Management Area Plan and Environmental Impact Statement, Shasta County, CA

AGENCY: Bureau of Land Management (BLM), Redding Resource Area, Ukiah District, California, Interior.

ACTION: Notice of Intent to prepare an Environmental Impact Statement (EIS).

SUMMARY: BLM proposes to prepare an EIS which will accompany an integrated, resources activity plan for the Interlakes Special Recreation Management Area. Preparation of this plan is directed by BLM's Record of Decision for the Redding Resource Management Plan and EIS which was prepared under the authority of the Federal Land Policy and Management Act of 1976 (section 202). BLM will be preparing an EIS under the authority of the National Environmental Policy Act of 1969.

SUPPLEMENTARY INFORMATION: The Interlakes Special Recreation Management Area is a 74,850 acre region which encompasses lands administered through the United States Department of the Interior's BLM, National Park Service, Bureau of Reclamation and Department of Agriculture's Forest Service. Most actions identified with the activity plan would be implemented through various cooperative management agreements.

FOR COMMENTS AND FURTHER INFORMATION: District Manager c/o Area Manager, Redding Resource Area, 355 Hemsted Drive, Redding California, 96002.

Dated: March 29, 1994.

Mark T. Morse,

Area Manager.

[FR Doc. 94–10262 Filed 4–28–94; 8:45 am]
BILLING CODE 4310–40–M

[AZ–010–94–4333–04]

Arizona; Notice of Designation

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of off-highway vehicle designation.

SUMMARY: The Beaver Dam Mountain Slope and Virgin Mountain Slope, in northwest Arizona, are designated as limited to designated roads and closed to off-road vehicle use. Notice is hereby given relating to the use of off-highway vehicles on public lands under administration of the Bureau of Land Management. These designations are made in accordance with the authority and requirements of Executive Orders

11644 and 11989, and regulations contained in 43 CFR 8340. Under 43 CFR 4.21, an appeal may be filed within 30 days with the Interior Board of Land Appeals.

The 116,610-acre area affected by the designation is known as the Beaver Dam and Virgin Mountain slopes in Mojave County, Arizona. The Beaver Dam Slope is defined as immediately north of Interstate 15 to the Utah and Nevada State lines on the north and west and the Beaver Dam Mountains on the east. The Virgin Mountain Slope is defined as the area between the Virgin Mountains, Interstate 15 and the Nevada state line. Public lands within these areas are designated as limited or closed to off-road motorized vehicle and bicycle use to protect fragile resources.

These designations are a result of resource management decisions made in the Arizona Strip Resource Management Plan (RMP), approved January 1992. Comments received during the RMP public comment period influenced the designation decisions. An Environmental Impact Statement was repaired for the Resource Management Plan. This designation order supersedes off-highway vehicle designations made prior to development of the 1992 Resource Management Plan. These designations are published as final today.

DESIGNATIONS: The following designation areas are displayed on maps available at the location under ADDRESSES below.

A. *Limited to Designated Roads and Trails*—97,886 acres. Vehicle and bicycle use in these areas is permitted only on designated roads and trails which are identified with signs and on maps. Public use is prohibited on roads and trails not designated. Administrative use may be allowed on some closed roads.

B. *Closed*—18,724 acres.

All motorized vehicle and bicycle use within these areas is prohibited to protect fragile resources.

DATES: This designation becomes effective April 29, 1994 and will remain in effect until rescinded or modified by the authorized officer.

ADDRESSES: Maps showing the location of the designations will be available at the Shivwits Resource Area, 225 North Bluff Street, St. George, Utah.

FOR FURTHER INFORMATION CONTACT: George Cropper, Area Manager, Shivwits Resource Area, 225 North Bluff Street, St. George, Utah 84770. Telephone (801) 628–4491.

Raymond D. Mapston,

Acting District Manager.

[FR Doc. 94–10263 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–32–M

[AZ–055–04–4210–04; AZA 26476; 4–00162]

Arizona: Realty Action, Land Exchange; Yuma District

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: Pursuant to section 206 of the Federal Land Policy and Management Act of 1976, the BLM proposes to exchange public land, on an equal value for equal value basis, for private lands. The proposed exchange would be a positive step towards meeting the goal of placing all land ownership within the Sears Point Archaeological District under Federal ownership and Bureau of Land Management administration.

DATES: The segregation effect of the notice of realty action on the public lands shall terminate upon issuance of patent or other document of conveyance to such lands, upon publication in the **Federal Register** of a termination of the segregation, or 2 years from the date of its publication, whichever occurs first.

ADDRESSES: Protests should be addressed to the Director, Bureau of Land Management (760), MS 406 LS, 849 C Street NW., Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The private lands are located within and adjacent to the Sears Point Archaeological District in Yuma County, which is also known as the Gila River Cultural Area, an area of critical environmental concern. The public lands proposed for exchange are described as follows:

Gila and Salt River Meridian, Arizona

T. 9 S., R. 23 W.,

Sec. 29, Lot 2, SE¼SW¼.

Containing 51.66 acres, more or less.

Final determination for exchange will await completion of an environmental assessment.

In accordance with the regulations of 43 CFR 2201.1(b), publication of this notice will segregate the affected public lands from appropriation under the mining laws, but not from the mineral leasing laws. The public lands would be conveyed out of Federal ownership subject to the following four rights-of-ways:

1. Bureau of Reclamation 50 feet wide 34.5kV electrical transmission line right-of-way for Yuma Boundary Pumping Plant (Bureau of Reclamation Drawing No. 50–304–19).

2. A–6884, Yuma County, Avenue A½, 30 feet wide road right-of-way; and

3. A–6398, Yuma County, County 15th Street, 66 feet wide road right-of-way.

FOR FURTHER INFORMATION CONTACT: Joy Gilbert, Yuma Resource Area Manager, Yuma District Office, 3150 Winsor Avenue, Yuma, Arizona 85365, telephone (602) 726–6300.

Dated: March 14, 1994.

Judith I. Reed,

District Manager.

[FR Doc. 94–10264 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–32–M

[OR–035–00–4333–02; G4–00141; 4–0151]

Powder River Management Plan (National Wild and Scenic River), Vale District, Baker Resource Area, and Baker County, OR

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: On April 20, 1994, Baker Resource Acting Area Manager, Dorothy Mason, made a decision to append the Bureau of Land Management, Baker Resource Management Plan, to include the Powder River Management Plan (National Wild and Scenic River).

This plan identifies use levels, facility development levels, resource protection measures, and sets the general management direction for managing the Powder River (designated section). This appendage is necessary to implement the Omnibus Oregon Wild and Scenic Rivers Act which required the Bureau of Land Management to develop a management plan for the Powder River. Interim direction was identified in the Baker Resource Management Plan. The environmental assessment documents the analysis of alternatives for managing the Powder Wild and Scenic River in accordance with the Omnibus Oregon Wild and Scenic Rivers Act.

For the Bureau of Land Management, this decision is subject to protest pursuant to Bureau of Land Management regulations 43 CFR part 4. The 30 day protest period begins May 1, 1994 and ends May 30, 1994. Notices of Protest must meet the requirements of 43 CFR 4.21.

The final corridor boundary of the designated segment of the Powder River lies entirely within the legal description below:

Beginning at Thief Valley Reservoir, Oregon

Willamette Meridian

T. 6S., R. 40E.,
Portions of Sections: 26, 35.
T. 7S., R. 40E.,
Portions of Sections: 1, 2, 11, 12, 13, 14.
T. 7S., R. 41E.,
Portions of Sections: 17, 18, 19, 20, 21, 27, 28, 29, 33, 34.

Ending at the Oregon State Highway 203.

A more detailed legal description is available upon request.

The environmental assessment for the Powder River Management Plan, Wild and Scenic River segment, is available for public review at the Bureau of Land Management, Baker Resource Area Office in Baker City, Oregon.

EFFECTIVE DATE: Implementation of this decision will occur no earlier than the end of the protest period identified above (May 1, 1994 through May 30, 1994).

FOR FURTHER INFORMATION CONTACT: For further information, contact Gerry Meyer, Bureau of Land Management, Baker Resource Area, P.O. Box 987, Baker City, Oregon, 97814 or phone (503) 523–1256.

Dated: April 20, 1994.

Dorothy Mason,

Area Manager.

[FR Doc. 94–10261 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–33–M

[NM–920–4210–06; NMNM 0557005]

Proposed Continuation of Withdrawal; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture, Forest Service, proposes that a 1,237.50-acre withdrawal for the Bernalillo Watershed Addition in the Cibola National Forest continue for an additional 20 years. The lands will remain closed to mining, but have been and will remain open to surface entry and mineral leasing.

DATES: Comments should be received by July 28, 1994.

ADDRESSES: Comments should be sent to State Director, BLM New Mexico State Office, P.O. Box 27115, Santa Fe, New Mexico 87502, 505–438–7502.

FOR FURTHER INFORMATION CONTACT: Georgiana E. Armijo, BLM New Mexico State Office, 505–438–7594.

SUPPLEMENTARY INFORMATION: The United States Department of Agriculture, Forest Service, proposes that the existing land withdrawal made by Public Land Order No. 3839, be continued for a period of 20 years pursuant to section 204 of the Federal Land Policy and Management Act of 1976, U.S.C. 1714 (1988). The lands are described as follows:

New Mexico Principal Meridian

Cibola National Forest

T. 12 N., R. 4 E.,
Sec. 1, lots 1 to 7, inclusive, SW¼NE¼, S½NW¼, SW¼, and NW¼SE¼. Those portions of lot 8 (approximately 34 acres), lot 9 (approximately 2 acres), and lot 10 (approximately 5 acres), and portions of the SW¼SE¼ (approximately 30 acres), that lie outside the Sandia Mountain Wilderness Area.
Sec. 2, lots 1 to 3, inclusive, S½NE¼, SE¼NW¼, N½SE¼ and SE¼SE¼.
Sec. 12, N½NW¼, SW¼NW¼, and those portions of the W½NW¼NE¼ (approximately 15 acres), NW¼SW¼NE¼ (approximately 1 acre), NE¼SE¼NW¼ (approximately 2 acres), and W½SE¼NW¼ (approximately 7 acres), that lie outside the Sandia Mountain Wilderness Area.
Sec. 14, lots 5 and 6, and those portions of lot 7 (approximately 1 acre), and NE¼NE¼ (approximately 19 acres), that lie outside the Sandia Mountain Wilderness Area.
T. 12 N., R. 5 E.,
Sec. 6, Those portions of lot 9 (approximately 28.80 acres), lot 17 (approximately 28.88 acres), lot 18 (approximately 3 acres) and lot 19 (approximately 18.59 acres), that lie outside the Sandia Mountain Wilderness Area.

The areas described aggregate approximately 1,237,50 acres in Sandoval County.

The purpose of the withdrawal is to protect the Forest Service's Bernalillo Watershed Addition in the Cibola National Forest. The withdrawal segregates the lands from the mining laws, but not the public land laws or the mineral leasing laws. No change is proposed in the purpose or segregative effect of the withdrawal.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed withdrawal continuation may present their views in writing to the State Director in the New Mexico State Office.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will also be prepared for consideration by the Secretary of the Interior, the President, and the Congress, who will determine whether or not the withdrawal will be continued, and if so, for how long.

The final determination on the continuation of the withdrawal will be published in the **Federal Register.** The existing withdrawal will continue until such final determination is made.

Dated April 15, 1994.

Patricia E. McLean,

State Director.

[FR Doc. 94–10265 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–FB–M

Bureau of Reclamation

Trinity River Basin Fish and Wildlife Task Force

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, announcement is made of a meeting of the Trinity River Basin Fish and Wildlife Task Force.

DATES: The meeting begins on Tuesday, September 13, 1994, at 1 p.m. and reconvenes on Wednesday, September 14, 1994, at 9 a.m.

ADDRESSES: Assemble at Tribal Headquarters, Hoopa, California.

FOR FURTHER INFORMATION CONTACT: Mr. Chip Bruss, Trinity River Task Force Secretary, Bureau of Reclamation, MP–720, 2800 Cottage Way, Sacramento, California 95825; telephone: (916) 978–4956 or TDD (916) 978–4417.

SUPPLEMENTARY INFORMATION: The first afternoon will be a field trip to view restoration work on the lower Trinity River. The Task Force will consider the Three-Year Action Plan and Budget. It will also discuss Bioregional Coordination and the program extension.

Dated: April 22, 1994.

Donald R. Glaser,

Acting Director, Program Analysis Office.

[FR Doc. 94–10227 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–94–M

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

PRT–788595

Applicant: Robert M. Faught, San Diego, CA.

The applicant requests a permit to conduct taped vocalization surveys, nest monitoring and impact assessments of the least Bell's vireo (*Vireo bellii pusillus*) in Southern California to enhance the survival of the species.

PRT–787844

Applicant: Charles Morzellec, Nokesville, VA.

The applicant requests a permit to purchase in interstate commerce one male Queen of Bavaria conure (*Aratinga guarouba*) from Elk Ridge Aviaries, Redway, California to enhance the propagation and survival of the species through captive breeding.

PRT–789407

Applicant: John M. Azevedo, Manteca, CA.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus dorcas dorcas*) culled from the captive herd maintained by the Ciskei Government, the Tsolwana Game Reserve, Tarkastad, Republic of South Africa, for the purpose of enhancement of survival of the species.

PRT–789043

Applicant: Columbus Zoological Gardens, Powell, OH.

The applicant requests a permit to import one captive-bred male white-cheeked gibbon (*Hylobates concolor leucogenys*) from Zoo Hannover, Hannover, West Germany, to enhance the propagation and survival of the species through captive breeding.

PRT–789201

Applicant: Cincinnati Zoo, Cincinnati, OH.

The applicant requests a permit to import a pair of captive-born Manchurian cranes (*Grus japonensi*) from the Khinganski Nature Reserve, Russia, to enhance the propagation and survival through captive breeding.

PRT–789522

Applicant: Brookfield Zoo, Brookfield, IL.

The applicant requests a permit to import 2 male and 3 female captive-born Leadbeater's possums (*Gymnobelideus leadbeateri*) from the Zoological Board of Victoria and Taronga Park Zoo, Sydney, Australia, to enhance the propagation and survival of the species through captive breeding.

PRT–788777

Applicant: International Animal Exchange, Ferndale, MI.

The applicant requests a permit to import a pair of captive-bred cheetahs (*Acinonyx jubatus*) from the Hoedspriut Jagluiperdprojek Cheetah Project, Silverton, Republic of South Africa, to Dickerson Park Zoo, Springfield, Missouri, to enhance the propagation and survival of the species through captive breeding.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 420(c), Arlington, Virginia 22203. Phone: (703/358–2104); FAX: (703/358–2281).

Dated: April 22, 1994.

Carol Anderson,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 94–10212 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–55–P

Receipt of Application(s) for Permit

The public is invited to comment on the following application(s) for permits to conduct certain activities with marine mammals. The application(s) was/were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*, the Endangered Species Act of 1973, *as amended* (U.S.C. 1531, *et seq.*) and the regulations governing marine mammals and endangered species (50 CFR 17 and 18).

File no. PRT–766818

Applicant: Mr. James Bodkin, National Biological Survey, Alaska Fish and Wildlife Research Center, Anchorage, AK.

Type of Permit: Scientific Research.

Name and Number of Animals: Sea otters (*Enhydra lutris lutris*), 25

Summary of Activity to be Authorized: The applicant requests an amendment to his current permit to take an additional 25 animals from waters in around Alaska in order to attach a flipper tag radio transmitter to one hind flipper and a sonic transmitter attached to the other hind flipper. This procedure will be used to develop alternative technologies to obtain dive depth and duration data.

Source of Marine Mammals for Research: Twenty-five sea otters will be taken from waters in and around southeastern Alaska.

Period of Activity: Through September 1995.

Concurrent with the publication of this notice in the **Federal Register**, the Office of Management Authority is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Written data or comments, requests for copies of the complete application, or requests for a public hearing on this application should be submitted to the Director, Office of Management Authority (OMA), 4401 N. Fairfax Dr., room 432, Arlington, VA 22203 and must be received by the Director within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such hearing is at the discretion of the Director.

Documents and other information submitted with these applications are available for review by any party who submits a written request for a copy of such documents to, or by appointment during normal business working hours (7:45—4:15) in, the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, OMA, 4401 North Fairfax Drive, room 420(c), Arlington, VA 22203. Phone: (1–800–358–2104); Fax: (703/358–2281).

Dated: April 22, 1994.

Carol Anderson,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 94–10211 Filed 4–28–94; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–360–361 (Preliminary) and 731–TA–688–695 (Preliminary)]

Certain Carbon Steel Butt-Weld Pipe Fittings From France, India, Israel, Malaysia, the Republic of Korea, Thailand, the United Kingdom, and Venezuela

AGENCY: International Trade Commission.

ACTION: The following paragraph was omitted from the Commission's previously reported determinations for the subject investigations, which appeared in the **Federal Register** on April 20, 1994 (59 F.R. 18825).

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on April 14,

1994. The views of the Commission are contained in USITC Publication 2767 (April 1994), entitled "Certain Carbon Steel Butt-Weld Pipe Fittings from France, India, Israel, Malaysia, the Republic of Korea, Thailand, the United Kingdom, and Venezuela: Investigations Nos. 701–TA–360 and 361 (Preliminary) and 731–TA–688 through 695 (Preliminary)."

Issued: April 22, 1994.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–10308 Filed 4–28–94; 8:45 am]

BILLING CODE 7020–02–P

[Investigation 337–TA–360]

In the Matter of Certain Devices for Connecting Computers via Telephone Lines; Notice of Initial Determination Terminating Respondent on the Basis of Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the Commission has received an initial determination from the presiding administrative law judge in the above captioned investigation terminating the following respondent on the basis of a settlement agreement: Pan International (USA).

SUPPLEMENTARY INFORMATION: This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the Commission thirty (30) days after the date of its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon parties on April 22, 1994.

Copies of the initial determination, the settlement agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

WRITTEN COMMENTS: Interested persons may file written comments with the Commission concerning termination of the aforementioned respondents. The original and 14 copies of all such documents must be filed with the Secretary to the Commission, 500 E Street, SW., Washington, DC 20436, no later than 10 days after publication of this notice in the **Federal Register**. Any person desiring to submit a document (or portions thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

FOR FURTHER INFORMATION CONTACT: Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, telephone (202) 205–1802.

Issued: April 22, 1994.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–10307 Filed 4–28–94; 8:45 am]

BILLING CODE 7020–02–P

INTERSTATE COMMERCE COMMISSION

[Docket No. AB–406 (Sub-No. 3X)]

Central Kansas Railway, Inc.; Abandonment Exemption; in Edwards and Pawnee Counties, KS

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts from the prior approval requirements of 49 U.S.C. 10903–10904 the abandonment by Central Kansas Railway, Inc., of a 12-mile line of railroad in Edwards and Pawnee Counties, KS, subject to standard labor protective conditions and an environmental condition.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on May 29, 1994. Formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) [1] must be filed by May 9, 1994. Petitions to stay must be filed by May 9, 1994. Requests for a public use condition conforming to 49 CFR 1152.28(A)(2) and petitions to reopen must be filed by May 19, 1994.

ADDRESSES: Send pleadings, referring to Docket No. AB–406 (Sub-No. 3X), to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423; and (2) Petitioner's representatives: Louis E. Gitomer, Taylor, Morell & Gitomer, 919 18th Street NW. suite 210, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services at (202) 927–5721.]

Decided: April 20, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin. Commissioner Philbin did not participate in the disposition of this proceeding.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94–10299 Filed 4–28–94; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–406 (Sub-No. 2X)]

Central Kansas Railway, Inc.; Abandonment Exemption; in Barber and Kiowa Counties, KS

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts from the prior approval requirements of 49 U.S.C. 10903–10904 the abandonment by Central Kansas Railway, Inc., of an 8-mile line of railroad in Barber and Kiowa Counties, KS, subject to standard labor protective conditions and an environmental condition.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on May 29, 1994. Formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) [1] must be filed by May 9, 1994. Petitions to stay must be filed by May 9, 1994. Requests for a public use condition conforming to 49 CFR 1152.28(A)(2) and petitions to reopen must be filed by May 19, 1994.

ADDRESSES: Send pleadings, referring to Docket No. AB–406 (Sub-No. 2X), to: (1)

[1] See Exempt. of Rail Abandonment—*Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

[1] See Exempt. of Rail Abandonment—*Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423; and (2) Petitioner's representatives: Louis E. Gitomer, Taylor, Morell & Gitomer, 919 18th Street NW. suite 210, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services at (202) 927–5721.]

Decided: April 20, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin. Commissioner Philbin did not participate in the disposition of this proceeding.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94–10300 Filed 4–28–94; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32485]

Norfolk & Western Railway Co.; Trackage Rights Exemption; Canadian National Railway Co., CNCP Niagara-Detroit

Canadian National Railway Company (CNRC) and CNCP Niagara-Detroit [1] have agreed to expand their existing trackage rights agreement.[2] Under their supplemental agreement, the trackage rights will allow all overhead traffic now being routed over a joint NW–CP rail car ferry facility operation adjacent to the said Detroit River Tunnel to be relocated (rerouted) through said tunnel, thereby increasing the efficiency of U.S.-Canadian rail movements of NW's and CP's traffic by decreasing the time necessary to move cars across the U.S-Canadian border at Detroit. The expanded trackage rights are to become effective on May 1, 1994.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: James L. Howe, III, Norfolk and Western Railway Company, Three Commercial Place, Norfolk, VA 23510–2191.

As a condition to use of this exemption, any employees adversely affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Decided: April 21, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94–10297 Filed 4–28–94; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32487]

Yakima Valley Rail and Steam Museum Association, d/b/a Toppenish, Simcoe & Western Railroad; Modified Rail Certificate

On March 31, 1994, Yakima Valley Rail and Steam Museum Association, d/b/a Toppenish, Simcoe & Western Railroad (TSWR), filed a notice for a modified certificate of public convenience and necessity under 49 CFR part 1150, subpart C, to operate the former Washington Central Railroad Company (WCRC) branch line in Yakima County, WA, between milepost 00.00 near Toppenish, WA, and milepost 20.56 at White Swan, WA.

The line was abandoned by WCRC in Docket No. AB–326X, in a decision served August 24, 1992. By decision served March 18, 1993, the Commission authorized the State of Washington to purchase the line under an offer of financial assistance (OFA) submitted by Yakima County. Upon purchase by Washington State, the property was transferred to Yakima County, which has entered into an operating agreement with TSWR.

The Commission will serve a copy of this notice on the Association of American Railroads (Car Service Division), as agent of all railroads subscribing to the car-service and car-hire agreement, and on the American Short Line Railroad Association.

Decided: April 21, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94–10298 Filed 4–28–94; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–33 (Sub-No. 85X)]

Union Pacific Railroad Co.—Abandonment Exemption—in Sarpy County, NE

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: Under 49 U.S.C. 10505, the Commission exempts from the regulatory requirements of 49 U.S.C. 10903–04, the abandonment by Union Pacific Railroad Company of 1.8 miles of rail line in Sarpy County, NE, a portion of the Millard Industrial Lead (formerly, the Old Main Line), subject to a public use condition and the standard employee protective conditions. The Commission also issues a notice of interim trail use for the entire line.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on May 29, 1994. Formal expressions of intent to file an offer [1] of financial assistance under 49 CFR 1152.27(c)(2) must be filed by May 9, 1994. Petitions to stay must be filed by May 16, 1994. Requests for a public use condition must be filed by May 19, 1994 and petitions to reopen must be filed by May 24, 1994.

ADDRESSES: Send pleadings referring to Docket No. AB–33 (Sub-No. 85X) to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423; and (2) Joseph D. Anthofer, Esq., 1416 Dodge Street #830, Omaha, NE 68179.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660. (TDD for the hearing impaired: (202) 927–5721)

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic

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[1] CNRC is manager and operator of the Detroit River Tunnel; CNCP Niagara-Detroit, a partnership comprised of CNRC and Canadian Pacific Limited (CP), is owner of the Detroit River Tunnel.

[2] By notice of exemption in Norfolk and Western Railway Company—Trackage Rights Exemption—Canadian National Railway Company and CNCP Niagara-Detroit, Finance Docket No. 31750 (ICC served Oct. 23, 1990), Norfolk and Western Railway Company (NW) was granted trackage rights between milepost 226.3, at the International Boundary line between the United States and Canada in the Detroit River Tunnel, approximately in the middle of the Detroit River, and milepost 228.1, at Detroit, MI. These mileposts describe the portion of the trackage rights lying wholly within the United States that are the subject of this notice. CNRC and CNCP Niagara-Detroit also agreed to grant overhead trackage rights to NW between milepost 225.1, at Windsor, Ontario, Canada, and milepost 228.1, at Detroit. The portion of the trackage rights in Canada is not within the scope of this notice.

[1] See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. (Assistance for the hearing impaired is available through TDD services (202) 927–5721).

Decided: April 20, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin. Commissioner Philbin did not participate in the disposition of this proceeding.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94–10301 Filed 4–28–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated January 6, 1994, and published in the **Federal Register** on January 18, 1994, (59 FR 2620), Norac Company, Inc., 405 S. Motor Avenue, Azusa, California 91702, made application to the Drug Enforcement Administration to be registered as a bulk manufacturer of Tetrahydrocannabinols (7370), a basic class of controlled substance listed in Schedule I.

No comments or objections have been received. Therefore, pursuant to section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and title 21, Code of Federal Regulations, § 1301.54(e), the Deputy Assistant Administrator hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: March 2, 1994.

Gene R. Haislip,

Deputy Assistant Administrator; Office of Diversion Control; Drug Enforcement Administration.

[FR Doc. 94–10302 Filed 4–28–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Business Research Advisory Council; Meeting and Agenda

The regular Spring meeting of the Committee on Occupational Safety and Health of the Business Research Advisory Council will be held on May 26, 1994, at 1 p.m. The meeting will be held in Meeting Rooms 7 and 8 of the Postal Square Building Conference Center, 2 Massachusetts Avenue, NE., Washington, DC.

The Business Research Advisory Board and its committees advise the Bureau of Labor Statistics with respect to technical matters associated with the Bureau's programs. Membership consists of technical officers from American business and industry.

The schedule and agenda for the meeting is as follows:

Thursday, May 26, 1994

1–4 p.m.—Committee on Occupational Safety and Health Statistics

1. Survey of Occupational Injuries and Illnesses: Case and demographic data.
2. Department of Labor Report to the Senate and House Appropriations Committees on the availability and use of data on occupational injuries and illnesses.
3. Occupational motor vehicle fatalities: Census of Fatal Occupational Injuries-Fatal Accident Reporting System (CFOI–FARS) linkage.
4. Survey of Employer-Provided Training—status report.
5. Other business.

The meeting is open to the public. Persons with disabilities wishing to attend should contact Constance B. DiCesare, Liaison, Business Research Advisory Council, at (202) 606–5887, for appropriate accommodations.

Signed at Washington, DC, the 20th day of April 1994.

Katherine G. Abraham,

Commissioner.

[FR Doc. 94–10274 Filed 4–28–94; 8:45 am]

BILLING CODE 4510–24–M

Employment and Training Administration

[TA–W–29,436]

A.C.A. Lumber Co., Beaver, WA; Negative Determination Regarding Application for Reconsideration

By an application dated March 18, 1994, the company requested administrative reconsideration of the subject petition for trade adjustment assistance (TAA). The denial notice was signed on March 18, 1994 and published in the **Federal Register** on March 30, 1994 (59 FR 14876).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The company stated that they could not compete with imported Canadian lumber.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met. The Department's survey showed that when the mill was in full operation (prior to May 1993), the respondents either did not import or did not increase their imports.

Between May, 1993 and December, 1993 A.C.A. Lumber produced cut lumber on a subcontracting basis. The Department's survey showed that A.C.A.'s only customer in this period ceased doing business with A.C.A. and placed its cut lumber orders with foreign producers. The findings also show that the customer sells the lumber produced abroad to customers in foreign countries and does not import any lumber into the United States.

The worker adjustment assistance program was not intended to provide TAA to workers who are in some way related to import competition but only for those workers who produce an article and are adversely affected by increased imports of like or directly competitive articles which contributed importantly to sales or production and employment declines at the workers' firm.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 18th day of April 1994.

Robert O. Deslongchamps,

Director, Office of Legislation & Actuarial Service, Unemployment Insurance Service.

[FR Doc. 94–10275 Filed 4–28–94; 8:45 am]

BILLING CODE 4510–30–M

Employment and Training Administration

[TA-W-27,776]

Halliburton Geophysical Services, Inc., A/K/A Halliburton Energy Services, Headquartered in Houston, TX and Operating at Various Other Locations; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance applicable to all workers of Halliburton Geophysical Services, Inc., headquartered in Houston, Texas and operating at various other locations. The notice was issued on October 23, 1992 and published in the **Federal Register** on November 17, 1992 (57 FR 54256).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. New findings from the company show that on July 1, 1993, Halliburton Energy Services became the successor-in-interest firm to Halliburton Geophysical Services.

Accordingly, the Department is amending the certification to show the correct name of the worker group.

The amended notice applicable to TA-W-27,776 is hereby issued as follows:

All workers Halliburton Geophysical Services, Inc., a/k/a Halliburton Energy Services, headquartered in Houston, Texas and operating at various other locations in the below cited states who became totally or partially separated from employment on or after August 17, 1991 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974:

TA-W-27,776A—Alaska
TA-W-27,776B—California
TA-W-27,776C—Colorado
TA-W-27,776D—Louisiana
TA-W-27,776E—Mississippi
TA-W-27,776F—Nevada
TA-W-27,776G—New Mexico
TA-W-27,776H—Oregon
TA-W-27,776I—Texas
TA-W-27,776J—Washington
TA-W-27,776K—Wyoming

Signed at Washington, DC, this 18th April, 1994.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 94-10277 Filed 4-28-94; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-27, 749]

Otis Engineering Corp., A/K/A Halliburton Co., A/K/A Halliburton Energy Services, Headquartered in Dallas, TX and Operating Out of Various States

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Workers Adjustment Assistance applicable to all workers of Otis Engineering Corporation in the above cited locations. The notice was issued on October 15, 1992 and published in the **Federal Register** on November 3, 1992 (57 FR 49721).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. New findings from the company show that on July 1, 1993, Halliburton Energy Services became the successor-in-interest firm to Otis Engineering Corporation. During the relevant certification period, workers at Otis Engineering Corporation have had their wages reported under unemployment insurance (UI) tax accounts for Halliburton Company and Halliburton Energy Services.

Accordingly, the Department is amending the certification to show the correct worker group.

The amended notice applicable to TA-W-27, 749 through TA-W-27, 764 is hereby issued as follows:

All workers Otis Engineering Corporation a/k/a Halliburton Company and a/k/a Halliburton Energy Services, headquartered in Dallas, Texas (T-W-27,749) and operating out of the below cited locations who became totally or partially separated from employment on or after August 25, 1991 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974:

TA-W-27,750—Anchorage, Alaska
TA-W-27,750A—Kenai, Alaska
TA-W-27,751—Fort Smith, Arkansas
TA-W-27,752—Bakersfield, California
TA-W-27,752A—Santa Fe Springs, California
TA-W-27,752B—Ventura, California
TA-W-27,753—Denver, Colorado
TA-W-27,754—Jay, Florida
TA-W-27,755—Saint Elmo, Illinois
TA-W-27,756—Belle Chasse, Louisiana
TA-W-27,756A—Bossier City, Louisiana
TA-W-27,756B—Houma, Louisiana
TA-W-27,756C—Lake Charles, Louisiana
TA-W-27,756D—New Iberia, Louisiana (exclude Wireline Division (covered TA-W-27,253)
TA-W-27,756E—New Orleans, Louisiana
TA-W-27,757—Kalkaska, Michigan
TA-W-27,758—Laurel, Mississippi
TA-W-27,759—Farmington, New Mexico
TA-W-27,759A—Hobbs, New Mexico
TA-W-27,760—Williston, North Dakota
TA-W-27,761—Elk City, Oklahoma
TA-W-27,761A—Enid, Oklahoma
TA-W-27,761B—Lindsay, Oklahoma
TA-W-27,761C—McAlester, Oklahoma
TA-W-27,761D—Oklahoma City, Oklahoma
TA-W-27,761E—Tulsa, Oklahoma
TA-W-27,762—Carrollton, Texas
TA-W-27,762A—Falfurrias, Texas
TA-W-27,762B—Friendswood, Texas
TA-W-27,762C—Garland, Texas
TA-W-27,762D—Houston, Texas
TA-W-27,762E—Longview, Texas
TA-W-27,762F—Odessa, Texas
TA-W-27,762G—Palestine, Texas
TA-W-27,762H—Robstown, Texas
TA-W-27,762I—Snyder, Texas
TA-W-27,763—Vernal, Utah
TA-W-27,764—Casper, Wyoming
TA-W-27,764A—Evanson, Wyoming
TA-W-27,764B—Rock Springs, Wyoming

Signed in Washington, DC, this 19th day of April, 1994.

Violet L. Thompson,

Deputy Director, Office of Trade Adjustment Assistance.

[FR Doc. 94-10278 Filed 4-28-94; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-29,442]

Simmons Upholstered Furniture, Inc., Vancouver, WA; Negative Determination Regarding Application for Reconsideration

By an application dated March 22, 1994, the workers requested administrative reconsideration of the subject petition for trade adjustment assistance (TAA). The certification notice was published in the **Federal Register** on March 18, 1994 (59 FR 12984).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The investigation files show that the workers produced upholstered furniture; however, only the workers involved in sewing and cushion filling activities met the worker group eligibility requirements necessary for certification.

Its stated that workers engaged in framing, cutting and upholstering were impacted by foreign imports as much as

those included in the certification—workers in sewing and cushion filling activities.

Other investigation findings show that all the cutting and upholstery operations were transferred to another domestic plant and that the framing and distribution activities would remain at Vancouver. A domestic shift of production would not form a basis for a worker group certification.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 18th day of April 1994.

Robert O. Deslongchamps,

Director, Office of Legislation & Actuarial Service, Unemployment Insurance Service.

[FR Doc. 94–10276 Filed 4–28–94; 8:45 am]

BILLING CODE 4510–30–M

Employment Standards Administration

Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., room S–3014, Washington, DC 20210.

New General Wage Determination Decision

The numbers of the decisions added to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" are listed by Volume and State.

Volume IV

Indiana
IN940037 (Apr. 29, 1994)
IN940038 (Apr. 29, 1994)

Volume V

Missouri
MO940055 (Apr. 29, 1994)
MO940056 (Apr. 29, 1994)
MO940057 (Apr. 29, 1994)
MO940058 (Apr. 29, 1994)
MO940059 (Apr. 29, 1994)
MO940060 (Apr. 29, 1994)
MO940061 (Apr. 29, 1994)
MO940062 (Apr. 29, 1994)
MO940063 (Apr. 29, 1994)

Volume VI

North Dakota
ND940055 (Apr. 29, 1994)
ND940056 (Apr. 29, 1994)
ND940057 (Apr. 29, 1994)

Modification to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

New Jersey
NJ940002 (Feb. 11, 1994)
NJ940007 (Feb. 11, 1994)
New York
NY940003 (Feb. 11, 1994)
NY940021 (Feb. 11, 1994)
NY940022 (Feb. 11, 1994)
NY940047 (Feb. 11, 1994)
NY940048 (Feb. 11, 1994)

Volume II

None

Volume III

Alabama
AL940027 (Feb. 11, 1994)
AL940034 (Feb. 11, 1994)
AL940052 (Feb. 11, 1994)
Florida
FL940001 (Feb. 11, 1994)
FL940009 (Feb. 11, 1994)
FL940017 (Feb. 11, 1994)

Volume IV

Illinois
IL940001 (Feb. 11, 1994)
IL940002 (Feb. 11, 1994)
IL940003 (Feb. 11, 1994)
IL940005 (Feb. 11, 1994)
IL940008 (Feb. 11, 1994)
IL940011 (Feb. 11, 1994)
IL940012 (Feb. 11, 1994)
IL940013 (Feb. 11, 1994)
IL940014 (Feb. 11, 1994)
IL940015 (Feb. 11, 1994)
IL940016 (Feb. 11, 1994)
IL940017 (Feb. 11, 1994)

IL940018 (Feb. 11, 1994)
IL940019 (Feb. 11, 1994)
IL940065 (Feb. 11, 1994)
Indiana
IN940003 (Feb. 11, 1994)
IN940005 (Feb. 11, 1994)
IN940006 (Feb. 11, 1994)
IN940036 (Feb. 11, 1994)
Wisconsin
WI940010 (Feb. 11, 1994)

Volume V

Iowa
IA940034 (Feb. 11, 1994)
Kansas
KS940006 (Feb. 11, 1994)
KS940007 (Feb. 11, 1994)
KS940012 (Feb. 11, 1994)
KS940013 (Feb. 11, 1994)
KS940014 (Feb. 11, 1994)
KS940015 (Feb. 11, 1994)
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KS940018 (Feb. 11, 1994)
KS940019 (Feb. 11, 1994)
KS940020 (Feb. 11, 1994)
KS940021 (Feb. 11, 1994)
KS940022 (Feb. 11, 1994)
KS940023 (Feb. 11, 1994)
KS940063 (Feb. 11, 1994)
Texas
TX940014 (Feb. 11, 1994)

Volume VI

Montana
MT940002 (Feb. 11, 1994)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783–3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC This 22nd Day of April 1994.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 94–10149 Filed 4–28–94; 8:45 am]

BILLING CODE 4510–27–M

Office of Federal Contract Compliance Programs

Commonwealth Aluminum Corporation Debarment

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of Debarment, Commonwealth Aluminum Corporation.

SUMMARY: This notice advises of the debarment of Commonwealth Aluminum Corporation (hereafter "Commonwealth Aluminum"), as an eligible bidder on Government contracts and subcontracts or other modifications of any existing Government contracts or subcontracts. The debarment is effective immediately.

FOR FURTHER INFORMATION CONTACT: Annie Blackwell, Director Program Policy, Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Ave., NW., Room C–3325, Washington, DC 20210 (202–219–9430).

SUPPLEMENTARY INFORMATION: On February 10, 1994, pursuant to 41 CFR 60–741.29(b)(3), the Acting Assistant Secretary for Employment Standards ("Assistant Secretary") issued a Final Decision and Order: (1) Finding Commonwealth Aluminum in violation of Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), and its implementing regulations; and (2) debarring Commonwealth Aluminum, its officers, subsidiaries, and successors, as eligible bidders on Government contracts and subcontracts or other modifications of existing Government contracts or subcontracts, if the company fails to comply with any provision of the Order within the specified time periods. The Final Decision and Order required Commonwealth to give the complainants, who are identified therein, offers of employment and award them appropriate seniority and all other applicable benefits in accordance with the Final Decision and Order within 60 days of receipt of the Order. It is now in excess of 60 days from the date Commonwealth received a certified copy of the Final Decision and Order. None of the complainants identified in the Final Decision and Order have received offers of employment, appropriate awards of seniority and all other applicable benefits. Therefore, it is necessary to commence the debarment process. This debarment will remain in effect until Commonwealth Aluminum satisfies the Assistant Secretary that it is in compliance with Section 503 of the Rehabilitation Act and the regulations and orders issued thereunder which have been found to have been violated. A copy of the Final Decision and Order is attached.

Signed April 21, 1994, Washington, DC.

Shirley J. Wilcher,

Deputy Assistant Secretary for Federal Contract Compliance Programs.

Date: February 10, 1994
Case No. 82–OFC–6

In the matter of: Office of Federal Contract Compliance Programs, United States Department of Labor, Plaintiff, v. Commonwealth Aluminum, Formerly Martin-Marietta Aluminum of Kentucky, Inc., Defendant.

Before: The Acting Assistant Secretary for Employment Standards.

Final Decision and Order

This case arises under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (1988), and its implementing regulations at 41 CFR part 60–741 (1992). The Office of Federal Contract Compliance Programs (OFCCP) filed exceptions to several aspects of the Administrative Law Judge's (ALJ) Recommended Decision and Order (R.D. and O.) which concluded that the complaint filed by OFCCP should be dismissed in its entirety.

Background

On September 7, 1982, OFCCP filed a complaint alleging that Commonwealth Aluminum [1] failed to employ or advance in employment eight qualified handicapped individuals. Administrative Exhibit (A) 1. At the hearing, the complaint relating to William J. Shelton was dismissed for "failure of proof." R.D. and O. at 2.

Commonwealth owns and operates an aluminum processing facility near Lewisport, Kentucky. All applicants for employment are required to have a pre-employment physical examination, which includes back x-rays. *Id.* at 3. If the x-rays reveal evidence of spondylolisthesis, severe scoliosis, discogenic disease or severe arthritis, the applicant is subject to rejection. Plaintiff's Exhibit (P)–26. If the physical examination discloses conditions which are surgically correctable, it is Commonwealth's policy to suspend the individual's employment application pending treatment. R.D. and O. at 3. See P–3, 5.

Job applicants Gregory Gray and David Worthington filed complaints with OFCCP alleging that Commonwealth did not employ them because they were handicapped. P–37,

[1] Although at the time the complaint was filed Defendant was known as Martin-Marietta Aluminum of Kentucky, Inc., for ease of reference it will be referred to throughout as Commonwealth.

38. OFCCP investigators examined Commonwealth's hiring policies and asked if there were other job applicants who were rejected during the same general time period for failure to pass the pre-employment physical examination. Commonwealth provided a list which included Robert Etnire, Thomas Marshall, Wilda Matthis, William Shelton, Kenneth Sherrard, and William Zellers. R.D. and O. at 3.

Commonwealth suspended Gray's application pending surgical correction of a hearing loss. P–3, 5. Complainant Worthington was blind in the left eye, had sixty percent hearing loss in the left ear and an eighteen percent permanent back disability. P–7. Commonwealth rejected his application [2] because he was too much of a safety risk in view of his multiple impairments. Transcript (T.) 296, 918. The applications of Matthis and Sherrard were rejected because of scoliosis. P–3; T. at 539. Commonwealth rejected Etnire's application [3] because of degenerative changes in the lumbar spine, P–18, and Zeller's application because of spondylolisthesis. T. 637. Marshall's application was suspended until he had a hernia surgically corrected. T. 613, 814.

The ALJ concluded that OFCCP could not seek individual relief on behalf of Complainants Etnire, Marshall, Matthis, Sherrard and Zellers because none of them filed a complaint. R.D. and O. at 5–11. Assuming that OFCCP had met its burden of establishing that Complainant Worthington was a handicapped individual, the ALJ noted that he had accepted employment with Commonwealth following his initial rejection and thereafter voluntarily terminated his employment. The ALJ concluded that an order to reemploy Worthington would be inappropriate and there was, therefore, no need to consider if Worthington would be entitled to retroactive seniority. Since OFCCP was not seeking back pay for Worthington, the ALJ decided that OFCCP had failed to state a claim upon which individual relief could be granted in his behalf. *Id.* at 12.

As to Complainant Gray, who had a hearing loss, the ALJ found that he was not substantially limited in his employment opportunities because Commonwealth suspended only one opportunity. Moreover, the ALJ concluded that Congress did not intend to include correctable impairments, such as Gray's hearing loss, in the definition of "handicapped individual." Finally, the ALJ found Commonwealth did not regard Gray as handicapped in that it would have reconsidered him for employment if he had his hearing loss surgically corrected. The ALJ concluded that OFCCP had failed to prove that Gray was handicapped and therefore could not seek individual relief in his behalf. *Id.* at 12–15.

In addition to individual relief, the ALJ noted that OFCCP sought a cease and desist order and debarment of Commonwealth for violation of its affirmative action duties. He stated that the merits of the contentions relating to five Complainants who did not file complaints could be considered as evidence of a failure to establish an effective affirmative action program. Because Complainant Marshall's hernia was correctable, the ALJ found that he was not handicapped and there was no duty of affirmative action owned to him. Concerning Complainants Matthis, Sherrard and Zellers, the ALJ noted that they had back impairments and, given the contraindications for heavy manual labor positions for these individuals, they are not qualified for the jobs for which they applied. As to Complainant Etnire, who was rejected in 1980 because his x-ray showed a back condition and hired in 1981 after passing a subsequent physical examination, the ALJ stated that at best the evidence shows a mistaken, but apparently good faith belief that he was not qualified for employment in 1980. *Id.* at 15–17.

Based on the record as a whole, the ALJ found that the evidence was insufficient to establish a violation of Commonwealth's affirmative action duties. In view of the foregoing, he recommended that OFCCP's complaint be dismissed in its entirety. *Id.*, at 17.

Discussion

I. Conciliation Efforts

Although the ALJ did not reach this issue because he recommended dismissal of other grounds, R.D. and O. at n.2, Commonwealth argues that, if the issue is considered, the complaint should be dismissed for OFCCP's failure to conciliate. Commonwealth's Response to OFCCP's Exceptions (Com. Resp.) at 19. While conceding that there were several conferences and negotiations, Commonwealth alleges that of OFCCP generally failed to communicate any offers of settlement to any of the complainants as required by its own Federal Contract Compliance Manual. Com. Resp. at 20–21. The pertinent section at the time of this action provided the "[g]enerally, the complainant should not be present during the conciliation sessions. However, the EOS [Equal Oppportunity Specialist] should keep the complainant informed of the progress, in order to gather further input and to discuss proposed settlements." Ch. 6–120.5.

Commonwealth contends that this section places OFCCP in a position similar to that of a lawyer who represents his client. Com. Resp. at 21. The first part of the quoted language, however, belies that assertion as it provides the complainant shall not be present, a clear indication that the complainant is a not a party to the action and need not be consulted on settlement matters in the same manner as a client. Rather, the Manual provision is more properly viewed as providing guidance to EOS concerning how to facilitate the conciliation process. As such it confers no rights upon parties to an action under the Act. *Cf. OFCCP* v. *National City Bank of Cleveland.* 30 Fair Empl. Prac. Cas. [BNA] 6, 9 (Sec'y Final Dec. and Order Sept. 9, 1982) (OFCCP vindicates government interest in terms of contract but does not represent individual complainants or class members). In any event, there is no basis for concluding that the Compliance Manual confers rights upon a Section 503 defendant which could be raised as defense to a Section 503 complaint.

Commonwealth also alleges that it was never advised that the conciliation process had reached an impasse except with respect to Complainant Gray and further that OFCCP never explained how the rejection for employment of Complainants Etnire, Marshall, Matthis, Sherrard and Zellers violated Section 503. *Id.* at 23–26. Although, as Commonwealth argues, the letter notifying Commonwealth that the complaint was being forwarded for enforcement refers only to Complainant Gray, Defendant's Exhibit (D)–3, Commonwealth was aware that OFCCP was seeking relief from the other similarly situated individuals in conjunction with Gray's complaint. In its response to the Gray complaint, Commonwealth questioned the connection between the Gray case and the other cases, but nevertheless offered employment opportunities to the other individuals as part of a settlement. *See* D–5. There is no evidence that a settlement had been reached as to them. Accordingly, it should have known that the enforcement action would include individuals as well as Gray. As for the alleged failure to explain the violations relative to the other individuals, Commonwealth could have inquiried about the nature of the violations during

[2] Worthington was thereafter hired but later resigned his position. R.D. and O. at 4

[3] Etnire passed a physical examination the following year, was hired, and was working for Commonwealth at the time of the hearing. T. at 363, 373, 377, 890.

the conciliation process. For all of the foregoing reasons, I conclude that OFCCP properly discharged its duty to conciliate under 41 CFR 60–741.26(g)(2).

II. Jurisdiction to Consider Alleged Discrimination Against Individuals Who Did Not File a Complaint

OFCCP, while arguing that it may seek individual relief even if no complaint has been filed, see OFCCP's Exceptions at 6–15, contends in the alternative that it may seek relief, during a complaint investigation, on behalf of individuals who did not file a complaint. *Id.* at 15–20. While both Section 503(b) of the Act and the implementing regulation, 41 CFR 60–741.26, provide that an individual may file a complaint alleging handicap discrimination, neither the Assistant Secretary for Employment Standards nor the courts has addressed whether a complaint must be filed for each individual for whom OFCCP seeks relief.

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1988), which requires that a charge by filed before the Equal Employment Opportunity Commission can take enforcement action, it has been held that the purpose of the charge is to trigger the investigatory and conciliatory procedures of the EEOC. *EEOC* v. *General Electric Co.*, 532 F.2d 359, 364 (4th Cir. 1976) (charge provides EEOC with jurisdictional springboard to investigate and investigation may disclose other illegal practices which provide basis for reasonable cause determination). In this setting it is nonsensical to require each of the plaintiffs to file individual administrative charges with EEOC, even though no class action has been filed. *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876, 882–83 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). Similarly, under the National Labor Relations Act, the purpose of a charge is to set a Board inquiry in motion, and acts not specifically mentioned in the charge may be investigated and subject to enforcement if they are sufficiently related to the specific acts alleged. See *N.L.R.B.* v. *Central Power & Light Co.*, 425 F.2d 1318, 1320 (5th Cir. 1970). *Cf. United States Dept. of Labor* v. *Honeywell, Inc.*, 77–OFCCP–3, Sec'y Dec. and Order June 2, 1993, slip op. at 16 (complaint may include discrimination like or reasonably related to original charges).

The Rehabilitation Act and regulations promulgated under it are to be interpreted broadly. *Gilbert* v. *Frank*, 949 F.2d 637, 641 (2d Cir. 1991). In view of the foregoing, I conclude that, similar to Title VII and the National Labor Relations Act, once a complaint is filed, OFCCP may seek relief on behalf of individuals found to have been subject to handicap discrimination even if they have not filed a complaint.[4]

III. Individual Discrimination Claims

In an individual discrimination case under Section 503, the plaintiff has the burden of establishing a prima facie case by showing that the complainant was a handicapped individual who was qualified for the job, applied for the job, and was rejected. *Office of Federal Contract Compliance Programs* v. *United Parcel Service, Inc.*, Case No. 87–OFC–17, Dep. Ass't. Sec. Dec., Nov. 22, 1991, slip op. at 8. Actual ability to perform the job is the only test for determining if an individual is qualified. *The Department of Labor, OFCCP* v. *Texas Industries, Inc.*, Case No. 80–OFCCP–28, Ass't Sec. Dec., June 7, 1988, slip op. at 14. In determining if a handicapped individual is qualified to do a job the employer must gather all relevant information regarding work history and medical history. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985);[5] *Office of Federal Contract Compliance Programs* v. *Washington Metropolitan Area Transit Authority*, Case No. 84–OFC–8, Acting Ass't Sec. Dec., Mar. 30, 1989, slip op. at 24 (WMATA).

While risk of injury may, in some cases, justify the refusal to hire an otherwise-qualified handicapped person, mere elevated risk of injury, without more, is not sufficient.[6] *Mantolete*, 767 F.2d at 1422; *WMATA*, slip. op. at 23. The issue is whether hiring the complainant posed a reasonable probability of substantial harm. *Mantolete*, 767 F.2d at 1422; *WMATA*, slip op. at 23. Further, where a contractor applies physical or mental job qualification requirements which tend to screen out qualified handicapped individuals, the job requirements must be job related and consistent with business necessity and safe performance of the job. 41 CFR 60–741.6(c)(2). *Office of Federal Contract Compliance Programs* v. *PPG Industries, Inc.*, Case No. 86–OFC–9, Dep'y. Ass't Sec. Dec., Jan. 9, 1989, slip op. at 14. The contractor has the burden of demonstrating compliance with this standard. *PPG Industries*, slip op. at 14.

A. Gregory Gray. The ALJ held that Complainant Gray was not covered by the Act because "Congress did not intend to include correctable and temporary impairments in the definition of 'handicapped individual' [but] intended to apply the handicap definition to more severe or permanent impairments." R.D. and O. at 14–15. The ALJ also held that Mr. Gray's condition did not significantly limit his employment opportunities, indicating that he was not "substantially limited" within the Act's definition. OFCCP excepted to the exclusion of Mr. Gray from coverage under the Act on the grounds that correctable conditions are covered, and that substantial limitation in any major life activity, not limited to employment as the ALJ held, establishes coverage.

Mr. Gray's physician described his condition as "modified radical mastoidectomy of the right ear [with] [a] small pinpoint perforation of the right drum [and] some granular tissue of the anterior aspect of the drum." Exhibit 11 to Deposition of Gregory C. Gray. An audiological evaluation found "[s]peech discrimination in [the right] ear is very good [although] [t]here is conductive loss [of hearing] in the right ear." *Id.* The doctor suggested that Mr. Gray "is a candidate for middle ear exploration and possible ossicular chain reconstruction for restoration of some of

[4] In light of this conclusion, I need not address the contention that no complaint is necessary to confer jurisdiction on OFCCP to investigate and take enforcement action on behalf of individuals. I note, however, that at least one court, citing 41 CFR 60–741.25, has stated that OFCCP is charged with conducting periodic reviews to assure that government contractors have complied with their non-discrimination and affirmative action obligations. *Board of Governors of the University of North Carolina* v. *United States Department of Labor*, 917 F.2d 812, 815 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2013 (1991).

[5] Commonwealth argues that *Mantolete* is not valid precedent in this case because it is a Section 501 case which involves stringent information gathering requirements for federal employers, the case did not render judgment for the plaintiff, the applicable regulations are more stringent with respect to accommodation, and the good faith defense rejected in *Mantolete* is recognized under Section 504. Com. Resp. at 66–67. These allegations are rejected. That the case did not render judgment for the plaintiff is insignificant if the case is cited for a legal proposition established therein. Although there are differences among Sections 501, 503 and 504, there are common elements in each section which are intended to be interpreted uniformly. See *Mantolete*, 767 F.2d at 1421 (no reason that Section 501 definition of qualified handicapped individual should differ from Section 504); *Texas Industries*, slip op. at 29 (Congress intended that Sections 503 and 504 be uniformly administered). The good faith defense has been effectively rejected by the Third Circuit which held that the Rehabilitation Act is directed particularly at unintentional conduct. *Nathanson* v. *Medical College of Pennsylvania*, 926 F.2d 1368, 1384 (3d Cir. 1991). *Cf. Albemarle Paper Co.* v. *Moody*, C. 22 U.S. 405, (1975) (good faith no defense to back pay award for violation of Title VII).

[6] Any qualification based on risk of future injury must be examined with special care since almost all handicapped persons are at greater risk from work-related injuries. *Bentivegna* v. *United States Department of Labor*, 694 F.2d 619, 622 (9th Cir. 1982).

the conductive loss," but noted that "in view of the fact that he is wearing an aid in the right ear, this brings his hearing to essentially normal." *Id.*

As the Acting Assistant Secretary pointed out in *Office of Federal Contract Compliance Programs* v. *Washington Metro. Area Transit Auth.*, Case No. 84–OFC–8, Final Dec. and Remand Ord. Mar. 30, 1989, slip op. at 16, applying the "substantially limited" clause of the definition of handicapped individual requires fulfilling Congressional intent that the Act be broadly construed without allowing the definition to become so open ended that the Act becomes trivialized. Coverage of individuals with "temporary" or "correctable" conditions, therefore, requires difficult line drawing. There can be no doubt, for example, that an individual with cancer which is operable or treatable with radiation or chemotherapy nevertheless is covered by the Act. *Cf.* 45 CFR part 84, appendix A, section A–3. Similarly, an individual with a condition such as diabetes or epilepsy controllable with medication is a handicapped individual under section 503. See *Office of Federal Contract Compliance Programs* v. *PPG Industries, Inc.*, Case No. 86–OFC–9, Sec'y. Dec. and Remand Order on Remedy Jan. 9, 1989, slip op. at 16. On the other hand, courts have hesitated to extend the Act to simple, temporary conditions or injuries which can reasonably be expected to limit an individual's activities only for a short period of time. See, *e.g.*, *Evans* v. *City of Dallas*, 861 F.2d 846, 852–53 (5th Cir. 1988) (knee injury correctable by surgery not within scope of Act); *Peagle* v. *Department of the Interior*, 813 F. Supp. 61, 64 (D.D.C. 1993) (back strain and pain due to Degenerative Disc Syndrome treatable by simple bed rest not covered); *Vissaraga* v. *Garrett*, 1992 U.S. Dist. LEXIS 9164, at *13 (N.D. Cal. June 16, 1992) (back strain and sprain not a handicap); *Grimard* v. *Carlson*, 567 F.2d 1171, 1174 (5th Cir. 1988) (fractured and dislocated ankle not a handicap).

I agree with OFCCP that a Congressional committee report, cited by the ALJ, on a proposed amendment in 1979 to Title VII of the Civil Rights Act of 1964 that did not pass, carries little weight in discerning the intent of Congress five years earlier when it amended the Rehabilitation Act to include the current definition of handicapped individual. The legislative history of the recently enacted Americans With Disabilities Act, 42 U.S.C. 12101–12213 (Supp. II 1991) is more relevant here because Congress explicitly stated that "[t]he definition of the term 'disability' * * * is comparable to the definition of the term 'individual with handicaps' in section 7(8)(B) of the Rehabilitation Act of 1973." H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332.[7]

Congress used the specific example of an individual like Mr. Gray to illustrate application of the term "substantially limits" and to distinguish "minor, trivial impairments" from those that restrict "the conditions, manner, or duration under which [important life activities] can be performed in comparison to most people." The report explained further that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid." *Id.* at 52.

In addition, I find no basis in the Act to permit a contractor to require an employee or applicant for employment to undergo a treatment, operation or drug regimen before being considered for employment or being entitled to other terms, conditions or privileges of employment. That decision is a private one to be made by each individual with a handicap in consultation with his or her physician and other health professionals.[8] Indeed, Commonwealth has an obligation under the duty to make reasonable accommodation "to permit an individual with a disability the opportunity to provide and utilize equipment, aids or services that an employer is not required to provide as a reasonable accommodation." 29 CFR part 1630, app., § 1630.2(o) Reasonable Accommodation (1992). Of course, handicapped applicants or employees must be qualified, with reasonable accommodation, but a contractor must consider each handicapped individual as he finds him.

For the same reason, I reject Commonwealth's contention that the reference in the regulations to the American Medical Association Guides to the Evaluation of Permanent Impairment, 41 CFR 60–741.7(d) (1990), requires a handicapped individual to undergo any particular treatment or surgical operation. The Guides define permanent impairment as an abnormality or loss after maximum medical rehabilitation has been achieved. But it is implicit that the appropriate rehabilitation regimen has been undertaken voluntarily by the patient with the advice of his physician.

The record is clear that Mr. Gray was qualified for the dross handler position for which Commonwealth considered him. He had worked at several laboring jobs and Commonwealth rejected him solely because of his hearing condition. P–2, 5; R.D. and O. at 4.

Commonwealth contend that its exclusion of Mr. Gray from consideration for employment was job related and consistent with business necessity[9] and safe performance of the job. Com. Resp. at 45. I reject that contention because, at the time of the hearing, Commonwealth employed two other individuals with uncorrectable hearing losses. D–13. Inasmuch as there is no apparent reason for differentiating correctable and uncorrectable hearing loss with respect to job relatedness or safety concerns, I conclude that Commonwealth violated section 503 of the At when it refused to hire Gray unless he had his hearing loss surgically corrected.

B. *David Worthington*. OFCCP contends that there is no indication that its case in regard to Complainant Worthington was settled when he was hired by Commonwealth or that Mr. Worthington intended to terminate his employment voluntarily in December 1981. OFCCP therefore argues that it may seek retroactive seniority and back pay on behalf of Worthington. Exceptions at 43. The record establishes that OFCCP was not seeking back pay for Mr. Worthington, and was not entitled to receive back pay on his behalf because Worthington was earning more elsewhere than he could have at Commonwealth. T. at 683; P–36. See R.D. and O. at 12. Inasmuch as OFCCP

[7] I recognize that the legislative history of the ADA was not yet in existence when the ALJ issued his recommended decision.

[8] I note that Dr. Logan reported that Mr. Gray "is a candidate for middle ear *exploration and possible ossicular chain reconstruction for restoration of some of the conductive loss.*" Gray Dep., Exh. 11. (Emphasis added). Mr. Gray would have to weigh the possibility of restoration of some of his hearing against the risks of surgery, a decision which is his alone to make.

[9] One of the stated reasons is Commonwealth's possible future medical liability if the individual elects to correct the condition. Com. Resp. at 45. Increased costs to an employer, however, is not a valid reason for rejecting a handicapped applicant. *OFCCP* v. *E. E. Black, Ltd.*, 19 Fair Empl. Prac. Cas. (BNA) 1625 (Ass't Sec'y. Dec. 1979) *modified on other grounds, E. E. Black, Ltd.* v. *Marshall* 497 F. Supp. 1088 (D. Hawaii 1980). *See also City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1988) (practice of requiring women to make greater contribution to pension fund than men because they live longer, and therefore generally receive greater pension benefits, is discriminatory under Title VII); 29 CFR part 1630, app., 1630.2(m) Qualified Individual with a disability ("The determination of whether an individual with a disability is qualified * * * should not be based on speculation that the employee * * * may cause increased health insurance premiums * * *.")

is not asking that Mr. Worthington be reinstated, the request for retroactive seniority is moot. Irrespective of whether the case has been settled, OFCCP has failed, as the AJL found, to state a claim upon which relief may be granted. I therefore accept the ALJ's recommendation that the complaint be dismissed as to Complainant Worthington.

C. *Wilda Matthis*. The ALJ found there was no question that Complainant Matthis had moderate scoliosis, R.D. and O. at 16, and Commonwealth does not dispute that she was handicapped. Based on the contraindication for heavy manual labor, however, the ALJ found that she was not qualified for the manual labor position for which she applied. *Id.* at 5, 16. The test of whether a handicapped individual is qualified is if the individual possesses the ability to perform the job. *Texas Industries*, slip op. at 14. The record establishes that Ms. Matthis worked as an automotive parts dispatcher at Sears where she inspected cars, pulled wheels, and carried pipes, mufflers and brakes. P–2. Inasmuch as this constitutes manual labor and there is no other evidence that she could not perform manual labor, I find that she was qualified to work in a manual labor position at Commonwealth. Since she was rejected for employment because of her scoliosis, OFCCP established a prima facie case of handicap discrimination as to Ms. Matthis.

Commonwealth contends that its job qualification requirements, which is this case caused Ms. Matthis to be rejected for employment in part because of radiographic evidence of a back abnormality, are job related and consistent with business necessity and safe job performance. Com. Resp. at 69–76. The job qualifications as applied essentially screened out Ms. Matthis because of an increased risk of injury. As such, they must be examined with special care. *Bentivegna*, 694 F.2d at 622. The evidence in this case fails to justify refusing employment to Ms. Matthis because it does not establish a reasonable probability of substantial harm, *Mantolete*, 767 F.2d at 1422, or even predict that any injury would ever happen if she were employed in a manual labor position. *Texas Industries*, slip op. at 21. An orthopedist reported Ms. Mathis had "asymptomatic idiopathic scoliosis [which would not] limit [her] activities." p. 21. See T. at 447, 975; PX 3; DX 23. I find that Commonwealth violated Section 503 by refusing to hire Complainant Matthis.

D. *Kenneth Sherrard*. The ALJ noted that Complainant Sherrard had severe scoliosis, R.D. and O. at 16, and Commonwealth concedes that he is obviously handicapped. Com. Resp. at 61. As with Ms. Matthis, and ALJ found that Mr. Sherrard was not qualified for employment in mechanical maintenance which involves heavy manual labor. R.D. and O. at 5, 16. At the time of his application, Sherrard had worked for ten years as a maintenance mechanic, P–2, and an orthopedist recommended that he could continue working in that capacity. P. 17. I find that Mr. Sherrard was qualified to perform the job for which he applied at Commonwealth and, because he was rejected for employment based on his scoliosis, OFCCP made a prima facie case of handicap discrimination as to him.

Commonwealth's job qualifications also screened out Mr. Sherrard because of an increased risk of injury. The evidence as to Mr. Sherrard does not support refusing him employment because all it states it that he should avoid heavy lifting, T. at 984, and it does not establish a probability of substantial harm or predict if any injury will occur. I therefore conclude that Commonwealth violated Section 503 by refusing to hire Mr. Sherrard.

E. Robert Etnire. The ALJ made no finding regarding whether Complainant Etnire was handicapped, but it is clear that Commonwealth regarded him as handicapped because he was foreclosed generally from positions involving manual labor from the time of his initial application for employment, April 29, 1980, until he was hired by Commonwealth on June 29, 1981. *Forrisi*, 794 F.2d at 935. Etnire's application for employment discloses that he worked in mechanical maintenance, the same position for which he applied at Commonwealth, from 1970 to 1979, at which time the plant where he was working closed. PX 2. I find that he was therefore qualified to work in mechanical maintenance at Commonwealth and, because his application was rejected due to degenerative changes in the lumbar spine, OFCCP has made a prima facie case of handicap discrimination as to Mr. Etnire.

The ALJ stated that, at best, the evidence shows a mistaken but good faith belief that Mr. Etnire was not qualified for employment in 1980. R.D. and O at 17. Good faith, however, is not a defense, as the Act is directed particularly at unintentional conduct. *Nathanson*, 926 F.2d at 1384. In addition, the contractor has the obligation to "gather all relevant information regarding the applicant's work history and medical history and independently assess both the probability and severity of potential injury." *PPG Industries.*, slip op. at 17 quoting *Mantolete* v. *Bolger*, 767 F.2d at 1423. Accordingly, I find that Commonwealth violated Section 503 by failing to hire Complainant Etnire in 1980.

F. William Zellers. Commonwealth contends that Complainant Zellers is not handicapped because he did not regard himself as handicapped and because his spondylolisthesis did not substantially limit any major life activities, particularly in view of his continued self-employment in the construction business.[10] Comm. Resp. at 63–64. Where, as here, an employer regards an individual as being foreclosed generally from heavy manual labor positions, that individual is considered handicapped. *Forrisi*, 794 F.2d at 935. *E.E. Black*, 497 F. Supp. at 1097–1102; *Texas Industries*, slip op. at 8. The record in this case establishes that Mr. Zellers worked in the supervision and maintenance of construction equipment from 1953 until the time of his application with Commonwealth, P–2, and that this was considered heavy labor. T. at 627. Mr. Zellers was therefore, contrary to the ALJ's conclusion, R.D. and O. at 16, qualified to work in electrical or mechanical maintenance at Commonwealth, see *Texas Industries*, slip op at 14, and, inasmuch as his application was rejected because of his spondylolisthesis, OFCCP has established a prima facie case as to Mr. Zellers.

As with some of the other complainants, Commonwealth's job qualifications screened out Zellers based on an increased risk of injury. The evidence does not justify refusing him employment because all it states is that he is at a higher risk for disabling back pains, T. at 440, but does not show a probability of substantial harm or predict if an injury will ever occur. An orthopedist reported that Mr. Zellers had "asymptomatic spondylolisthesis [with] no evidence of a herniated disc or spinal stenosis. Considering his previous work history and lack of any previous symptoms [there was] no reason to limit [his] function." p. 21. I find that Commonwealth violated Section 503 when it refused to hire Complaint Zellers.

[10] Commonwealth contends that OFCCP cannot seek relief on behalf of Zellers because OFCCP determined that his complaint was not timely and that determination became final when Zellers did not seek further agency review pursuant to 41 CFR 60–741.26 (g)(1). Comm. Resp. at 63. I need not address this argument because, for the reasons discussed above, once a complaint is received OFCCP has jurisdiction to seek individual relief for all violations discovered in its investigation.

G. Thomas Marshall. The ALJ concluded that Complainant Marshall was not a handicapped individual because his hernia was temporary and correctable. R.D. and O. at 16. For the reasons discussed in ¶A above, I reject this conclusion and find that Mr. Marshall was handicapped because Commonwealth regarded him as being foreclosed generally from employment with them. *Forrisi*, 794 F.2d at 935. Mr. Marshall's employment application disclosed that he worked as chief electrician for two years prior to applying at Commonwealth. PX 2. I therefore find that he was qualified to work at Commonwealth in an electrical maintenance position. Because Mr. Marshall was denied employment until he had surgery, I conclude that OFCCP has made a prima facie case as to him.

Commonwealth notes that Mr. Marshall's hernia was discovered on July 18, 1980, and that between then and September 1980, Mr. Marshall saw Dr. Schell, had the surgery and visited Commonwealth to seek reinstatement of his application. Comm. Resp. at 52. From this, Commonwealth argues that "it is obvious that Dr. Schell thought Mr. Marshall needed survery immediately" and it was therefore entitled to exclude Mr. Marshall because the risk of future injury was imminent. *id.*

The difficulty with this argument is that there is no evidentiary support for the premise. Given Commonwealth's policy concerning correctable conditions, the more likely inference is that Mr. Marshall scheduled the surgery early so that he could have his employment application reinstated as soon as possible. See T. 612. The most that can be determined based on the record is that Mr. Marshall's hernia presented an elevated risk of injury at some point in the future. Mr. Marshall was working as Chief Electrician at another company when he applied for work with Commonwealth. His job involved stooping, bending and lifting up to 80 pound weights, T. 592, but he was not aware that he had an inguinal hernia. T. 593. Because the hernia has characterized as "early", PX 3, no reasonable probability of substantial harm has been shown for employing Complainant Marshall at the time he applied and I therefore find that Commonwealth has violated Section 503 by failing to hire him.

IV. Individual Relief

In addition to seeking offers to employment [11] for those subjected to handicap discrimination, OFCCP requests back pay and retroactive seniority. Commonwealth argues that back pay is not authorized by the Act and regulations. While Section 501 authorizes back pay by incorporating that remedy from Title VII of the Civil Rights Act of 1964, Commonwealth notes that Section 504 incorporates the remedy from Title VI which does not have a provision relating to back pay. Because Section 503 does not provide for back pay awards, Commonwealth maintains that, as under Section 504, a back pay remedy is not available. Com. Resp., at 76–77.

The Supreme Court, however, has held that Section 504 authorizes a plaintiff to bring an equitable action for back pay, because, although not specially listed therein, back pay is an available remedy under Title VI. *Consolidated Rail Corp.* V. *Darrone*, 465 U.S. 624, 630–31 (1984). It is therefore apparent that the absence of any mention of back pay in Section 503 does not preclude its availability as a remedy for violations. The Assistant Secretary has so held, finding that back pay is within the directive of Section 503(b) to "take such action thereon as the facts and circumstances warrant * * *" *Texas Industries*, slip op. at 31. *See* also *Office of Federal Contract Compliance Programs* v. *Exide Corporation*, Case No. 84–OFC–11, Acting Ass't Sec. Dec., Apr. 30, 1991, slip op. at 17. In addition, the Secretary has recently held that back pay may be ordered under the parallel contact compliance program, Executive Order No. 11,246, although there is no explicit reference to back pay in the Executive Order. *United States Dep't of Labor* v. *Honeywell, Inc.*, Sec'y Dec. and Order June 2, 1993, slip op. at 26–34.

Commonwealth also contends that there is no authority for awarding retroactive seniority because the Section 503 remedies are tailored for compliance with affirmative action obligations rather than for private remedies and the absence of a private right of action under Section 503 means there is no private remedy available. Com. Resp. at 80–81. I disagree. The cases cited by Commonwealth, while stating that there is no private right of action under Section 503, nowhere hold that OFCCP cannot seek a remedy on behalf of a complainant.[12] The Assistant Secretary has consistently held that retroactive seniority is an appropriate remedy for a Section 503 violation.[13] See, *e.g.*, *WMATA*, slip op. at 29; *PPG Industries*, slip op. at 35.

Commonwealth nevertheless argues that retroactive seniority should not be awarded in this case because the union was not jointed as a party. Com. Resp. at 81. See *EEOC* v. *Safeway Stores, Inc.*, 714 F.2d 567, 577 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). While *Safeway* holds that a union must have the opportunity to participate in the proceedings where the relief ordered violates the seniority provisions of a collective bargaining agreement, 714 F.2d at 577, 579, that decision, in my view, goes beyond the requirements of applicable Supreme Court precedent.

In *W.R. Grace & Co.* v. *Local Union 759, United Rubber Workers of America*, 461 U.S. 757, 771 (1983), the Court held, in a Title VII case, that by entering into a conciliation agreement, the EEOC and the employer cannot alter a collective bargaining agreement without the union's consent. In that case, the conciliation agreement implemented a quota system under which the percentage of women would not be reduced during layoffs notwithstanding the fact that some women would be retained while having less seniority than their male counterparts. The Court held that absent a judicial determination the EEOC and an employer cannot alter a collective bargaining agreement without the union's consent. 461 U.S. at 770–72.

In *Safeway*, the EEOC attempted to distinguish *W.R. Grace* by arguing that the conciliation agreement in *Safeway* did not result in the "wholesale destruction" of a collective bargaining agreement. Rather, the seniority system would remain intact with discriminatees being afforded their rightful place, the place they would have occupied but for the discrimination. The court rejected that argument, stating that "we cannot agree that a difference in the degree of conflict with collective bargaining structure,

[11] The Assistant Secretary has held that ordering employment of a job applicant is an appropriate remedy for a Section 503 violation. *Office of Federal Contract Compliance Programs* v. *Washington Metro. Area Transit Auth.*, Case No. 84–OFC–8, Ass't Sec. Dec., Nov. 17, 1989, slip op. at 4, *rev'd on other grounds sub nom Washington Metro. Area Transit Auth.* v. *DeArment*, 55 Empl. Prac. Dec. [CCH] ¶ 40,507 (D.D.C. 1991).

[12] These cases generally held that because Section 503(b) authorizes the Secretary to take action on complaints, relief is available to complainants and a private right of action would be incongruous.

[13] This is consistent with federal case law which provides that in employment discrimination cases the remedy should be designed, as nearly as possible, to make the victim whole. See *Albemorle Paper Co.* v. *Moody*, 422, 418–19 (1975). The existence of a right, in this case not be subjected to handicap discrimination, implies the existence of all necessary and appropriate remedies. See *Sullivan* v. *Little Hunting Park, Inc. 396 U.S. 229, 238–39 (1969), SEe Johnson* V. *Railway Express Agency*, 421 U.S. 454 (1975); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Mizell* v. *North Broward Hospital Dist.*, 427 F.2d 468 (5th Cir. 1970).

beyond de minimis, [sic] can affect our ultimate decision." 714 F.2d at 578.

Conciliation agreements, which are a form of contract and which purport to amend or alter another contract, the collective bargaining agreement, without the consent of one party, the union, must be distinguished from the retroactive award of seniority after an adjudication of discrimination. *Holsey* v. *Armour & Co.*, 743 F.2d 199, 218 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). There is a presumption in favor of the rightful place seniority remedy. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 n. 41 (1976). *E.E.O.C.* v. *Pneumatics, Inc.*, 779 F.2d 21, 23 (8th Cir. 1985). Indeed, the Supreme Court explicitly declined to decide in *W.R. Grace* whether an arbitration award for violation of the seniority provisions of a collective bargaining agreement "could be enforced in the face of a valid judicial alteration of seniority provisions pursuant to *Franks* v. *Bowman* [] to provide relief to discriminatees under Title VII or other law." 461 U.S. at 767 n.9. I conclude have the authority under Section 503, after a finding of discrimination, to award retroactive seniority without participation of the union in the proceedings.

Averring that the record is not complete enough to calculate the relief due complainants, OFCCP requests a remand to the ALJ for a determination of the appropriate relief. Exceptions at 68. In accordance with this opinion, Commonwealth is ordered to make offers of employment, in positions comparable to the ones for which they applied, to Complainants Gregory Gray, Wilda Matthis, Kenneth Sherrard, William Zellers and Thomas Marshall. In addition, seniority must be awarded retroactive to the date complainants would have been hired but for the illegal discrimination. Complainant Robert Etnire is to be granted additional seniority from the date he would have been hired in 1980 until his actual date of hire, June 29, 1981. The case is remanded to the ALJ to compute the amount of back pay due these complainants, taking into account the seniority they would have accrued if hired.

Conclusions and Order

For the foregoing reasons, I hold that Commonwealth violated Section 503 of the Act when it refused to hired Complainants Gray, Matthis, Sherrard, Zellers and Marshall and by declining to hire Complainant Etnire when he first applied.[14] Commonwealth is ordered to give the complainants, with the exception of Etnire, offers of employment within 60 days of receipt of this order. All complainants are to be awarded appropriate seniority and all other applicable benefits in accordance with this opinion. The case is remanded to the ALJ for calculation of back pay due complainants and submission of a supplemental recommended decision.

If Defendant Commonwealth Aluminum fails to comply with any provision of this order within the specified time periods, Defendant, its officers, subsidiaries, and successors shall be ineligible for the award of any government contracts or subcontracts, and shall be ineligible for extensions or other modifications of any existing Government contracts or subcontracts, until Defendant has satisfied the Assistant Secretary of Labor that it is in compliance with the provisions of Section 503 of the Rehabilitation Act of 1973 and the regulations and orders issued thereunder which have been found to have been violated in this case.

So Ordered.

Washington, DC.

John R. Fraser,

Acting Assistant Secretary for Employment Standards.

Certificate of Service

Case Name: Office of Federal Contract Compliance Programs, United States Department of Labor v. Commonwealth Aluminum

Case No.: 82–OFC–6

Document: Final Decision and Order

A copy of the above-referenced document was sent to the following persons on February 10, 1994.

Tisa McRae.

Certified Mail

Ralph York, Associate Regional Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203

Carole Fernandez, Esq., Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203

Frank Stainback, Esq., Holbrook, Gary, Wible & Sullivan, 100 St. Ann Building, Owensboro, KY 42302–0727

C.T. Corporation System, Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202

Lorence L. Kessler, Esq., McGuiness & Williams, Suite 1200, 1015 15th Street, NW., Washington, DC 20005

Hand Delivered

Richard L. Gilman, Esq., Senior Trial Attorney, Civil Rights Division, U.S. Department of Labor, 200 Constitution Ave., NW., Room N–2464, Washington, DC 20210

Regular Mail

Hon. David J. Roketenetz, Administrative Law Judge, Office of Administrative Law Judge, 304A U.S. Post Office and Courthouse, Cincinnati, Ohio 45202

Hon. Nahum Litt, Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW., Suite 400, Washington, DC 20001–8002

[FR Doc. 94–10279 Filed 4–28–94; 8:45 am]

BILLING CODE 4510–27–M

[14] OFCCP also alleges that Commonwealth violated the affirmative action clause by discrimination against complaints. Exceptions at 67. Since I have concluded that Commonwealth has discriminated against six of the complainants (potential discrimination against Complainant David Worthington was not addressed because no relief was available), it has violated the affirmative action clause. 41 CFR 60–741.4(a).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 20240; 811–6534]

Dreyfus Adjustable Rate Securities Fund, Inc.; Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Dreyfus Adjustable Rate Securities Fund, Inc.

RELEVANT ACT SECTION: Order requested under Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on April 12, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 144 Glenn Curtiss Boulevard, Uniondale, New York 11556–0144.

FOR FURTHER INFORMATION CONTACT:

Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, non-diversified management company under the Act and organized as a corporation under the laws of the State of Maryland. On January 21, 1992, Applicant filed a Notification of Registration on Form N–8A pursuant to section 8(a) of the Act and a registration statement on Form N–1A under section 8(b) of the Act and under the Securities Act of 1933. Applicant's registration statement has not been declared effective. Applicant has not sold any of its shares of common stock to the public pursuant to a public offering.

2. Pursuant to written consent dated as of April 8, 1994, the Applicant's Board determined that it was advisable and in the best interest of the Applicant and its sole stockholder that the Applicant terminate its existence as a Maryland corporation and liquidate any assets and that the proceeds from the liquidation be returned to the Applicant's sole stockholder and sponsor, The Dreyfus Corporation.

3. As of the date of this application, Applicant has no assets, debts, or liabilities; has no shareholders; and is not a party to any litigation or administrative proceeding. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10203 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20241; 811–7422]

Dreyfus Investors Appreciation Fund, Inc.; Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Dreyfus Investors Appreciation Fund, Inc.

RELEVANT ACT SECTION: Order requested under Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on April 12, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 144 Glen Curtiss Boulevard, Uniondale, New York 11556–0144.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, diversified management company under the Act and organized as a corporation under the laws of the State of Maryland. On January 6, 1993, Applicant filed a Notification of Registration on Form N–8A pursuant to section 8(a) of the Act and a registration statement on Form N–1A under section 8(b) of the Act and under the Securities Act of 1933. Applicant's registration statement has not been declared effective. Applicant has not sold any of its shares of common stock to the public pursuant to a public offering.

2. Pursuant to written consent dated as of April 8, 1994, the Applicant's Board of Directors determined that it was advisable and in the best interest of the Applicant and its sole stockholder that the Applicant terminate its existence as a Maryland corporation and liquidate any assets and that the proceeds from the liquidation be returned to the Applicant's sole stockholder and sponsor, The Dreyfus Corporation.

3. As of the date of this application, Applicant has no assets, debts, or liabilities; has no shareholders; and is not a party to any litigation or administrative proceeding. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10204 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20243; 811–7294]

Dreyfus Master Appreciation Portfolio; Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Dreyfus Master Appreciation Portfolio.

RELEVANT ACT SECTION: Order requested under Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on April 12, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 144 Glenn Curtiss Boulevard, Uniondale, New York 11556–0144.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, diversified management company under the Act and organized as a business trust under the laws of the State of Delaware. On October 21, 1992, Applicant filed a Notification of Registration on Form N–8A pursuant to section 8(a) of the Act and a registration statement on From N–1A under section 8(b) of the Act. Applicant never registered any shares under the Securities Act of 1933. Applicant has not sold any securities of which it is the issuer other than the initial share sold to its sponsor.

2. Pursuant to written consent dated as of April 8, 1994, the Applicant's Board of Trustees determined that it was advisable and in the best interest of the Applicant and its sole stockholder that the Applicant terminate its existence as a Delaware business trust and liquidate any assets and that the proceeds from the liquidation be returned to the Applicant's sole stockholder and Sponsor, The Dreyfus Corporation.

3. As of the date of this application, Applicant has no assets, debts, or liabilities; has no shareholders; and is not a party to any litigation or administrative proceedings. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10201 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20242; 811–7500]

Dreyfus M&G International Equity Trust; Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Dreyfus M&G International Equity Trust.

RELEVANT ACT SECTION; Order requested under Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE; The application was filed on April 12, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 144 Glenn Curtiss Boulevard, Uniondale, New York 11556–0144.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, non-diversified management company under the Act and organized as a business trust under the laws of the State of Delaware. On February 11, 1993, Applicant filed a Notification of Registration on Form N–8A pursuant to section 8(a) of the Act and a registration statement on Form N–1A under section 8(b) of the Act. Applicant never registered any shares under the Securities Act of 1933. Applicant has not sold any securities of which it is the issuer other than the initial share sold to its sponsor.

2. Pursuant to written consent dated as of April 8, 1994, the Applicant's Board of Trustees determined that it was advisable and in the best interest of the applicant and its sole stockholder that the Applicant terminate its existence as a Delaware business trust and liquidate any assets and that the proceeds from the liquidation be returned to the Applicant's sole stockholder and sponsor, the Dreyfus Corporation.

3. As of the date of this application, Applicant has no assets, debts, or liabilities; has no shareholders; and is not a party to any litigation or administrative proceeding. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10202 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20244; 811–7504]

Dreyfus Overseas Equity Retirement Fund, Inc.; Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Dreyfus Overseas Equity Retirement Fund, Inc.

RELEVANT ACT SECTION: Order requested under Section 8(f)).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on April 12, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 144 Glenn Curtiss Boulevard, Uniondale, New York 11556–0144.

FOR FURTHER INFORMATION CONTACT:

Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, non-diversified management company under the Act and organized as a corporation under the laws of the State of Maryland. On February 11, 1993, Applicant filed a Notification of Registration on Form N–8A pursuant to section 8(a) of the Act and a registration statement on Form N–1A under section 8(b) of the Act and under the Securities Act of 1933. Applicant's registration statement has not been declared effective and Applicant has not sold any of its shares of common stock to the public pursuant to a public offering or otherwise.

2. Pursuant to written consent dated as of April 8, 1994, the Applicant's Board of Directors determined that it was advisable and in the best interest of the Applicant and its sole stockholder that the Applicant terminate its existence as a Maryland corporation and liquidate any assets and that the proceeds from the liquidation be returned to the Applicant's sole stockholder and sponsor, The Dreyfus Corporation.

3. As of the date of this application, Applicant has no assets, debts, or liabilities; had no shareholders; and is not a party to any litigation or administrative proceeding. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10200 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20245; 811–7036]

Dreyfus Short-Term Fund, Inc.; Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Dreyfus Short-Term Fund, Inc.

RELEVANT ACT SECTION: Order requested under Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on April 12, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 144 Glenn Curtiss Boulevard, Uniondale, New York 11556–0144.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, diversified management company under the Act and organized as a corporation under the laws of the State of Maryland. On July 20, 1992, Applicant filed a Notification on Form N–8A pursuant to section 8(a) of the Act and a registration statement on Form N–1A under section 8(b) of the Act and under the Securities Act of 1933. Applicant's registration statement has not been declared effective and Applicant has not sold any of its shares of common stock to the public pursuant to a public offering.

2. Pursuant to written consent dated as of April 8, 1994, the Applicant's Board of Directors determined that it was advisable and in the best interest of the Applicant and its sole stockholder that the Applicant terminate its existence as a Maryland corporation and liquidate any assets and that the proceeds from liquidation be returned to the Applicant's sole stockholder and sponsor, The Dreyfus Corporation.

3. As of the date of this application, Applicant has no asset, debts, or liabilities; has no shareholders; and is not a party to any litigation or administrative proceeding. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10199 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20239; 811–827]

Pioneer Investment Plans for the Accumulation of Shares of the Pioneer Fund; Notice of Application

April 21, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: Pioneer Investment Plans for the Accumulation of Shares of the Pioneer Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on November 26, 1993, and an amendment was filed on March 1, 1994. By letter dated April 20, 1994, applicant has stated that it will make current its NSAR filings during the notice period.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 16, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a

hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549. Applicant, 60 State Street, Boston, Massachusetts 02109.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Staff Attorney, at (202) 942–0574, or Robert A. Robertson, Branch Chief, (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a periodic payment plan, which registered as a unit investment trust on July 30, 1958 by filing a notification of registration on Form N–8A pursuant to section 8(a) of the Act. On the same day, applicant filed a registration statement on Form S–6 under the Securities Act of 1933 to register its securities. The registration statement was declared effective on or about April 12, 1961, and applicant's initial public offering commenced soon thereafter.

2. Applicant consisted of Insurted Systematic Investment Plans and Single Payment Plans (collectively, the "Plans") under which payments by planholders were invested in shares of Pioneer Fund, an open-end investment company. Each Plan was established and governed by the terms of (a) an individual agreement among the investor, and depositor, Pioneer Plans Corporation, and (b) a custody agreement between a sponsor and the custodian, State Street Bank. The individual agreements and the custody agreement were governed by the laws of The Commonwealth of Massachusetts.

3. On December 20, 1990, the board of directors of Pioneering Services Corporation approved a plan of conversion which would convert each Plan to a Pioneer Fund Open Account. This vote subsequently was ratified by a written action of directors dated as of February 22, 1994.

4. Planholders who had completed their contractual Plan payments at the time of conversion were notified of the conversion by letter dated January 2, 1991. On the same day, planholders who had not completed their contractual payments were given the right to purchase shares of Pioneer Fund at a reduced sales charge of 2% to complete their Plans. This charge was lower than the amounts that would have been required to complete their Plan obligations.

5. On January 5, 1991, Pioneer Plans Corporation converted each Single Payment Plan and Insured Systematic Investment Plan to a Pioneer Fund Open Account. Upon the effectiveness of the conversion, the entire share balance of each Plan was transferred to a Pioneer Fund Open Account registered in the name of the holder of the converted Plan. The conversion had no effect on the value of the assets held in the Plans (*i.e.*, shares of Pioneer Fund).

6. Pioneering Services Corporation paid all expenses in connection with the conversion. Expenses were incurred to pay the manager of the project, and mailing and printing costs.

7. Applicant has no debts or other liabilities outstanding, and is not a party to any litigation or administrative proceeding. Applicant had no planholders at the time of filing of the application.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs. Applicant presently has no legal existence under the state laws pursuant to which it was created.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10198 Filed 4–28–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–33957; File No. SR–Amex–92–26]

Self-Regulatory Organizations; American Stock Exchange; Order Approving Proposed Rule Change Relating to Amendments to Rule 170 Pertaining to Specialists' Liquidating Transactions

April 22, 1994.

I. Introduction

On August 13, 1992, the American Stock Exchange ("Amex" or "Exchange") submitted to the Securities and Exchange Commission ("SEC"or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Amex Rule 170 to permit a specialist to effect a liquidating transaction on a zero minus tick, in the case of a "long" position, or a zero plus tick, when covering a "short" position, without Floor Official approval. The Amex also proposes to amend this Rule to set forth the affirmative action that specialists would be required to take subsequent to effecting various types of liquidating transactions. The Amex proposes to implement the proposed rule change for a one-year pilot period.

The proposed rule change was published for comment in Securities Exchange Act Release No. 32804 (August 25, 1993), 58 FR 45926 (August 31, 1993). No comments were received on the proposal. This order approves the proposed rule change for a one year period.

II. Description of the Proposal

Amex Rule 170, which is the primary Amex rule governing the functions of specialists, restricts a specialist's purchases or sales of his or her specialty stock to those dealings that are reasonably necessary to permit the specialist to maintain a fair and orderly market.[3]

A specialist's dealer responsibilities consist of "affirmative" and "negative" obligations. In accordance with their affirmative obligations, specialists are obligated to trade for their own accounts to minimize order disparities and contribute to continuity and depth in the market.[4] Conversely, pursuant to their negative obligations, specialists are

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1990).

[3] Amex Rule 170(c) states that a specialist shall not effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he or his member organization is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market, or to act as an odd-lot dealer in such security.

In general, specialist's activities are circumscribed by Section 11 of the Act [15 U.S.C. 78k] and the rules thereunder, and by the rules of the exchange where the specialist is registered. Commission Rule 11b–1(a)(2), which sets forth the primary responsibilities of a specialist, states that a specialist's course of dealings for his or her own account must assist in the maintenance, so far as practicable, of a fair and orderly market. 17 CFR 240.11b–1(a)(2). Rule 11b–1(a)(2) also states, however, that a specialist should restrict his or her dealings so far as practicable to those reasonably necessary to permit him or her to maintain a fair and orderly market.

[4] Amex Rule 170(d) states, in part, that it is ordinarily expected that a specialist will engage, to a reasonable degree under the existing circumstances, in dealings for his own account in full lots when lack of price continuity or lack of depth in the full lot market or temporary disparity between supply and demand in either the full lot or the odd-lot market exists or is reasonably to be anticipated. In addition, Rule 170(d) states that transactions on the Exchange for his own account effected by a specialist in the securities in which he is registered are to constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd-lot market.

precluded from trading for their own accounts unless such dealing is necessary for the maintenance of a fair and orderly market.[5] In view of these obligations, the price trend in a security should be determined not by specialist trading, but by the movements of the incoming orders that initiate the trades. Amex Rule 170.02, which contains one of the specalist's "negative" obligations, sets forth distinct prohibitions against specialist trades on destablizing ticks (i.e., purchases on plus or zero plus ticks and sales on minus or zero minus ticks).[6] Rule 170.02 also provides that, unless a specialist has Floor Official approval, he or she should avoid liquidation of all, or substantially all, of a position by selling stock at prices below the last different price (on a direct minus or zero minus tick) or by purchasing stock at prices above the last different price (on a direct plus or zero plus tick), unless the transaction is reasonably necessary in relation to the specialist's overall position in his or her specialty stocks.[7]

The Exchange proposes to amend Rule 170.02 regarding how specialists can "reliquify" a dealer position. When reliquifying, a specialist is reducing a large inventory position in order to be able to fully participate on the contra side of the market during periods of substantial buying or selling interest. The amended rule would permit a specialist, when reliquifying, to sell "long" inventory stock on a zero minus tick, or purchase stock to "cover" a "short" position on a zero plus tick, without Floor Official approval. In addition, the Amex proposes to amend Rule 170.02 to emphasize the specialist's affirmative role in providing stabilizing dealer participation to the marketplace, especially during periods of volatile or unusual market activity, involving significant price movement in a security, where reliquification may be required to facilitate the maintenance of a fair and orderly market. In this regard, Rule 170.02 would be amended on a one year pilot basis to provide that:

Liquidations involving the principal selling of *any* specialty stock on a direct minus tick, or the purchasing of such stock on a direct plus tick will require Floor Official approval, and should be effected only in conjunction with the specialist's re-entering the market on the opposite side of the market from the liquidating transaction where the imbalance indicates that the immediate succeeding transactions would result in a lower price following the sale (or higher price following the purchase).

During volatile or unusual market conditions involving significant price movement in a security, the specialist should re-enter the market following a liquidation transaction which was effected by selling stock on a direct minus or zero minus tick, or purchasing stock on a direct plus or zero plus tick and, at a minimum, participate as a dealer to the extent of his or her usual level of dealer participation in the subject security.

During such periods, a series of such liquidating transactions effected within a brief period of time should be accompanied by the specialist's re-entry in the market and effecting transactions which reflect a significant degree of dealer participation.

The Exchange believes that its proposed amendments to Rule 170.02 will provide specialists with the ability to respond to periods of extreme market volatility, particularly those characterized by high volume and selling pressure, by permitting him or her to liquidate large dealer positions acquired as a result of such selling pressure. In addition, the Exchange believes that the amendments would reinforce the specialist's affirmative obligation to maintain a fair and orderly market by providing stabilizing dealer participation to the marketplace, and would reinforce his or her negative obligations in that a specialist would not be able to liquidate in the absence of a large dealer position, but could only do so if reasonably necessary to maintain a fair and orderly market.

The Exchange proposes to implement the proposed rule change as a one-year pilot, and will monitor compliance with the requirements of the Rule through existing surveillance procedures. In particular, the Exchange stated that liquidation transactions effected by specialists on direct plus or minus destabilizing ticks will initially be reviewed as to whether the requisite Floor Official approval was obtained, and will be subjected to a further review with respect to the specialist's dealer participation levels, re-entry into the market in terms of timing and support, and whether the transactions were counter to the market trend. The Exchange stated that it would provide the Commission with a report summarizing the results of its surveillance prior to the conclusion of the pilot period.

The Exchange believes that the proposed rule change is consistent with section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest, by enabling specialists to facilitate orderly and continuous markets during periods of unusual volatility of price changes.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with sections 6(b) (5) and 11 of the Act.[8] The Commission believes the proposal is consistent with the section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and, in general, protect investors and the public interest. The Commission also believes that the proposal is consistent with section 11(b) of the Act and Rule 11b–1 thereunder,[9] which allow exchanges to promulgate rules relating to specialists in order to maintain fair and orderly markets.

Both the Act and Exchange rules reflect the crucial role played by specialists in providing stability, liquidity, and continuity in the Exhange's auction market. Recognizing the importance of the specialist in the auction market, the Act, as well as Exchange rules, impose stringent obligations upon specialist.[10] Primary among the obligations are the requirements to maintain fair and olderly markets and to restrict specialist dealings to those that are "reasonably necessary" in order to maintain a fair and orderly market.[11]

The importance of specialist performance to the quality of Exchange markets was highlighted during the 1987 and 1989 market breaks. In the Division of Market Regulation's ("Division") report on the October 1987 market break ("1987 Market Break Report"), the Division examined specialist performance on the Amex on October 19 and 20, 1987.[12] The Division

[5] See Amex Rule 170(c).

[6] A plus tick is a price above the price of the last preceding sale. A zero plus tick is a price equal to the last sale if the last preceding transaction at a different price was at a lower price. Conversely, a minus tick is a price below the price of the last preceding sale. A zero minus tick is a price equal to the last sale if the last preceding transaction at a different price was at a higher price.

[7] Rule 170.02 also provides that, unless a specialist has Floor Official approval, he or she should avoid: Failing to re-enter the market where necessary, after effecting transactions such as those described above; and failing to maintain a fair and orderly market during liquidations. The Amex proposes to delete these two provisions and replace them with new language described *infra*.

[8] 15 U.S.C. 78f and 78k (1988).

[9] 17 CFR 240.11b–1 (1991).

[10] See Rule 11b–1 under the Act, 17 CFR 240.11b–1 (1993); Amex Rule 170.

[11] 17 CFR 240.11b–1(A)(2) (1993).

[12] See Division of Market Regulation, The October 1987 Market Break, February 1988, at 4–29 to 4–41.

found that, although some Amex specialists appeared to perform well under adverse conditions, others did not.[13]

The Division also examined Amex specialist performance during the volatile conditions of October 13 and 16, 1989 ("October 1989 Report"), and found that specialist performance during the time was similar in many respects to the pattern of specialist performance during the October 1987 Market Break.[14] Specifically, the Division found that, during these two periods of adverse market conditions, specialists were confronted with extreme volume and volatility.[15]

Both the 1987 Market Break Report and the October 1998 Report reaffirmed the importance of specialist participation in countering market trends during periods of market volatility. At the same time, the reports emphasized the importance the Commission placed on the Amex's ability to ensure that all specialists comply with their affirmative and negative market making obligations during such periods.

One area of specialist performance specifically reviewed by the October 1989 Report involved specialist's compliance with their obligation to maintain and orderly market by buying and selling stocks for their own accounts to relieve imbalances between supply and demand. In the October 1989 Report, the Division requested that the Amex examine the language of Rule 170.02.[16] Amex Rule 170.02 states that, unless a specialist has the prior approval of a Floor Official, he or she should avoid liquidation of all or substantially all of position by selling stock at prices below the last different price or by purchasing stock at prices above the last different price unless such transactions are reasonably necessary in relation to the specialist's overall position in the stocks in which he or she is registered. The Division indicated that Rule 170.02 appeared to provide specialists with unnecessarily broad latitude for effecting transactions on destabilizing tricks.[17]

The proposed rule change is responsive to the request regarding Rule 170.02 as well as the conclusions of the two market break reports. The Amex, recognizing that market conditions may necessitate that a specialist participate heavily in a rapidly declining market, has proposed amendments to Rule 170.02 to provide specialists with flexibility in liquidating specialty stock positions in order to facilitate their ability to maintain fair and orderly markets, particularly during unusual market conditions. At the same time, the amendments also would strengthen the specialist's concomitant obligation to participate as dealer on the opposite side of the market after a liquidating transaction.

Under the amended Rule, a specialist may liquidate a position by selling stock on a direct minus tick or by purchasing stock on a direct plus tick only if such transactions are reasonably necessary for the maintenance of a fair and orderly market and only if the specialist has obtained the prior approval of a Floor Official. Liquidations on a zero minus or a zero plus tick, which previously required Floor Official approval, can be effected under the pilot procedures without a Floor Official's approval, but continue to be subject to the restriction that they be effected only when reasonably necessary to maintain a fair and orderly market. In addition, the specialist must maintain a fair and orderly market during the liquidation.

Both the Act and Exchange rules reflect the crucial role played by specialists in providing stability, liquidity, and continuity in the Exchange's auction market. Recognizing the importance of the specialist in the auction market, the Act, as well as Exchange rules, impose stringent obligations upon

After the liquidation, a specialist is required to re-enter the market on the opposite side of the market from the liquidating transaction to offset any imbalances between supply and demand. During any period of volatile or unusual market conditions resulting in a significant price movement in a specialist's specialty stock, the specialist's re-entry into the market must reflect, at a minimum, his or her usual level of dealer participation in the specialty stock. In addition, during such periods of volatile market conditions or unusual price movements, re-entry into the market following a series of transactions must reflect a significant level of dealer participation.

Thus, the amendments to Rule 170.02 would reinforce the specialist's affirmative obligation to maintain a fair and orderly market by providing stabilizing dealer participation to the marketplace, especially during periods of volatile or unusual market activity. For example, during periods of high market volatility, not only would specialists continue to be obligated to temper disparities between supply and demand, but would specifically have to reenter the market after a liquidating transaction. Similarly, the amendments to Rule 170.02 would reinforce the negative market making obligations of specialists. For example, a specialist would not be permitted to reliquify in the absence of a large dealer position; rather he or she would only be able to do so if reasonably necessary to enable him or her to maintain fair and orderly market. Thus, the new amendments to Rule 170.02 would not allow the specialist to use the rule as a vehicle for trading.

During future periods of market volatility, accompanied by increasing volume and selling pressure, specialists may be under extreme pressure to keep the markets orderly and continuous by entering the market as buyers. In these instances, the Commission believes that the amendments to Rule 170.02 should assist specialists in tempering sudden price movements and keeping any general price movements orderly, thereby furthering the maintenance of fair and orderly markets consistent with Sections 6 and 11 under the Act.

The Commission emphasizes that reliquifications are not precluded during periods of significant price movements, but they should be accompanied by the necessary dealer participation against the trend of the market, even in situations where continuity and depth reflect variations that may normally be experienced in the stock.

In addition, the Commission believes that approval of the Amex proposal for a one year pilot period will provide the Commission and Exchange an opportunity to monitor the operation of the rule during periods of unusual or volatile market conditions. This one year period also will allow the Commission and the Exchange the opportunity to monitor specialist compliance with the new rule to ensure that specialists are properly assuming their responsibilities of re-entering the market following liquifying transactions.

Finally, in its rule filing, the Amex indicated that, during the one year pilot period, the Exchange would monitor compliance with the requirements of the Rule. Specifically, the Amex stated that liquidation transactions effected by specialists on direct plus or minus destabilizing ticks will initially be

[13] See 1987 Market Break Report at 4–41.

[14] See Division of Market Regulation, Market Analysis of October 13 and 16, 1989, at 33.

[15] 1987 Market Break Report at 4–30; October 1989 Report, at 27.

[16] See October 1989 Report at 29. The Division also requested that the New York Stock Exchange ("NYSE") examine the language of NYSE Rule 104.10, which contains similar language to Amex Rule 170.02. Specifically, the Division stated that the suggestion regarding NYSE Rule 104.10's treatment of estabilizing transactions is equally applicable to Amex Rule 170.02. See October 1989 Report at 29–30, note 56.

[17] See October 1989 Report at 19, note 31.

reviewed as to whether the requisite Floor Official approval was obtained, and will be subjected to a further review with respect to the specialist's dealer participation levels, re-entry into the market in terms of timing and support, and whether to transactions were counter to the market trend. The Exchange also stated that it would provide the Commission with a report summarizing the results of its surveillance prior to the conclusion of the pilot period. In this regard, the Commission requests that the Exchange submit a report, by January 22, 1995, setting forth the criteria developed by the Exchange to determine whether any reliquifications by specialists were necessary and appropriate in connection with fair and orderly markets and providing information gathered regarding the Exchange's monitoring of liquidation transactions effected by specialists on any destabilizing tick. In addition, the Commission requests that the Amex provide, among other things, the following information in its report:

(1) A review of all liquidation transactions effected by specialists on any destabilizing ticks;

(2) A review of liquidating transactions by specialists to determine that the required Floor Official approval was obtained where necessary;

(3) And a review of liquidating transactions in light of dealer participation levels and re-entry into the market in terms of timing and support (e.g., whether the specialist's transactions were counter to the market trend).

It therefore is ordered, pursuant to section 19(b)(2) of the Act,[18] that the proposed rule change is approved for a one year pilot period ending on April 22, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-10251 Filed 4-28-94; 8:45 am]

BILLING CODE 8010-01-M

[18] 18 U.S.C. 78s(b)(2) (1988).

[19] 17 CFR 200.30-3(a)(12) (1991).

[Release No. 34-33954; File No. SR-Phlx-94-19]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Amending Its Schedule of Fees and Charges Relating to Charges on Stock Execution Machines.

April 21, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notices hereby given that on March 29, 1994, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. On April 21, 1994, the Phlx submitted to the Commission Amendment No. 1 to the proposal.[1] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx is proposing to amend its Schedule of Fees and Charges respecting the charges of non-exchange sponsored stock execution equipment[2] operated by Phlx members on the Phix floor. The proposed amendment would provide a 50 percent credit on the fees charged on each stock execution machine operated by any member firm for each 2,500 trades such member executes on the PHlx in a non-specialist account.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments if received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Since 1990, the Exchange has imposed a proprietary stock execution machine charge of $250.[3] Effective for the Exchange's April 1994 billing cycle, the Phix shall provide a monthly credit of 50 percent of the fees charged for each stock execution machine operated by a member per each 2,500 trades executed by such member of the Phlx. The credit shall not exceed 50 percent of the total stock execution machine billing charges per member operating such machine.

Accordingly, a member firm with three stock execution machines, executing 7,500 trades in a non-specialist account, would be entitled to a credit of $375.00. In this example, the charges for the stock execution machines would be $750 ($250 fee multiplied by the 3 machines) minus the credit of $375 (½ [$250 fee] multiplied by 3 machines. If, however, in the above example the member firm had operated only two stock execution machines, the credit given would be $250 because the credit per member would be capped at 50 percent of the member's total stock execution machine billing charges. Thus, in the latter case, the total charges would be $250, which equals the total fees ($500) minus the credit per each machine (2 multiplied by $125).

The purpose of the proposed rule change is to amend the Phlx's current schedule of fees and charges and to also enhance the Exchange's equity floor as a highly attractive floor of execution for a member firm's business.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

[1] See letter from William W. Uchimoto, Vice President and General Counsel, Phlx, to Louis A. Randazzo, Attorney, SEC, dated April 21, 1994. Amendment No. 1 deleted text requiring member firms to clear trades through the Stock Clearing Corporation of Philadelphia in order to receive the discount.

[2] The Exchange stated that stock execution machines are terminals that route order flow to other market places. Currently, the only stock execution machines at the Phlx are Designated Order Turnaround machines ("DOT") that route orders to the New York Stock Exchange ("NYSE").

[3] See Securities Exchange Act Release No. 28212 (July 17, 1990), 55 FR 30065 (July 24, 1990).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee or other charge imposed by the Exchange and therefore has become effective pursuant to Section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–94–19 and should be submitted by May 20, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–10205 Filed 4–28–94; 8:45 am]

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DEPARTMENT OF STATE

[Public Notice 1996]

Secretary of State's Advisory Committee on Private International Law; Annual Meeting and Review of Developments in Private International Law

The Secretary of State's Advisory Committee on Private International Law (ACPIL) will hold its annual meeting on Monday, May 16, 1994 from 9:30 a.m. to 5 p.m. at the Department of State in Washington, DC.

The meeting agenda will include a review of some of the developments in international organizations specializing in this field of work, including the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), the Inter-American Specialized Conference on Private International Law (CIDIP) sponsored by the Organization of American States (OAS), the International Institute for Unification of Private Law (UNIDROIT), and other international organizations as appropriate.

The principle topics for discussion at the meeting will be: U.S. accession to the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods and its 1980 Protocol; the 1994 Inter-American Convention on Law Applicable to International Contracts, adopted at the Fifth Specialized Conference on Private International Law (CIDIP–V); the 1993 Hague Convention on intercountry adoption and issues involved in preparing federal implementing legislation; the 1994 Inter-American Convention on Civil and Criminal Aspects of the Traffic in Minors, also adopted at CIDIP–V; and current or proposed law unification projects on secured interests in international transactions, insolvency and assignment of claims.

Copies of documents on particular topics may be requested from the Legal Adviser's Office by contacting Harold S. Burman by fax at (202) 653–9854 or by writing to the Office of the Legal Adviser (L/PIL), suite 501, 2100 "K" Street, NW., Washington, DC 20037–7180.

Members of the general public may attend up to the capacity of the meeting room and participate subject to the direction of the Chair. The meeting will be held in Conference Room 1912 at the Department of State. As access to the building is controlled, the office indicated above must be notified not later than Tuesday, May 10 of the name, affiliation, address, social security number and date of birth of persons wishing to attend. In order to facilitate planning for the meeting, members of the public are requested to indicate to L/PIL in advance the particular issues on which they may wish to comment. Attendees should use the State Department 23rd Street entrance between C and D Streets NW., between 9 a.m. and 10:15 a.m.; later entrants should use the C Street (Diplomatic) entrance between 21st and 23rd Streets. Persons interested but unable to attend the meeting are welcome to request documents and to submit comments or proposals to the address indicated above.

Dated: April 22, 1994.

Peter H. Pfund,

Assistant Legal Adviser for Private International Law, U.S. Department of State.

[FR Doc. 94–10238 Filed 4–28–94; 8:45 am]

BILLING CODE 4710–08–M

[Public Notice 1997]

Secretary of State's Advisory Committee on Private International Law; Study Group on International Procurement; Meeting

A Study Group of the Secretary of State's Advisory Committee on Private International Law will hold a meeting at 9:30 a.m. until 2 p.m. on Wednesday, May 18th, 1994 in Washington, DC at the International Law Institute, 1615 New Hampshire Avenue NW.

The Study Group will review proposed provisions of a model law for the procurement of services which is under consideration by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL will meet for possible final adoption of the proposed rules in June 1994. Participants in the Study Group meeting will be asked to provide technical advice and to make recommendations for possible U.S. positions for the UNCITRAL session.

UNCITRAL recently completed the Model Law on Procurement of Goods and Construction at its Plenary Session in May 1993, which was endorsed by the United Nations General Assembly by resolution 48–33 on December 9, 1993. The text of the Model Law is printed in the annual report of the Commission's work, U.N. Doc. A/48/17 Annex I and 33 I.L.M. 445 (March 1994). A Guide to Enactment was also prepared to accompany the Model Law (U.N. Doc. A/CN.9/393). The proposed additional model law provisions covering procurement of services and corresponding changes to the Guide to Enactment are set out in an annex to the

report of the Commission's most recent Working Group meeting on this subject, held at the U.N. in March 1994 (U.N. Docs. A/CN.9/392 and 394).

The Study Group will review the proposed scope of the UNCITRAL project, including rules on requests for proposals and other procurement methods for acquisition of services, open access to markets, competitive or restricted bidding, and related matters.

Copies of the U.N. Documents referred to above and other relevant information may be obtained by contacting Harold S. Burman by fax at (202) 653–9854 or writing the Office of the Assistant Legal Adviser for Private International Law, L/PIL, Suite 501, 2100 "K" Street NW., Washington, DC 20037–7180.

The Study Group will also review the status of two related international projects, the UNCITRAL Legal Guide on International Countertrade Transactions, which is now available as United Nations Publication Sales No. E.93.V.7, and the UNIDROIT Principles for International Commercial Contracts, which is expected to become final in May 1994.

Members of the general public may attend the meeting up to the capacity of the meeting room. The office indicated above should be notified not later than Thursday, May 12th of the name, affiliation, address and phone number of persons wishing to attend. In order to facilitate planning for the meeting, members of the public are requested to indicate whether they expect to comment on particular issues. Persons interested but unable to attend the meeting are welcome to submit comments or proposals to the address indicated above. Persons wishing to be placed on the mailing list for notices for meetings of the Study group and for further information on documents on this subject relating to UNCITRAL's work should so advise the above Office.

Peter H. Pfund,

Assistant Legal Adviser for Private International Law.

[FR Doc. 94–10239 Filed 4–28–94; 8:45 am]

BILLING CODE 4710–08–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Application of TRI Star Airlines, Inc. For Issuance of New Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause [Order 94–4–33] Docket 49308.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order (1) finding Tri Star Airlines, Inc., fit, willing, and able, and (2) awarding it a certificate of public convenience and necessity to engage in interstate and overseas scheduled air transportation of persons, property, and mail.

DATES: Persons wishing to file objections should do so no later than May 9, 1994.

ADDRESSES: Objections and answers to objections should be filed in Docket 49308 and addressed to the Documentary Services Division (C–55, room 4107), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Janet A. Davis, Air Carrier Fitness Division (X–56, room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9721.

Dated: April 22, 1994.

Patrick V. Murphy,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. 94–10240 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–62–P

Federal Aviation Administration

Noise Exposure Map Notice; Receipt of Noise Compatibility Program and Request for Review, Laredo International Airport, Laredo, TX

AGENCY: Federal Aviation Administration.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the City of Laredo, Texas for Laredo International Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 Code of Federal Regulation (CFR) part 150 are in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program that was submitted for Laredo International Airport under part 150 in conjunction with the noise exposure map, and that this program will be approved or disapproved on or before October 15, 1994

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps and of the start of its review of the associated noise compatibility program is April 18, 1994. The public comment period ends June 17, 1994.

FOR FURTHER INFORMATION CONTACT: Donald C. Harris, DOT/FAA, Texas Airport Development office, 2601 Meacham Boulevard, Fort Worth, TX 76193–0651, telephone (817) 222–5651. Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Laredo International Airport are in compliance with applicable requirements of part 150, effective April 18, 1994. Further, FAA is reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before October 15, 1994. This notice also announces the availability of this program for public review and comment.

Under section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The City of Laredo, Texas, submitted to the FAA on March 15, 1994, noise exposure maps, descriptions and other documentation which were produced from 1992 to February 1994 during the development of the Laredo International Airport FAR part 150 Airport Noise Compatibility Plan. It was requested that the FAA review this material as the noise exposure maps, as described in section 103(a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and

surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by City of Laredo, Texas. The specific maps under consideration are Figures 6A, 6B, and 10A in the submission. The FAA has determined that these maps for Laredo International Airport are in compliance with applicable requirements. This determination is effective on April 18, 1994. FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through FAA's review of noise exposure maps.

Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Laredo International Airport, Texas, also effective on April 18, 1994. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before October 15, 1994.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR part 150, § 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing noncompatible land uses and preventing the introduction of additional noncompatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comment, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA's evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations:

Federal Aviation Administration, 800 Independence Avenue, SW., room 617, Washington, DC 20591.

Federal Aviation Administration, Texas Airport Development Office, suite 697, 2601 Meacham Boulevard, Fort Worth, TX 76193–0651.

Mr. Jose Luis Flores, Airport Director, Laredo International Airport, Post Office Box 579, 518 Flightline, Bldg 132, Laredo, TX 78041–0579

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Fort Worth, Texas on April 18, 1994.

John M. Dempsey,

Manager, Airports Division.

[FR Doc. 94–10284 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

Noise Exposure Map Notice; Manassas Regional Airport, Manassas, VA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the City of Manassas Airport Board for the Manassas Regional Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR part 150 are in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program, that was submitted for Manassas Regional Airport under part 150 in conjunction with the noise exposure maps, and that this program will be approved or disapproved on or before October 21, 1994.

EFFECTIVE DATE: The effective date of FAA's determination on the noise exposure maps and of the start of its review of the associated noise compatibility programs is March 21, 1994. The public comment period ends June 6, 1994.

FOR FURTHER INFORMATION CONTACT: Frank Squeglia, Environmental Specialist, FAA—Easter Regional Office, Airports Division, AEA–610, Fitzgerald Federal Building, JFK International Airport, Jamaica, NY 11430, (718) 553–0902.

Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for the Manassas Regional Airport are in compliance with applicable requirements of part 150, effective March 21, 1994.

Further, the FAA is reviewing a proposed noise compatibility program for the airport which will be approved or disapproved on or before October 21, 1994. This notice also announces the availability of this program for public review and comment.

Under section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the way in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of FAR part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing non-compatible uses and for the prevention of the introduction of additional con-compatible uses.

The City of Manassas submitted to the FAA on February 24, 1992, noise

exposure maps, descriptions and other documentation which were produced during an airport noise compatibility planning study. It was requested that the FAA review this material as the noise exposure maps, as described in section 103(a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by the City of Manassas. The specific maps under consideration are the noise exposure maps: Figure X–1 Existing (1992) Noise Exposure Map (page 56) and Figure X–2 Future (1997) Noise Exposure Map (page 57) of the February 1992 submission as amended.

The FAA has determined that these maps for Manassas Regional Airport are in compliance with applicable requirements. This determination is effective on March 21, 1994. FAA's determination on an airport operator's noise exposure maps is limited to finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure maps submitted under section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land-use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the maps depicting properties on the surface rests exclusively with the airport operator which submitted those maps or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator under § 150.21 of FAR part 150, that the statutorily required consultation has been accomplished.

The FAA formally received the noise compatibility program for Manassas Regional Airport also effective of February 24, 1992. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to the approval or disapproval of the program. The former review period limited by law to a maximum of 180 days, will be completed on or before October 21, 1994.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land-use authorities, will be considered by the FAA to the extent practicable. The public comment period ends June 6, 1994.

Copies of the noise exposure maps and the FAA's evaluation of the maps are available for examination at the following locations:

Eastern Regional Office, FAA—Fitzgerald Federal Building, Airports Division, room 337, JFK International Airport, Jamaica, NY 11430.

Washington Airports District Office, FAA—101 West Broad Street, suite 300, Falls Church, VA 22046.

Manassas Regional Airport, Airport Manager, P.O. Box 560, 10522 Terminal Road, Manassas, VA 22110.

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT.**

Issued in Jamaica, New York on April 8, 1994.

Peter A. Nelson,

Acting Manager, Airports Division, Eastern Region.

[FR Doc. 94–10281 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

Index of Administrator's Decisions and Orders in Civil Penalty Actions; Publication

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of publication.

SUMMARY: This notice constitutes the required quarterly publication of an index of the Administrator's decisions and orders in civil penalty cases. The FAA is publishing an index by order number, an index by subject matter, and case digests that contain identifying information about the final decisions and orders issued by the Administrator. Publication of these indexes and digests is intended to increase the public's awareness of the Administrator's decisions and orders and to assist litigants and practitioners in their research and review of decisions and orders that may have precedential value in a particular civil penalty action. Publication of the index by order number, as supplemented by the index by subject matter, ensures that the agency is in compliance with statutory indexing requirements.

FOR FURTHER INFORMATION CONTACT: Daniel J. Peterson, Special Counsel and Director of Civil Penalty Adjudications (AGC–700), Federal Aviation Administration, 701 Pennsylvania Avenue NW., suite 925, Washington, DC 20004; telephone (202) 376–6441.

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act requires Federal agencies to maintain and make available for public inspection and copying current indexes containing identifying information regarding materials required to be made available or published. 5 U.S.C. 552(a)(2). In a notice issued on July 11, 1990, and published in the **Federal Register** (55 FR 29148; July 17, 1990), the FAA announced the public availability of several indexes and summaries that provide identifying information about the decisions and orders issued by the Administrator under the FAA's civil penalty assessment authority and the rules of practice governing hearings and appeals of civil penalty actions. 14 CFR part 13, subpart G. The FAA maintains an index of the Administrator's decisions and orders in civil penalty actions organized by order number and containing identifying information about each decision or order. The FAA also maintains a subject-matter index, and digests organized by order number.

In a notice issued on October 26, 1990, the FAA published these indexes and digests for all decisions and orders issued by the Administrator through September 30, 1990. 55 FR 45984; October 31, 1990. The FAA announced in that notice that it would publish supplements to these indexes and digests on a quarterly basis (*i.e.*, in January, April, July, and October of each year). The FAA announced further in

that notice that only the subject-matter index would be published cumulatively, and that both the order number index and the digests would be non-cumulative.

Since that first index was issued on October 26, 1990 (55 FR 45984; October 31, 1990), the FAA has issued supplementary notices containing the quarterly indexes of the Administrator's civil penalty decisions as follows:

Dates of quarter	Federal Register publication
10/1/90–12/31/90	56 FR 44886; 2/6/91.
1/1/91–3/31/91	56 FR 20250; 5/2/91.
4/1/91–6/30/91	56 FR 31984; 7/12/91.
7/1/91–9/30/91	56 FR 51735; 10/15/91.
10/1/91–12/31/91	57 FR 2299; 1/21/92.
1/1/92–3/31/92	57 FR 12359; 4/9/92.
4/1/92–6/30/92	57 FR 32825; 7/23/92.
7/1/92–9/30/92	57 FR 48255; 10/22/92.
10/1/92–12/31/92	58 FR 5044; 1/19/93.
1/1/93–3/31/93	58 FR 21199; 4/19/93.
4/1/93–6/30/93	58 FR 42120; 8/6/93.
7/1/93–9/30/93	58 FR 58218; 10/29/93.
10/1/93–12/31/93	59 FR 5466; 2/4/94.

In the notice published on January 19, 1993, the Administrator announced that for the convenience of the users of these indexes, the order number index published at the end of the year would reflect all of the civil penalty decisions for that year. 58 FR 5044; 1/19/93. The order number indexes for the first, second, and third quarters would be non-cumulative.

As noted at the beginning of the digests, the digests do not constitute legal authority, and should not be cited or relied upon as such. The digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

The Administrator's final decisions and orders, indexes, and digests are available for public inspection and copying at all FAA legal offices. (The addresses of the FAA legal offices are listed at the end of this notice.)

In addition, the Administrator's decisions and orders have been published by commercial publishers and are available on computer databases. (Information about these commercial publications and computer databases is provided at the end of this notice.)

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Digests

(Current as of March 31, 1994)

The digests of the Administrator's final decisions and orders are arranged by order number, and briefly summarize key points of the decision. The following compilation includes all final decisions and orders issued by the Administrator from January 1, 1994, to March 31, 1994. The FAA will publish noncumulative supplements to these digests on a quarterly basis (*i.e.*, January, April, July, and October of each year).

These digests do not constitute legal authority, and should not be cited or relied upon as such. The digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

In the Matter of Delta Air Lines, Inc., Order No. 94–1 (2/18/94).

Unauthorized Access. The law judge's finding that Respondent did not violate Section V.A.2 of the Air Carrier Standard Security Program is reversed.

In the Matter of Mary Woodhouse, Order No. 94–2 (3/10/94).

Duty of Hot Air Balloon Repairman. The law judge's finding that Respondent violated the Federal Aviation Regulations when she certified a hot air balloon as airworthy with unauthorized fuel manifolds is affirmed. Respondent should have questioned the owner, the manufacturer, or the FAA concerning the origin of the fuel manifolds when the aircraft manual, maintenance log, and type certificate data sheet contained no information on fuel manifolds. However, the law judge's finding that Respondent violated the regulations by certifying the balloon as airworthy with unauthorized fuel tanks is reversed because Complainant failed to establish the number of fuel tanks authorized by the balloon's type design.

In the Matter of Valley Air Services, Inc., Order No. 94–3 (3/10/94).

Expert Testimony. The law judge erred to the extent he used a simple credibility test to evaluate the expert testimony in this case. Expert testimony is not evaluated on the basis of its credibility but on its logic, depth, and persuasiveness.

Failure of Proof. Complainant failed to bear its burden of proving that Respondent violated the regulations when it welded the cracked spinners on its Piper Chieftain aircraft.

In the Matter of Northwest Aircraft Rental Inc., Order No. 94–4 (3/10/94).

Impeachment of Witnesses. A written summary of the informal conference was admissible for the limited purpose of impeachment.

Financial Hardship. Where Respondent did not raise the issue of financial hardship at the hearing, it failed to preserve the matter for consideration on appeal. Respondent did not show that the evidence of financial hardship that he sought to introduce on appeal was not available during the hearing.

In the Matter of Merritt A. Grant, Order No. 94–5 (3/10/94).

Failure to File Timely Answer. The law judge did not err in dismissing Respondent's request for hearing on the ground that Respondent failed to file a timely answer.

Sanction. A $1,000 civil penalty is deemed appropriate under the new sanction policy where Respondent attempted to bring an unloaded firearm with accessible ammunition and two hunting knives on an aircraft.

In the Matter of Raymond B. Strohl, Order No. 94–6 (3/10/94).

Request for Hearing Construed to Cover Instant Case. Respondent's request for hearing, which technically covered only a separate civil penalty action, is construed as a timely request for hearing in the instant case as well. Respondent did not apparently understand that there were two civil penalty actions brought against him. His confusion was understandable, given that the notices and proposed notices of proposed civil penalty in the two cases

were so strikingly similar. Complainant is granted 30 days from the date of service of this order to file a complaint.

In the Matter of Eric Hereth, Order No. 94–7 (3/10/94).

Untimely Complaint. Where the request for hearing and the final notice of proposed civil penalty were withdrawn, and a complaint was subsequently filed without the withdrawn documents being reissued, the complaint was not untimely filed. The withdrawn request for hearing and the final notice of proposed civil penalty were necessarily reactivated and refiled with the complaint, or the complaint would have been null.

Jurisdictional Bar. An untimely complaint is not a jurisdictional bar to a civil penalty action. An untimely complaint may be excused upon a finding of good cause.

In the Matter of Raul Nunez, Order No. 94–8 (3/10/94).

Failure to File Answer. Respondent did not show good cause for his failure to file an answer to the complaint. The law judge's dismissal of Respondent's request for hearing is affirmed.

In the Matter of B&G Instruments, Order No. 94–9 (3/29/94).

Withdrawal of Appeal. Complainant withdrew its notice of appeal fom the initial decision. Complainant's appeal is dismissed.

In the Matter of John G. Boyle, Order No. 94–10 (3/29/94).

Withdrawal of Appeal. Complainant withdrew its notice of appeal fom the initial decision. Complainant's appeal is dismissed.

Commercial Reporting Services of the Administrator's Civil Penalty Decisions and Orders

In June 1991, as a public service, the FAA began releasing to commercial publishers the Administrator's decisions and orders in civil penalty cases. The goal was to make these decisions and orders more accessible to the public. The Administrator's decisions and orders in civil penalty cases are now available in the following commercial publications:

Avlex, published by Aviation Daily, 1156 15th Street, NW., Washington, DC 20005, (202) 822–4669; and

Civil Penalty Cases Digest Service, published by Hawkins Publishing Company, Inc., P.O. Box 480, Mayo, MD 21106, (410) 798–1677, and

Federal Aviation Decisions, Clark Boardman Callaghan, 50 Broad Street East, Rochester, NY 14694, (716) 546–1490.

The decisions and orders may be obtained on disk from Aviation Records, Inc., P.O. Box 172, Battle Ground, WA 98604, (206) 896–0376. Aeroflight Publications, P.O. Box 854, 433 Main Street, Gruver, TX 79040, (806) 733–2483, is placing the decisions of CD-ROM. Finally, the Administrator's decisions and orders in civil penalty cases are available on the following computer databases: Compuserve; Fedix; and Genie.

The FAA has stated previously that publication of the subject-matter index and the digests may be discontinued once a commercial reporting service publishes similar information in a timely and accurate manner. No decision has been made yet on this matter, and for the time being, the FAA will continue to prepare and publish the subject-matter index and digests.

FAA Offices

The Administrator's decisions and orders, indexes, and digests are available for public inspection and copying at the following location in FAA headquarters: FAA Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., room 924A, Washington, DC 20591; (202) 267–3641.

These materials are also a available at all FAA regional and center legal offices at the following locations:

Office of the Assistant Chief Counsel for the Aeronautical Center (AMC–7), Mike Monroney Aeronautical Center, 6500 South MacArthur, Oklahoma City, OK 73125; (405) 680–3296.

Office of the Assistant Chief Counsel for the Alaskan Region (AAL–7), Alaskan Region Headquarters, 222 West 7th Avenue, Anchorage, AL 99513; (907) 271-5269.

Office of the Assistant Chief Counsel for the Central Region (ACE–7), Central Region Headquarters, 601 East 12th Street, Federal Building, Kansas City, MO 64106; (816) 426–5446.

Office of the Assistant Chief Counsel for the Eastern Region (AEA–7), Eastern Region Headquarters, JFK International Airport, Fitzgerald Federal Building, Jamaica, NY 11430; (718) 553–1035.

Office of the Assistant Chief Counsel for the Great Lakes Region (AGL–7), Great Lakes Region Headquarters, O'Hare Lake Office Center, 2300 East Devon Avenue, Des Plaines, IL 60018; (708) 294–7108.

Office of the Assistant Chief Counsel for the New England Region (ANE–7), New England Region Headquarters, 12 New England Executive Park, Burlington, MA 01803; (617) 273–7050.

Office of the Assistant Chief Counsel for the Northwest Mountain Region (ANM–7), Northwest Mountain Region Headquarters, 18000 Pacific Highway South, Seattle, WA 98188; (206) 227–2007.

Office of the Assistant Chief Counsel for the Southern Region (ASO–7), Southern Region Headquarters, 1701 Columbia Avenue, College Park, GA 30337; (404) 305–5200.

Office of the Assistant Chief Counsel for the Southwest Region (ASW–7), Southwest Region Headquarters, 4400 Blue Mound Road, Fort Worth, TX 76193; (817) 624–5707.

Office of the Assistant Chief Counsel for the Technical Center (ACT–7), Federal Aviation Administration Technical Center, Atlantic City International Airport, Atlantic City, NJ 08403; (609) 485–7087.

Office of the Assistant Chief Counsel for the Western-Pacific Region (AWP–7), Western-Pacific Region Headquarters, 15000 Aviation Boulevard, Hawthorne, CA 90261; (310) 297–1270.

Issued in Washington, DC on April 18, 1994.

Daniel J. Peterson,

Special Counsel and Director of Civil Penalty Adjudications.

[FR Doc. 94–10296 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

[Summary Notice No. PE–94–16]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket

number involved and must be received on or before May 18, 1994.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC–200), Petition Docket No. _____, 800 Independence Avenue SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–200), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3132.

FOR FURTHER INFORMATION CONTACT: Mr. Frederick M. Haynes, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3939.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC, on April 20, 1994.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: 26721.

Petitioner: Mr. William C. Keil.

Sections of the FAR Affected: 14 CFR 135.63(a)(4) & subparts E, G, & H of part 135.

Description of Relief Sought/ Disposition: To extend Exemption No. 5450 to continue to permit member airlines and other similarly situated commuter air carriers to train, check, and qualify the crewmembers under §§ 121.681 and 121.683; subparts N and O; and appendixes E, F, and H, of part 121.

Grant, April 11, 1994, Exemption No. 5450A.

Docket No.: 27282.

Petitioner: Flight Training International, Inc.

Sections of the FAR Affected: 14 CFR 121.411(a)(2), (3) and (b)(2), 121.413(b), (c), and (d), and Part 121, Appendix H

Description of Relief Sought/ Disposition: To permit FTI, without holding an air carrier operating certificate, to train the certificate holder's pilots and flight engineers in initial, transition, upgrade, differences, and recurrent training in approved simulators and in airplanes without FTI's instructor approved simulators and in airplanes without FTI's instructor pilots meeting all the applicable training requirements of subpart N and the employment requirements of appendix H of part 121.

Grant, 3/31/94, Exemption No. 5868.

Docket No.: 27341.

Petitioner: United Airlines.

Sections of the FAR Affected: 14 CFR 121.417(C)(2)(i)(A).

Description of Relief Sought: To permit UAL to conduct flight operations with flight attendants who have been trained in the emergency mode of door operation but not in the normal mode of door operation.

Denial, 4/11/94, Exemption No. 5867.

Docket No.: 27636.

Petitioner: Airbus Industrie.

Sections of the FAR Affected: 14 CFR 25.785(d), 25.813(b), 25.857(e), and 25.1447(c).

Description of Relief Sought: To permit carriage of noncrewmembers on an all-freighter airplane.

Grant, 3/30/94, Exemption No. 5864.

Docket No.: 27680.

Petitioner: American Airlines, Inc.

Sections of the FAR Affected: 14 CFR 93.123.

Description of Relief Sought/ Disposition: To allocate landing and takeoff slots at O'Hare International Airport.

Grant, 4/1/94, Exemption No. 5865.

[FR Doc. 94–10282 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

[Summary Notice No. PE–94–15]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR chapter I), disposition of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before May 18, 1994.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC–200), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–200), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone 9202) 267–3132.

FOR FURTHER INFORMATION CONTACT: Mr. Frederick M. Haynes, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3939.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC, on April 18, 1994.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: 27609.

Petitioner: Mr. Mark Shannon.

Sections of the FAR Affected: 14 CFR 91.9 and 91.531.

Description of Relief Sought/ Disposition: To permit operation of Cessna Citation 500 series aircraft with only one pilot, although the aircraft is certified under part 25.

Docket No.: 27612.

Petitioner: United Airlines.

Sections of the FAR Affected: 14 CFR 121.411(a)(6).

Description of Relief Sought/ Disposition: To permit Captain Larry Walters, an experienced Boeing 767/757 Check Airman who has lost his medical certification, to continue to serve United Airlines and the Federal Aviation Administration as a Check Airman and Aircrew Program Designee in 767/757 simulators and to conduct line checks from the observer's seat in United 767/757 aircraft.

Docket No.: 27621.

Petitioner: Aerial Productions, Inc.

Sections of the FAR Affected: 14 CFR 21.191(d).

Description of Relief Sought: To allow the petitioner to use an Antonov An-2 to transport and discharge parachutists for the purpose of jumping, parachute jump training, and parachute jump demonstrations and promotions.

Docket No.: 27622.
Petitioner: Mr. James C. Rosater.
Sections of the FAR Affected: 14 CFR 121.383(c).
Description of Relief Sought: To allow the petitioner to serve as pilot in part 121 air carrier operations after his 60th birthday.

Docket No.: 27629.
Petitioner: Mr. Jimmy E. Banks.
Sections of the FAR Affected: 14 CFR 121.383(c).
Description of Relief Sought/ Disposition: To permit the petitioner to serve as a pilot in part 121 air carrier operations after his 60th birthday.

Dispositions of Petitions

Docket No.: 23869.
Petitioner: Relative Workshop, Inc.
Sections of the FAR Affected: 14 CFR 105.43(a).
Description of Relief Sought/ Disposition: To amend Exemption No. 4943B to allow a one-time waiver to the adult student volunteer parachute jumper requirement. This amendment seeks to allow Mt. John Pounds, a 16-year-old minor, diagnosed with terminal cancer, to fulfill his ultimate wish to skydive.
Grant, March 30, 1994, Exemption No. 4943C

Docket No.: 25789.
Petitioner: Martin Aviation, L.P.
Sections of the FAR Affected: 14 CFR 43.3(g).
Description of Relief Sought: To extend Exemption No. 5202 to enable the petitioner to continue to have its pilots perform the preventive maintenance function of removing aircraft passenger seats or installing approved stretchers in the aircraft it operates in air carrier service when certified mechanics are not available.
Grant, April 1, 1994, Exemption No. 5202B

Docket No.: 26349.
Petitioner: Vocational Industrial Clubs of America.
Sections of the FAR Affected: 14 CFR 147.21.
Description of Relief Sought/ Disposition: To extend Exemption No 2597A co continue to permit students in aviation maintenance technician schools that are certificated under the provisions of part 147 to participate in the petitioner's airframe and powerplant aviation skill competition at both state and national levels without the student or school being in violation of the FAR.
Grant, March 31, 1994, Exemption No. 5297B

Docket No.: 26538.
Petitioner: A. C. E. Flyers, Inc. d/b/a Jay Hawk Air.
Sections of the FAR Affected: 14 CFR 43.3(g).
Description of Relief Sought: To extend the termination date of Exemption 5430 to continue to allow properly trained pilots, employed by the petitioner, to change the seating configuration by removing and replacing aircraft passenger seats when certified mechanics are not available.
Grant, March 28, 1994, Exemption No. 5430A

Docket No.: 26741.
Petitioner: Pacific Wing, Inc.
Sections of the FAR Affected: 14 CFR 43.3(g).
Description of Relief Sought: To extend Exemption No. 5445 to continue to allow properly trained pilots employed by the petitioner to remove and reinstall cabin seats on the aircraft it operates when certified mechanics are not available.
Grant, April 1, 1994, Exemption No. 5445A

Docket No.: 27405.
Petitioner: British Airways.
Sections of the FAR Affected: 14 CFR 129.18.
Description of Relief Sought: To extend the termination date of Exemption No. 5798 which permits the petitioner to operate Concord Aircraft that are not equipped with an approved TCAS II-traffic alert and collision avoidance system.
Grant, April 1, 1994, Exemption No. 5799A

Docket No.: 27435.
Petitioner: Air France.
Sections of the FAR Affected: 14 CFR 129.18.
Description of Relief Sought: To extend the termination date of Exemption No. 5799 which permits the petitioner to operate Concord Aircraft that are not equipped with an approved TCAS II-traffic alert and collision avoidance system.
Grant, April 1, 1994, Exemption No. 5799A

Docket No.: 27535.
Petitioner: Aeroflot Russian International Airlines.
Sections of the FAR Affected: 14 CFR 129.18.
Description of Relief Sought/ Disposition: To amend Exemption No. 5823 to permit the deadline specified in condition number 1 be amended to April 25, 1994. Exemption No. 5823 allows the petitioner to operate certain aircraft not equipped with an approved/TCASII-Traffic alert and collision avoidance system after December 30, 1993.
Denial, March 30, 1994, Exemption No. 5823A

Docket No.: 27563.
Petitioner: Air Ukraine Airline.
Sections of the FAR Affected: 14 CFR 129.18
Description of Relief Sought: To amend Extension No. 5824 to extend the termination date from February 20, 1994, to June 30, 1994. Extension No. 5824 permits the petitioner to operate certain aircraft not equipped with an approved TCAS II-traffic alert and collision avoidance system in the United States after December 30, 1993.
Denial, March 30, 1994, Exemption No. 5824A

[FR Doc. 94–10290 Filed 4–28–94; 8:45 am]
BILLING CODE 4910–13–M

Aviation Rulemaking Advisory Committee; General Aviation and Business Airplane Issues; Accelerated Stalls Working Group—New Task

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of new task assignment for the Accelerated Stalls Working Group.

SUMMARY: Notice is given of a new task assignment to the Aviation Rulemaking Advisory Committee (ARAC) Accelerated Stalls Working Group. This notice informs the public about that activities of the ARAC on general Aviation and Business Airplane issues.

FOR FURTHER INFORMATION CONTACT: Mr. John Colomy (ACE–110), Assistant Executive Director for GABA issues, Small Airplane Directorate, 601 E. 12th Street, Kansas City, Missouri 64106; telephone (816) 426–6930.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rulemaking (NPRM) on Accelerated Stalls was published on June 7, 1993, Notice No. 93–5 (58 FR 32034), and the comment period closed on September 7, 1993. As a result of discussions at the February 8, 1994, ARAC meeting, the FAA decided that the Accelerated Stalls Working Group should review and dispose of the comments received on the NPRM. Specifically, the Accelerated Stalls Working Group task is as follows:

Task

Review the comments received in response to the Accelerated Stalls Notice of Proposed Rulemaking, Notice No. 93–5 (58 FR 32034, June 7, 1993). Recommend a disposition of those comments to the FAA. Develop appropriate regulatory documents to

support the recommended disposition) (for example, Final Rule, Supplemental Notice of Proposed Rulemaking, or withdrawal).

Reports

The working group chair should develop and present the following to the ARAC:

1. A work plan for completion of the task, including the rationale.

2. A detailed conceptual presentation.

3. A briefing on the recommendation.

4. A task status report at each meeting.

Composition

The Accelerated Stalls Working Group is composed of experts from those organizations having an interest in the task. A working group member need not be a representative of one of the organizations of the ARAC. An individual who has expertise in the subject matter and wishes to become a member of the working group should write to the person listed under the caption **FOR FURTHER INFORMATION CONTACT** expressing that desire, describing his or her interest in the task, and stating the expertise he or she would bring to the working group. The request will be reviewed with the Assistant ARAC chair for GABA issues who will advise the individual whether or not he/she is accepted as a member of the working group.

The Secretary of Transportation determined that the ARAC is necessary and in the public interest. The ARAC permits the Secretary of Transportation to complete duties imposed on the FAA by law. Meetings of the full ARAC will be open to the public except as authorized by section 10(d) of the Federal Advisory Committee Act. Accelerated Stalls Working Group meetings will not be open to the public, except to the extent that individuals with an interest and expertise are selected to participate. Working group meetings will not be announced to the public.

Issued in Kansas City, Missouri on April 25, 1994.

John R. Colomy,

Assistant Executive Director for General Aviation and Business Airplane Issues, Aviation Rulemaking Advisory Committee.

[FR Doc. 94–10286 Filed 4–26–94; 8:45 am]

BILLING CODE 4910–13–M

RTCA, Inc.; Special Committee 182 Second Meeting, Notice of Meeting; Minimum Operational Performance Standards (MOPS) for an Avionics Computer Resource (ACR)

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix I), notice is hereby given for Special Committee 182 meeting to be held June 7–8, starting at 9 a.m. The meeting will be held at the RTCA Conference Room, 1140 Connecticut Avenue NW., suite 1020, Washington, DC 20036.

The agenda for this meeting is as follows: (1) Chairman's introductory remarks; (2) Review and approval of meeting agenda; (3) Review and approval of minutes from first meeting held March 8–9, 1994; (4) Discuss ACR Principles of Operation; (5) Enumerate services to be provided by the ACR platform; (6) Reports on related activities: (a) AEEC APEX (Application Executive) (b) AEEC IMA (Integrated Modular Avionics) Certification Task Force; (7) Discuss "Pre-Qualification" benefits and develop proposed method; (8) Recommend revisions to SC–182 Terms of Reference; (9) Other business; (10) Date and place of next meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on April 19, 1994.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 94–10285 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

Intent To Rule on Application To Impose and Use the Revenue from a Passenger Facility Charge (PFC) at Pocatello Regional Airport, Pocatello, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Pocatello Regional Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before May 31, 1994.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: J. Wade Bryant, Manager, Seattle Airports District Office, SEA–ADO, Federal Aviation Administration, 1601 Lind Avenue SW., suite 250, Renton, WA 98055–4056.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Len Nelson, Airport Manager, at the following address: City of Pocatello, P.O. Box 4169, Pocatello, ID 83205.

Air carriers and foreign air carriers may submit copies of written comments previously provided to Pocatello Regional Airport under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra M. Simmons, (206) 227–2656; Seattle Airports District Office, SEA–ADO; Federal Aviation Administration; 1601 Lind Avenue SW., suite 250, Renton, WA 98055–4056. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Pocatello Regional Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On April 7, 1994, the FAA determined that the application to impose and use the revenue from a PFC submitted by the city of Pocatello was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than July 7, 1994.

The following is a brief overview of the application.

Level of the Proposed PFC: $3.00.

Proposed Charge Effective Date: September 1, 1994.

Proposed Charge Expiration Date: March 1, 2002.

Total Estimated PFC Revenue: $400,000.00.

Brief Description of Proposed Project(s): Impose & Use Projects: Equipment purchase of a snow blower/broom (combined as one unit) and a passenger lift device; Terminal building expansion and remodeling.

Impose only Project: Pavement rehabilitation The pavement

rehabilitation project was originally submitted as impose and use. The change of status was made on March 17, 1994, by the Pocatello Airport. They notified the air carriers by letter and comments will be accepted during the **Federal Register** comment period.

Class or Classes Air Carrier Which the Public Agency Has Requested Not Be Required To Collect PFCs: Air Taxi/Commercial Operators using aircraft with less than twenty seats, and a maximum payload capacity of less than 6,000 pounds.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Federal Aviation Administration, Northwest Mountain Region, Airports Division, ANM–600, 1601 Lind Avenue SW., suite 540 Renton, WA 98055–4056.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Pocatello Regional Airport.

Issued in Renton, Washington on April 7, 1994.

David A. Field,

Manager, Planning, Programming and Capacity Branch, Northwest Mountain Region.

[FR Doc. 94–10280 Filed 4–28–94; 8:45 am]

BILLING CODE 4910–13–M

Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In March 1994, there were four applications approved.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IV of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: City of Pullman, Pullman, Washington.

Application Number: 94–01–C–00–PUW.

Application Type: Impose and Use PFC Revenue.

PFC Level: $3.00.

Total Approved Net PFC Revenue: $169,288.

Earliest Permissible Charge Effective Date: June 1, 1994.

Estimated Charge Expiration Date: January 1, 1998.

Class of Air Carriers Not Required to Collect PFC's: Air taxis defined as the carriage in air commerce of persons for compensation or hire as a commercial operator, but not an air carrier, on an "on-demand" basis with aircraft having a maximum seating capacity of less than 20 passengers or a maximum payload capacity of less than 6,000 pounds.

Determination: Approved. Based on information submitted by the public agency, the FAA has determined that the proposed class accounts for less than 1 percent of Pullman-Moscow Regional Airport's total annual enplanements.

Brief Description of Projects Approved for Collection and Use: Runway 5/23 rehabilitation, runway/taxiway signage, lighting upgrade, and safety area stabilization, master plan update, aircraft rescue and firefighting (ARFF) vehicle acquisition and stormwater pollution prevention plan development, modify ARFF building and expand general aviation ramp.

Decision Date: March 22, 1994.

FOR FURTHER INFORMATION CONTACT: Mary Vargas, Seattle Airports District Office, (206) 227–2660.

Public Agency: Waterloo Municipal Airport Commission, Waterloo, Iowa.

Application Number: 94–01–C–00–ALO.

Application Type: Impose and Use PFC Revenue.

PFC Level: $3.00.

Total Approved Net PFC Revenue: $637,000.

Earliest Permissible Charge Effective Date: June 1, 1994.

Estimated Charge Expiration Date: June 1, 1998.

Class of Air Carriers Not Required to Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use: Visual approach slope indicator relocation and security gate construction, snow removal equipment and ARFF self (contained) breathing apparatus, ARFF rapid intervention vehicle, runway end identification lights on runways 18, 6, and 24, precision approach path indicator on runway 12, and distance-to-go markers on runways 12/30, 18/36, and 6/24, update airport layout plan, runway 12/30 paving overlay, installation of Part 139 airfield signs, snow removal equipment, new master plan, perimeter fence, terminal expansion and American with Disabilities Act upgrade, mobility impairments lifting device, overlay runway 18/36 (pavement study).

Brief Description of Project Approved for Collection: Overlay runway 18/36 (construction).

Decision Date: March 29, 1994.

FOR FURTHER INFORMATION CONTACT: Ellie Anderson, Central Region Airports Division, (816) 426–4728.

Public Agency: Potomac Highlands Airport Authority, Wiley Ford, West Virginia.

Application Number: 94–01–I–00–CBE.

Application Type: Impose PFC Revenue.

PFC Level: $3.00.

Total Approved Net PFC Revenue: $150,000.

Earliest Permissible Charge Effective Date: July 1, 1994.

Estimated Charge Expiration Date: July 1, 1999.

Class of Air Carriers Not Required to Collect PFC's: Part 135 air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information submitted by the public agency, the FAA has determined that the proposed classes account for less than 1 percent of Cumberland Regional Airport's total annual enplanements.

Brief Description of Projects Approved for Collection: 1995 terminal complex, phase 1, 1996 terminal complex, phase 1, 1997 partial parallel taxiway, 1998 taxiway C and D resurfacing, 1999 runway 5/23 overlay/groove and light.

Decision Date: March 30, 1994.

FOR FURTHER INFORMATION CONTACT: Robert Mendez, Washington Airports District Office, (703) 285–2570.

Public Agency: Kenton County Airport Board (Board), Covington, Kentucky.

Application Number: 94–01–C–00–CVG.

Application Type: Impose and Use PFC Revenue.

PFC Level: $3.00.

Total Approved Net PFC Revenue: $20,737,000.

Earliest Permissible Charge Effective Date: June 1, 1994.

Estimated Charge Expiration Date: September 1, 1995.

Class of Air Carriers Not Required to Collect PFC's: Part 121 supplemental operators which operate at Cincinnati/Northern Kentucky International Airport (CVG) without an operating agreement with the Board and enplane less than 1,500 passengers per year; and part 135 on-demand air taxis, both fixed wing and rotary.

Determination: Approved. Based on information submitted by the public agency, the FAA has determined that the proposed classes account for less

than 1 percent of CVG's total annual enplanements.

Brief Description of Projects Approved for Collection and Use: Noise compatibility and land use management measures, part 150 supplemental study and relating planning costs, monitoring equipment.

FOR FURTHER INFORMATION CONTACT: Peggy S. Kelley, Memphis Airports District Office, (901) 544–3495.

Issued in Washington, DC, on April 20, 1994.

Donna Taylor,

Manager, Passenger Facility Charge Branch.

CUMULATIVE LIST OF PFC APPLICATIONS PREVIOUSLY APPROVED

State, Application No., Airport, City	Date approved	Level of PFC	Total approved net PFC revenue	Earliest charge effective date	Estimated charge expiration date*
Alabama:					
92–01–I–00–HSV. Huntsville Intl-Carl T Jones Field, Huntsville	03/06/1992	$3	19,002,366	06/01/1992	11/01/2008
92–02–U–00–HSV. Huntsville Intl-Carl T Jones Field, Huntsville	06/03/1993	3	0	09/01/1993	11/01/2008
92–01–C–00–MSL. Muscle Shoals Regional, Muscle Shoals	02/18/1992	3	100,000	06/01/1992	02/01/1995
Arizona:					
92–01–C–00–FLG. Flagstaff Pulliam, Flagstaff	09/29/1992	3	2,463,581	12/01/1992	01/01/2015
93–01–C–00–YUM. Yuma MCAS/Yuma International, Yuma	09/09/1993	3	1,678,064	12/01/1993	06/01/2003
California:					
92–01–C–00–ACV. Arcata, Arcata	11/24/1992	3	188,500	02/01/1993	05/01/1994
93–01–C–00–CIC. Chico Municipal, Chico	09/29/1993	3	137,043	01/01/1994	06/01/1997
92–01–C–00–IYK. Inyokern, Inyokern	12/10/1992	3	127,500	03/01/1993	09/01/1995
93–01–C–00–LGB. Long Beach-Daughtery Field, Long Beach	12/30/1993	3	3,533,766	03/01/1994	03/01/1998
93–01–C–00–LAX. Los Angeles International, Los Angeles	03/26/1993	3	360,000,000	07/01/1993	07/01/1998
93–01–C–00–MRY. Monterey Pensinsula, Monterey	10/08/1993	3	3,960,855	01/01/1994	06/01/2000
92–01–C–00–OAK. Metropolitan Oakland International, Oakland	06/26/1992	3	12,343,000	09/01/1992	05/01/1994
94–02–C–00–OAK. Metropolitan Oakland International, Oakland	02/23/1994	3	8,999,000	05/01/1995	04/01/1995
93–01–I–00–ONT. Ontario International, Ontario	03/26/1993	3	49,000,000	07/01/1993	07/01/1998
92–01–C–00–PSP. Palm Springs Regional, Palm Springs	06/25/1992	3	81,888,919	10/01/1992	11/01/2032
92–01–C–00–SMF. Sacramento Metropolitan, Sacramento	01/26/1993	3	24,045,000	04/01/1993	03/01/1996
92–01–C–00–SJC. San Jose International, San Jose	06/11/1992	3	29,228,826	09/01/1992	08/01/1995
93–02–U–00–SJC. San Jose International, San Jose	02/22/1993	3	0	05/01/1993	08/01/1995
93–03–C–00–SJC. San Jose International, San Jose	06/16/1993	3	16,245,000	08/01/1995	05/01/1997
92–01–C–00–SBP. San Luis Obispo County–McChesney Field, San Luis Obispo	11/24/1992	3	502,437	02/01/1993	02/01/1995
92–01–C–00–STS. Sonoma County, Santa Rosa	02/19/1993	3	110,500	05/01/1993	04/01/1995
91–01–I–00–TVL. Lake Tahoe, South Lake Tahoe	05/01/1992	3	928,747	08/01/1992	03/01/1997
Colorado:					
92–01–C–00–COS. Colorado Springs Municipal, Colorado Springs	12/22/1992	3	5,622,00	03/01/1993	02/01/1996
92–01–C–00–DVX. Driver International (new), Denver	04/28/1992	3	2,330,734,321	07/01/1992	01/01/2026
93–01–C–00–EGE. Eagle County Regional, Eagle	06/15/1993	3	572,609	09/01/1993	04/01/1998
93–01–C–00–FNL. Fort Collins-Loveland, Fort Collins	07/14/1993	3	207,857	10/01/1993	06/01/1996
92–01–C–00–GJT. Walker Field Grand Junction	01/15/1993	3	1,812,000	04/01/1993	03/01/1998
93–01–C–00–GUC. Gunnison County, Gunnison	08/27/1993	3	702,133	11/01/1993	03/01/1998
93–01–C–00–HDN. Yampa Valley, Hayden	08/23/1993	3	532,881	11/01/1993	04/01/1997
93–01–C–00–MTJ. Montrose County, Montrose	07/29/1993	3	1,461,745	11/01/1993	02/01/2009
93–01–C–00–PUB. Pueblo Memorial, Pueblo	08/16/1993	3	1,200,745	11/01/1993	08/01/2010
92–01–C–00–SBS. Steamboat Springs/Bob Adams Field, Steamboat Springs	01/15/1993	3	1,887,337	04/01/1993	04/01/2012
92–01–C–00–TEX. Telluride Regional, Telluride	11/23/1992	3	200,000	03/01/1993	11/01/1997
Connecticut:					
93–01–C–00–HVN. Tweed-New Haven, New Haven	09/10/1993	3	2,490,450	12/01/1993	06/01/1999
93–02–I–00–BDL. Bradley International, Windsor Locks	07/09/1993	3	12,030,000	10/01/1993	09/01/1995

CUMULATIVE LIST OF PFC APPLICATIONS PREVIOUSLY APPROVED—Continued

State, Application No., Airport, City	Date approved	Level of PFC	Total approved net PFC revenue	Earliest charge effective date	Estimated charge expiration date*
94-03-U-00-BDL. Bradley International, Windsor Locks	02/22/1994	3	0	05/01/1994	09/01/1995
Florida:					
93-01-C-00-DAB. Daytona Beach Regional, Daytona Beach	04/20/1993	3	7,967,835	07/01/1993	11/01/1999
92-01-C-00-RSW. Southwest Florida International, Fort Myers	08/31/1992	3	253,858,512	11/01/1992	06/01/2014
93-02-U-00-RSW. Southwest Florida International, Fort Myers	05/10/1993	3	0	11/01/1992	06/01/2014
93-01-C-00-JAX. Jacksonville International, Jacksonville	01/28/1994	3	12,258,255	05/01/1994	07/01/1997
92-01-C-00-EYW. Key West International, Key West	12/17/1992	3	945,937	03/01/1993	12/01/1995
92-01-C-00-MTH. Marathon, Marathon	12/17/1992	3	153,556	03/01/1993	06/01/1995
92-01-C-00-MCO. Orlando International, Orlando	11/27/1992	3	167,574,527	02/01/1993	02/01/1998
93-02-C-00-MCO. Orlando International, Orlando	09/24/1993	3	12,957,000	12/01/1993	02/01/1998
93-01-I-00-PFN. Panama City-Bay County International, Panama City	12/01/1993	3	8,238,499	02/01/1994	10/01/2007
92-01-C-00-PNS. Pensacola Regional, Pensacola	11/23/1992	3	4,715,000	02/01/1993	04/01/1996
92-01-I-SRQ. Sarasota-Bradenton International Sarasota.	06/29/1992	3	38,715,000	09/01/1992	09/01/2005
92-01-I-00-TLH. Tallahassee Regional, Tallahassee	11/13/1992	3	8,617,154	02/01/1993	12/01/1998
93-02-U-00-TLH. Tallahassee Regional, Tallahassee	12/30/1993	3	0	02/01/1993	06/01/1998
93-01-C-00-TPA. Tampa International, Tampa	07/15/1993	3	87,102,000	10/01/1993	09/01/1999
93-01-C-00-PBI. Palm Beach International, West Palm Beach	01/26/1994	3	38,801,096	04/01/1994	04/01/1999
Georgia:					
93-01-C-00-CSG. Columbus Metropolitan, Columbus	10/01/1993	3	534,633	12/01/1993	06/01/1995
91-01-C-00-SAV. Savannah International, Savannah	01/23/1992	3	39,501,502	07/01/1992	03/01/2004
92-01-I-00-VLD. Valdosta Regional, Valdosta	12/23/1992	3	260,526	03/01/1993	10/01/1997
Idaho:					
93-01-C-00-SUN. Friedman Memorial, Hailey	06/29/1993	3	188,000	09/01/1993	09/01/1997
92-01-C-00-IDA. Idaho Falls Municipal, Idaho Falls	10/30/1992	3	1,500,000	01/01/1993	01/01/1998
94-01-I-00-LWS. Lewiston-Nez Perce County, Lewiston	02/03/1994	3	229,610	05/01/1994	03/01/1997
92-01-C-00-TWE. Twin Falls-Sun Valley Regional, Twin Falls	08/12/1992	3	270,000	11/01/1992	05/01/1998
Illinois:					
93-01-C-00-MDW. Chicago Midway, Chicago	06/28/1993	3	79,920,958	09/01/1993	08/01/2001
93-01-C-00-ORD. Chicago O'Hare International, Chicago	06/28/1993	3	500,418,285	09/01/1993	10/01/1999
92-01-I-00-RFD. Greater Rockford, Rockford	07/24/1992	3	1,177,348	10/01/1992	10/01/1996
93-02-U-00-RFD. Greater Rockford, Rockford	09/02/1993	3	0	12/01/1993	10/01/1996
92-01-I-00-SPI. Capital, Springfield	03/27/1992	3	562,104	06/01/1992	02/01/1994
93-02-U-00-SPI. Capital, Springfield	04/28/1993	3	0	06/01/1992	02/01/1994
93-03-I-00-SPI. Capital, Springfield	11/24/1993	3	4,585,443	06/01/1992	02/01/2006
Indiana:					
92-01-C-00-FWA. Fort Wayne International, Fort Wayne	04/05/1993	3	26,563,457	07/01/1993	03/01/2015
93-01-C-00-IND. Indianapolis International, Indianapolis	06/28/1993	3	17,344,750	09/01/1993	07/01/2005
Iowa:					
93-01-C-00-DSM. Des Moines Municipal, Des Moines	11/29/1993	3	6,446,507	03/01/1994	04/01/1997
92-01-I-00-DBQ. Dubuque Regional, Dubuque	10/06/1992	3	148,500	01/01/1993	05/01/1994
94-02-C-00-DBQ. Dubuque Regional, Dubuque	02/09/1994	3	203,420	05/01/1994	02/01/1996
93-01-C-00-SUX. Sioux Gateway, Sioux City	03/12/1993	3	204,465	06/01/1993	06/01/1994
Kentucky:					
93-01-C-00-LEX. Blue Grass, Lexington	08/31/1993	3	12,378,791	11/01/1993	05/01/2003
93-01-C-00-PAH. Barkley Regional, Paducah	12/02/1993	3	386,550	03/01/1994	12/01/1998
Louisiana:					
92-01-I-00-BTR. Baton Rouge Metropolitan, Ryan Field, Baton Rouge	09/28/1992	3	9,823,159	12/01/1992	12/01/1998

CUMULATIVE LIST OF PFC APPLICATIONS PREVIOUSLY APPROVED—Continued

State, Application No., Airport, City	Date approved	Level of PFC	Total approved net PFC revenue	Earliest charge effective date	Estimated charge expiration date*
93-02-U-00-BTR. Baton Rouge Metropolitan, Ryan Field, Baton Rouge	04/23/1993	3	0	12/01/1992	12/01/1998
93-01-C-00-MSY, New Orleans International/ Moisant Field, New Orleans	03/19/1993	3	77,800,372	06/01/1993	04/01/2000
93-02-U-00-MSY, New Orleans International/ Moisant Field, New Orleans	11/16/1993	3	0	06/01/1993	04/01/2000
93-01-I-00-SHV. Shreveport Regional, Shreveport	11/19/1993	3	33,050,278	02/01/1994	02/01/2019
Maine:					
93-01-C-00-PWM. Portland International Jetport, Portland	10/29/1993	3	12,233,751	02/01/1994	05/01/2001
Maryland:					
93-01-I-00-BWI. Baltimore-Washington International, Baltimore	07/27/1992	3	141,866,000	10/01/1992	09/01/2002
Massachusetts:					
93-01-C-00-BOS. General Edward L. Logan International, Boston	08/24/1993	3	598,800,000	11/01/1993	10/01/2011
92-01-C-00-ORH. Worcester Municipal, Worcester	07/28/1992	3	2,301,382	10/01/1992	10/01/1997
Michigan:					
92-01-C-00-DTW. Detroit Metropolitan-Wayne County, Detroit	09/21/1992	3	640,707,000	12/01/1992	06/01/2009
92-01-I-00-ESC. Delta County, Escanaba	11/17/1992	3	158,325	02/01/1993	08/01/1996
93-01-C-00-FNT. Bishop International, Flint	06/11/1993	3	32,296,450	09/01/1993	09/01/2030
92-01-I-00-GRR. Kent County International, Grand Rapids	09/09/1992	3	12,450,000	12/01/1992	05/01/1998
92-01-C-00-CMX. Houghton County Memorial, Hancock	04/29/1993	3	162,986	07/01/1993	01/01/1996
93-01-C-00-IWD. Gogebic County, Ironwood	05/11/1993	3	74,690	08/01/1993	10/01/1998
93-01-C-00-LAN. Capital City, Lansing	07/23/1993	3	7,355,483	10/01/1993	03/01/2002
92-01-I-00-MQT. Marquette County, Marquette	10/01/1992	3	459,700	12/01/1992	04/01/1996
94-01-C-00-MKG. Muskegon County, Muskegon	02/24/1994	3	5,013,088	05/01/1994	05/01/2019
92-01-C-00-PLN. Pellston Regional—Emmet County, Pellston	12/22/1992	3	440,875	03/01/1993	06/01/1995
Minnesota:					
93-01-C-00-BRD. Brainerd-Crow Wing County Regional, Brainerd	05/25/1993	3	43,000	08/01/1993	12/01/1995
92-01-C-00-MSP. Minneapolis-St. Paul International, Minneapolis	03/31/1992	3	66,355,682	06/01/1992	08/01/1994
Mississippi:					
91-01-C-00-GTR. Golden Trinagle Regional, Columbus	05/08/1992	3	1,693,211	08/01/1992	09/01/2006
92-01-C-00-GPT. Gulfport-Biloxi Regional, Gulfport-Biloxi	04/03/1992	3	390,595	07/01/1992	12/01/1993
93-01-C-00-GPT. Gulfport-Biloxi Regional, Gulfport-Biloxi	11/02/1993	3	607,817	07/01/1992	12/01/1995
92-01-C-00-PIB. Hattiesburg-Laurel Regional, Hattiesburg-Laurel	04/15/1992	3	119,153	07/01/1992	01/01/1998
93-01-C-00-JAN. Jackson International, Jackson	02/10/1993	3	1,918,855	05/01/1993	04/01/1995
92-01-C-00-MEI. Key Field, Meridian	08/21/1992	3	122,500	11/01/1992	06/01/1994
93-02-C-00-MEI. Key Field, Meridian	10/19/1993	3	155,223	11/01/1992	08/01/1996
Missouri:					
93-01-C-00-SGF. Springfield Regional, Springfield	08/30/1993	3	1,937,090	11/01/1993	10/01/1996
92-01-C-00-STL. Lambert-St. Louis International, St. Louis	09/30/1992	3	84,607,850	12/01/1992	03/01/1996
Montana:					
93-01-C-00-BIL. Billings-Logan International, Billings	01/26/1994	3	5,622,136	04/01/1994	05/31/2002
93-01-C-00-BZN. Gallatin Field, Bozeman	05/17/1993	3	4,198,000	08/01/1993	06/01/2005
92-01-C-00-GTF. Great Falls International, Great Falls	08/28/1992	3	3,010,900	11/01/1992	07/01/2002
93-02-U-00-GTF. Great Falls International, Great Falls	05/25/1993	3	0	11/01/1992	07/01/2002
92-01-C-00-HLN. Helena Regional, Helena	01/15/1993	3	1,056,190	04/01/1993	12/01/1999
93-01-C-00-FCA. Glacier Park International, Kalispell	09/29/1993	3	1,211,000	12/01/1993	11/01/1999
92-01-C-00-MSO. Missoula International, Missoula	06/12/1992	3	1,900,000	09/01/1992	08/01/1997

CUMULATIVE LIST OF PFC APPLICATIONS PREVIOUSLY APPROVED—Continued

State, Application No., Airport, City	Date approved	Level of PFC	Total approved net PFC revenue	Earliest charge effective date	Estimated charge expiration date*
Nevada:					
91-01-C-00-LAS. McCarran International, Las Vegas	02/24/1992	3	944,028,500	06/01/1992	02/01/2014
93-02-C-00-LAS. McCarran International, Las Vegas	06/07/1993	3	36,500,000	06/01/1992	09/01/2014
93-01-C-00-RNO. Reno Cannon International, Reno	10/29/1993	3	34,263,607	01/01/1994	05/01/1999
New Hampshire:					
92-01-C-00-MHT. Manchester, Manchester	10/13/1992	3	5,461,000	01/01/1993	03/01/1997
New Jersey:					
92-01-C-00-EWR. Newark International, Newark	07/23/1992	3	84,600,000	10/01/1992	08/01/1995
New York:					
93-01-I-00-ALB. Albany County, Albany	12/03/1993	3	40,726,364	03/01/1994	04/01/2005
93-01-C-00-BGM. Binghamton Regional/Edwin A. Link Field, Binghamton	08/18/1993	3	1,872,264	11/01/1993	11/01/1997
92-01-I-00-BUF. Greater Buffalo International, Buffalo	05/29/1992	3	189,873,000	08/01/1992	03/01/2026
92-01-I-00-ITH. Tompkins County, Ithaca	09/28/1992	3	1,900,000	01/01/1993	01/01/1999
92-01-C-00-JHW. Chautauqua County/Jamestown, Jamestown	03/19/1993	3	434,822	06/01/1993	06/01/1996
92-01-C-00-JFK. John F. Kennedy International, New York	07/23/1992	3	109,980,000	10/01/1992	08/01/1995
92-01-C-00-LGA. Laguardia, New York	07/23/1992	3	87,420,000	10/01/1992	08/01/1995
93-01-C-00-PLB. Clinton County, Plattsburgh	04/30/1993	3	227,830	07/01/1993	01/01/1998
92-01-C-00-HPN. Westchester County, White Plains	11/09/1992	3	27,883,000	02/01/1993	06/01/2022
North Carolina:					
93-01-C-00-ILM. New Hanover International, Wilmington	11/02/1993	3	1,505,000	02/01/1994	08/01/1997
North Dakota:					
92-01-C-00-GFK. Grand Forks International, Grand Forks	11/16/1992	3	1,016,509	02/01/1993	02/01/1997
93-01-C-00-MOT. Minot International, Minot	12/15/1993	3	1,569,483	03/01/1994	03/01/1999
Ohio:					
92-01-C-00-CAK. Akron-Canton Regional, Akron	06/30/1992	3	3,594,000	09/01/1992	08/01/1996
92-01-C-00-CLE. Cleveland-Hopkins International, Cleveland	09/01/1992	3	34,000,000	11/01/1992	11/01/1995
94-02-U-00-CLE. Cleveland-Hopkins International, Cleveland	02/02/1994	3	0	05/01/1994	11/01/1995
92-01-I-00-CMH. Port Columbus International, Columbus	07/14/1992	3	7,341,707	10/01/1992	03/01/1994
93-02-I-00-CMH. Port Columbus International, Columbus	07/19/1993	3	16,270,256	02/01/1994	09/01/1996
93-03-U-00-CMH. Port Columbus International, Columbus	10/27/1993	3	0	10/01/1992	09/01/1996
93-01-C-00-TOL. Toledo Express, Toledo	06/29/1993	3	2,750,896	09/01/1993	09/01/1996
94-01-C-00-YNG. Youngstown-Warren Regional, Youngstown	02/22/1994	3	351,180	05/01/1994	07/01/1996
Oklahoma:					
92-01-C-00-LAW. Lawton Municipal, Lawton	05/08/1992	3	482,135	08/01/1992	04/01/1996
92-01-I-00-TUL. Tulsa International, Tulsa	05/11/1992	3	9,717,000	08/01/1992	08/01/1995
93-02-U-00-TUL. Tulsa International, Tulsa	10/18/1993	3	0	02/01/1994	08/01/1995
Oregon:					
93-01-C-00-EUG. Mahlon Sweet Field, Eugene	08/31/1993	3	3,729,699	11/01/1993	11/01/1998
93-01-C-00-MFR. Medford-Jackson County, Medford	04/21/1993	3	1,066,142	07/01/1993	11/01/1995
93-01-C-00-OTH. North Bend Municipal, North Bend	11/24/1993	3	182,044	02/01/1994	01/01/1998
92-01-C-00-PDX. Portland International, Portland	04/08/1992	3	17,961,850	07/01/1992	0701/1994
93-01-C-00-RDM. Roberts Field, Redmond	07/02/1993	3	1,191,552	10/01/1993	03/01/2000
Pennsylvania:					
92-01-I-00-ABE. Allentown-Bethlehem-Easton, Allentown	08/28/1992	3	3,778,111	11/01/1992	04/01/1995
92-01-C-00-A00. Altoona-Blair County, Altoona	02/03/1993	3	198,000	05/01/1993	02/01/1996
92-01-C-00-ERI. Erie International, Erie	07/21/1992	3	1,997,885	10/01/1992	06/01/1992
93-01-C-00-JST. Johnstown-Cambria County, Johnstown	08/31/1993	3	307,500	11/01/1993	02/01/1998
92-01-I-00-PHL. Philadelphia International, Philadelphia	06/29/1992	3	76,169,000	09/01/1992	07/01/1995

CUMULATIVE LIST OF PFC APPLICATIONS PREVIOUSLY APPROVED—Continued

State, Application No., Airport, City	Date approved	Level of PFC	Total approved net PFC revenue	Earliest charge effective date	Estimated charge expiration date*
93–02–U–00–PHL. Philadelphia International, Philadelphia	05/14/1993	3	0	08/01/1993	07/01/1995
92–01–C–00–UNV. University Park, State College	08/28/1992	3	1,495,974	11/01/1992	07/01/1997
93–01–C–00–AVP. Wilkes-Barre/Scranton International, Wilkes-Barre/Scranton	09/24/1993	3	2,369,566	12/01/1993	06/01/1997
Rhodes Island:					
93–01–C–00–PVD. Theodore F Green State, Providence	11/30/1993	3	103,885,286	02/01/1994	08/01/2013
South Carolina:					
93–01–C–00–CAE. Columbia Metropolitan, Columbia	08/23/1993	3	32,969,942	11/01/1993	09/01/2008
93–01–C–00–49J. Hilton Head, Hilton Head Island	11/19/1993	3	1,542,300	02/01/1994	03/01/1999
Tennessee:					
93–01–C–00–TYS. McGhee Tyson, Knoxville	10/06/1993	3	5,681,615	01/01/1994	01/01/1997
92–01–I–00–MEM. Memphis International, Memphis	05/28/1992	3	26,000,000	08/01/1992	12/01/1994
93–02–C–00–MEM. Memphis International, Memphis	01/14/1994	3	24,026,000	04/01/1994	10/01/1999
92–01–C–00–BNA. Nashville International, Nashville	10/09/1992	3	143,358,000	01/01/1993	02/01/2004
Texas:					
93–02–C–00–AUS. Robert Mueller Municipal, Austin	06/04/1993	3	6,189,300	11/01/1993	01/01/1995
93–01–C–00–CRP. Corpus Christi International, Corpus Christi	12/29/1993	3	5,540,745	03/01/1994	01/01/1998
94–01–C–00–DFW. Dallas/Fort Worth International, Dallas/Fort Worth	02/17/1994	3	115,000,000	07/01/1994	02/01/1996
92–01–C–00–ILE. Killeen Municipal, Killeen	10/20/1992	3	243,339	01/01/1993	11/01/1994
93–01–I–00–LRD. Laredo International, Laredo	07/23/1993	3	11,983,000	10/01/1993	09/01/2013
93–01–C–00–LBB. Lubbock International, Lubbock	07/09/1993	3	10,699,749	10/01/1993	02/01/2000
94–02–U–00–LBB. Lubbock International, Lubbock	02/15/1994	3	0	05/01/1994	02/01/2000
92–01–I–00–MAF. Midland International, Midland	10/16/1992	3	35,529,521	01/01/1993	01/01/2013
93–01–C–00–SJT. Mathis Field, San Angelo	02/24/1993	3	873,716	05/01/1993	11/01/1998
93–01–C–00–TYR. Tyler Pounds Field, Tyler	12/20/1993	3	819,733	03/01/1994	07/01/1998
Virginia:					
92–01–I–00–CHO. Charlottesville-Albemarle, Charlottesville	06/11/1992	2	0	09/01/1992	11/01/1993
92–02–U–00–CHO. Charlottesville-Albemarle, Charlottesville	12/21/1992	2	255,559	09/01/1992	11/01/1993
93–03–U–00–CHO. Charlottesville-Albemarle, Charlottesville	10/20/1993	2	0	01/01/1994	11/01/1993
94–01–C–00–RIC. Richmond International (Byrd Field), Richmond	02/04/1994	3	0	05/01/1994	08/01/2005
93–01–C–00–IAD. Washington Dulles International, Washington, DC	10/18/1993	3	199,752,390	01/01/1994	11/01/2003
93–01–C–00–DCA. Washington National, Washington, DC	08/16/1993	3	166,739,071	11/01/1993	11/01/2000
Washington:					
93–01–C–00–BLI. Bellingham International, Bellingham	04/29/1993	3	366,000	07/01/1993	07/01/1994
93–01–C–00–PSC. Tri-Cities, Pasco	08/03/1993	3	1,230,731	11/01/1993	11/01/1996
93–01–C–00–CLM. William R Fairchild International, Port Angeles	05/24/1993	3	52,000	08/01/1993	08/01/1994
92–01–C–00–SEA. Seattle-Tacoma International, Seattle	08/13/1992	3	28,847,488	11/01/1992	01/01/1994
93–02–C–00–SEA. Seattle-Tacoma International, Seattle	10/25/1993	3	47,500,500	01/01/1994	01/01/1996
93–01–C–00–GEG. Spokane International, Spokane	03/23/1993	3	15,272,000	06/01/1993	12/01/1999
93–01–I–00–ALW. Walla Walla Regional, Walla Walla	08/03/1993	3	1,187,280	11/01/1993	11/01/2014
93–01–C–00–EAT. Pangborn Field, Wenatchee	05/26/1993	3	280,500	08/01/1993	10/01/1995
92–01–C–00–YKM. Yakima Air Terminal, Yakima	11/10/1992	3	416,256	02/01/1993	04/01/1995
West Virginia:					
93–01–C–00–CRW. Yeager, Charleston	05/28/1993	3	3,256,126	08/01/1993	04/01/1998
93–01–C–00–CKB. Benedum, Clarksburg	12/29/1993	3	105,256	04/01/1994	04/01/1996
92–01–C–00–MGW. Morgantown Muni-Walter L. Bill Hart, Morgantown	09/03/1992	3	55,500	12/01/1992	01/01/1994

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State, Application No., Airport, City	Date approved	Level of PFC	Total approved net PFC revenue	Earliest charge effective date	Estimated charge expiration date*
Wisconsin:					
92-01-C-00-GRB. Austin Straubel International, Green Bay	12/28/1992	3	8,140,000	03/01/1993	03/01/2003
93-01-C-00-MSN. Dane County Regional-Truax Field, Madison	06/22/1993	3	6,746,000	09/01/1993	03/01/1998
93-01-I-00-CWA. Central Wisconsin, Mosinee	08/10/1993	3	7,725,600	11/01/1993	11/01/2012
93-01-C-00-RHI. Rhinelander-Oneida County, Rhinelander	08/04/1993	3	167,201	11/01/1993	04/01/1996
Wyoming:					
93-01-C-00-CPR. Natrona County International, Casper	06/14/1993	3	506,144	09/01/1993	10/01/1996
93-01-C-00-CYS. Cheyenne, Cheyenne	07/30/1993	3	742,261	11/01/1993	08/01/2000
93-01-I-00-GCC. Gillette-Campbell County, Gillette	06/28/1993	3	331,540	09/01/1993	09/01/1999
93-01-C-00-JAC. Jackson Hole, Jackson	05/25/1993	3	1,081,183	08/01/1993	02/01/1996
Guam:					
92-01-C-00-NGM. Agana NAS, Agana	11/10/1992	3	5,632,000	02/01/1993	06/01/1994
93-02-C-00-NGM. Agana NAS, Agana	02/25/1994	3	258,408,107	05/01/1994	06/01/2021
Puerto Rico:					
92-01-C-00-BON. Rafael Hernandez, Aguadilla	12/29/1992	3	1,053,000	03/01/1993	01/01/1999
92-01-C-00-PSE. Mercedita, Ponce	12/29/1992	3	866,000	03/01/1993	01/01/1999
92-01-C-00-SJU. Luis Munoz Marin International, San Juan	12/29/1992	3	49,768,000	03/01/1993	02/01/1997
93-02-U-00-SJU. Luis Munoz Marin International, San Juan	12/14/1993	3	0	03/01/1994	02/01/1997
Virgin Islands:					
92-01-I-00-STT. Cyril E. King, Charlotte Amalie	12/08/1992	3	3,871,005	03/01/1993	02/01/1995
92-01-I-00-STX. Alexander Hamilton, Christiansted St. Croix	12/08/1992	3	2,280,465	03/01/1993	05/01/1995

*The estimated charge expiration date is subject to change due to the rate of collection and actual allowable project costs.

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

April 19, 1994.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0064.
Form Number: IRS Form 4029.
Type of Review: Extension.
Title: Application for Exemption from Social Security and Medicare Taxes and Waiver of Benefits.
Description: Form 4029 is used by members of recognized religious groups to apply for exemption from Social Security and Medicare taxes under Internal Revenue Code (IRC) sections 1402(g) and 3127. The information is used to approve or deny exemption from Social Security and Medicare taxes.
Respondents: Individuals or households.
Estimated Number of Respondents/Recordkeepers: 3,754.
Estimated Burden Hours Per Respondent/Recordkeeper:
Recordkeeping—7 min.
Learning about the law or the form—10 min.
Preparing the form—11 min.
Copying, assembling, and sending the form to the SSA—35 min.
Frequency of Response: Other (Filed only once).
Estimated Total Reporting/Recordkeeping Burden: 3,942 hours.
Clearance Officer: Garrick Shear (202) 622-3869, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports, Management Officer.

[FR Doc. 94-10210 Filed 4-28-94; 8:45 am]

BILLING CODE 4830-01-P

Sunshine Act Meetings

Federal Register
Vol. 59, No. 82
Friday, April 29, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: May 10, 1994, 2:00 p.m. (Eastern Time).

PLACE: Conference Room on the Ninth Floor of the EEOC Office Building, 1801 "L" Street, N.W., Washington, D.C. 20507.

STATUS: Part of the Meeting will be open to the public and part of the Meeting will be closed.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes.
2. Reports to the Commission—Office of Federal Operations and Office of Program Operations.
3. Proposed Enforcement Guidance: Preemployment Disability-Related Inquiries and Medical Examination.

Closed Session

Litigation Authorization: General Counsel Recommendations.

Note: Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.) Please telephone (202) 663–7100 (voice) and (202) 663–4077 (TTD) at any time for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Frances M. Hart, Executive Officer on (202) 663–4070.

Dated: April 26, 1994.

Frances M. Hart,

Executive Officer, Executive Secretariat.

[FR Doc. 94–10463 Filed 4–26–94; 3:01 pm]

BILLING CODE 6750–06–M

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, May 3, 1994 at 10:00 a.m.

PLACE: 999 E Street, N.W. Washington, D.C. (Ninth Floor.)

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, May 5, 1994 at 10:00 a.m.

PLACE: 999 E Street, N.W. Washington, D.C.

STATUS: This Meeting Will Be Open to the Public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes
Advisory Opinion 1994–6: Frances Morgan of Coors PACE PAC
Advisory Opinion 1994–7: Woodrow W. Ban of Geon PAC
Advisory Opinion 1994–8: Liz Herring on behalf of Friends of Mike Parker for Congress Committee
Convention Regulations (continued from meeting of April 21, 1994
Request for a Stay of the Best Efforts Regulations
Administrative Matters

PERSON TO CONTACT FOR INFORMATION: Ron Harris, Press Officer, Telephone: (202) 219–4155.

Delores Hardy,

Administrative Assistant.

[FR Doc. 94–10460 Filed 4–26–94; 2:38 pm]

BILLING CODE 6715–01–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, May 4, 1994.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTER TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: April 26, 1994.

William W. Wiles,

Secretary of the Board.

[FR Doc. 94–10442 Filed 4–26–94; 2:15 pm]

BILLING CODE 6210–01–P

UNITED STATES INTERNATIONAL TRADE COMMISSION

[USITC SE–94–14A; Emergency Notice]

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 59 FR 19752—dated April 25, 1994.

CHANGE OF DATE, AND TIME:

Original Date and Time: April 27, 1994 at 2:00 p.m.
New Date and Time: April 28, 1994 at 3:00 p.m.

Notice is given that a Commission meeting was scheduled at 2:00 p.m., on April 27, 1994 and in conformity with 19 C.F.R. § 201.37(a), the Commission has voted to change the date and time for the meeting to April 28, 1994 at 3:00 p.m.

Commissioners Newquist, Watson, Rohr, Nuzum, Crawford, and Bragg determined by circulation of an action jacket that Commission business requires the change in the date and time, and affirmed that no earlier notice of the change was possible, and directed the issuance of this notice at the earliest practicable time.

CONTACT PERSON FOR MORE INFORMATION: Donna R. Koehnke, Secretary (202) 205–2000.

Dated: April 26, 1994.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–10441 Filed 4–26–94; 2:15 pm]

BILLING CODE 7020–02–P

TENNESSEE VALLEY AUTHORITY

[Meeting No. 1465]

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 59 FR 19752, April 25, 1994.

CHANGES IN PREVIOUSLY ANNOUNCED DATE AND TIME OF MEETING: Because of the Federal day of mourning of former President Nixon's death announced by the President, the previously announced date and time of the April TVA Board meeting to be held at the TVA Environmental Research Center, Muscle Shoals, Alabama, are changed, as follows:

Date Has Been Changed to: April 26, 1994.

Time Has Been Changed to: 4 p.m.

CONTACT PERSON FOR MORE INFORMATION: J. Alan Carmichael, Senior Vice President, Communications, or a member of his staff can respond to requests for information about this meeting. Call 615–632–6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office, 202–479–4412.

Dated: April 25, 1994.

Edward S. Christenbury,

General Counsel and Secretary.

[FR Doc. 94–10357 Filed 4–26–94; 9:49 am]

BILLING CODE 8120–02–M

federal register

Friday
April 29, 1994

Part II

Department of Agriculture

Farmers Home Administration

7 CFR Part 1944

Department of Housing and Urban Development

Office of the Secretary

24 CFR Part 700

Congregate Housing Services Program; Final Rule and Notice of Funding Availability for Fiscal Year 1994

DEPARTMENT OF AGRICULTURE

Farmers Home Administration

7 CFR Part 1944

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 700

[Docket No. R-94-1617; FR-2990-F-02]

RIN 2501-AB34

Congregate Housing Services Program; Final Common Rule

AGENCY: Farmers Home Administration, (USDA) and the Department of Housing and Urban Development, (HUD).

ACTION: Final common rule.

SUMMARY: This document is the joint final rule for the supportive services component of the Congregate Housing Services Program, which is authorized by section 802 of the National Affordable Housing Act and section 604 of the Housing and Community Development Act of 1992. The program provides assistance in the form of supportive services to the frail elderly, persons with disabilities, and temporarily disabled persons for the purpose of preventing premature or unnecessary institutionalization and encouraging deinstitutionalization. The joint interim rule for the supportive services component of the program was published on December 8, 1992 (57 FR 58042).

EFFECTIVE DATE: May 31, 1994.

FOR FURTHER INFORMATION CONTACT: For general information concerning the Congregate Housing Services Program (CHSP), contact Jerold S. Nachison, Housing for Elderly and Handicapped People Division, Office of Elderly and Assisted Housing, Department of Housing and Urban Development, 451 Seventh Street SW., room 6122, Washington, DC 20410, telephone (202) 708-3291.

For general information concerning Farmers Home Administration's Congregate Housing Services Program contact Sue M. Harris-Green, Senior Loan Officer, Farmers Home Administration, U.S. Department of Agriculture, 14th & Independence Ave., SW., room 5343, Washington, DC 20250, telephone (202) 720-1606.

Hearing or speech impaired individuals may call HUD's TDD number (202) 708-4594. (The telephone numbers listed above are not toll-free.)

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register.**

Public reporting burden for the collection of information requirements contained in this rule is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under *Other Matters.* Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410-0500; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for HUD, Washington, DC 20503.

I. Introduction

The Congregate Housing Services Demonstration Program was first established by the Congregate Housing Services Act of 1978 (42 U.S.C. 8001). It provided congregate housing and coordinated supportive services for elderly disabled and non-elderly disabled individuals to allow them to maintain their independence and avoid costly and unnecessary institutionalization. Congress appropriated funds for fiscal years 1979 through 1982, to remain available until expended. Since then, Congress has appropriated funds annually to continue the grantees funded. The Congregate Housing Services Program was implemented through the HUD Congregate Housing Services Handbook (4640.1).

On November 28, 1990, the National Affordable Housing Act (42 U.S.C. 8011) (NAHA) was enacted. In section 802, Congress specifically directed the Secretary of Housing and Urban Development (HUD) and the Secretary of Agriculture (USDA) through the Farmers Home Administration (FmHA) to jointly implement regulations to carry out the Congregate Housing Services Program (CHSP). Section 802 provides for congregate services which are minimally necessary to prevent premature or unnecessary institutionalization of frail elderly persons, persons with disabilities regardless of whether a person is elderly, or temporarily disabled persons living in eligible housing for the elderly.

HUD and FmHA shall enter into grants with States, units of general local government, Indian tribes, PHAs, IHAs, and local nonprofit housing sponsors, to provide congregate services. An IHA, PHA, and local non-profit housing sponsor can enter into grants only on behalf of its project. States, units of general local government and Indian tribes may enter into grants on behalf of for profit or not for profit owners of eligible housing. Each grant agreement shall be made for a term of five years and shall be renewable (subject to the availability of funds) at the expiration of the term by the Secretary concerned. The CHSP funds will provide for not more than 40 percent of the cost of providing the congregate services program; at least 50 percent of the total cost will come from the grantee or third party organization, and at least 10 percent from the program participant (up to a maximum of 20% of the participant's adjusted income). Program participant fees may be waived by the Secretary concerned for eligible residents without income. In instances where a waiver is granted, the grantee and the Secretary concerned will share the deficit on a 50/50 basis.

The grantee will develop a supportive services plan and a case management process as part of the application. Supportive services include meals, transportation, personal care (which may include dressing, bathing, and toileting), housekeeping, chore assistance, non-medical counseling, group and socialization activities, non-medical supervision, wellness programs, preventive health screening, monitoring of medication consistent with State law, personal emergency response systems, and other requested supportive services if approved by the Secretary concerned.

Under NAHA, eligible housing projects that were receiving assistance under the Congregate Housing Services Act of 1978 on November 28, 1990 shall continue to receive priority for assistance funded under that Act. These grantees will receive priority for assistance under this section after the expiration of the term of the grant. Each grantee shall maintain, for the six-year

transition period, the same dollar amount of its annual contributions in support of the activities eligible for assistance under this section equal to the amount contributed for such activities in the year ending on November 28, 1990. The grantee's contribution shall be equal to no less than the amount of the eligible owner's annual contribution plus any inflationary increases allowed by the Secretary concerned. At the end of six years, each grantee must meet the requirements of the new Congregate program.

On October 28, 1992, the Housing and Community Development Act of 1992 (HCDA of 1992) was enacted (Public Law 102–550). Sections 604 and 672 of the HCDA of 1992 amended section 802 of NAHA. Section 604 amended section 802(i)(1)(B)(i) of NAHA by increasing from three to six years the period of time that grantees funded under the Congregate Housing Services Act of 1978 would be exempt from the requirement to provide 50% matching funds upon expiration of the term of the grant. It also increased the three-year requirement for maintenance of funds contributed by the grantee to six years. Section 672 of the HCDA of 1992, amended section 802(d)(4) of NAHA by requiring that service coordinators be trained in the aging process, elder services, disability services, eligibility for and procedures of Federal and applicable State entitlement programs, legal liability issues relating to providing service coordination, drug and alcohol use and abuse by the elderly, and mental health issues.

On December 8, 1992, HUD and FmHA published a joint interim rule and invited the public to comment on it for consideration in drafting the final joint common rule. The public was also invited to comment and provide suggestions concerning the implementation of the retrofitting and renovation components of the Congregate Housing Services Program. The joint final rule responds to public comments on the joint interim rule.

The FmHA and HUD are promulgating identical regulations applicable to the Congregate Housing Services Program. Since the regulations are identical, the text of the regulations is set out only once at the end of the common preamble. The part heading, table of contents, and authority citation for the regulations as they will appear in each CFR title follow the text of the final common rule. The entire text of the regulations as they will appear in each CFR title follows the text of the final common rule. The entire text of the regulation will appear in the respective parts of the Code of Federal Regulations of both FmHA and HUD.

II. Public Comments

HUD received 9 comments on the December 8, 1992, joint interim rule. The comments were from governmental entities, public housing agencies (PHAs), nonprofit organizations, HUD field offices and advocacy groups for the aging.

General

Comment: One comment was directed to the overall program with the commenter stating that the language in the rule was too complex and that the number of repetitions was "dumbfounding". The commenter stated that he would like to see a "simple and common English explanation of how employment will impact an elderly individual's Section 8 or 236 rent subsidy, medicare premiums and 551 payments. The commenter also indicated that he would like to see a concise list of the duties of a service coordinator.

HUD and FmHA response: The CHSP does not set income limits for the section 8 program or for the Section 236 program. The CHSP also does not set requirements regarding medicaid and section 551. The regulations concerning the definition of income and income limits for participants in the section 8 program can be found at 24 CFR (Code of Federal Regulations) Part 813. The CHSP interim rule has been simplified in the final version of the rule. Section _____.220 of both the interim common rule and this final rule list the duties of the service coordinator.

Comment: One commenter stated the rule appears to discriminate against the housing authority that has not been able to accumulate unrestricted funds sufficient to purchase services, and that many housing authorities already have in place (prior to 1992 and 1993), eligible housing for the elderly already adapted for use with frail elderly and persons with disabilities for the purpose of preventing unnecessary institutionalization, without having grant funds available to them under the Congregate Housing Service Program. This commenter also indicated that the interim common rule clearly contradicts the intent and spirit of the statute.

HUD and FmHA response: Section 802(i)(1)(A)(i) of the National Affordable Housing Act requires that the cost for services under the CHSP be shared between the Secretary concerned and the grantee. The grantee or other third party shall provide 50% of the cost of providing the CHSP; the Secretary concerned shall provide no more than 40% of the cost of providing CHSP; and fees from the program participant shall provide at least 10% of the cost. HUD and FmHA recognize that there are many projects that already had supportive services programs in existence prior to the implementation of this CHSP and therefore, cannot use existing services as match for the CHSP. In accordance with the statutory requirement, only new or expanded services can be used as match. The matching funds provided by the grantee must cover at least 50% of the cost of providing supportive services under the CHSP. The rule is consistent with the statutory purpose which is to provide new or expanded supportive services in federally assisted housing to prevent premature institutionalization in a manner that respects the dignity of the elderly and persons with disabilities and the cost sharing requirements of the program.

Comment: One commenter stated that the interim joint rule does not require applicants to address transition to other service programs in the event of cessation of CHSP funding. The commenter suggested that the rule include a provision which would provide that requests for grant application include a plan for the continuation of necessary services or transition to other service providers in the event CHSP funds are no longer available.

HUD and FmHA response: While HUD and FmHA share the commenter's concern for a commitment from the applicant to continue to provide services in the event funds are no longer appropriated for this program, it was agreed not to impose any additional paperwork or commitments upon the applicant. Applicants are experiencing difficulties obtaining matching funds and it was agreed that requiring the grantees to factor in funds for continuation or transition to other service providers five years in advance would be too burdensome.

Comment: The commenter stated that the interim rule should be amended to permit applicants to request CHSP funding for multiple projects.

HUD and FmHA response: The rule does not contain application requirements. The application requirements are set forth in the Notice of Funding Availability (NOFA) for the CHSP. The NOFA announces the availability of funds and sets forth the application requirements. HUD and FmHA will publish a new NOFA announcing the availability of funding and the application requirements. The commenter's suggestion will be

considered in drafting the NOFA for fiscal year 1994.

Comment: One commenter states that §_____. 205(f) should spell out whether the Grants Officer will be a field, regional or headquarters employee.

HUD and FmHA response: The Grants Officer responsibility and the responsible office will be explained in the CHSP notice and handbook.

Cost Distribution

Comment: One commenter states that the regulation should be amended to allow the 10% of the total program costs that are required to be generated by participants' fees to be generated by participants' fees, contributions, or the cost-sharing that is already required by an existing program eligible for match rather than just through participant fees. The commenter states that for fee-generating purposes §§_____.235(2) and _____.240(a) preclude the use of otherwise eligible local match programs that permit contributions, but not fees, or which already charge cost-share fees. The commenter states that if fees generated by participant fees, contributions, or cost-sharing already in an existing program eligible for match are allowed, HUD can retain the CHSP's program's intent to incorporate a participant expense sharing component and will also address the significant barriers to sufficient fee-generation that applicants will experience because of the different fee-charge regulations in a variety of programs that would logically be used for the CHSP matching requirements.

HUD and FmHA response: Section _____.240 of the rule has been revised to allow fees to include cash contributions of the program participant, food stamps and any other contributions or donations. Cost sharing and fees collected by any eligible new or expanded service program for the CHSP are currently eligible. However, due to the statutory constraints concerning matching funds, funds for existing services which are not expanded are not eligible for match. Matching funds must pay for 50% of the cost of the services under CHSP and therefore, only costs for new or expanded services are eligible for match.

Definitions

Comment: One commenter urged the Department to reconsider its definition of activities of daily living (ADL) and the way that its definition is applied in the interim common rule. The commenter stated that the definition of ADL promulgated in the new rule combines what are now commonly known in the worlds of gerontological research and community-based aging programs as "activities of daily living" (ADL) and "instrumentalities of daily living" (IDL). The commenter stated that the rule definition of ADL was created by combining these terms without regard to what is currently used in the community and other common programs. The commenter argues that this definition is not in the spirit of coordination of housing and services which it believes is intended by the CHSP. The commenter further states that the way in which the definition of activities of daily living is applied is "antithetical to the concept of aging in place." The commenter states that when one looks at the definition and all its caveats, the potential population to be served is not what is commonly known as the frail elderly but rather a fairly narrow niche of somewhat frail older adults. The commenter stated that while it understands HUD might want to be cautious about this definition in order to maintain a housing rather than an institutional character to its developments, it is also important that such appropriateness decisions be reviewed on an individual rather than a categorical basis whenever possible.

HUD and FmHA response: Program participants are limited to the frail elderly deficient in at least three activities of daily living by statute. Therefore, HUD and FmHA decided to combine the ADL's and IDL's based upon HUD's past experiences in operating the CHSP of 1978. By combining ADLs and IDLs for the definition of ADLs and stating the minimum deficiency level, the program is able to serve a larger population of frail elderly persons than would be served by the traditional definitions of the ADLs.

Comment: One commenter states that the definition of activities of daily living (ADL) should be more concise and the minimum requirements of ADL which are listed in §_____.225(c)(2) should be initially stated under the definitions.

HUD and FmHA response: Section _____.225(c)(2) restates the definition of activities of daily living found in the definition section.

Comment: One commenter states that instead of including PHAs specifically in the definition of "Applicant" PHAs are identified as eligible grantees under the definition of "Local nonprofit housing sponsor." The commenter suggests that the rule specifically identify PHAs and IHAs as eligible grantees.

HUD and FmHA response: The definition of "Applicant" has been revised to specifically identify PHAs and IHAs as eligible grantees.

Comment: One commenter states that the definition of qualifying supportive services found in §_____.105 and the eligible activities found in §_____.210 do not tie in directly to the minimum requirements for ADL. The commenter states that the minimum requirements of ADL do not include non-medical supervision and personal emergency response systems.

HUD and FmHA response: Qualifying supportive services and eligible activities should not tie directly into the requirements of ADL. The ADLs are used to determine if frail elderly persons are minimally eligible to participate in the program. Program participants (frail elderly persons deficient in at least three ADLs and persons with disabilities) would then be eligible to receive qualifying supportive services such as non-medical supervision and personal emergency response systems, if they need them.

Comment: The commenter states that the section number in the reference for the Developmental Disabilities Assistance and Bill of Rights Act contained in §_____.105(7) should be changed from (7) to (5).

HUD and FmHA response: This error has been corrected.

Comment: The commenter states that in §_____.205(e) Eligible housing projects of the interim rule the reference to non-elderly "disabled" should be changed to non-elderly people with "disabilities."

HUD and FmHA response: All references to non-elderly handicapped or non-elderly disabled have been changed to non-elderly people with disabilities.

Eligibility

Comment: One commenter recommended deleting the reference to nonresidents in §_____.230 under eligibility. The commenter maintained that due to the limited amount of funds available for this CHSP, funds should be utilized by tenants occupying eligible housing and that if a community shows a need to serve nonresidents, other sources of funding could be pursued to meet that need.

HUD and FmHA response: Nonresident elderly persons, persons with disabilities, and temporarily disabled are eligible to participate in CHSP at the option of the program management in consultation with project residents. The program management has the discretion to deny nonresidents participation in the program if their participation is not cost-effective or if it adds to the need for

assistance under the program. Nonresidents who receive services under CHSP must pay a fee equal to the cost of the services provided. Nonresidents are not eligible for CHSP funds to subsidize their costs for services.

Match

Comment: The commenter states that the 50% match requirement for the grantee or eligible owner is excessively burdensome and may result in an inordinate amount of program failures. These program failures would have the ultimate result of doing harm to the program participants who relocate to the congregate housing locations in reliance on the programs. The commenter also states that the rules as written necessitate the inclusion of a great deal of estimated information in the budget. The commenter states that while service costs may be known, the likelihood of program failure increases because the number of participants, types of services to be requested and the ability of the participant to pay cannot be known until program startup.

HUD and FmHA response: Section 802(i)(1)(A)(i) of the National Affordable Housing Act requires that the cost for services under the CHSP be shared between the Secretary concerned and the grantee. The grantee shall provide 50% of the cost of providing the CHSP; the Secretary concerned shall provide 40% of the cost of providing CHSP; and fees from the program participant shall provide 10% of the cost. While HUD and FmHA agree that both participant interest and need are estimated at best, the budget information is necessary to establish a dollar value and limit for the application and to assist in the rating and ranking of applications for CHSP funding.

Comment: One commenter stated that the 50% match requirement and the restrictions on what can be counted as in-kind service are barriers that the rule presents which causes its housing authority to be unable to participate in the program. The commenter suggests that in instances like its own where projects have limited resources that it be allowed to count the services already provided as in-kind match. The commenter also contends that local community services are already "maxed" out because housing authorities have been successful in having a number of services provided by community agencies and that the housing authorities prior to the grant period have already invested as much or more than the match requirement.

HUD and FmHA response: Section 802(i)(1)(A)(i) of the National Affordable Housing Act requires that the cost for services under the CHSP be shared between the Secretary concerned and the grantee. The grantee or other third party is required to provide 50% of the cost of providing the CHSP; the Secretary concerned provides no more than 40% of the cost of providing CHSP; and fee from the program participant provides at least 10% of the cost. Match funds must account for 50% of the cost of services under the CHSP program. Only qualified supportive services are eligible services under the CHSP. Since section 802(k)(16) defines qualified supportive services as new or expanded services, match funds can only be used for new or expanded services.

Non-Allowable Costs

Commenter: One commenter states that the examples of non-allowable costs under the program include capital funding items. The commenter states that the failure to allow projects access to funds to cover capital cost will place projects at a disadvantage in developing a CHSP and may also discourage many nonprofit owners from applying and participating in the program. The commenter also states that during congressional consideration of NAHA, it supported Senate passage of a new and separately funded retrofit program to provide for modernization and retrofitting of elderly housing projects.

HUD and FmHA response: HUD and FmHA decided to disallow capital funding items because they were concerned the majority of the funds for supportive services would be used to fund capital improvements. Upon implementation of the retrofit component of the CHSP, modernization and retrofitting will be eligible activities. Due to the limited amount of funding available FmHA and HUD decided that the purposes of the program are best served by only funding the supportive services component.

Program Participant Fees

Comment: One commenter states that the regulations should include a provision that does not cap HUD's contribution for resident fee deficits. The commenter also suggests that the regulations should allow the CHSP to use other income sources to make up for any resident-fee deficit that arises because of the 20% cap on resident fees, or that arises because the local program match program permits only contributions. The commenter states that contributions should be permitted to count as part of the fee amount and that the regulations should be amended to allow a flexible sliding scale fee schedule for participants for whom 20% or even 10% of adjusted income is too costly or where 10% of the cost of a specific fee is too high. Commenter also states that there should be more flexible fee waivers to include participants who are at or below the poverty level.

HUD and FmHA response: Section _____ .240 of the regulation has been revised to allow food stamps and other contributions or donations to be included as part of the 10% fee amount for program participants. In instances where the grantee finds that the fees for a participant are too high, the grantee can request a waiver of § _____.240(e) of the regulation. Any waived fees are shared 50% between the Secretary concerned and the grantee.

Retrofit and Renovations Component

Comment: There were several comments and suggestions concerning the retrofitting and renovation component of the Congregate Housing Services Program. Several commenters expressed discontent with the decisions not to fund the retrofit and renovation component and the failure to implement regulations. Many stated that the retrofit component was an integral and critical part of the program. One commenter stated that HUD and FmHA had the authority and the flexibility to allocate some funding for retrofit in order to have the program in place for full funding later. There was a general concern for the Department's failure to develop interim regulations in order to implement retrofit once funding is made available.

HUD and FmHA response: Since HUD and FmHA had very little guidance from Congress on the implementation of the program, they invited comments from the public on how the renovation and retrofit component should be implemented. They also invited comments on specific issues concerning this component. HUD and FmHA will use the responses received to assist in the drafting of regulations implementing the retrofit and renovation component at a later date.

III. Findings and Certifications

A. *National Environmental Policy Act.* A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 implementing section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the Office of the Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410.

B. *Regulatory Flexibility.* The Secretary and the Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), have reviewed this rule before publication and by approving it certify that this rule does not have a significant economic impact on a substantial number of small entities. The rule will provide grants to States, Indian tribes, units of general local government and local nonprofit housing sponsors for congregate services programs for eligible project residents. Although small entities will participate in the program, the rule would not have a significant impact on them.

C. *Family Impact.* The General Counsel of HUD, as the Designated Official under Executive order 12606, *The Family,* has determined that the policies contained in this rule will have some significant impact on the maintenance and general well-being of families. The revised CHSP can be expected to provide supportive services which can prevent or postpone unnecessary or premature institutionalization, and reduce unnecessary stress and financial burdens on participants' families by allowing them to remain in their apartments. Because the impact on family concerns is wholly beneficial, no further review under the executive order is considered necessary.

D. *Federalism Impact.* The General Counsel of the Department of Housing and Urban Development, as the Designated Official for the Department of Housing and Urban Development under section 6(a) of Executive Order No. 12611—Federalism, has determined that the rule does not involve the preemption of State law by Federal statute or regulation and does not have Federalism implications.

E. *Semiannual Agenda.* This final common rule was listed as item number 1477 in the Department of Housing and Urban Development's Semiannual Agenda of Regulations published on October 25, 1993 (58 FR 56402) under Executive Order 12291 and the Regulatory Flexibility Act.

F. This rule has been reviewed in light of Executive Order 12778 and meets the applicable standards provided in sections 2(a) and 2(b)(2) of that Order. Provisions within this part which are inconsistent with state law are controlling. All administrative remedies pursuant to 7 CFR part 1900, subpart B must be exhausted prior to filing suit.

Public Reporting Burden

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520). The Department has determined that the following provisions contain information collection requirements.

Existing Congregate Housing Services Program

7 responses are estimated from each respondent.

3.71 hours is the estimated average response time for each respondent.

Total Respondents time is 1456 hours.

Estimate of cost to the respondents is $15.00 per hour.

Total respondents time @ $15/hour=1456×$15=$21,840.

TABULATION OF REPORTING BURDEN

Information collected	No. of respondents	×	No. of responses per respondent	=	Total annual responses	×	Hours per response	Total hours
Existing congregate housing services program								
	17.1		17.2		17.3		17.4	17.5
Budget submission	56		1		56		3	168
Annual program reports	56		1		56		3	168
Participant applications to CHSP	56		5		280		4	1120
Summary	56		7		392		3.71	1456

Revised Congregate Services Housing Program

14 responses are estimated from each respondent.

5.10 hours is the estimated average response time for each respondent per response.

Total Respondents time is 9,675.

Estimate of cost to the respondents is $15.00 per hour.

Total respondents time @ $15/hour=9675×$15=$145,125

TABULATION OF REPORTING BURDEN

Information collected	No. of respondents	×	No. of responses per respondent	=	Total annual responses	×	Hours per response	Total hours
Revised congregate housing services program								
	17.1		17.2		17.3		17.4	17.5
Initial owner applications	150		1		150		14	2100
Budget formats	50		1		50		3	150
Semiannual program reports	50		1		50		1.5	75
Annual program reports	50		1		50		3	150
Participant applications to new CHSP	50		36		1800		4	7200
Summary	150		14		2100		5.10	9675

Total existing and Revised CHSP is 11,131.

IV. Regulations Promulgation

On October 25, 1990, Congress passed the NAHA. 42 U.S.C. 8011. NAHA was signed into law by President Bush on November 29, 1990. Section 802(m) of NAHA states inter alia as follows:

Promulgation of Regulations: The Secretary of Housing and Urban Development and the Secretary of Agriculture shall, not later than the expiration of the 180-day period beginning on the date of enactment of this Act, jointly issue any regulations necessary to carry out this section.

Conference Report 101–943, October 25, 1990. Accordingly, the regulation was to have been published by May 27, 1991.

Text of Final Common Rule

The text of the final common rule, as adopted by the agencies in this document, appears below:

Part _____ Congregate Housing Services Program

Sec.

§_____.100 Authority and purpose.
§_____.105 Definitions.
§_____.200 Announcement of fund availability and selection criteria.
§_____.205 Grant agreement.
§_____.210 Eligible activities.
§_____.215 Service plan.
§_____.220 Service coordinator.
§_____.225 Professional Assessment Committee (PAC).
§_____.230 Eligibility.
§_____.235 Cost distribution.
§_____.240 Program participant fees.
§_____.245 Other Federal requirements.
§_____.300 Application.
§_____.305 Application evaluation and selection.
§_____.325 Monitoring of project sites by governmental units.
§_____.330 Evaluation of provision of congregate services programs.
§_____.335 Renewal of grants.
§_____.400 Participatory agreement.
§_____.405 Reserve for supplemental adjustment.
§_____.415 Recapture.
§_____.420 Reports.
§_____.425 Budget submissions.
§_____.430 Program costs.
§_____.435 Use of residents in providing services.
§_____.440 Services provided, not income.
§_____.445 Consultation with the Department of Health and Human Services.
§_____.500 Eligibility and priority for 1978 Act recipients.
§_____.505 Submission and approval of applications by grantees.
§_____.510 Submission and approval of applications by grantees funded initially under the 1978 Act, after the six-year transition period.
§_____.515 Waiver authority.

§_____.100 Authority and purpose.

(a) *Authority.* This part is adopted pursuant to section 802 of the National Affordable Housing Act (42 U.S.C. 8011) and section 604 of the Housing and Community Development Act of 1992. Pursuant to section 802(m) of the National Affordable Housing Act (NAHA), the Farmers Home Administration (FmHA) and HUD are promulgating rules and regulations applicable to the supportive services component of the congregate housing services program.

(b) *Purpose.* (1) The program under this part provides for minimal supportive services to the frail elderly, persons with disabilities and temporarily disabled individuals as a means of preventing unnecessary institutionalization and encouraging deinstitutionalization. The program also provides management with the capacity to assess the service needs of eligible residents and to locate and arrange for the delivery of community based supportive services. The program is implemented in a manner that both respects the dignity of the participants and encourages their independence. The provision of supportive services allows for a continuum of care on a long term basis and offers another option in supportive living arrangements. The program functions as an active proponent of community based care and affords an opportunity for housing projects to become an additional source for supportive service delivery in the local area.

(2) The program is additionally designed to:

(i) Improve the quality of life of older Americans living in federally assisted housing;

(ii) Preserve the viability of existing affordable housing projects for low income older residents who are aging in place by assisting managers of housing with the difficulties and challenges created by serving older residents;

(iii) Develop partnerships between the Federal Government and State governments in providing services to the frail elderly and persons with disabilities and the temporarily disabled, and

(iv) Utilize Federal and State funds in a more cost-effective and humane way in serving the needs of older adults.

(c) *Applicability.* This part applies to:

(1) Public housing as that term is defined in section 3(b) of the United States Housing Act of 1937;

(2) Low income housing developed or operated under a contract between the Secretary of Housing and Urban Development and an Indian housing authority under title II of the United States Housing Act of 1937;

(3) Housing assisted under section 8 of the United States Housing Act of 1937 with a contract that is attached to the structure under section 8(d)(2) or with new construction or substantial rehabilitation of the structure under section 8(b)(2), as that section existed before October 1, 1983;

(4) Housing assisted under section 202 of the Housing Act of 1959;

(5) Housing assisted under section 221(d) or 236 of the National Housing Act, with respect to which the owner has made a binding commitment to the Secretary of Housing and Urban Development not to prepay the mortgage or terminate the insurance contract under section 229 of the National Housing Act (unless the binding commitments have been made to extend the low-income use restriction relating to the housing);

(6) Housing assisted under section 514 or 515 of the Housing Act of 1949, with respect to which the owner has made a binding commitment to the Secretary of Agriculture not to prepay or refinance the mortgage (unless the binding commitments have been made to extend the low income use restrictions relating to the housing for not less than the 20-year period under section 502(c)(4) of the Housing Act of 1949); and

(7) Housing assisted under section 516 of the Housing Act of 1949.

§_____.105 Definitions.

As used in this part—

Act means section 802 of the Cranston-Gonzalez National Affordable Housing Act.

Activity of Daily Living (ADL) means an activity regularly necessary for personal care and includes eating (may need assistance with cooking, preparing or serving food, but must be able to feed self); dressing (must be able to dress self, but may need occasional assistance); bathing (may need assistance in getting in and out of the shower or tub, but must be able to wash self; grooming (may need assistance in washing hair, but must be able to take care of personal appearance); getting in and out of bed and chairs, walking, going outdoors, using the toilet; and household management activities (may need assistance in doing housework, grocery shopping or laundry, or getting to and from one location to another for activities such as going to the doctor and shopping, but must be mobile. The mobility requirement does not exclude persons in wheelchairs or those requiring mobility devices). Each of the Activities of Daily Living noted above includes a requirement that a person must be deficient in his or her ability to perform at a specified minimal level (e.g., to satisfy the eating ADL, the person must be able to feed him/herself). The determination of whether a person is deficient in this minimal level of performance must include consideration of those services that will be performed by a person's spouse, relatives or other attendants to be provided by the individual. For example, if a person requires assistance with cooking, preparing or serving food plus assistance in feeding him/herself, the individual would meet the minimal performance level and thus satisfy the eating ADL, if a spouse, relative or attendant provides assistance with

feeding the person. Should such assistance become unavailable at any time, the Owner is not obligated at any time to provide individualized services beyond those offered to the resident population in general. The Activities of Daily Living analysis is relevant *only* with regard to determination of a person's eligibility to receive supportive services paid for by CHSP and is not a determination of eligibility for occupancy.

Adjusted income means adjusted income as defined in 24 CFR part 813 or 913.

Applicant means a State, Indian tribe, unit of general local government, PHA, IHA or local nonprofit housing sponsor. A State, Indian tribe, or unit of general local government may apply on behalf of a local nonprofit housing sponsor or a for-profit owner of eligible housing for the elderly.

Area agency on aging means the single agency designated by the State Agency on Aging to administer the program described in Title III of the Older Americans Act of 1965 (45 CFR chapter XIII).

Assistant Secretary means the HUD Assistant Secretary for Housing—Federal Housing Commissioner or the HUD Assistant Secretary for Public and Indian Housing.

Case management means implementing the processes of: establishing linkages with appropriate agencies and service providers in the general community in order to tailor the needed services to the program participant; linking program participants to providers of services that the participant needs; making decisions about the way resources are allocated to an individual on the basis of needs; developing and monitoring of case plans in coordination with a formal assessment of services needed; and educating participants on issues, including, but not limited to, supportive service availability, application procedures and client rights.

Congregate housing means low-rent housing that is connected to a central dining facility where wholesome and economical meals can be served to the residents.

Congregate Housing Services Program (CHSP) means a program assisted under this part undertaken by an eligible housing project to provide congregate services to program participants.

Elderly person means a person who is at least 62 years of age.

Eligible housing for the elderly means any eligible project including any building within a mixed-use project that was designated for occupancy by elderly persons, or persons with disabilities at its inception or, although not so designated, for which the eligible owner or grantee gives preference in tenant selection (with HUD approval) for all units in the eligible project (or for a building within an eligible mixed-use project) to eligible elderly persons, persons with disabilities, or temporarily disabled individuals. For purposes of this part, this term does not include projects assisted under the Low-Rent Housing Homeownership Opportunity program (Turnkey III (24 CFR part 905, subpart G)).

Eligible housing project means:

(1) Public housing (as that term is defined in section 3(b) of the United States Housing Act of 1937);

(2) Low income housing developed or operated under a contract between the Secretary of Housing and Urban Development and an Indian housing authority under title II of the United States Housing Act of 1937;

(3) Housing assisted under section 8 of the United States Housing Act of 1937 with a contract that is attached to the structure under section 8(d)(2), or with a contract entered into in connection with the new construction or substantial rehabilitation of the structure under section 8(b)(2), as that section existed before October 1, 1983;

(4) Housing assisted under section 202 of the Housing Act of 1959;

(5) Housing assisted under section 221(d) or 236 of the National Housing Act, with respect to which the owner has made a binding commitment to the Secretary of Housing and Urban Development not to prepay the mortgage or terminate the insurance contract under section 229 of the National Housing Act (unless the binding commitments have been made to extend the low-income use restrictions relating to the housing for the remaining useful life of the housing);

(6) Housing assisted under section 514 or 515 of the Housing Act of 1949, with respect to which the owner has made a binding commitment to the Secretary of Agriculture not to prepay or refinance the mortgage (unless the binding commitments have been made to extend the low income use restrictions relating to the housing for not less than the 20-year period under section 502(c)(4) of the Housing Act of 1949); and

(7) Housing assisted under section 516 of the Housing Act of 1949.

Eligible owner means an owner of an eligible housing project.

Eligible project resident means a person residing in eligible housing for the elderly who qualifies under the definitions of frail elderly, person with disabilities (regardless of whether the person is elderly), or temporarily disabled.

Excess residual receipts mean residual receipts of more than $500/per unit in the project which are available and not committed to other uses at the time of application to HUD for CHSP. Such receipts may be used as matching funds and may be spent down to a minimum of $500/unit.

Farmers Home Administration (FmHA) means a credit agency for agriculture and rural development in the U.S. Department of Agriculture (USDA).

Fees mean charges levied to residents for meals with or without other supportive services under CHSP and equivalent fees and donations made to new or expanded State and local supportive services program which are used to match the CHSP other than those of the Older Americans Act.

For-profit owner of eligible housing for the elderly means an owner of an eligible housing project in which some part of the project's earnings lawfully inure to the benefit of any private shareholder or individual.

Frail elderly person means a person at least 62 years of age who is unable to perform three or more activities of daily living.

Grantee or *grant recipient* means the recipient of funding or an eligible owner receiving funding under the Congregate Housing Services Program.

HUD means the Department of Housing and Urban Development.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional corporation as defined in or established under the Alaska Native Claims Settlement Act, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Instrumental activity of daily living means a regularly necessary home management activity, and includes preparing meals, shopping for personal items, managing money, using the telephone, and performing light or heavy housework.

Local nonprofit housing sponsor means an owner or borrower of eligible housing for the elderly; no part of the net earnings of the owning organization shall lawfully inure to the benefit of any shareholder or individual.

Nonprofit, as applied to an organization,

(1) Means no part of the net earnings of the organization inures, or may lawfully inure, to the benefit of any private shareholder or individual; or

(2) Means a public housing agency as that term is defined in section 3(b)(6) of the United States Housing Act of 1937.

Person with disabilities means a household composed of one or more persons, at least one of whom is an adult who has a disability. A person shall be considered to have a disability if such person is determined under regulations issued by the Secretary to have a physical, mental, or emotional impairment which

(1) Is expected to be of long-continued and indefinite duration;

(2) Substantially impedes his or her ability to live independently; and

(3) Is of such a nature that the person's ability could be improved by more suitable housing conditions.

A person shall also be considered to have a disability if the person has a developmental disability as defined in section 102(5) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001–7).

Notwithstanding the preceding provisions of this paragraph, the terms "person with disabilities" or "temporarily disabled" include two or more persons with disabilities living together, one or more such persons living with another person who is determined (under regulations prescribed by the Secretary of HUD) to be essential to their care or well-being, and the surviving member or members of any household where at least one or more persons was an adult with a disability who was living, in a unit assisted under this section, with the deceased member of the household at the time of his or her death.

Professional Assessment Committee (PAC) means a group consisting of at least 3 individuals appointed by the officials of the eligible housing project responsible for the Congregate Housing Services Program and shall include at least one qualified medical and other health and social service professional competent to appraise the functional abilities of the frail elderly, persons with disabilities, and temporarily disabled persons in relation to the performance of activities of daily living.

Program participant means a frail elderly person, person with disabilities, or temporarily disabled person receiving services under the Congregate Housing Services Program.

Qualifying supportive services means new or significantly expanded services determined by the Secretary concerned to be minimally necessary and essential to enable eligible residents to live independently and avoid unnecessary institutionalization, including, but not limited to:

(1) Meal service adequate to meet nutritional need;

(2) Housekeeping aid;

(3) Personal assistance (which may include, but is not limited to, aid given to eligible residents in grooming, dressing, and other activities which maintain personal appearance and hygiene);

(4) Transportation services;

(5) Non-medical supervision, wellness programs, preventive health screening, monitoring of medication consistent with State law;

(6) Non-medical components of adult day care;

(7) Personal emergency response systems and other requested supportive services essential for achieving and maintaining independent living if approved by the Secretary concerned.

An owner may provide the qualifying services directly to eligible residents or may, by contract, provide such services through other appropriate agencies or providers.

Secretary concerned means:

(1) The Secretary of Housing and Urban Development, with respect to eligible federally assisted housing administered by HUD; and

(2) The Secretary of Agriculture, with reference to programs administrated by the Administrator of the Farmers Home Administration.

Service coordinator means a social services staff person who is hired by an eligible owner, grantee or management company, or another third party contractor such as a local case management agency. The service coordinator is responsible for assuring thorough case management so that program participants are linked to the supportive services they need to continue independent living.

Service provider means a person or organization licensed or otherwise approved in writing by a State or local agency (e.g., Department of Health, Department of Human Services or Welfare) to provide supportive services.

State means the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

State agency on aging means the single agency designated by the Governor to administer the program described in Title III of the Older Americans Act of 1965 (see 45 CFR part 13).

State agency means the State or an agency or instrumentality of the State.

Temporarily disabled means having an impairment that is expected to be of no more than 6 months duration; and that impedes the ability of the individual to live independently unless the individual receives congregate services.

Unit of general local Government means any city, town, township, county, parish, village, or other general purpose political subdivision of a State; and includes a unit of general government acting as an applicant for assistance under this section in cooperation with a nonprofit housing sponsor, and a nonprofit housing sponsor acting as an applicant for assistance under this section in cooperation with a unit of general local government.

§ _____.200 Announcement of Fund Availability and Selection Criteria.

(a) *Notice of funding availability.* A Notice of Funding Availability will be published periodically in the **Federal Register** by the Secretary concerned containing the amounts of funds available, allocation or distribution of funds available among eligible applicant groups, where to obtain and submit applications, the deadline for submissions, and further explanation of the selection criteria. The Secretary concerned will designate the maximum allowable size for grants.

(b) *Selection criteria.* The criteria for selection shall include:

(1) The types and priorities of the basic services proposed to be provided, the appropriateness of the targeting of services, the methods of providing for deinstitutionalized older individuals and individuals with disabilities, and the relationship of the proposal to the needs and characteristics of the eligible residents of the projects where the services are to be provided;

(2) The schedule for establishment of services following approval of the application;

(3) The degree to which local social services are adequate for the purpose of assisting eligible project residents to maintain independent living and avoid unnecessary institutionalization;

(4) The professional qualifications of the members of the professional assessment committee (PAC);

(5) The reasonableness and application of fees schedules established for congregate services;

(6) The adequacy and accuracy of the proposed budgets; and

(7) The extent to which the owner will provide funds from other services in excess of that required under the CHSP.

§ _____.205 Grant Agreement.

(a) *General.* HUD will enter into grant agreements with states, units of general local government, Indian tribes, PHAs, IHAs and local nonprofit housing sponsors, utilizing amounts appropriated under NAHA for the purpose of providing congregate services for program participants for eligible housing for the elderly to promote and encourage maximum independence within a home environment for such residents capable of self-care, with appropriate supportive services.

(b) *Term of grant agreement.* A grant will be for a term of five years, and will be renewable at the expiration of the term, subject to the availability of funds and in conformance with these regulations except as otherwise provided in § _____.500.

(c) *Reservation of amount.* The Secretary concerned shall reserve a sum equal to the total approved grant amount for each grantee.

(d) *Eligible grant recipients.* The Secretary concerned will provide assistance, and enter into grant agreements with grant recipients cited under paragraph (a) of this section.

(e) *Grant Officer.* The Grant Officer for the Secretary concerned will enter into the supportive services grant agreement on behalf of HUD or FmHA. The Secretary concerned will hold the grantee responsible for the administration of the Congregate Housing Services Program.

(f) *Grantee requirements.* The grant agreement will require that the grantee:

(1) Operate the congregate services program in accordance with applicable program regulations, laws, or other requirements of the Secretary concerned;

(2) Assure the effective provision of supportive services to the program participants;

(3) Conduct an ongoing assessment of the housing assistance and supportive services required by the program participants; and

(4) Comply with such other terms and conditions, required by NAHA or its implementing regulations, including monitoring, if required, data and record keeping requirements and submission of reports (which must include racial and ethnic data on participants) that the Secretary concerned establishes for the purposes of carrying out an effective Congregate Housing Services Program. The Department concerned will enforce the obligations of the grantee under the agreement through such action as may be necessary, including the termination and recapture of supportive services funds awarded under CHSP.

§ _____.210 Eligible activities.

(a) *Supportive services.* Funding for supportive services may be provided by state, local, public, or private providers, and/or CHSP funds. Grantees may provide the services directly or may subcontract with service providers in the community.

(1) Qualifying supportive services may include, but need not be limited to:

(i) Meal service adequate to meet nutritional need;

(ii) Housekeeping aid;

(iii) Personal assistance (which may include, but is not limited to, aid given to eligible residents in grooming, dressing, and other activities which maintain personal appearance and hygiene);

(iv) Transportation services;

(v) Non-medical supervision, wellness programs, preventive health screening, monitoring of medication consistent with state law;

(vi) Non-medical components of adult day care;

(vii) Personal emergency response systems; and

(viii) Other requested supportive services essential for achieving and maintaining independent living, which are approved by the Secretary concerned.

(2) The grantee may provide the qualifying services directly to program participants or may contract out the services through other appropriate agencies or providers. A congregate services program under this section shall provide meal and other services for program participants (and other residents and nonresidents, as provided in this section) that are coordinated on site.

(3) Meal services shall meet the following guidelines:

(i) *Type of service.* At least one meal a day must be served in a group setting for some or all of the participants; if more than one meal a day is provided, a combination of a group setting and carry-out meals may be utilized.

(ii) *Hot meals.* At least one meal a day must be hot. A hot meal for the purpose of this program is one in which the principal food item is hot at the time of serving.

(iii) *Special menus.* Grantees shall provide special menus as necessary for meeting the dietary needs arising from the health requirements of conditions such as diabetes and hypertension. Grantees should attempt to meet the dietary needs of varying religious and ethnic backgrounds.

(iv) *Meal service standards.* Grantees shall plan for and provide meals which are wholesome, nutritious, and each of which meets a minimum of one-third of the minimum daily dietary allowances as established by the Food and Nutrition Board of the National Academy of Sciences-National Research Council (or State or local standards, if these standards are higher). Grantees must have an annual certification, prepared and signed by a registered dietitian, which states that each meal provided under CHSP meets the minimum daily dietary allowances.

(v) *Food stamps and agricultural commodities.* In providing meal services under this paragraph (a)(2), each congregate services program shall apply for approval as a retail food store under section 9 of the Food Stamp Act of 1977 (42 U.S.C. 2018); and

(A) If approved under the Food Stamp Act, accept coupons (as defined in section 3(e) of that Act) as payment from individuals to whom such meal services are provided; and

(B) Shall request, and use to provide such meal services, agricultural commodities made available without charge by the Secretary of Agriculture.

(vi) *Preference for nutrition providers:* In contracting for or otherwise providing for meal services under subparagraph (a)(2), each congregate housing services program shall give preference to any provider of meal services who:

(A) Receives assistance under title III of the Older Americans Act of 1965; or

(B) Has experience, according to such standards as the Secretary concerned shall require, in providing meal services in a housing project under the Congregate Housing Services Act of 1978, or any other program for congregate services.

(b) The requirements of paragraph (a)(2) of this section do not preclude a grantee or owner from directly preparing and providing meals under its own auspices.

§ _____.215 Service plan.

(a) The grantee shall provide a service plan with the application, estimating the type and nature of the services to be provided, and the estimated cost for each unit of service.

(b) The grantee shall develop the service plan in consultation with the Area Agency on Aging and the appropriate state or local agency serving persons with disabilities, as applicable. Supportive services or funding for supportive services may be provided by state, local, public or private providers. Grantees may provide the services or may contract out the services with service providers in the community.

§ _____.220 Service coordinator.

(a) Assistance may be provided to fund one or more service coordinators who may be responsible for:

(1) Working with the professional assessment committee established under section § _____.225 on an ongoing basis to assess the service needs of eligible residents;

(2) Working with service providers and the professional assessment committee to tailor the provision of services to the minimum needs and characteristics of eligible residents;

(3) Mobilizing public and private resources to ensure that the qualifying supportive services identified under § _____.210 can be funded over the time period identified under § _____.205;

(4) Monitoring the effectiveness of any supportive service program receiving grant assistance under this section; and

(5) Performing other duties and functions that the Secretary concerned determines to be appropriate to enable frail elderly persons, persons with disabilities, and temporarily disabled individuals residing in federally assisted housing for the elderly to live with dignity and independence.

(b) The service coordinator shall comply with the qualifications and standards required by the Secretary concerned. The service coordinator shall be trained in the aging process, elder services, disability services, eligibility for and procedures of Federal and applicable State entitlement programs, legal liability issues relating to providing service coordination, drug and alcohol use and abuse by the elderly, mental health issues, and any other areas required by the Secretary concerned.

(c) The Service Coordinator may be employed directly by the grantee, or employed under a contract with a case management agency on a fee-for-service basis, and may serve less than full-time. The Service Coordinator or the case management agency providing service coordination shall not provide supportive services under a CHSP grant or have a financial interest in a service provider agency which intends to provide services to the grantee for the CHSP.

(d) Funding for service coordinators may be provided by state, local, public or private providers or CHSP.

(e) The Service Coordinator shall:

(1) Provide general case management and referral services to all potential participants in the Congregate Housing Services Program. This involves intake screening upon referral, from the grantee, of income-eligible frail elderly persons, persons with disabilities and temporarily disabled individuals, and preliminary assessment of frailty or disability, using a commonly accepted assessment tool. The Service Coordinator then will refer to the professional assessment committee (PAC) those individuals who appear eligible for the CHSP;

(2) Establish professional relationships with all agencies and service providers in the community, and develop a directory of providers for use by program staff and program participants;

(3) Refer proposed participants to service providers in the community, or those of the grantee. Serve as staff to the PAC. Complete, for the PAC, all paperwork necessary for the assessment, referral, case monitoring and reassessment processes; implement the case plan developed by the PAC and agreed to by the program participant. Maintain necessary case files on each program participant, containing such information and kept in such form that HUD and FmHA shall require. Provide the files to PAC members upon request, in connection with PAC duties;

(4) Monitor the ongoing provision of services from community agencies and keep the PAC and the agency providing the supportive service informed of the progress of the participant;

(5) Educate grant recipient's program participants on such issues as application procedures, service availability, and program participant options and responsibilities;

(6) Establish volunteer support programs with service organizations in the community;

(7) Assist the grant recipient to build informal support networks with neighbors, friends and family;

(8) Educate other project management staff on issues related to "aging-in-place" and services coordination, to help them to work with and assist other persons receiving housing assistance through the grantee.

(f) Service coordinators shall not serve as members of the PAC.

(g) For a Service Coordinator obtained under contract with a case management agency, the contract must include provisions containing, at a minimum: beginning and end dates of the contract; number and responsibilities of staff provided by the agency; rates of pay/costs of services to be provided; location of offices, and an agreement to provide HUD and FmHA access to the files; and other documentation pertinent to the Congregate Housing Services Program. Any contracts awarded or purchases made under this subsection by grantees that are public bodies must conform to the policies and procedures stated at 24 CFR 85.36.

(h) (1) Each frail elderly person, person with disabilities and temporarily disabled individual tentatively selected by the grantee must be assessed for degree of functional incapacity before being accepted into the Congregate Housing Services Program. The assessment is performed by a voluntary PAC, which handles the individual's entrance into and the transition out of the Congregate Housing Services Program, development of case plans for that person, and regular reassessment of the individuals in the program. PAC members may not be paid with Congregate program grant funds, but if the duties and responsibilities of the PAC are discharged by a community agency, the agency's costs may be counted as matching funds for any time spent on assessments after the initial approval of program participants, if approved by the Secretary concerned.

(2) The PAC, upon completion of the assessment, must make a recommendation to the Service Coordinator for acceptance into (or denial of acceptance into) the Congregate Program. In the case of an acceptance, the PAC must provide a case plan for each eligible resident. Once an individual is accepted into the CHSP it is the responsibility of the Service Coordinator to tailor the case plan to the needs of that participant, and to work with community agencies, the grantee and third party service providers to ensure that the services are provided on a regular, ongoing, and satisfactory basis, in accordance with the plan. Before actual acceptance into the Congregate Housing Services Program, the eligible resident must work with the PAC and the Service Coordinator in developing his or her supportive services plan. Acceptance of any services under the plan by the program participant is voluntary. In developing this plan, the PAC must take into consideration the participant's needs and wants and must provide the minimum supportive services necessary to maintain independence. If participants want other services, they can buy them at cost, if available.

§ _____.225 Professional Assessment Committee (PAC).

(a) *General.* A professional assessment committee, under paragraph (b) of this section, shall identify eligible project residents and shall designate services appropriate to the functional abilities and needs of each eligible project resident. The committee shall utilize procedures that ensure that the process of determining eligibility of individuals

for congregate services affords individuals fair treatment, due process and a right of appeal of the determination of eligibility, and shall ensure the confidentiality of personal and medical records. A professional assessment committee under this section shall consist of not less than three individuals, who shall be appointed to the committee by the officials of the eligible housing project responsible for the congregate services program. It shall include at least one qualified medical or other health professional and social services professionals competent to appraise the functional abilities of frail elderly persons, persons with disabilities and temporarily disabled individuals in relation to the performance of tasks of daily living. Service coordinators shall not serve as PAC members. PAC members are subject to the conflict of interest provisions in § _____.245(f). The PAC may be either a voluntary committee appointed by the project management or an agency in the community which provides assessment services and can conform to HUD and FmHA requirements. At least one PAC member shall not have any direct or indirect relationship to the grantee. No PAC member may be affiliated with organizations providing services under the grant. If a case management agency provides the service coordination, the agency may not be affiliated with the organization providing supportive services under the grant.

(b) *Operating procedures.* The PAC shall:

(1) Recommend, to the Service Coordinator, persons eligible for entrance, or for transition out of, CHSP;

(2) Authorize or perform medical evaluations, if necessary. These evaluations may be performed by a PAC medical professional, or the applicants to CHSP may be referred to another agency in the community that will perform the evaluation without charge;

(3) Recommend, and update as necessary, a supportive services plan for each frail elderly person or person with disabilities, or temporarily disabled person;

(4) Obtain and retain information in files concerning program participants. The files should contain such information and be maintained in such form, as HUD and FmHA shall require;

(5) Present written evaluations to the grantee; and

(6) Allow program participants to appeal decisions related to entrance to, degree of participation needed, and transition out of CHSP.

(c) *Duties of the PAC.* The PAC is required to:

(1) Perform a formal assessment of each potential elderly program participant's deficiencies in performing the ADLs. This assessment shall be based upon the screening done by the Service Coordinator, and shall include a review of the adequacy of the informal support network (i.e., family and friends available to the potential participant to assist in meeting the ADL needs of that individual);

(2) Determine that each elderly program participant is deficient in at least three ADLs. The minimum requirements of ADL include:

(i) Eating (may need assistance with cooking, preparing or serving food, but must be able to feed self),

(ii) Dressing (must be able to dress self, but may need occasional assistance),

(iii) Bathing (may need assistance in getting in and out of the shower or tub, but must be able to wash self),

(iv) Grooming (may need assistance in washing hair, but must be able to take care of personal appearance),

(v) Getting in and out of bed and chairs, walking, going outdoors, using the toilet and

(vi) Household management activities (may need assistance in doing housework, grocery shopping or laundry, or getting to and from one location to another for activities such as going to the doctor and shopping, but must be mobile. The mobility requirement does not exclude persons in wheelchairs or those requiring mobility devices.)

Each of the Activities of Daily Living noted above includes a requirement that a person must be able to perform at a specified minimal level (e.g., to satisfy the eating ADL, the person must be able to feed him/herself). The determination of whether a person meets this minimal level of performance must include consideration of those services that will be performed by a person's spouse, relatives or other attendants to be provided by the individual. For example, if a person requires assistance with cooking, preparing or serving food plus assistance in feeding him/herself, the individual would meet the minimal performance level and thus satisfy the eating ADL, if a spouse, relative or attendant provides assistance with feeding the person. Should such assistance become unavailable at any time, the Owner is not obligated at any time to provide individualized services beyond those offered to the resident population in general. The Activities of Daily Living analysis is relevant only with regard to determination of a person's eligibility to receive supportive services paid for by CHSP and is not a determination of eligibility for occupancy;

(3) Determine that non-elderly disabled individuals qualify under the definition of person with disabilities under § _____.105;

(4) Perform a regular assessment and updating of the supportive services plan of all participants;

(5) Replace any members of the PAC within 30 days after a member resigns. A PAC shall not do formal assessments if its membership drops below three, or if the qualified medical professional leaves the PAC and has not been replaced by the grantee;

(6) Notify the grantee or eligible owner and the program participants of any proposed modifications to PAC procedures, and provide these parties with a process and reasonable time period in which to review and comment, before adoption of a modification;

(7) Provide assurance of nondiscrimination in selection of CHSP participants, with respect to race, religion, color, sex, national origin, familial status or type of disability;

(8) Provide complete confidentiality of information related to any individual examined, in accordance with the Privacy Act of 1974;

(d) *Procedural rights of participants.* (1) The PAC must provide an informal process that recognizes the rights of individuals receiving assistance to due process of law. This process, at a minimum, must consist of:

(i) Serving the participant with a written notice containing a clear statement of the reasons for termination;

(ii) A review of the decision, in which the participant is given the opportunity to present written or oral objections before a person other than the person (or a subordinate of that person) who made or approved the termination decision; and

(iii) Prompt written notification of the final decision to the participant.

(2) Procedures must ensure that any frail elderly person, person with disabilities, or temporarily disabled person (and program participant upon reassessment) has the option of refusing offered services and requesting other supportive services as part of the case planning process.

(3) In situations where an individual requests additional services, not initially recommended by the PAC, the PAC must make a determination whether the request is legitimately a needs-based service that can be covered under the CHSP subsidy. Individuals can pay for services other than those recommended by the PAC as long as the

additional services do not interfere with the efficient operation of the program.

(e) *Eligibility, admissions and transition-out procedures.* (1) Before selecting frail elderly persons, persons with disabilities, or temporarily disabled participants, each grantee (with PAC assistance) shall develop a supportive services application form for the use of persons applying for supportive services under CHSP. The information in the individual's supportive services application is crucial to the PAC's determination of the need for further physical or psychological evaluation of any individual who wishes to receive the supportive services offered. The application should include: any intake form, the ADL assessment, and appropriate comments from both the applicant's physician and the Service Coordinator.

(2) The grantee or PAC must develop procedures for providing for an individual's transition out of the CHSP to another setting. Transition out is based upon the degree of supportive services needed by an individual to continue to live independently. If a program participant is transitioned out of the program, but wishes to retain supportive services, he or she may do so, as long as he or she remains income eligible, continues to live in an eligible project, and pays the full cost of services provided. A participant can be transitioned out of CHSP if he or she:

(i) Gains physical and mental health and is able to function without supportive services, even if only for a short time (in which case readmission, based upon reassessment to determine the degree of frailty or the disability, is acceptable);

(ii) Requires a higher level of care than that which can be provided under CHSP; or

(iii) Refuses or fails to pay service fees.

§ _____.230 Eligibility.

(a) *Participants.* (1) Any eligible resident as defined in § _____.105 of an eligible housing project (or any person who, with deinstitutionalization and appropriate supportive services under this section, could become a resident of eligible federally assisted housing) shall be eligible for services under the CHSP.

(2) In providing services under a Congregate Housing Services Program, the program shall give priority to very low income individuals, and shall consider their service needs in selecting program participants.

(b) *Other residents.* Elderly persons, persons with disabilities and temporarily disabled individuals who reside in an eligible housing project other than eligible project residents under paragraph (a)(1) of this section may receive services from a congregate services program if the housing managers, congregate service coordinators, and the professional assessment committee jointly determine that the participation of these individuals will not negatively affect the provision of services to eligible project residents. Residents eligible for services under this paragraph shall pay fees as provided under § _____.240.

(c) *Nonresidents.* Elderly persons, persons with disabilities, and temporarily disabled persons who are not residents of the project may participate in the Congregate Housing Services Program at the option of program management in consultation with project residents, if the participation of these persons will not adversely affect the cost effectiveness or operation of the program, or add significantly to the need for assistance. Nonresidents who receive services under the congregate services program shall pay a fee as established under § _____.240(f).

§ _____.235 Cost distribution.

(a) *General.* Each state, Indian tribe, unit of general government, or local nonprofit housing sponsor that receives amounts under a contract under § _____.205(a) shall supplement any such amount with amounts sufficient to provide at least 50 percent of the cost of providing the congregate services program. In instances where the state is the applicant, the local government's contribution shall not exceed 10 percent of the amount required of the state. The Secretary concerned shall authorize owners to use excess residual receipts (if authorized) to the extent available to supplement funds received from CHSP.

(1) The CHSP shall provide no more than 40 percent of the cost of the program, under a grant agreement in accordance with § _____.205(a).

(2) Fees paid by the participants under § _____.240 shall provide at least 10% of the cost of the program up to a maximum of 20% of each participant's adjusted income. The Secretary concerned shall provide for the waiver of fees for individuals who are without income.

(b) *Maintenance of existing supportive services.* In the application, the applicant (and or Project, if different) shall certify that it shall maintain the existing supportive services that frail elderly and nonelderly disabled residents are already receiving, including those which a PAC may determine are necessary to maintain independence for potential CHSP participants. These services will be maintained either for the time the individual remains in the CHSP, or for the duration of the CHSP grant. These services do not qualify as matching funds.

(c) *Prohibition on substitution of funds.* The grantee shall ensure that the activities provided to the project under a grant in support of activities eligible for assistance under this part will be in addition to, and not in substitution for, annual funds the grantee was providing to the project in support of activities eligible for assistance under this part before the date of the submission of the application for CHSP assistance. The grantee shall certify to the Secretary concerned that CHSP funds will not be substituted for funds that the grantee was providing before the date of application for assistance under CHSP.

(d) *Eligible supplemental contributions (Matching Funds).* (1) All sources of matching funds must be directly related to the types of supportive services prescribed by the PAC or CHSP administration.

(2) Matching funds may include:

(i) Cash (which may include funds from federal, state and local governments, third party contributions, available payments authorized under Medicaid for specific individuals in the Congregate Housing Services Program, Community Development Block Grants or Community Services Block Grants, Older Americans Act programs or excess residual funds with the approval of the Secretary concerned).

(ii) The imputed dollar value of other agency or third party-provided direct services or staff who will work with or provide services to program participants; these services must be justified in the application to assure that they are the new or expanded services of the CHSP necessary to keep the program participants independent without creating dependence. If services are provided by the state, Indian tribe, unit of general local government, or local nonprofit housing sponsor, IHA, PHA, for profit or not for profit owner, any salary paid to staff from governmental sources to carry out the program of the grantee and any salary paid to residents employed by the program (other than from amounts under a contract under § _____.205) is allowable match.

(iii) In-kind items (these are limited to 10 percent of the 50 percent matching amount), such as the current market value of donated common or office space, utility costs, furniture, material, supplies, equipment and food used in direct provision of services. The

applicant must provide an explanation for the estimated donated value of any item listed.

(iv) The value of services performed by volunteers to the program, at the rate of $5.00 an hour.

(e) *Limitation.* (1) The following are not eligible for use as cash match funds:

(i) Funds from a PHA's operating funds;

(ii) PHA's section 8 administrative fee;

(iii) CHSP funds;

(iv) Section 8 funds other than excess residual receipts;

(v) CIAP funds unless used for service coordination or case management;

(vi) Comprehensive grant funds unless used for service coordination or case management.

(2) For purposes of complying with the requirements of paragraph (a) of this section, if the state is the applicant, the Secretary concerned may not consider any amounts contributed or provided by any local government to any state receiving assistance under this section that exceeds 10 percent of the amount required of the state.

(f) *Annual review of match.* The Secretary concerned will review the infusion of matching funds annually, as part of the program/budget review. If there are insufficient matching funds available to meet program requirements at any point after grant start-up, or at any time during the term of the grant (i.e., if matching funds from sources other than program participant fees drop below 50 percent of total supportive services cost), the Secretary concerned may decrease the federal grant share of supportive services funds accordingly.

§ _____.240 Program participant fees.

(a) *Eligible program participants.* The grantee of each funded eligible housing project shall establish fees for meals and other services provided under a congregate services program, which shall be sufficient to provide at least 10 percent of the costs of the program. Each program participant shall pay CHSP fees as stated below up to a maximum of 20 percent of the program participant's adjusted income. In cases where a program participant has no adjusted income, the fee requirement may be waived by the grantee. If a participant's fees are waived, the grantee shall share 50/50 the cost of any shortfall in fee collections with the Secretary concerned.

(b) *Fees shall include.* (1) Cash contributions of the program participant;

(2) Food Stamps; and

(3) Contributions or donations to other eligible programs acceptable as match under § _____.235(d).

(c) *Older Americans Act Program.* No fee may be charged for any meals or supportive services under the CHSP if that service is funded under an Older Americans Act Program.

(d) *Meal Fees.* (1) For full meal services, the fees for residents receiving more than one meal per day, seven days per week, shall be reasonable and shall equal between 10 and 20 percent of the adjusted income of the project resident, or the cost of providing the services, whichever is less.

(2) The fees for residents receiving meal services less frequently than as described in subparagraph (d)(1) shall be in an amount equal to 10 percent of the adjusted income of the project resident, or the cost of providing the services, whichever is less.

(e) *Other service fees.* The grantee of an eligible project may also establish fees for other supportive services so that the total fees collected from all participants for meals and other services is no less than 10 percent of the total cost of the CHSP. However, no program participants may pay more than 20 percent of their adjusted incomes for any combination of services.

(f) *Other residents and nonresidents.* Fees shall be established for residents of eligible housing projects (other than eligible project residents) and for nonresidents who receive meals and other services from a congregate services program under § _____.230 (b) or (c). These fees shall be in an amount equal to the cost of providing the services.

§ _____.245 Other Federal requirements.

(a) *OMB circulars and administrative requirements.* The policies, guidelines and requirements of OMB Circular No. A–87 and 24 CFR part 85 apply to the acceptance and use of assistance under this program by public body grantees. The policies, guidelines and requirements of OMB Circular No. A–122 apply to the acceptance and use of assistance under this program by nonprofit grantees. Grantees are also subject to the audit requirements described in 24 CFR part 44 (OMB Circular A–128).

(b) *Drug-free workplace.* Grantees must certify that they will provide a drug-free workplace, in accordance with the Drug-Free Workplace Act of 1988 and HUD's implementing regulations at 24 CFR part 24, subpart F.

(c) *Nondiscrimination and equal opportunity.* Recipients must comply with the following requirement for nondiscrimination on the basis of race, color, religion, sex, national origin, age, familial status, and disability:

(1) Fair housing requirements. The requirements of the Fair Housing Act (42 U.S.C. 3601–19) and HUD's fair housing regulations (24 CFR part 100); Executive Order 11063 (Equal Opportunity in Housing) and 24 CFR part 107; the fair housing poster regulations (24 CFR part 110) and advertising guidelines (24 CFR part 109).

(2) Nondiscrimination in housing. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and HUD regulations at 24 CFR part 1.

(3) Discrimination on the basis of age or handicap. The prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101–07) and HUD regulations at 24 CFR part 146, and the prohibitions against discrimination against disabled individuals under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD regulations at 24 CFR part 8.

(4) Employment opportunities. The requirements of section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) (Employment Opportunities for Lower Income Persons in Connection With Assisted Projects) and the implementing regulations at 24 CFR part 135.

(5) Minority and women's business enterprises. The requirements of Executive Orders 11246, 11625, 12432, and 12138. Consistent with HUD's responsibilities under these Orders, recipients must make efforts to encourage the use of minority and women's business enterprises in connection with funded activities.

(6) Affirmative outreach. The Affirmative Fair Housing Marketing Program requirements of 24 CFR part 200, subpart M, and the implementing regulations at 24 CFR part 108.

(7) Disability requirements. Fair Housing Act and section 504.

(8) Racial and ethnic collection requirements. Recipients must maintain current data on the race, ethnicity and gender of program applicants and beneficiaries in accordance with section 562 of the Housing and Community Development Act of 1987 and section 808(e)(6) of the Fair Housing Act.

(d) *Anti-lobbying certification.* Section 319 of Public Law 101–121 prohibits recipients of Federal contracts, grants and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government. Indian tribes, tribal organizations and Indian Housing Authorities created under Tribal Law are excluded from coverage under Section 319. A common rule governing the restrictions on lobbying was published by the Department of Agriculture at 7 CFR part 3018 and by

the Department of Housing and Urban Development at 24 CFR part 87. The rule requires applicants, grantees, and subgrantees of assistance exceeding $100,000 in budget authority to certify that no Federal funds have been or will be spent on lobbying activities in connection with the assistance. The rule also requires disclosures from applicants, among others, if nonappropriated funds have been spent or committed for lobbying activities if those activities would be prohibited if paid with appropriated funds. The law provides substantial monetary penalties for failure to file the required certification or disclosure.

(e) *Debarred or suspended contractors.* The provisions of 24 CFR part 24 and 7 CFR part 3017 apply to the employment, engagement of services, awarding of contracts, or funding of any contractors or subcontractors during any period of debarment, suspension, or placement in ineligibility status.

(f) *Conflict of interest.* In addition to the conflict of interest requirements in OMB Circular A–87 and 24 CFR part 85, no person who is an employee, agent, consultant, officer, or elected or appointed official of the applicant, and who exercises or has exercised any function or responsibilities with respect to activities assisted with congregate housing services program grant funds, or who is in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or any proceeds thereunder, either for himself or herself or for those with whom he or she has family or business ties during his or her tenure, or for one year thereafter.

(g) *Disclosures required by Reform Act.* Section 102(c) of the HUD Reform Act of 1989, Public Law 101–235 (December 15,1980) requires disclosure concerning other government assistance to be made available with respect to the program and parties with a pecuniary interest in the Congregate Housing Services Program and submission of a report on expected sources and uses of funds to be made available for CHSP. Each applicant shall include information required by 24 CFR part 12 on form HUD–2880 "Applicant/Recipient Disclosure/Update Report."

§ _____.300 Application.

The application must contain all of the information required by the Notice of Funding Availability (NOFA).

§ _____.305 Application evaluation and selection.

Each application shall be reviewed and screened for technical deficiencies in accordance with the guidelines and procedures published in the NOFA. Applications will be selected in accordance with the procedures set forth in the NOFA.

§ _____.325 Monitoring of project sites by Governmental units.

States, Indian tribes and units of general local government with a grant for multiple projects shall be responsible for monitoring the performance of all project sites for compliance with CHSP regulations and procedures in such manner as prescribed by HUD/FmHA.

§ _____.330 Evaluation of provision of congregate services programs.

(a) States, Indian tribes and units of general local government receiving assistance annually shall review and evaluate the performance of the congregate services programs at eligible housing projects receiving assistance in their respective jurisdictions.

(b) Grantees annually shall submit to the Secretary concerned, a report evaluating the impact and effectiveness of congregate services programs in the jurisdiction of the grantee, in such form as the Secretary concerned shall require.

(c) The Secretary of Housing and Urban Development and the Secretary of Agriculture shall review and evaluate the performance of the congregate services programs of eligible housing projects receiving assistance under this section.

(d) Each state, Indian tribe, unit of general local government and nonprofit housing sponsor receiving assistance shall submit a certification with its application, agreeing to cooperate with and to provide requested data to the entity responsible for the program evaluation, if requested to do so by the Secretary concerned.

§ _____.335 Renewal of grants.

(a) Grantees funded initially under this part shall be eligible to receive continued, non-competitive renewals after the initial five-year term of the grant, if funds are appropriated and available.

(b) Grantees will receive priority funding within time periods prescribed by the Secretary concerned, subject to the availability of funding, satisfactory performance, and compliance with these regulations.

(c) Renewal of these grants shall be within the time periods and in the form as prescribed by the Secretary concerned.

§ _____.400 Participatory agreement.

Each program participant must sign a participatory agreement governing the utilization of supportive services and the payment of supportive services fees. The agreement must be renegotiated with the participant annually by the grantee.

§ _____.405 Reserve for supplemental adjustment.

The Secretary concerned may reserve not more than 5 percent of the amounts made available in each fiscal year to supplement grants awarded to owners under this section when, in the determination of the Secretary concerned, supplemental adjustments are required to maintain adequate levels of services to eligible residents. Requests to utilize supplemental funds by the grantee shall be transmitted to the Secretary concerned in such form as may be required. Funds in the reserve which are not used during the first six months of each annual review cycle may be used for future CHSP grants.

§ _____.415 Recapture.

(a) The Secretary concerned may impose sanctions, recapture grant funds or terminate grants for supportive services for:

(1) Grantee's non-compliance with the grant agreement, regulations of HUD or FmHA requirements; or

(2) Failure of the grantee to provide supportive services within 12 months of execution of the Congregate Housing Services Program grant.

(b) Sanctions include but are not limited to the following:

(1) Temporary withholding of reimbursements, extensions or renewals under the grant agreement, pending correction of deficiencies by the grantee;

(2) Contract conditioning;

(3) Termination of the grant;

(4) Substitution of grantee;

(5) And any other action deemed necessary by the Secretary concerned.

§ _____.420 Reports.

Each grantee shall submit annual and other program and fiscal reports to the Secretary concerned in such form and at such times, as the Department concerned requires.

§ _____.425 Budget submissions.

Each grantee shall submit a supportive services budget for the first year of supportive services delivery, and annually thereafter, in such form as the Department concerned requires. The budget for the first year normally will utilize less than 20 percent of the funds potentially available, due to start-up. Any utilization of less than 20 percent

of supportive services funds in any year can be carried forward for use in later years.

§ _____.430 Program costs.

(a) *Allowable costs.* (1) Allowable costs for direct provision of supportive services includes the provision of supportive services and others approved by the Department concerned for:

(i) Direct hiring of staff, including a Service Coordinator;

(ii) Supportive service contracts with third parties;

(iii) Equipment and supplies (including food) necessary to provide services;

(iv) Operational costs of a transportation service (e.g., mileage, insurance, gasoline and maintenance, driver wages, taxi or bus vouchers);

(v) Purchase or leasing of vehicles;

(vi) Direct and indirect administrative expenses for administrative costs such as annual fiscal review and audit, telephones, postage, travel, professional education, furniture and equipment, and costs associated with self evaluation or assessment (not to exceed one percent of the total budget for the activities approved) and

(vii) States, Indian tribes and units of general local government with more than one project included in the grant may receive up to 1% of the total cost of the grant for monitoring the projects.

(2) Allowable costs shall be reasonable, necessary and recognized as expenditures in compliance with the Office of Management and Budget's (OMB) Cost Policies, i.e., OMB Circular A-87, 24 CFR 85.36, and OMB Circular A-128. (Copies of OMB Circulars may be obtained from E.O.P. Publications, room 2200, New Executive Office Building, Washington, DC 20503, telephone (202) 395–7332. (This is not a toll-free number.) There is a limit of two free copies.

(b) *Nonallowable costs.* (1) The Congregate Housing Services Program supportive service funds may not be used to cover expenses related to any grantee program, service, or activity existing at the time of application to the Congregate Housing Services Program.

(2) Examples of non-allowable costs under the program are:

(i) Capital funding (such as purchase of buildings, related facilities or land and certain major kitchen items such as stoves, refrigerators, freezers, dishwashers, trash compactors or sinks);

(ii) Administrative costs, such as a non-proportional share of costs charged to the Congregate Housing Services Program for rent/lease, utilities, staff time;

(iii) Payments to PAC members (other than the Service Coordinator) or third party organizations providing that function;

(iv) Cost of supportive services other than those approved by the Secretary concerned;

(v) Modernization, renovation or new construction of a building or facility, including kitchens;

(vi) Any costs related to the development of the application and plan of operations before the effective date of the Congregate Housing Services Program grant award;

(vii) Emergency medical services and ongoing and regular care from doctors and nurses, including but not limited to administering medication, purchase of medical supplies, equipment and medications, overnight nursing services, and other institutional forms of service, care or support;

(viii) Occupational therapy and vocational rehabilitation services; or

(ix) The value of PAC members' time for any time period estimate related to the initial assessment of individuals before they are accepted into the CHSP; or

(x) Other items defined as unallowable costs in the supportive services grant instrument and OMB Circular A–87 or 122.

(c) *Administrative cost limitation.* A recipient of assistance under this section may not use more than 10 percent of the sum of the assistance and the contribution amounts required under § _____.235(a) for administrative costs, and shall ensure that any entity to which the recipient distributes amounts may not expend more than a reasonable amount from distributed amounts for administrative costs. Administrative costs may not include any capital expenses.

§ _____.435 Use of residents in providing services.

Each housing project that receives assistance under this section shall, to the maximum extent practicable, utilize the elderly and persons with disabilities who are residents of the housing project, but who are not eligible project residents, to participate in providing congregate services under this part. These individuals shall be paid wages that shall not be less than the higher of:

(a) The minimum wage that would be applicable to the employee under the Fair Labor Standards Act of 1938, if section 6(a)(1) of that Act applied to the resident, and if the resident were not exempt under section 13 of that Act;

(b) The State or local minimum wage for the most nearly comparable covered employment; or

(c) The prevailing rates of pay for persons employed in similar public occupations by the same employer.

§ _____.440 Services provided not income.

Except for wages paid under § _____.435, services provided to a resident of an eligible housing project under a congregate services program shall not be considered as income for the purpose of determining eligibility for or the amount of assistance or aid furnished under, any federal, federally assisted, or state program based on need.

§ _____.445 Consultation with the Department of Health and Human Services.

The Secretary concerned shall consult with the Secretary of Health and Human Services regarding the availability of assistance from other Federal programs to support services under this part and shall make information available to applicants for assistance under this part.

_____.500 Eligibility and priority for 1978 Act recipients.

(a) Notwithstanding any other provision of this section, any public housing agency or nonprofit corporation assisted under section 202 of the Housing Act of 1959 that was receiving assistance under a grant under the Congregate Housing Services Act of 1978 on November 28, 1990 shall receive assistance under the Congregate Housing Services Act of 1978 for the remainder of the term of its grant, and shall receive priority for assistance under this section after the expiration of its grant.

(b) For any congregate services program that was receiving assistance under a grant under the Congregate Housing Services Act of 1978 on November 28, 1990, the grantee, in coordinating with a local government with respect to that grantee's program, shall not be subject to the requirement to provide supplemental contributions under § _____.235(a) (for that program) for the six-year period beginning on the expiration of the program's current assistance contract. Each such program recipient shall maintain, for the six-year period, the same dollar amount of annual contributions in support of the services eligible for assistance under this section as was contributed to the program during the year preceding November 28, 1990. This amount shall be equal to no less than the dollar amount of the annual contribution plus any inflationary increases allowed by HUD and FmHA.

§ _____.505 Submission and approval of applications by grantees.

The applicant shall submit an application as required by the Secretary concerned.

§ _____.510 Submission and approval of applications by grantees funded initially under the 1978 Act, after the six-year transition period.

Grantees funded initially under the 1978 Act shall be eligible to receive continued, non-competitive funding after the six-year transition period. These grantees will be eligible to receive priority funding under this part if they comply with these regulations and with the requirements of any Funding Notice issued in a particular fiscal year.

§ _____.515 Waiver authority.

The Secretary concerned may waive any requirement of these regulations that is not required by law, upon a determination of good cause. Each waiver will be in writing, supported by documentation of the pertinent facts and grounds, and signed by the Secretary concerned. The Secretary concerned will publish notice of granted waivers in the **Federal Register**.

Adoption of the Final Common Rule

The agency specific adoption of the final common rule, which appears at the end of the common preamble appears below:

FARMERS HOME ADMINISTRATION

7 CFR Part 1944

List of Subjects in 7 CFR Part 1944

Farm labor housing, Migrant labor, Nonprofit organizations, Public housing, Rent subsidies, and Rural rental housing.

Chapter XVIII of title 7 of the Code of Federal Regulations is amended by revising subpart F to part 1944 to read as set forth at the end of the common preamble.

Dated: April 5, 1994.

Bob J. Nash,

Under Secretary, Small Community and Rural Development.

PART 1944—HOUSING

Subpart F—Congregate Housing Services Program

Sec.

1944.251 (_____.100) Authority and purpose.
1944.252 (_____.105) Definitions.
1944.253 (_____.200) Announcement of fund availability and selection criteria.
1944.254 (_____.205) Grant agreement.
1944.255 (_____.210) Eligible activities.
1944.256 (_____.215) Service plan.
1944.257 (_____.220) Service coordinator.
1944.258 (_____.225) Professional Assessment Committee (PAC).
1944.259 (_____.230) Eligibility.
1944.260 (_____.235) Cost distribution.
1944.262 (_____.240) Program participant fees.
1944.264 (_____.245) Other Federal requirements.
1944.266 (_____.300) Application.
1944.268 (_____.305) Application evaluation and selection.
1944.270 (_____.325) Monitoring of project sites by Governmental units.
1944.272 (_____.330) Evaluation of provision of Congregate Services Programs.
1944.274 (_____.335) Renewal of grants.
1944.276 (_____.400) Participatory agreement.
1944.278 (_____.405) Reserve for supplemental adjustment.
1944.282 (_____.415) Recapture.
1944.284 (_____.420) Reports.
1944.286 (_____.425) Budget submissions.
1944.288 (_____.430) Program costs.
1944.290 (_____.435) Use of residents in providing services.
1944.292 (_____.440) Services provided not income.
1944.294 (_____.445) Consultation with the Department of Health and Human Services.
1944.296 (_____.500) Eligibility and priority for 1978 Act recipients.
1944.298 (_____.505) Submission and approval of applications by grantees.
1944.300 (_____.510) Submission and approval of applications by grantees funded initially under the 1978 Act, after the six-year transition period.
1944.302 (_____.515) Waiver authority.

Authority: 42 U.S.C. 1480, 8011; 5 U.S.C. 301, 7 CFR 2.23 and 2.70.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 700

List of Subjects in 24 CFR Part 700

Aged, Grant Programs—housing and community development, Individuals with disabilities, Low and moderate income housing, Nutrition, Public housing, Rent subsidies, Reporting and recordkeeping requirements, and Supportive Services.

Title 24 of the Code of Federal Regulations is amended by revising part 700 to read as set forth at the end of the common preamble.

Dated: April 14, 1994.

Henry G. Cisneros,

Secretary.

Part 700 is revised to read as set forth at the end of the common preamble.

PART 700—CONGREGATE HOUSING SERVICES PROGRAM

Sec.

700.100 Authority and policy.
700.105 Definitions.
700.200 Announcement of fund availability and selection criteria.
700.205 Grant agreement.
700.210 Eligible activities.
700.215 Service plan.
700.220 Service coordinator.
700.225 Professional Assessment Committee (PAC).
700.230 Eligibility.
700.235 Cost distribution.
700.240 Program participant fees.
700.245 Other Federal requirements.
700.300 Application.
700.305 Application evaluation and selection.
700.325 Monitoring of Project Sites by Governmental Units.
700.330 Evaluation of provision of Congregate Services Programs.
700.335 Renewal of grants.
700.400 Participatory agreement.
700.405 Reserve for supplemental adjustment.
700.415 Recapture.
700.420 Reports.
700.425 Budget submissions.
700.430 Program costs.
700.435 Use of residents in providing services.
700.440 Services provided not income.
700.445 Consultation with the Department of Health and Human Services.
700.500 Eligibility and priority for 1978 Act recipients.
700.505 Submission and approval of applications by grantees.
700.510 Submission and approval of applications by grantees funded initially under the 1978 Act, after the six-year transition period.
700.515 Waiver authority.

Authority: Sec. 802, National Affordable Housing Act (42 U.S.C. 8011) and Sec. 604, Housing and Community Development Act of 1992.

[FR Doc. 94–9878 Filed 4–28–94; 8:45 am]

BILLING CODE 4210–32–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N-94-3487; FR-3630-N-01]

Funding Availability (NOFA) for Fiscal Year 1994 Congregate Housing Services Program

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD; Office of the Administrator, Farmers Home Administration (FmHA).

ACTION: Notice of Funding Availability for Fiscal Year 1994.

SUMMARY: This Notice of Funding Availability (NOFA) announces the funding of Regional competitions for HUD dollars and a national competition for dollars allotted to the Farmers Home Administration (FmHA), which are available for the supportive services component of the Congregate Housing Services Program (CHSP). A Final Common Rule for the CHSP is published elsewhere in today's **Federal Register**, as 7 CFR part 1944 and 24 CFR part 700. Funding announced in today's document covers new grants for congregate services for frail elderly persons, persons with disabilities, and temporarily disabled individuals living in eligible housing for the elderly. States, Indian tribes, units of general local government, Public Housing Agencies (PHAs) and Indian Housing Authorities (IHAs) and local nonprofit housing sponsors, are eligible applicants. Applications from PHA/IHAs and local non-profit housing sponsors are limited to the housing they own. States, Indian tribes and units of general local government may submit one or more applications on behalf of one or more owners of eligible housing who may be either local non-profit housing sponsors or for-profit housing owners.

This document contains information concerning: (a) The purpose of the NOFA; (b) where to get the application package; (c) deadline for filing applications; (d) eligibility, available amounts, and selection criteria; and (e) information on application processing, and the selection process.

DATES: The deadline date for submission of an application to HUD for funding under the CHSP is on or before 3 p.m., local time, July 13, 1994, at the appropriate HUD field office.

The deadline date for submission of an application to FmHA for funding under the CHSP is on or before 3 p.m., Eastern Daylight Time, July 13, 1994, at FmHA Headquarters.

RECEIPT OF APPLICATIONS: HUD will receive applications at the Field Office for the jurisdiction in which the projects are located.

FmHA will receive applications at the FmHA Headquarters Building in Washington, DC. Copies will also be received at the FmHA State office which has jurisdiction over the project.

FOR FURTHER INFORMATION CONTACT: For general information concerning grants under the CHSP, or limited technical assistance by telephone regarding the preparation of an application for the CHSP, potential applicants may contact HUD and FmHA as follows:

For questions regarding HUD projects, applicants applying for Public and/or Indian Housing Projects should contact the Housing Management Specialist in the Field Office which has jurisdiction for the projects.

Applicants applying for Section 8, 202, 221(d) or 236 Projects should call the Loan Servicer in the field office which has jurisdiction for the projects.

HUD and FmHA Field office addresses and telephone numbers are listed in Attachment 1 to this NOFA.

Applicants for FmHA projects should contact John Pentecost or Sue Harris at FmHA Headquarters at 202-720-1606. (This is NOT a toll-free number.) Hearing impaired individuals may reach FmHA by calling the central TDD number of (202)-245-0846, HUD by calling (202)-708-9300, or either agency by calling the TDD number of the Federal Relay Service 1-800-877-TDDY and requesting a transfer.

Applicants for HUD projects should not contact HUD Headquarters: such calls will normally be referred to the appropriate HUD Field Office.

Applicants for FmHA projects should not contact FmHA State or District Offices; such calls will normally be referred to FmHA Headquarters.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act Statement

The information collection requirements contained in this NOFA have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

Public reporting burden for the collection of information requirements contained in this NOFA is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under *Other Matters*. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410-0500; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for HUD, Washington, DC 20503.

I. Purpose and Substantive Description

A. Authority and Background

(1) Authority

(a) Section 802 of the Cranston-Gonzales National Affordable Housing Act (NAHA) (42 USC 8011) created a new CHSP.

(b) Section 604 and 672 of the Housing and Community Development Act of 1992 amended the CHSP.

(c) A final common rule for the CHSP is published elsewhere in today's **Federal Register**.

(2) Background

The CHSP was originally authorized and funded as a demonstration program under the Congregate Housing Services Act of 1978 (1978 Act) (42 USC 8001). It provided congregate housing and coordinated supportive services for elderly handicapped or non-elderly handicapped individuals to allow them to maintain their independence and avoid costly and unnecessary institutionalization. Congress appropriated funds for Fiscal Years 1979 through 1982, to remain available until expended. Since then, Congress has provided funds on an annual basis to continue funding grantees that previously received assistance. The demonstration became a permanent program in 1987.

Based upon the experience of the grantees funded under the demonstration, Congress created a new CHSP as one of the components of NAHA, which was enacted on November 28, 1990 and amended in 1992. HUD, in coordination with the Farmers Home Administration (FmHA) of the Department of Agriculture, administers the CHSP under a Common

Rule in accordance with the statute. This Notice announces the availability of both HUD and FmHA funds for the CHSP and invites applications from both HUD and FmHA applicants.

The CHSP is a program with two components: A retrofit and renovation component which has not yet been implemented and a supportive services component. RETROFITTING AND RENOVATION OF FACILITIES ARE NOT ELIGIBLE FOR FUNDING UNDER THIS NOFA.

Funds are available under the supportive services component for five-year, renewable, congregate services grants for frail elderly persons, persons with disabilities, and temporarily disabled individuals living in eligible housing for the elderly. The program serves as a means of preventing unnecessary institutionalization and encouraging deinstitutionalization of those potentially eligible residents who do not need an institutionalized setting. It also improves the capacity of management to assess the supportive service needs of eligible residents, and to either ensure the coordination and delivery of supportive services from third party providers or provide the services directly in order to meet the minimum needs of eligible residents.

HUD and FmHA are interested in using the services funds in the most cost-efficient manner and with appropriate targeting. Thus, a number of changes have been made from last year's program to increase efficiency, target the program more effectively and attempt to make the limited funds available to more applicants. The major changes are to:

(a) stress the service coordination/case management aspects of the program by making the service coordinator a clearly mandated function, whether funded wholly or in part by CHSP, or funded by a third party; (The more coordinators that are funded, the larger the number of projects whose residents will ultimately benefit from supportive services in the community.)

(b) target the available funds to meals and service coordination/case management and limit funds for additional supportive services, by capping the amount of funds that an applicant may receive for other supportive services thus allowing more potential grants; (Thus, an applicant may receive a maximum of $1,200/person/year in HUD funds for supportive services other than case management/service coordination and the mandatory meals program.)

(c) focus on projects nearly fully occupied this year. (Occupied projects more readily are able to plan programs for existing needs and get them operational in the most effective manner and the shortest time. Thus, CHSP is offered this year only to projects which are at least 85 percent occupied as of the date of the CHSP application to HUD.)

Additionally, HUD and FmHA are clarifying the meals requirement. While the current requirement that each CHSP provide at least one hot meal per day in a group setting for some or all of the participants who are assessed as needing such assistance is not changed, additional meals can be available for frail elderly or non-elderly disabled participants who are assessed with a need for them. Such additional meals can be either hot or cold and may be home delivered.

The CHSP will ensure the long-term provision of supportive services in a manner which insures the program participant's freedom of choice and which respects the dignity of the persons served. It will also provide readily available and efficient services with emphasis on providing only those services minimally necessary to maintain independent living, but maintaining a continuum of support for individual program participants over time.

B. Allocation Amounts

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993 (P.L. 102–389) appropriated $21,000,000 in FY 1993. Approximately $14,500,000 of these funds remained after the FY 1993 competition and the refunding of the 53 existing grantees for an additional 24 months. Additionally, the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1994 (P.L. 103–124) made available $25,000,000 for the CHSP, all of which is included in the NOFA. Together with the carryover funds, $39,500,000 is available for new grants. In consultation with FmHA, the dollars are allocated as follows:

—Approximately 20 percent ($7,900,000) of the total funds are available to applicants with FmHA projects.
—The remainder, approximately 80 percent ($31,600,000) is for applicants with HUD projects.

1. HUD Projects

Applicants for HUD projects may apply for grants from the available $31,600,000. The formula for the HUD allocation is stated below:

a. Compute the total number of section 8 New Construction/substantial rehabilitation elderly, section 202, section 221(d) elderly, section 236 elderly and PIH/IHA elderly units in each Region for the nation as a whole.

b. Calculate the proportion of the national total represented by each Region's share.

c. Divide the available dollars proportionally in accordance with the Regional share of the elderly housing inventory, as follows:

Region	No. of units	Dollars	Percentage
I	102,257	$2,844,000	9
II	127,124	3,476,000	11
III	135,760	3,792,000	12
IV	182,684	4,740,000	15
V	273,075	7,268,000	23
VI	82,319	2,212,000	7
VII	95,605	2,528,000	8
VIII	36,616	948,000	3
IX	96,958	2,528,000	8
X	42,837	1,264,000	4
Total	1,175,235	$31,600,000	100[1]

[1] Percentages are rounded to equal 100%.

The funds for the CHSP will be awarded by HUD through 10 Regional competitions, in which applicants are selected to receive supportive services grants by HUD. The funding process is further described in Section II. of this NOFA.

2. FmHA Projects

Applicants for FmHA projects may apply for grants from the available $7,900,000.

The funds for the CHSP will be awarded by FmHA through a national competition, in which applicants are selected to receive supportive services grants by FmHA Headquarters. HUD will fund the grants, and administer them with FmHA assistance. The funding process is further described in Section II. of this NOFA.

C. Eligibility

1. General

Applicants must submit applications for HUD projects to HUD field offices and applications for FmHA projects to FmHA Headquarters and State offices. Applicants may apply for either HUD and/or FmHA dollars. Applications may only be submitted to the HUD field office/FmHA State office which has jurisdiction over the project.

Projects submitted by eligible applicants under this NOFA are limited to eligible housing for the elderly, as defined below.

2. Eligible Applicants

Eligible applicants are States, Indian Tribes, units of general local government, PHA/IHAs or local non-profit housing sponsors as defined in 7 CFR 1944.252 and 24 CFR 700.105. Local non-profit housing sponsors and PHA/IHAs may only apply on behalf of projects they own. For-profit owners of eligible housing for the elderly may not apply directly for CHSP grants; the request must be submitted under an application by a State, Indian tribe or unit of general local government (but NOT under an application submitted by a local non-profit sponsor or a PHA/IHA).

3. Eligible Housing Projects

Eligible projects under this NOFA must be eligible housing for the elderly as defined in 7 CFR 1944.252 and 24 CFR 700.105, and must be 85 percent occupied as of the date of the application deadline for funding under this NOFA. For-profit owners of eligible housing for the elderly may not apply directly for CHSP grants; the request may be submitted under an application by a State, Indian tribe or unit of general local government (but NOT under an application submitted by a local non-profit sponsor or a PHA/IHA).

4. Services Required by the CHSP

Each application must provide documentation that it will provide or is already providing the following required services.

a. A meals program of at least one hot meal a day, seven days a week in a group setting for some or all of the participants; and,

b. A service coordinator to provide case management and other activities as required by section 700.220 and 225 or 1944.257 and 258 of the common rule.

5. Funding Limits

There is a limit on the amount of dollars HUD/FmHA will approve for supportive services *other than case management/ service coordination and meals.* This limit is $1,200 in HUD funds per person per year in FY 1994. (Costs for meals and case management/ service coordination are not capped, but follow normal market considerations for that jurisdiction.) The proposed amount for case management/service coordination together with the capped amount for other services and a limited amount make up the 40 percent that HUD will pay as its share of the grant.

THE MAXIMUM AMOUNT OF FUNDS WHICH WILL BE GRANTED TO ANY ONE APPLICANT UNDER THIS NOFA is $2,000,000, subject to Section II.G.(6).

D. Selection Criteria/Ranking Factors

1. General

To provide each applicant a fair and equitable opportunity to receive FY 1994 funds under the CHSP, HUD and FmHA will use the selection criteria stated below to rate all eligible applications which have passed eligibility, threshold and technical review.

2. Selection Criteria

The selection criteria, with a maximum total rating value of 75 points, are as follows:

Selection Criteria

a. Experience or capability of the applicant:

The applicant currently administers an effective, successful service program for the frail elderly or for persons with disabilities, or evidences relevant experience or capability to develop and implement such service programs. The applicant is:

Experienced _____ (10)
Has capability only _____ (5)
Unqualified _____ (0)

b. The degree of adequacy of local service providers, appropriateness of the targeting of the services and the relationship of the proposal to the needs and characteristics of the eligible residents of the projects where the services are to be provided:

Proposed services to be provided by both the applicant and local social service agencies:

(1) Appropriately address the daily living needs of the residents presented in the application;

(2) Adequately appear to both provide a core of necessary services and fill the gap between the existing services and those that are not available/affordable; and,

(3) Will serve all residents identified as either disabled or frail (deficient in at least 3 activities of daily living).

Meets all three _____ (15)
Meets 2 of 3 _____ (10)
Meets one _____ (5)
Meets none _____ (0)

c. The schedule for establishment of services following approval of the application:

The applicant's timetable for implementation of services is reasonable and credible based upon HUD/FmHA's experience with the applicant.

Implementation in 6 months or less _____ (5)
From 7 to 12 months _____ (3)
Over 12 months _____ (0)
Plan is not credible as presented _____ (0)

d. The professional qualification of the members of the PAC:

The proposed PAC consists of no less than three individuals, and includes both social service professionals and at least one qualified medical or other health professional. PAC members are competent to appraise the functional abilities of frail elderly individuals and persons with disabilities in regard to performing activities of daily living.

Acceptable _____ (5)
Not acceptable _____ (0)

e. The reasonableness and application of fee schedules established for congregate services:

The applicant proposes reasonable fees which meet prescribed requirements. The applicant has:

(1) Accurately calculated meal fees according to Exhibit 20, or did not utilize meal fees as the meals are funded totally from the Older Americans Act;

(2) Presented flat fees for services other than meals that do not exceed the cost of each service, or had no other service fee(s); and,

(3) Proposed total fees that do not exceed 20% of a participant's adjusted income.

Yes, meets all three _____ (10)
Yes, meets one or two _____ (5)
No, fee schedule meets none _____ (0)

f. The adequacy and accuracy of proposed budgets:

The budget conforms to the following conditions:

(1) Service costs are consistent with local market conditions;

(2) Costs of all services correspond directly to the proposed number of participants;

(3) All costs proposed are eligible;

(4) The limits on administrative costs (10% of program), in-kind contributions (10% of match), local government proportion of match when a State is the applicant (10%) and the $1,200 per/person/year limit are not exceeded; and,

(5) Total participant fees as shown in the first year budget are equal to or greater than 10% of total program cost.

Conforms to all five _____ (15)
Conforms to at least two _____ (5)
Conforms to one or none _____ (0)

g. The extent to which the applicant proposes funds from other services in excess of that required:

The applicant proposes matching funds for the first year and for the next four years in an amount that exceeds the minimum required. The applicant's match is:

(1) 55% or more of total program cost for the first year and/or one or more of the next four years _____ (3)

(2) Under 55% of total program cost for the first and other years. _____ (0)

h. The methods of providing for deinstitutionalized older individuals and persons with disabilities:

The application has a proposed plan to identify and transfer potential participants from institutions to the project and into the CHSP.

There is a plan and it is acceptable.
Yes _____ (2); No _____ (0)

i. Existing/new services;

The applicant or other third parties currently do not provide supportive services to frail or disabled residents and the proposed CHSP services will constitute an entirely new program. _____ (5)

The applicant or other third party provides some supportive services to eligible residents; the proposed CHSP services will expand or add to existing services. _____ (0)

j. Housing/Services Assistance for Minorities and Minority Business Enterprise/Women Business Enterprise (MBE/WBE).

1. Housing/services experience:

Applicant has significant previous experience in serving minorities (i.e., previous housing/services to minorities was equal to or greater than the percentage of minorities in the jurisdiction where the previous housing/service experience occurred AND has direct experience in serving the client group proposed to be served in the application. _____ (3)

Applicant has previous experience in serving minorities, BUT previous housing/services to minorities was less than the percentage of minorities in the jurisdiction where the previous service experience occurred. _____ (1)

Applicant does not have experience in serving minorities. _____ (0)

2. Minority business enterprise/Women business enterprise experience (MBE/WBE).

Applicant has substantial prior MBE AND WBE experience (awarded services or other contracts over $10,000). _____ (2)

Applicant has substantial prior MBE OR WBE experience (awarded services or other contracts over $10,000). _____ (1)

Applicant does not have significant MBE/WBE experience. _____ (0)

II. Application Process

A. Obtaining Application Packages

CHSP applications can be obtained ONLY from the Multifamily Housing Clearinghouse at 1-800-955-2232. The Clearinghouse must be called regardless of whether the potential applicant is considering HUD projects or FmHA projects. Applications will not be available to applicants directly from HUD Headquarters or Field offices or from FmHA Headquarters or State offices.

The application packages will be available from April 29, 1994 through July 13, 1994.

B. Application Requirements

All applications must contain the following information, in such form and in such detail as HUD/FmHA require in the application package:

Part A: Applicant Information

1. SF-424, "Request for Federal Assistance."

General information:

Exhibit 1: Applicant Information
Exhibit 2: Evidence of Eligibility
Exhibit 3: List of Applications Submitted to Other HUD Field/FmHA State Offices
Exhibit 4: Applicant Experience Statement

Disclosures and certifications:

Exhibit 5: HUD-2880, "Applicant/Recipient Disclosure/Update Report,"
Exhibit 6: Applicant's Anti-lobbying Certifications (certification for Grants, Loans, Contracts and Cooperative Agreements and SF-LLL, "Disclosure Form to Report Lobbying.")
Exhibit 7: Applicant Certifications (SF-424B "Assurances, Non-construction Programs", Drug-Free Workplace Certification and Civil Rights Certifications)
Exhibit 8: CHSP Blanket certification

Part B: Project Information

General information:

Exhibit 1A: Applicant Identifier
Exhibit 9: Letter of Support from Area Agency on Aging/Agency Serving the Disabled
Exhibit 10: Project Information
Exhibit 11: Evidence of Eligibility
Exhibit 12: Certification for HUD-Approved Budget and for use of Residual Receipts (section 202 only)
Exhibit 13: Existing Services Description

Needs of residents and need for supportive services:

Exhibit 14: Profile of Eligible Project Residents
Exhibit 15: Description of the Need for the Supportive Services
Exhibit 16: Deinstitutionalization Plan

Proposed CHSP program:

Exhibit 17: Description of Proposed Services
Exhibit 18: Meals description
Exhibit 19: Implementation Start-up Schedule
Exhibit 20: Participant Fees Calculation Form
Exhibit 21: Budget Forms:
—HUD-91178—"Annual Program Budget, Applicant",
—HUD-91179—"Summary Budget, Five-Year Projection", and,
—HUD-91180—"Summary Budget, Applicant."

Matching funds:

Exhibit 22: Summary Form for Match
Exhibit 23: Match Letters
Exhibit 24: Documentation of Residual Receipts (NOT for use of Public/Indian Housing Agencies)

Professional assessment committee (PAC):

Exhibit 25: Qualification of PAC members

For applicant's information, the application package contains a copy of the Joint Common Rule and three Attachments:

—Attachment 1: CHSP Questions and Answers;
—Attachment 2: Discussion of Service Coordinator; and,
—Attachment 3: Instructions for Completing Budget Forms.

C. Packaging of Applications

Applications must be submitted on the basis of "one application—one

project". A HUD PHA/IHA project is defined either by number or by distinct building name; HUD Multifamily and FmHA projects are defined by a project number and/or a Section 8 contract number. The applicant's portion of the application submission is "Part A" and the project's portion of the application with project and program information is "Part B."

FmHA applicants must submit an original "Part A and one or more Part Bs" to FmHA Headquarters; A copy of each Part A and Part B must be submitted to the appropriate FmHA State offices.

An applicant submitting one application for one project only must submit one Part A and one Part B. (For example, the Smalltown Housing and Redevelopment Authority submits one application for one project "Pleasant Valley Towers" to the HUD Omaha Field Office. That application must contain one Part A and one Part B.)

Applicants submitting applications for multiple projects must submit a separate application for each project, in each jurisdiction in which it is submitting applications.

However, for multiple applications from the same applicant in the same jurisdiction, only one copy of Part A is submitted. Thus, an applicant submitting three applications in one jurisdiction must submit one Part A and three Part Bs (e.g., the North Carolina Office on Aging is submitting three applications for three HUD projects to the HUD Greensboro office. It submits one Part A to that office, with a Part B for each of the three separate projects.)

However, if an applicant is submitting applications to more than one HUD Field office or FmHA State office or to both HUD and FmHA, it must submit one "Part A" and the appropriate number of "Part Bs" in EACH jurisdiction. For example, the Ohio Office of Aging is submitting two applications for two HUD projects to the Cleveland HUD Office, one application for one HUD project to the Columbus HUD Office and one FmHA application to the FmHA Columbus State office. An original Part A must be submitted to EACH of the three Offices, with two Part Bs to the Cleveland Office, one Part B to the HUD Columbus office and one Part B to the FmHA Columbus Office.

Each Part A and each Part B must be in separate folders. Each Part must be appropriately tabbed and numbered according to the instructions in the Application Package.

D. Submission of Applications

1. Submission of Applications to HUD

All applicants shall submit an original and THREE copies (a FAX copy of the application is NOT acceptable) of the CHSP application to the Director of Housing Management in the HUD Field Office which has jurisdiction over the project at the address noted in Attachment 1 of the NOFA by 3 p.m., Local Time, on or before July 13, 1994. In the case of IHAs, the submission is to the Director of Housing Management in the HUD Field Office in which is located the Office of Native American Programs which has jurisdiction over that project. The deadline date is firm as to date and hour.

In the interest of fairness to all applicants requesting CHSP funds, HUD will treat as ineligible for consideration any request which is received after the deadline.

Applicants making requests for CHSP funds should take this practice into account and make early submission of their materials to avoid any risk of lost eligibility brought about by unanticipated delivery-related problems.

Applications received after the date and time stated herein will not be accepted, and will be returned to the applicant.

Each application package must be identified on the envelope or wrapper as follows: Director of Housing Management, CHSP FY 1994 Application Package, Due by 3 p.m., Local Time July 13, 1994.

Determination whether an application is received in a timely manner is solely the responsibility of the receiving HUD Field Office.

2. Submission of Applications to FmHA

All applicants shall submit an original and TWO copies (a FAX copy of the application is NOT acceptable) of the CHSP application to FmHA Headquarters by 3 p.m., Eastern Daylight Time, on or before July 13, 1994. The deadline date is firm as to date and hour. The Address is: U.S. Department of Agriculture, Farmers Home Administration, ATTN: Sue M. Harris-Green, South Building, room 5343, 14th and Independence Ave, SW., Washington, DC 20250.

One copy of the application must also be submitted to the FmHA State office which has jurisdiction over the project.

In the interest of fairness to all applicants requesting CHSP funds, the FmHA will treat as ineligible for consideration any request which is received by FmHA Headquarters after the deadline.

Applicants making requests for CHSP funds should take this practice into account and make early submission of their materials to avoid any risk of lost eligibility brought about by unanticipated delivery-related problems.

Applications received after the date and time stated herein will not be accepted, and will be returned to the applicant.

Each application package must be identified on the envelope or wrapper as follows: CHSP FY 1994 Application Package, Due by 3 p.m., Eastern Daylight Time July 13, 1994.

Determination whether an application is received in a timely manner is solely the responsibility of FmHA Headquarters. The decision of that Office is not subject to appeal.

E. Eligibility Review

HUD Field Office/FmHA State office staff will review all timely applications for eligibility. Both applicants and projects will be reviewed to determine that the applicant entity and the project included in the application, if different, is eligible under the terms of this NOFA and the common rule to participate in the FY 1994 CHSP.

Applicants must submit a copy of their charter or other evidence of legal status and of their authority to run a CHSP, or evidence of non-profit status as a local non-profit housing sponsor, as appropriate. Applicants that are applying as local non-profit housing sponsors or PHA/IHAs must ALSO submit proof of ownership of the project submitted in the application.

Applicants must also submit proof of project eligibility, as shown by a copy of the regulatory agreement, the HAP contract, or other document which shows the project's legal identity.

All proofs of eligibility or ownership must be legally signed and dated on or before the application deadline.

Eligibility will also include determination that the application was submitted to the appropriate HUD or FmHA office.

Applicants and/or projects which are not eligible or have been submitted to the incorrect HUD field office/FmHA State office will be rejected and so notified by the appropriate office at this time. Applications which pass eligibility review will proceed to threshold/technical deficiency review. If eligibility material is missing, it will be treated as a deficiency, subject to sections II.F(4) and III below.

F. Threshold and Technical Deficiency Review

1. General. HUD Field Offices/FmHA Headquarters staff will review applications for threshold and technical acceptability concurrently.

2. First, each application will be checked for completeness. Any application missing three or more exhibits other than certifications will be rejected by the HUD Field Office/FmHA Headquarters, with the applicant being notified.

3. Second, the applications will be checked for threshold eligibility. During this review, an applicant (or project in the case of an application from a governmental jurisdiction) will be rejected if:

a. The project is not 85 percent occupied;

b. It has not met the match requirement (i.e., there is a lack of clear and documented evidence of at least a 50 percent eligible match for the supportive services from the applicant or project owners, or from third party providers, for the first year of the five-year grant).

Indicators of clear and documented evidence are:

(i) There is a separate match letter on letterhead of the provider from each provider of match;

(ii) Match letters show committed dollar levels at least equal to the dollar level in the first year budget;

(iii) The match items provided are firm commitments not contingent upon any other action (e.g., state or county legislation, board of directors or local county legislation/approval); and

(iv) For match other than in-kind, the required certification for new or expanded services is included.

c. It has not submitted a participant fee-collection plan that proposes to collect at least 10 percent of the cost of the CHSP (up to 20 percent of adjusted incomes or the cost of providing the services, whichever is less).

d. The proposal includes a retrofit or renovation component in the budget subject to section 802(a)(2) of the Act.

e. The meals program does not provide at least one hot meal a day in a group setting *SEVEN* days a week, for some or all of the participants. (The meals program may be an existing program; it may be funded fully or in part with funds *other* than the CHSP.)

f. A service coordinator is NOT included as part of the services program. (The coordinator may be paid fully or in part from funds other than the CHSP.)

g. There is:

—A pending civil rights suit against the applicant (or project owner, if different) brought by the Department of Justice;

—An outstanding finding of non-compliance as a result of formal administrative proceedings under any of the statutes, regulations, or other requirements listed in the civil rights certification, unless the applicant is operating under a HUD-approved compliance agreement designed to correct the area(s) of noncompliance, or, in cases of noncompliance with state or local statutes, regulations or other requirements, is operating under a compliance agreement approved by the appropriate state or local agency designed to correct the area(s) of non-compliance.

—A charge issued by the Secretary concerned against the applicant (or project owner, if different) under Section 810(g) of the Fair Housing Act as implemented by 24 CFR 103.400.

—A pending denial of application processing by HUD or by FmHA under Title VI of the Civil Rights Act of 1964, under the Attorney General's guidelines (28 CFR 50.3), or the HUD Title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1), or under Section 504 of the rehabilitation Act of 1973 and the HUD Section 504 regulations (24 CFR 8.57); or,

—An adjudication adverse to the applicant (or the project owner, if different) of a civil rights violation in a civil action brought against it under any of the statutes, regulations or other requirements listed in the civil rights certification, unless the sponsor is operating in compliance with a court order designed to correct the area(s) of noncompliance.

h. There exist serious, unaddressed or outstanding Inspector General audit findings or HUD Headquarters/Field Office/FmHA State Office Management monitoring review findings for any of the applicant's (or project's, if different) ongoing management operations or in connection with its administration of existing grants;

i. There exist serious, unaddressed or outstanding Inspector General audit findings or HUD Headquarters/Field Office/FmHA State Office FH&EO monitoring review findings for any of the applicant's (or project's, if different) ongoing management operations or in connection with its administration of existing grants; or,

j. The applicant (or project owner, if different) is involved with litigation which could seriously jeopardize its ability to administer the CHSP.

If an applicant (or project within an application) is determined to be the subject of a rejection on the basis of one or more of the above criteria, the HUD field office or FmHA Headquarters staff shall reject the application; the review cannot be completed nor the application scored.

If the applicant agency is a governmental jurisdiction supporting one or more projects in multiple applications and the applicant agency is rejected, all projects submitted by that applicant agency will be disqualified. However, any individual project may be rejected without disqualifying the applicant agency, if a different legal entity.

All applicants whose application(s) have been rejected by HUD field offices or FmHA Headquarters will be notified that they have been rejected, in writing, at the time the decision to reject is made.

4. Third, applicants will be reviewed for technical completeness (deficiency review).

During the technical review process, if HUD or FmHA determines that an application is missing up to two exhibits (other than certifications), or has certain technical deficiencies, the applicant will be given 14 calendar days from the date of written notification in which to correct such deficiencies.

The purpose of this process is to assist an applicant in completing a fundable proposal, and not to provide an opportunity for an application to be substantively improved, once it has been submitted. Curable, technical deficiencies relate to submission of a limited number of missing items, submission of items that are not necessary for HUD review under threshold review or selection criteria/ranking factors, e.g., a missing certification, inadvertent blank spot in certain forms and certifications or missing signature; substantive items for which information exists elsewhere in the application showing that the items have been created (e.g., an annual first year budget summary is missing, but there are sufficient program budgets to determine what the annual budget is; or revision of match letters to include missing data, when the amount of resources is clearly indicated); or, missing match letters in certain instances (see next paragraph).

Submission of missing items or correction of technical deficiencies does not allow additional time to complete, amend or correct the application to overcome any substantive defects in the original submission. Thus, missing match letters, or corrected match letters adding the required certification of new or expanded qualifying resources must be submitted together with proof that

the match was available to the applicant on or before the application deadline (e.g., copy of dated Board resolution approving the allocation of the match dollars). Also, missing documents dealing with applicant or project eligibility (e.g., articles of incorporation) must be dated on or before the application deadline date.

The HUD Field Office or FmHA Headquarters will request documents as necessary to correct technical deficiencies in any CHSP application. (A FAX copy of an original document may NOT be submitted to meet any technical deficiency correction request.) A response to a letter request from HUD or FmHA to an applicant for correction of technical deficiencies must be received by the requesting HUD Field Office/FmHA Headquarters, by 3 p.m., Local Time on the 14th calendar day following the date on the request letter to the applicant. This means (for example) that if the deficiency letter to the applicant is dated June 15, 1994, the response must be received by 3 p.m., Local Time, in the HUD Field Office or FmHA Headquarters on June 29, 1994. Information provided after 3 p.m. on the fourteenth day of the correction period will be rejected as non-responsive. In any such situation, the application, or the appropriate project, will be rejected.

All applicants are encouraged to review the Table of Contents provided in the application package. The Table of Contents identifies all technical exhibits needed for application processing. Filling in the appropriate page number indicates that the exhibit has been prepared.

5. HUD/FmHA reserves the right to reduce the amount of funding requested in any application. Examples of reasons to reduce initial funding requests during HUD Field office/FmHA Headquarters review include, but are not limited to: (a) activities proposed in any project are not eligible or not approved by HUD or FmHA; (b) HUD or FmHA determines that the cost of any particular component of a proposed program is more than necessary to make the activity feasible; and, (c) the cost of the grant is reduced to meet the funding limits of Section I.C(5).

Reductions may take place in the Field offices as part of the review process.

6. Once threshold and technical reviews have been completed, HUD Field offices, or the FmHA Headquarters (as appropriate) will score all selection criteria.

HUD Field offices will send preliminary scores and full reports to the HUD Regional offices. The Regional offices will: (a) Review all materials and preliminary ratings for accuracy and conformance to program policy; (b) make corrections, if necessary; (c) integrate the Field Office recommendations; (d) do final rating and ranking; and, (e) select projects.

Within each HUD Regional allocation and the FmHA Headquarters allocation, applications will be rank-ordered by score.

G. Final Selection

1. General

HUD recognizes that the Regional role stated herein may have to be modified later in the fiscal year, depending on the reorganization and the manner in which the transition to the Field organization takes place. If necessary there will be appropriate notification to the procedures stated in this Notice.

All eligible applications, other than those noted as rejects, will be rank-ordered by score in either the FmHA Headquarters or each HUD Regional Office.

2. Final Reductions in Funding Within Applications

HUD/FmHA reserves the right to additionally reduce the amount of funding requested in any application at time of selection to reduce the cost of the grant to meet the funding limits of section I.C(5).

Reductions may also take place after selection and announcement of award, as part of final negotiations.

3. Ranking of Projects

a. *Ranking of FmHA Projects.* FmHA Headquarters will select applicants by rank-order until all CHSP funds allocated have been exhausted. If there is more than one unfunded application at the next-highest score (in a tie) and there are insufficient funds to cover both, funding will be decided subject to section II.F.4, below. Further selections will be made until any residual funds are insufficient to fund another FmHA project.

If there is a residual amount after all eligible applications in rank order are funded, the next application(s) on the list which contain funding requests above the level of the residual may be skipped over to reach a fundable project lower down on the list which is within the level of the residual amount. The first remaining fundable but unfunded project on the list which is within the residual limit must be funded, as well as any subsequent projects which are still within any remaining residual.

If funds remain available after ranking all the approvable FmHA projects, these funds will be utilized by HUD Headquarters for reallocation to HUD projects which were approvable but unfunded (see subsection II.G(3)(b), below). The FmHA Headquarters reserves the right to reduce any proposed amount of CHSP funds requested.

b. *Ranking of HUD projects.* HUD will select applicants in rank-order in each Region until the funds allotted to that Region are exhausted.

If there is more than one unfunded application at the next-highest score (in a tie) and there are insufficient funds to cover both, funding will be decided subject to section II.G.4, below. Further selections will be made until any residual funds are insufficient to fund another HUD project.

If there is a residual amount after most eligible applications are funded in rank order, the next application(s) on the list which contain funding requests above the level of the residual may be skipped over to reach a fundable project lower down on the list which is within the level of the residual amount. The first remaining fundable but unfunded project on the list which is within the residual limit must be funded, as well as any subsequent projects which are still within any remaining residual.

Regions (and FmHA) will return any excess funds to Headquarters. Headquarters will integrate by score order all approvable but not funded applications sent in from Regions in which there were too many projects to fund from within the Regional allocation. Headquarters will then fund additional projects in rank order from this score ranking using residual funds, consistent with section II.G(4), below.

If there are insufficient fundable applications, any excess funds will be made available to approvable but unfunded FmHA applicants.

4. Tie Scores

In the event of a tie score among the last-to-be-considered applications in either FmHA Headquarters or in a HUD Regional allocation, the application that scores higher on Selection Criteria Numbers b, f, g, and i will be selected, if that application is within the limits of the remaining dollars or can be so modified. If there is still a tie score among two or more applications, one of the tied applications will be selected by lottery.

5. Multi-Project Grants

HUD and FmHA reserve the right to aggregate into one grant award multiple applications from a single applicant in any jurisdiction.

6. Self-Monitoring

HUD and FmHA reserve the right to require self-monitoring of those applications approved for States, Indian tribes and units of general local government (NOT PHA/IHAs). In such cases, HUD/FmHA will add an amount equal to one percent of the total HUD grant approved, for monitoring costs, under which certain responsibilities will be delegated to that agency subject to 24 CFR 700.325 or 7 CFR 1944.270. As this is a HUD or FmHA-directed add-on, it may bring the total award granted to more than the limit stated in section I.C(5).

7. Excess Funds

In the event that funds still remain after completion of the selection process, such funds will be allotted to the HUD Headquarters Reserve Fund, subject to section 700.405 of the Joint Common Rule.

H. Awarding of Grants

Once selections are made, the HUD Field Office, or FmHA Headquarters, as appropriate, will negotiate the final amount of the grant with the selected applicant. Once agreement is reached on all issues, a grant award will be prepared and sent to the HUD or FmHA applicant for signature. Once the signed grant award is returned to HUD, it will be executed by an appropriate HUD Official.

If an applicant cannot complete negotiations so that a grant can be executed before September 30, 1994, *and* the reserved dollars revert to the Treasury, the grant award may be canceled.

III. Checklist of Application Submission Requirements

The checklist specifies the required information that must be submitted as part of an application, and identifies those materials necessary to pass eligibility and threshold requirements. Other items including forms and certifications may be corrected during the technical deficiency correction period, subject to section II.F(4) of this Notice.

The Checklist is the Table of Contents in the application package; the check is done by filling in the appropriate application page number in the blank space.

IV. Other Matters

A. Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, room 10276, 451 Seventh Street, SW., Washington, DC 20410.

B. Family Executive Order

The General Counsel of HUD, as the Designated Official under Executive Order 12606, *The Family*, has determined that the policies contained in this NOFA will have some significant impact on the maintenance and general well-being of families. The revised CHSP can be expected to provide supportive services which can prevent or postpone unnecessary or premature institutionalization, and reduce unnecessary stress and financial burdens on participants' families by allowing them to remain in their apartments. Because the impact on family concerns is wholly beneficial, no further review under the executive order is considered necessary.

C. Federalism Executive Order

The General Counsel of HUD, as the Designated Official under section 6(a) of the Executive Order 12612, *Federalism*, has determined that the policies contained in this NOFA do not have Federalism implications, and, thus, are not subject to review under the order. These guidelines are limited to providing the procedures under which HUD would make rental assistance available to applicants under a program designed to provide housing assistance and supportive services to frail elderly individuals. The program involves intergovernmental cooperation, but in no manner will involve federal incursion upon local or state decision making, or the administration of local or state law.

D. Section 102 of the HUD Reform Act—Accountability in the Provision of HUD Assistance

1. Documentation and Public Access

HUD will ensure that documentation and other information regarding each application submitted pursuant to this NOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a five-year period beginning not less than thirty days after the award for assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. In addition, HUD will include the recipients of assistance pursuant to this NOFA in its quarterly **Federal Register** notice of all recipients of HUD assistance awarded on a competitive basis. (See 24 CFR 12.14(a) and 12.16(b) and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942) for further information on these requirements.)

2. Disclosures

HUD will make available to the public for five years all applicant disclosure reports (Form HUD–2880) submitted in connection with this NOFA. Update reports (also Form HUD–2880) will be made available along with the applicants' disclosure reports, but in no case for a period of less than three years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (95 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 15. (See 24 CFR, subpart C, and the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942) for further information on disclosure requirements.)

3. Subsidy-Layering Determinations

24 CFR 12.52 requires HUD to certify that the amount of HUD assistance is not more than necessary to make the assisted activity feasible after taking into account other government assistance. HUD will make the decision with respect to each certification available free of charge, for a three-year period. (See the notice published in the **Federal Register** on January 16, 1992 (57 FR 1942) and the guidelines published in the **Federal Register** on February 25, 1994 (59 FR 9332) for further information on this certification.) Additional information about applications, HUD certifications and assistance adjustments, both before assistance is provided or subsequently, are to be made under the Freedom of Information Act (24 CFR part 15).

E. Section 103 of the HUD Reform Act—Prohibition of Advance Disclosures of Funding Decisions

HUD's regulation implementing section 103 of the Reform Act was published on May 13, 1991 (56 FR 22088) and became effective on June 12, 1991. That regulation, codified as 24 CFR part 4, applies to the funding competition announced today. The requirements of the rule continue to apply until the announcement of the selection of successful applicants. Also,

refer to (58 FR 61016), a final rule amending part 4 regarding the regulations of certain conduct by HUD employees and by applicants for HUD assistance during the selection process for the award of financial assistance by HUD.

HUD and FmHA employees involved in the review of applications and in the making of funding decisions are restrained by part 4 from providing advance information to any person (other than an authorized employee of HUD or FmHA) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted under 24 CFR part 4.

Applicants who have questions should contact the HUD Office of Ethics, (202) 708–3815. (This is not a toll-free number.) The Office of Ethics can provide information of a general nature to HUD employees, as well. However, a HUD or FmHA employee who has specific program questions, such as whether particular subject matter can be discussed with persons outside the Department, should contact his or her Regional or Field Office Counsel, or Headquarters Counsel for the program to which the question pertains.

F. Section 112 of the HUD Reform Act

Section 13 of the Department of Housing and Urban Development Act (section 112 of the Reform Act) contains two provisions dealing with efforts to influence HUD's decisions with respect to financial assistance. The first imposes disclosure requirements on those who are typically involved in these efforts—those who pay others to influence the award of assistance or the taking of a management action by the Department *and* those who are paid to provide the influence. The second restricts the payment of fees to those who are paid to influence the award of HUD assistance, if the fees are tied to the number of housing units received or are based on the amount of assistance received, or if they are contingent upon the receipt of assistance.

Section 13 was implemented by final rule published in the **Federal Register** on May 17, 1991 (56 FR 22912), as 24 CFR part 86. If readers are involved in any efforts to influence the Department in these ways, they are urged to read the final rule, particularly the examples contained in Appendix A of the rule.

Any questions regarding the rule should be directed to: Acting Director, Office of Ethics, room 2158, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Telephone: (202) 708–3815; TDD: (202) 708–1112. (These are not toll-free numbers.) Forms necessary for compliance with the rule may be obtained from the local HUD office.

G. Prohibition Against Lobbying Activities

The use of funds awarded under this NOFA is subject to the disclosure requirements and prohibitions of section 319 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (31 U.S.C. 1352) and the implementing regulations at 24 CFR part 87. These authorities prohibit recipients of Federal contracts, grants, or loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. The prohibition also covers the awarding of contracts, grants, cooperative agreements, or loans unless the recipient has made an acceptable certification regarding lobbying. Under 24 CFR part 87 and 7 CFR part 1944, subpart G, applicants, recipients, and subrecipients of assistance exceeding $100,000 must certify that no Federal funds have been or will be spent on lobbying activities in connection with the assistance.

Indian Housing Authorities (IHAs) established by an Indian tribe as a result of the exercise of the tribe's sovereign power are excluded from coverage of the Byrd Amendment, but IHAs established under State law are not excluded from the statute's coverage.

IHAs established by an Indian tribe as a result of the tribe's sovereign power are excluded from coverage of the Byrd Amendment, but IHAs established under State law are *not* excluded from the statute's coverage.

Required Reporting

A certification is required at the time application for funds is made that federally appropriated funds are not being or have not been used in violation of section 319 and the *disclosure* will be made of payments for lobbying with other than federally appropriated funds. Also, there is a standard disclosure form, SF–LLL, "Disclosure Form to Report Lobbying", which must be used to disclose lobbying with other than federally appropriated funds at the time of application.

Public Reporting Burden

The information collection requirements contained in this NOFA have been submitted to the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520). The Department has determined that the following provisions contain information collection requirements.

Revised Congregate Services Housing Program

14 responses are estimated from each respondent.

5.10 hours is the estimated average response time for each respondent per response.

Total Respondents time is 9,675.

Estimate of cost to the respondents is $15.00 per hour.

Total respondents time @ $15/hour=9675×$15=$145,125.

Tabulation of Reporting Burden

Revised Congregate Housing Services Program

Information collected	No. of respondents	X	No. of responses per respondent	=	Total annual responses	X	Hours per response	Total hours
	17.1		17.2		17.3		17.4	17.5
Initial owner applications	150		1		150		14	2100
Budget formats	50		1		50		3	150
Semiannual program reports	50		1		50		1.5	75
Annual program reports	50		1		50		3	150
Participant applications to new CHSP	50		36		1800		4	7200
Summary	150		14 avg.		2100		5.10	9675

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program title and number is 14.170, Congregate Housing Services Program.

Authority: Section 802, Cranston-Gonzales National Affordable Housing Act (42 U.S.C. 8012).

Section 604 and 672, Housing and Community Development Amendments of 1992 (Pub.L. 102-550).

Dated: April 14, 1994.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

HUD Field Offices

Region I

Boston, Massachusetts Regional Office (Jurisdiction: Massachusetts)
Casimir Kolaski (Acting) Regional Administrator-Regional Housing Commissioner, HUD—Boston Regional Office, Thomas P. O'Neill, Jr. Federal Building, 10 Causeway Street, Room 375, Boston, Massachusetts 02222-1092, (617) 565-5234, TDD (617) 565-5453

Hartford, Connecticut Office (Jurisdiction: Connecticut)
Robert Donovan (Acting Manager), HUD—Hartford Office, 330 Main Street, Hartford, Connecticut 06106-1860, (203) 240-4522, TDD (203) 240-4665

Manchester, New Hampshire Office (Jurisdiction: New Hampshire, Maine)
David B. Harrity, Manager, HUD—Manchester Office, Norris Cotton Federal Building, 275 Chestnut Street, Manchester, New Hampshire 03101-2487, (603) 666-7681, TDD (603) 666-7518

Providence, Rhode Island Office (Jurisdiction: Rhode Island)
Michael Dziok (Acting Manager), Manager, HUD—Providence Office, 330 John O. Pastore Federal Building and U.S. Post Office—Kennedy Plaza, Providence, Rhode Island 02903-1785, (401) 528-5351, TDD (401) 528-5364

Region II

New York Regional Office (Jurisdiction: New York)
Burton Bloomberg (Acting), Regional Administrator-Regional Housing Commissioner, HUD—New York Regional Office, 26 Federal Plaza, New York, New York 10278-0068, (212) 264-6500, TDD (212) 264-0927

Buffalo, New York Office (Jurisdiction: Western New York)
Joseph B. Lynch, Manager, HUD—Buffalo Office, Layette Court, 5th Floor, 465 Main Street, Buffalo, New York 14203-1780, (716) 846-5755

Newark, New Jersey Office (Jurisdiction: New Jersey)
Diane J. Johnson (Acting Manager), HUD—Newark Office, Military Park Building, 60 Park Place, Newark, New Jersey 07102-5504, (201) 877-1662, TDD (201) 645-6649

Region III

Philadelphia, Pennsylvania Regional Office (Jurisdiction: Eastern Pennsylvania)
Harry W. Staller (Acting), Regional Administrator, HUD—Philadelphia Regional Office, Liberty Square Building, 105 South 7th Street, Philadelphia, Pennsylvania 19106-3392, (215) 597-2560 (Ext. 6), TDD (215) 597-5564

Washington, DC Office (Jurisdiction: District of Columbia Area)
I. Toni Thomas, Manager, HUD—Washington, DC Office, Union Center Plaza, Phase II, 820 First Street, N.E., Suite 300, Washington, DC 20002-4205, (202) 275-9200, TDD (202) 275-0967

Baltimore, Maryland Office (Jurisdiction: Maryland)
Maxine S. Saunders, Manager, HUD—Baltimore Office, 10 South Howard Street, 5th Fl., Baltimore, Maryland 21201-2505, (410) (962-2520—Ext. 3474, TDD (410) 962-0106

Pittsburgh, Pennsylvania Office (Jurisdiction: Western Pennsylvania)
Choice Edwards, Manager, HUD—Pittsburgh Office, Old Post Office Courthouse Bldg., 700 Grant Street, Pittsburgh, PA 15219-1939, (412) 644-6428, TDD (412) 644-5747

Richmond, Virginia Office (Jurisdiction: Virginia)
Mary Ann Wilson, Manager, HUD—Richmond Office, The 3600 Centre, 3600 West Broad Street, P.O. Box 90331, Richmond, Virginia 23230-0331, (804) 278-4507, TDD (804) 278-4501

Charleston, West Virginia Office (Jurisdiction: West Virginia)
Frederick S. Roncaglione (Acting Manager), HUD—Charleston Office, 405 Capitol Street, Suite 708, Charleston, West Virginia 25301-1795, (304) 347-7000, TDD (304) 347-5332

Region IV

Atlanta, Georgia Regional Office (Jurisdiction: Georgia)
Raymond A. Harris, Regional Administrator-Regional Housing Commissioner, HUD—Atlanta Regional Office, Richard B. Russell Federal Building, 75 Spring Street, S.W., Atlanta, Georgia 30303-3388, (404) 331-5136, TDD (404) 730-2654,

Birmingham, Alabama Office (Jurisdiction: Alabama)
Robert E. Lunsford, Manager, HUD—Birmingham Office, 600 Beacon Parkway West, Suite 300, Birmingham, Alabama 35209-3144, (205) 290-7617, TDD (205) 790-7624

Louisville, Kentucky Office (Jurisdiction: Kentucky)
Verna V. Van Ness, Manager, HUD—Louisville Office, 601 West Broadway, Post Office Box 1044, Louisville, Kentucky 40201-1044, (502) 582-5251

Jackson, Mississippi (Jurisdiction: Mississippi)
Sandra Freeman, Manager, HUD—Jackson Office, Dr. A.H. McCoy Federal Building, 100 W. Capitol Street, Room 910, Jackson, Mississippi 39269-1096, (601) 965-5308, TDD (601) 965-4171

Greensboro, North Carolina (Jurisdiction: North Carolina)
Larry J. Parker, Manager, HUD—Greensboro Office, 2306 W. Meadowview Road, Greensboro, North Carolina 27407, (919) 547-4000, TDD (919) 547-4010

Caribbean Office (Jurisdiction: Puerto Rico)
Rosa C. Villagonga, Manager, HUD—Caribbean Office, New San Juan Office Building, 159 Carlos E. Chardon Avenue, San Juan, Puerto Rico 00918-1804, (809) 766-6121

Columbia, South Carolina Office (Jurisdiction: South Carolina)
Ted B. Freeman, Manager, HUD—Columbia Office, Strom Thurmond Federal Building, 1835-45 Assembly Street, Columbia, South Carolina 29201-2480, (803) 765-5592

Knoxville, Tennessee Office (Jurisdiction: Eastern Tennessee)
Richard B. Barnwell, Manager, HUD—Knoxville Office, John J. Duncan Federal Bldg., 710 Locust Street SW., Knoxville, Tennessee 37902-2526, (615) 549-4384, TDD (615) 549-4379

Nashville, Tennessee Office (Jurisdiction: Western Tennessee)
John H. Fisher, Manager, HUD—Nashville Office, 251 Cumberland Bend Drive, Suite 200, Nashville, Tennessee 37228-1803, (615) 736-5213

Jacksonville, Florida Office (Jurisdiction: Florida)
James T. Chaplin, Manager, HUD—Jacksonville Office, 301 West Bay Street, Suite 2200, Jacksonville

Florida 32202–5121, (904) 232–2626

Region V

Chicago, Illinois Regional Office (Jurisdiction: Illinois)
Edwin Eisendrath, Regional Administrator-Regional Housing Commissioner, HUD—Chicago Regional Office, Ralph H. Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, Illinois 60606, (312) 353–5680

Detroit, Michigan Office (Jurisdiction: Eastern Michigan)
Harry I. Sharrott, Manager, HUD—Detroit Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Detroit, Michigan 48226–2592, (313) 226–7900

Indianapolis, Indiana Office (Jurisdiction: Indiana)
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Part III

Department of Education

34 CFR Part 602

Secretary's Procedures and Criteria for Recognition of Accrediting Agencies; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 602

RIN 1840–AB82

Secretary's Procedures and Criteria for Recognition of Accrediting Agencies

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the Secretary's recognition of accrediting agencies in order to implement provisions added to the Higher Education Act of 1965 (HEA) by the Higher Education Amendments of 1992, and the Higher Education Technical Amendments of 1993. The purpose of the Secretary's recognition of accrediting agencies is to assure that those agencies are, for HEA and other Federal purposes, reliable authorities as to the quality of education or training offered by the institutions of higher education or higher education programs they accredit.

EFFECTIVE DATE: These regulations take effect on July 1, 1994, with the exception of §§ 602.4, 602.10, and 602.27. These sections will become effective after the information collection requirements contained therein have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

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SUPPLEMENTARY INFORMATION: In order to approve a postsecondary education institution to participate in the student financial assistance programs authorized under Title IV of the HEA (referred to as "Title IV, HEA programs") and many other Federal programs, the Secretary must determine, in part, that the institution satisfies the statutory definition of an "institution of higher education." Under the HEA and many other Federal statutes, one element of that definition requires an eligible institution of higher education to be accredited or preaccredited by an accrediting agency recognized by the Secretary as a reliable authority as to the quality of the education or training provided by the institution. Another element requires an eligible institution to be legally authorized to provide an education program beyond the secondary level in the State in which it is located. In addition, to participate in the Title IV, HEA programs, the institution must be certified by the Secretary as administratively capable and financially responsible. Thus, the HEA provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the "gate" to Title IV, HEA programs is opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three "gatekeepers" sharing this responsibility have traditionally been referred to as "the triad."

While the concept of a triad of entities responsible for gatekeeping has had a long history, originating in 1952, the Higher Education Amendments of 1992, Public Law 102–325, significantly increased the gatekeeping responsibilities of each member of the triad. Specifically, Congress amended the HEA to provide for a new part H of Title IV entitled "Program Integrity Triad." Under the new part H, the requirements that accrediting bodies must meet if they are to be recognized by the Secretary as "gatekeepers" for Title IV or other Federal purposes are specified in detail. Part H also provides a new oversight responsibility for States: The State Postsecondary Review Program. Altogether, part H establishes a set of responsibilities for accrediting agencies, States, and the Secretary that creates a stronger and more coordinated evaluation of institutions that participate, or wish to participate, in the Title IV, HEA programs.

The Secretary recognizes that the approach to significantly increased gatekeeping activity outlined in the statute for the three members of the triad is a new one. This approach will require leadership in both implementation and evaluation if it is to achieve the effectiveness that Congress intended. The Secretary will take steps to assure that the various responsibilities of the triad members are carried out in a manner that, in fact, results in the identification of institutions that should not be eligible to participate in the Title IV, HEA programs, on the basis of either the quality of education they offer or their inability to handle program funds. At the same time, the Secretary is committed to carrying out the responsibility for coordinating the activities of the triad members that are inherent in the statute in a manner that causes the least burden to institutions participating in the Title IV, HEA programs.

To these ends, the Secretary is committed to effective management of the gatekeeping function. The Secretary will review carefully the applications of accrediting bodies and the standards and operating plans proposed by State Postsecondary Review Entities (SPREs) under the State Postsecondary Review Program to insure that they meet the requirements of the statute and these regulations and will enable these triad agencies to fulfill their statutory purposes. The Secretary will also place a priority on the completion of the "Postsecondary Education Participation System," the Department's new integrated data base, which will contain the information that the Secretary generates in the course of the Secretary's oversight of institutions participating in Title IV, HEA programs. The Secretary will use the data base to inform accrediting bodies and SPREs of actions taken by the Secretary so that they may in turn carry out their responsibilities. This expanded data base is also critical to the Secretary's effective selection of institutions for program review.

Monitoring the results of the gatekeeping process is a very important key to effective management. The Secretary will evaluate the activities of accrediting agencies, SPREs, and the Department to determine their effectiveness in improving the integrity of institutions participating in Title IV programs and will take such steps as may be indicated to improve the results. Finally, as provided in the statute, the Secretary will seek the advice and counsel of the National Advisory Committee on Institutional Quality and Integrity in evaluating the effectiveness of the triad.

The Secretary believes that the approach best suited to achieving the objectives of the statute is a complementary one, with each member of the triad focusing its evaluation on its obligations within the context of the HEA. Thus, the focus for accrediting agencies is the quality of education or training provided by the institutions or programs they accredit. States, in addition to providing the legal authority to operate within the state required for participation in the Title IV, HEA programs, will review institutions that meet certain statutory review criteria related to institutional performance in

the Title IV, HEA programs. The focus of the Secretary's evaluation of institutions is on the administrative and financial capacity of those institutions to participate in the Title IV, HEA programs.

While the functions and responsibilities of each of the triad members are generally different, the statute does require, in some instances, that all members of the triad evaluate similar areas. For the most part, the principle of complementary functions will lead to the members evaluating those same areas from different perspectives for different purposes. For example, all three of the triad members are required to examine the finances of an institution. If each looks at financial strength from a perspective complementary to that of the others, accrediting agencies would focus principally on the capacity of the institution to continue to offer programs at a level of quality sufficient to meet accrediting agency standards and to fulfill the institution's mission over a 5–10 year period of accreditation. The emphasis of a review by a SPRE would be on whether or not the institution possesses the full range of resources needed to serve students currently attending the institution. The Secretary's responsibilities focus on the institution's finances in light of its ability to provide the services described in its official publications and statements, to provide the administrative resources necessary to comply with its Title IV, HEA program responsibilities, and to meet all of its financial obligations, including, but not limited to, refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.

Despite the Secretary's efforts to encourage complementary functions for each of the triad members, it is theoretically possible that, in some instances, an institution could be subject to three different standards regulating the same area of operation. For this reason, where a Title IV standard has been promulgated at the Federal level, the Secretary expects accrediting agencies and States to take this into account in establishing their own standards to insure that varying standards do not pose an unnecessary burden on institutions. It is also important that accrediting agencies and States not impose any standard that is weaker than a comparable Title IV, HEA program standard. The Secretary believes coordination of this is a federal responsibility.

In view of the complementary approach to the functions of the triad members, the Secretary believes, for example, that institutions should not have to develop different methodologies to provide data that the three members of the triad may require. The Secretary also believes that, to the extent feasible, any other requests for data about the institution, its students, or its graduates should rely on information already in the institution's possession. To that end, the Secretary expects accrediting agencies and States either to accept student data based on the methodology that will be specified in the regulations governing "Student Right to Know," also mandated by the Higher Education Amendments of 1992, or, where the institution may have other methodologies for calculating data, such as a system designed to provide data to a State higher education commission or other State agency, to accept data in the format already being used by the institution. Similarly, the Secretary expects accrediting agencies and SPREs to use the audited financial statements institutions are now required to provide to the Secretary on an annual basis to the extent those statements are compatible with the nature of the reviews conducted under their respective standards.

The Secretary also recognizes that other Federal agencies, such as the Department of Labor and the Veterans Administration, also regulate institutions in some areas that are similar to those included in part H. The suggestion has been made that the Secretary should promulgate Federal standards in the areas of overlap so that institutions would not be subject to varying standards developed by other Federal agencies and the triad members. However, the Secretary interprets part H as permitting States and accrediting agencies to establish their own standards, as opposed to using a Federal standard, and also believes that this is the most effective approach. In addition, it is not clear how the requirements of the different agencies are compatible with the requirements of part H. The purposes of these programs administered by other agencies may be very different. As a result, the Secretary has not pursued this alternative. The Secretary does believe that it would be useful to explore how the varying requirements of other Federal agencies that are similar to those of part H might be coordinated to reduce any burden on institutions and will initiate such exploration.

The Secretary believes that, where possible, data developed at the national level should be made available to institutions, as well as to States and accrediting agencies to assist them in carrying out their responsibilities under part H. In particular, data concerning labor markets and compensation for specific fields and information concerning graduation and withdrawal rates at various types of institutions may be helpful to both triad members and institutions. The Secretary will facilitate the development of this type of information and, where possible under the auspices of the Department, will coordinate the development of data that will be helpful to institutions and the triad.

Finally, as part of the commitment to providing leadership to the triad, the Secretary will convene representatives of the triad members and institutions to exchange information about the gatekeeping process and to discuss how the triad is functioning, both in identifying institutions whose performance is questionable and in reporting requirements that have proven to be unreasonably burdensome. The Secretary invites comments concerning the functioning of the triad, as it is implemented through these and other regulations governed by part H. The Secretary will seek improvement, where possible, within existing regulations and will propose modifications to regulations and to the statute itself if experience indicates those changes are both necessary to achieve effective gatekeeping, with minimal burden, and compatible with the need to maintain, and assure the public of, the integrity of the Title IV, HEA programs.

On January 24, 1994, the Secretary published a notice of proposed rulemaking (NPRM) for part 602 in the **Federal Register** (59 FR 3578). The NPRM included, on pages 3578–3601, a thorough discussion of the major issues addressed by the proposed regulations. The following is a brief summary of the major proposed changes to the Secretary's Procedures and Criteria for Recognition of Accrediting Agencies that were contained in the NPRM.

1. As required by section 496(m) of the HEA, the proposed regulations authorized the Secretary to recognize only those accrediting agencies that accredit institutions of higher education or higher education programs for the purpose of enabling those institutions or programs to establish eligibility to participate in programs administered either by the Secretary or by other Federal agencies.

2. As required by section 496(a) of the HEA, the proposed regulations required accrediting agencies whose accreditation enables the institutions they accredit to participate in programs authorized under the HEA to be administratively and financially

separate from and independent of any related, associated, or affiliated trade association or membership organization. In accordance with the statute, the proposed regulations allowed the Secretary to waive this requirement under certain conditions.

3. The proposed regulations added two new steps to the process by which accrediting agencies are recognized by the Secretary. First, the Secretary proposed to give an agency seeking recognition the opportunity to respond in writing to the designated Department official's analysis of its application for recognition before the application was reviewed by the National Advisory Committee on Institutional Quality and Integrity. Second, after the Advisory Committee's review of the agency's application and recommendation to the Secretary, the Secretary proposed to give both the agency and the designated Department official an opportunity to contest the Advisory Committee's recommendation.

4. In accordance with section 496(n) of the HEA, the proposed regulations permitted the Department, at the Secretary's discretion, to conduct unannounced site visits to an accrediting agency or its member institutions or programs as part of the Department's analysis of the agency's application for recognition or its compliance with the requirements for recognition.

5. In accordance with section 496(l) of the HEA, the proposed regulations allowed the Secretary to limit, suspend, or terminate an agency's recognition if the Secretary determined that the agency failed to meet the requirements for recognition.

6. The proposed regulations eliminated the provision contained in previous regulations that, in order to demonstrate experience in accreditation, an agency had to demonstrate that its policies, evaluation methods, and decisions were accepted throughout the United States by recognized accrediting agencies.

7. As required by section 496(c)(1) of the HEA, the proposed regulations required an accrediting agency whose accreditation enables the institutions it accredits to participate in programs authorized under the HEA to conduct, in addition to its regular announced on-site review of an institution, at least one unannounced on-site review of each institution that provides prebaccalaureate vocational education or training.

8. The proposed regulations required accrediting agencies to assess any new or substantively changed program before including it in the agency's previous grant of accreditation.

9. As required by section 496(a)(5) of the HEA, the proposed regulations required accrediting agencies to have standards that assess curricula; faculty; facilities, equipment and supplies; fiscal and administrative capacity as appropriate to the specified scale of operation; student support services; recruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising; program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered; measures of program length in clock hours or credit hours; success with respect to student achievement in relation to the institution's mission; default rates in student loan programs under Title IV of the HEA; record of student complaints received by, or available to, the accrediting agency; and the institution's compliance with its program responsibilities under Title IV of the HEA.

10. As required by section 484B of the HEA, the proposed regulations required accrediting agencies to have a standard that assesses an institution's practice of making refunds to students.

11. The proposed regulations required an accrediting agency to take adverse action against an institution or program that failed to bring itself into compliance with agency standards within a time frame established by the agency. The proposed regulations permitted this time frame to exceed 18 months only for cause.

12. As required by section 496(c) of the HEA, the proposed regulations required accrediting agencies whose accreditation enables institutions to participate in Title IV, HEA programs to take special action whenever institutions establish new branch campuses. Specifically, agencies must approve a business plan for the branch before its opening and conduct an on-site review within six months.

13. As required by section 496(c) of the HEA, the proposed regulations required accrediting agencies to conduct an on-site review within six months at any institution that undergoes a change in ownership that results in a change in control.

14. As required by section 496(c) of the HEA, the proposed regulations required that any institution that enters into a teach-out agreement with another institution must agree to submit to its accrediting agency for approval a teach-out agreement that is consistent with applicable standards and regulations.

Changes Resulting From Public Comment

As a result of the comments received concerning the NPRM, and as discussed in detail in the appendix, the Secretary has made the following significant changes in the final regulations.

1. The term "prebaccalaureate vocational education" has been deleted from these final regulations. The term "vocational education" has been redefined to be "an instructional program, below the bachelor's level, designed to prepare individuals with the skills and training required for employment in a specific trade, occupation, or profession related to the instructional program." This definition is consistent with that used for the term "vocational program" in the final regulations governing the State Postsecondary Review Program. This definition was chosen because it is basically the same as the Integrated Postsecondary Education Data System (IPEDS) glossary definition of an "occupationally specific program," and institutions already use this term in reporting enrollment data for various types of vocational education. The advantage in using this definition is that the IPEDS inventory of occupationally specific programs provides a list of instructional programs which, if offered by an institution, subject the institution to an unannounced inspection by its accrediting agency.

2. A new section, § 602.5—Notice to accrediting agencies of Federal actions, has been added that provides for the Secretary to notify an accrediting agency if the Secretary takes an action against an institution or program accredited by the agency, if the Secretary learns of an action taken by another Federal agency against the institution or program, or if the institution is referred for review under the State Postsecondary Review Program.

3. Time frames have been added for the designated Department official to provide an accrediting agency with the staff analysis of its application for recognition and for the agency to respond to that analysis, if it so desires.

4. The provision that an accrediting agency may request that the Secretary reconsider a decision to deny recognition or to limit, suspend, or terminate the agency's recognition during the recognition period has been deleted.

5. The requirement that institutional accrediting agencies must conduct unannounced site visits to institutions that offer prebaccalaureate vocational education has been replaced with a requirement that those agencies must

conduct unannounced inspections at each institution that offers vocational education for the purpose of determining whether, at a minimum, the institution has the personnel, facilities, and resources it claimed to have either during its most recent on-site review by the accrediting agency or in subsequent reports to the agency. Accrediting agencies are free to determine the procedures for conducting the unannounced inspections. An unannounced inspection does not have to be as comprehensive as an agency's full accreditation or preaccreditation review of an institution or program unless the agency wishes it to be.

6. The substantive change requirement has been revised to clarify the types of changes that require prior approval by an accrediting agency before they can be included in the institution's accreditation. The substantive change requirement applies only to institutional accrediting agencies.

7. The specific language included in the NPRM for each of the 12 required accreditation standards has been deleted. The section now simply repeats the statutory language for each required standard.

8. The requirement that accrediting agencies must have a standard that assesses an institution's practice of making refunds to students has been eliminated.

9. The time limit for institutions or programs to come into compliance with agency standards has been changed. For programs of less than one year in length, the time limit is now 12 months. For programs that are at least one year in length but less than two years, the time limit is 18 months. For programs that are at least two years in length, the time limit is 24 months.

10. A requirement has been added that accrediting agencies must notify the Secretary at the same time they notify an institution or program of a final adverse accrediting action.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, more than 1800 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix to these final regulations. Included in this analysis are comments received during several public hearings and other meetings held by the Department throughout the United States for purposes of obtaining comment on the proposed regulations.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for effective and efficient administration.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

Paperwork Reduction Act of 1980

Sections 602.4, 602.10, and 602.27 of these regulations contain information collection requirements. In addition, § 602.21(b)(7) contains specific record retention requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education has submitted a copy of these sections to the Office of Management and Budget for its review. (44 U.S.C. 3504(h))

The annual reporting burden for this collection of information is estimated to be 47 hours per respondent, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This annual reporting estimate takes into account the fact that the average recognition period granted to accrediting agencies is five years. The total annual reporting burden for the estimated 96 respondents is 4,512 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. Comments must be received by May 31, 1994.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States. Based on the response to the proposed regulations and on the Department's own review, the Secretary has determined that these regulations do not require the transmission of information concerning accrediting agencies that is being gathered by or is available from any other agency or authority of the United States. Where specific provisions of these regulations require the transmission of information concerning institutions or programs that is similar to that being collected by the Department for other purposes, such as for the State Postsecondary Review Program or the Department's review of institutions seeking to become certified to participate in the Title IV, HEA programs, these regulations have been modified to minimize the burden on institutions. A detailed discussion of the changes to the regulations is provided in the appendix to these regulations.

List of Subjects in 34 CFR Part 602

Colleges and universities, Education, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number does not apply.)

Dated: April 20, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by revising part 602 to read as follows:

PART 602—SECRETARY'S PROCEDURES AND CRITERIA FOR THE RECOGNITION OF ACCREDITING AGENCIES

Subpart A—General Provisions

Sec.

602.1 Purpose.
602.2 Definitions.
602.3 Organization and membership.
602.4 Submission of information to the Secretary by recognized accrediting agencies.
602.5 Notice to accrediting agencies of Federal actions.

Subpart B—Recognition and Termination Procedures

602.10 Application for recognition.
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602.12 Review by the National Advisory Committee on Institutional Quality and Integrity.
602.13 Review and decision by the Secretary.
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602.16 Publication of list of recognized agencies.

Subpart C—Criteria for Secretarial Recognition

602.20 Geographic scope of accrediting activities.
602.21 Administrative and fiscal responsibility.
602.22 Accreditation experience.
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602.25 Substantive change.
602.26 Required accreditation standards.
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602.28 Due process for institutions and programs.
602.29 Notification of accrediting agency decisions.
602.30 Regard for decisions of States and other accrediting agencies.

Authority: 20 U.S.C. 1099b, unless otherwise noted.

Subpart A—General Provisions

§ 602.1 Purpose.

(a)(1) This part establishes procedures and criteria for the Secretary's recognition of accrediting agencies. The purpose of the Secretary's recognition of agencies is to ensure that these agencies are, for the purposes of the Higher Education Act of 1965, as amended (HEA), or for other Federal purposes, reliable authorities as to the quality of education or training offered by the institutions of higher education or the higher education programs they accredit.

(2) The Secretary's recognition of an accrediting agency is based on the Secretary's determination that the agency satisfies the requirements of this part.

(b) The Secretary only grants recognition to those accrediting agencies that—

(1) Accredit—

(i) Institutions of higher education, provided that accreditation by the agency is a required element in enabling those institutions to establish eligibility to participate in HEA programs; or

(ii) Institutions of higher education or higher education programs, provided that accreditation by the agency is a required element in enabling those institutions or programs to establish eligibility to participate in other programs administered by the Department or by other Federal agencies;

(2) Meet the organization and membership requirements specified in § 602.3;

(3) For agencies already recognized by the Secretary, comply with the information sharing requirements specified in § 602.4; and

(4) Satisfy the criteria for Secretarial recognition specified in Subpart C of this part.

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

§ 602.2 Definitions.

The following definitions apply to terms used in this part:

Accreditation means the status of public recognition that an accrediting agency grants to an educational institution or program that meets the agency's established standards and requirements.

Accrediting agency or *agency* means a legal entity, or that part of a legal entity, that conducts accrediting activities through voluntary, non-Federal peer evaluations and makes decisions concerning the accreditation or preaccreditation status of institutions, programs, or both.

Act means the Higher Education Act of 1965, as amended.

Adverse accrediting action means the denial, withdrawal, suspension, or termination of accreditation or preaccreditation, or any comparable accrediting action an agency may take against an institution or program, except that placing an institution or program on probation or issuing a show cause order against an institution or program is not an adverse accrediting action unless it is so defined by the accrediting agency.

Advisory Committee means the National Advisory Committee on Institutional Quality and Integrity.

Branch campus means

(1) A location of an institution of higher education that meets the definition of this term in 34 CFR 600.2, and

(2) Any location of an institution, other than the main campus, at which the institution offers at least 50 percent of an educational program.

Designated Department official means the official in the Department of Education to whom the Secretary has delegated the responsibilities indicated in this part.

Final accrediting action means a final determination by an accrediting agency regarding the accreditation or preaccreditation status of an institution or program that is not subject to any further appeal within the agency.

Institution of higher education or *institution* means an educational institution that qualifies or may qualify as an eligible institution under 34 CFR part 600.

Institutional accrediting agency means an agency that accredits institutions of higher education.

Nationally recognized accrediting agency, nationally recognized agency, or *recognized agency* means an accrediting agency that is recognized by the Secretary under this part.

Preaccreditation means the status of public recognition that an accrediting agency grants to an institution or program for a limited period of time that signifies that the agency has determined that the institution or program is progressing towards accreditation and is likely to attain accreditation before the expiration of that limited period of time.

Program means a postsecondary educational program offered by an institution of higher education that leads to an academic or professional degree, certificate, or other recognized educational credential.

Programmatic accrediting agency means an agency that accredits specific educational programs that prepare students for entry into a profession, occupation, or vocation.

Representative of the public means a person who is not

(1) An employee, member of the governing board, owner, or shareholder of, or consultant to, an institution or program that either is accredited by the agency or has applied for accreditation;

(2) A member of any trade association or membership organization related to, affiliated with, or associated with the accrediting agency; or

(3) A spouse, parent, child, or sibling of an individual identified in paragraph (1) or (2) of this definition.

Secretary means the Secretary of the U.S. Department of Education or any official or employee of the Department acting for the Secretary under a delegation of authority.

State means a State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Teach-out agreement means a written agreement between accredited institutions that provides for the equitable treatment of students if one of those institutions stops offering an educational program before all students enrolled in that program complete the program.

Vocational education means an instructional program, below the bachelor's level, designed to prepare individuals with the skills and training required for employment in a specific trade, occupation, or profession related to the instructional program.

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

§ 602.3 Organization and membership.

(a) The Secretary recognizes only the following categories of accrediting agencies:

(1) A State agency that—

(i) Has as a principal purpose the accrediting of institutions of higher education, higher education programs, or both; and

(ii) Has been listed by the Secretary as a nationally recognized accrediting agency on or before October 1, 1991;

(2) An accrediting agency that—

(i) Has a voluntary membership of institutions of higher education;

(ii) Has as a principal purpose the accrediting of institutions of higher education and that accreditation is a required element in enabling those institutions to participate in programs authorized under this Act; and

(iii) Satisfies the "separate and independent" requirements contained in paragraph (b) of this section;

(3) An accrediting agency that—

(i) Has a voluntary membership; and

(ii) Has as its principal purpose the accrediting of higher education programs, or higher education programs and institutions of higher education, and that accreditation is a required element in enabling those institutions or programs, or both, to participate in Federal programs not authorized under this Act; and

(4) An accrediting agency that, for purposes of determining eligibility for Title IV, HEA programs—

(i)(A) Has a voluntary membership of individuals participating in a profession; or

(B) Has as its principal purpose the accrediting of programs within institutions that are accredited by another nationally recognized accrediting agency; and

(ii)(A) Satisfies the "separate and independent" requirements contained in paragraph (b) of this section; or

(B) Obtains a waiver from the Secretary under paragraph (d) of this section of the "separate and independent" requirements contained in paragraph (b) of this section.

(b) For purposes of this section, "separate and independent" means that—

(1) The members of the agency's decision-making body—who make its accrediting decisions, establish its accreditation policies, or both—are not elected or selected by the board or chief executive officer of any related, associated, or affiliated trade association or membership organization;

(2) At least one member of the agency's decision-making body is a representative of the public, with no less than one-seventh of the body consisting of representatives of the public;

(3) The agency has established and implemented guidelines for each member of the decision-making body to avoid conflicts of interest in making decisions;

(4) The agency's dues are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(5) The agency's budget is developed and determined by the agency without review by or consultation with any other entity or organization.

(c) The Secretary considers that any joint use of personnel, services, equipment, or facilities by an accrediting agency and a related, associated, or affiliated trade association or membership organization does not violate the provisions of paragraph (b) of this section if—

(1) The agency pays the fair market value for its proportionate share of the joint use; and

(2) The joint use does not compromise the independence and confidentiality of the accreditation process.

(d)(1) Upon request of an accrediting agency described in paragraph (a)(4) of this section, the Secretary waives the "separate and independent" requirements of this section if the agency demonstrates that—

(i) The agency has been listed by the Secretary as a nationally recognized agency on or before October 1, 1991; and

(ii) The existing relationship between the agency and the related, associated, or affiliated trade association or membership organization does not compromise the independence of the accreditation process.

(2) To demonstrate that the existing relationship between the agency and the related, associated, or affiliated trade association or membership organization does not compromise the independence of the accreditation process, the agency must show that—

(i) The related, associated, or affiliated trade association or membership organization plays no role in making or ratifying the accreditation decisions of the agency;

(ii) The agency has sufficient budgetary and administrative autonomy to carry out its accrediting functions; and

(iii) The agency provides to the related, associated, or affiliated trade association or membership organization only information it makes available to the public.

(3) An agency seeking a waiver of the "separate and independent" requirements contained in this section must apply for the waiver each time it seeks recognition or renewal of recognition by the Secretary.

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

§ 602.4 Submission of information to the Secretary by recognized accrediting agencies.

Each accrediting agency recognized by the Secretary shall submit to the Secretary—

(a) Notice of final accrediting actions taken by the agency with respect to the institutions and programs it accredits;

(b) A copy of any annual report prepared by the agency;

(c) A copy, updated annually, of the agency's directory of accredited institutions and programs;

(d) A summary of the agency's major accrediting activities during the previous year (an annual data summary), if so requested by the Secretary to carry out the Secretary's responsibilities related to this part;

(e) Upon request of the Secretary, information regarding an accredited or preaccredited institution's compliance with its Title IV, HEA program responsibilities, including its eligibility to participate in Title IV, HEA programs, for the purpose of assisting the Secretary in resolving problems with the institution's participation in these programs;

(f) The name of any institution or program accredited by the agency that the agency has reason to believe is failing to meet its Title IV, HEA program responsibilities or is engaged in fraud or abuse and the reason for the agency's concern; and

(g) Any proposed change in the agency's policies, procedures, or accreditation standards that might alter the agency's—

(1) Scope of recognition; or

(2) Compliance with the requirements of this part.

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

§ 602.5 Notice to accrediting agencies of Federal actions.

(a) If the Secretary takes an action against an institution or program, the Secretary notifies the appropriate accrediting agency or agencies no later than 10 days after taking that action.

(b) If the Secretary is informed that another Federal agency is taking an action against an institution or program, the Secretary notifies the appropriate accrediting agency or agencies as soon as possible but no later than 10 days after learning of that action.

(c) If an institution is referred for review under the State Postsecondary Review Program, the Secretary notifies the institution's accrediting agency or agencies at the same time the Secretary notifies the State Postsecondary Review Entity.

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

Subpart B—Recognition and Termination Procedures

§ 602.10 Application for recognition.

(a) An accrediting agency seeking initial or renewed recognition by the

Secretary as a nationally recognized accrediting agency submits a written application to the Secretary. The application for recognition consists of—

(1) A statement of the agency's requested scope of recognition;

(2) Evidence of the agency's compliance with the criteria for recognition set forth in this part; and

(3) Supporting documentation.

(b) An accrediting agency's application for recognition constitutes a grant of authority to the Secretary to conduct site visits and to gain access to agency records, personnel, and facilities on an announced or unannounced basis.

(c) The Secretary does not make available to the public any confidential agency materials examined by Department personnel or the Secretary as part of the Secretary's evaluation of either an accrediting agency's application for recognition or its compliance with the requirements for recognition.

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

§ 602.11 Preliminary review by the Secretary.

(a) Upon receipt of an accrediting agency's application for initial or renewed recognition, the Secretary—

(1) Establishes a schedule for the review of the agency by the designated Department official, the National Advisory Committee on Institutional Quality and Integrity, and the Secretary;

(2) Publishes notice of the agency's application in the **Federal Register**, inviting public comment on the agency's compliance with the requirements for recognition and stipulating a deadline for receipt of public comment; and

(3) Provides State Postsecondary Review Entities and other appropriate organizations with copies of the notice described in paragraph (a)(2) of this section.

(b)(1) The designated Department official analyzes the accrediting agency's application to determine whether the agency satisfies the requirements of this part, taking into account all available relevant information concerning the compliance of the agency with the requirements for recognition. The analysis includes—

(i) Site visits, on an announced or unannounced basis, to the agency and, at the Secretary's discretion, institutions or programs it accredits;

(ii) Review of public comment and other third-party information received or solicited by the Secretary, as well as any other information provided to the Secretary, concerning the performance of the agency in relation to the requirements of this part; and

(iii) Review of complaints or legal actions involving the agency.

(2) The designated Department official's evaluation may also include a review of information directly related to institutions or programs accredited or preaccredited by the agency, relative to their compliance with the accrediting agency's standards, the effectiveness of the agency's standards, and the agency's application of those standards.

(c) The designated Department official—

(1) Prepares a written analysis of the accrediting agency;

(2) Sends the analysis and all supporting documentation, including all third-party comments received by the Secretary, to the agency no later than 45 days before the Advisory Committee meeting; and

(3) Specifies a time period, which will be no later than 14 days before the Advisory Committee meeting, during which the agency may provide the designated Department official with any written comments on the analysis.

(d) The accrediting agency provides any written comments it chooses to make to the designated Department official before the expiration of the time period specified in paragraph (c)(3) of this section.

(e) The designated Department official provides the Advisory Committee with the accrediting agency's application and supporting documentation, the designated Department official's analysis of the application, all information relied upon by the designated Department official in developing the analysis, any response by the agency to the analysis or third-party comment, any Department concurrence with or rebuttal to the agency's response, and any third-party information the Secretary receives regarding the agency.

(f) The designated Department official provides the agency with a copy of any Department rebuttal provided to the Advisory Committee under paragraph (e) of this section.

(g) If the designated Department official fails to provide the agency with the materials described in paragraph (c)(2) of this section within the 45-day time frame specified in that section, the agency may request that the Advisory Committee defer action on its application until the next meeting of the Advisory Committee.

(h) At least 30 days before the Advisory Committee meeting, the Secretary publishes a notice of the meeting in the **Federal Register** and invites interested parties, including those who submitted third-party comments concerning an agency's compliance with the requirements for recognition, to make oral presentations before the Advisory Committee.

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

§ 602.12 Review by the National Advisory Committee on Institutional Quality and Integrity.

(a)(1) The Advisory Committee considers an accrediting agency's application at a public meeting and invites the designated Department official, the agency, and other interested parties to make oral presentations at the meeting.

(2) The designated Department official arranges for a transcript to be made of the Advisory Committee meeting.

(b) At the conclusion of the meeting, the Advisory Committee recommends that the Secretary approve or deny recognition of the accrediting agency or defer a decision on the agency's application.

(c)(1) Except as provided in paragraph (c)(2) of this section, the Advisory Committee recommends recognition of an agency if the agency complies with each of the requirements of this part.

(2) The Advisory Committee may recommend recognition despite finding that the agency failed to comply with each of the requirements of this part if the Advisory Committee provides the Secretary with a detailed explanation as to why it believes the agency's failure to comply with the particular requirement(s) does not require denial or deferral.

(3) If the Advisory Committee recommends recognition, the Advisory Committee also recommends the scope of recognition for the agency and a recognition period.

(4) If the Advisory Committee recommends denial of recognition, the Advisory Committee specifies the reasons for the recommendation and the requirements of this part that the agency failed to meet.

(5) If the Advisory Committee recommends deferral of a decision on the agency's application, the Advisory Committee specifies the reasons for the recommendation, the requirements of this part that it believes the agency has not met, and a recommended deferral period.

(d) After the meeting, the Advisory Committee forwards its written recommendations concerning recognition to the Secretary.

(Authority: 20 U.S.C. 1099b, 1145)

§ 602.13 Review and decision by the Secretary.

(a) The Secretary determines whether to grant national recognition to an applicant accrediting agency based on

the Advisory Committee's recommendation and the full record of the agency's application, including all oral and written presentations to the Advisory Committee by the agency, the designated Department official, and interested third parties.

(b)(1) Before making a final decision, the Secretary affords both the designated Department official and the accrediting agency an opportunity to contest, in writing, the Advisory Committee's recommendation. If either the agency or the designated Department official wishes to contest the recommendation, that party shall notify the Secretary and the other party no later than 10 days after the Advisory Committee meeting.

(2) If the party contesting the Advisory Committee's recommendation wishes to make a written submission to the Secretary, the Secretary must receive that submission no later than 30 days after the Advisory Committee meeting. However, the contesting party may not submit any evidence to the Secretary that it did not submit to the Advisory Committee. The contesting party shall simultaneously provide a copy of its submission to the other party.

(3) If the noncontesting party wishes to respond in writing to the Secretary, the Secretary must receive that submission no later than 30 days after the noncontesting party receives the contesting party's submission. However, the noncontesting party may not submit any evidence to the Secretary that it did not submit to the Advisory Committee. The noncontesting party shall simultaneously provide a copy of its response to the contesting party.

(4) If the Advisory Committee's recommendation is contested, the Secretary renders a final decision after taking into account the two parties' timely written submissions, if any.

(c) The Secretary approves the accrediting agency for national recognition if the Secretary determines that the agency satisfies each of the requirements contained in this part.

(d) The Secretary approves the accrediting agency for national recognition even if the agency does not satisfy each of the requirements contained in this part if the Secretary determines that the agency's effectiveness is not impaired by the noncompliance.

(e) If the Secretary approves the accrediting agency for national recognition, the Secretary defines—

(1) The scope of the agency's recognition for Federal purposes, which shall include the—

(i) Geographic area;

(ii) Degrees and certificates awarded;

(iii) Types of institutions, programs, or both that the agency may accredit; and

(iv) Preaccreditation status(es), if any, that the Secretary approves for recognition; and

(2) The recognition period, which does not exceed five years.

(f) If the Secretary denies recognition to the accrediting agency or grants recognition for a scope narrower than that requested by the agency, the Secretary indicates in writing the reasons for that decision.

(g) If the Secretary defers a decision on the accrediting agency's application, the Secretary—

(1) Indicates in writing the reasons for the deferral and the deferral period; and

(2) Automatically extends any previously granted recognition period until the Secretary reaches a decision on the renewal application.

(h) If the Secretary does not reach a final decision on an accrediting agency's application for renewal of recognition before the expiration of the agency's recognition period, the Secretary automatically extends the previously granted recognition period until the Secretary reaches a decision on the renewal application.

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

§ 602.14 Limitation, suspension, or termination of recognition.

(a)(1) The Secretary may limit, suspend, or terminate the recognition of an accrediting agency before completion of its previously granted recognition period if the Secretary determines, after notice and opportunity for a hearing, that the agency fails or has failed to satisfy any of the requirements of this part.

(2)(i) If the agency requests a hearing, the hearing is conducted by the Advisory Committee or by a subcommittee of five members of the Advisory Committee, selected by the Secretary, if the Secretary determines that a more timely hearing is necessary than can be accommodated by the schedule of the full Advisory Committee.

(ii) If the Secretary selects a subcommittee of the Advisory Committee instead of the full Advisory Committee, the agency may challenge the membership of the subcommittee on grounds of conflict of interest on the part of one or more of the members of the subcommittee, and the Secretary replaces the member(s) if the agency's challenge is successful.

(iii) The designated Department official arranges for a transcript to be made of the hearing.

(b) The designated Department official begins a limitation, suspension, or termination proceeding against an accrediting agency by sending the agency a notice that—

(1) Informs the agency of the Secretary's intent to limit, suspend, or terminate its recognition;

(2) Identifies the alleged violations of the governing regulations that constitute the basis for the action;

(3) Describes the limits to be imposed if the Secretary seeks to limit the accrediting agency;

(4) Specifies the effective date of the limitation, suspension, or termination; and

(5) Informs the agency that it may—

(i) Submit to the designated Department official a written response to the notice no later than 30 days after it receives the notice; and

(ii) Request a hearing, which shall take place in Washington, DC, before the Advisory Committee or subcommittee if the agency submits a hearing request to the designated Department official no later than 30 days after it receives the notice.

(c)(1) As part of its response to the limitation, suspension, or termination notice or its hearing request, if any, the accrediting agency shall identify the issues and facts in dispute and its position with regard to those issues and facts.

(2) After receipt of the agency's response and hearing request, if any, the designated Department official—

(i) Transmits the limitation, suspension, or termination notice and the agency's response, if any, to that notice to the Advisory Committee or subcommittee; and

(ii) Establishes the date and time of any hearing before the Advisory Committee or subcommittee.

(d)(1) Except as provided in paragraph (d)(2) of this section, if a hearing is held, the Advisory Committee or subcommittee shall allow the designated Department official, the accrediting agency, and any interested party to make an oral or written presentation. That presentation may include the introduction of written and oral evidence.

(2) If the designated Department official and the accrediting agency each agree, the Advisory Committee or subcommittee review shall be based solely on the written materials submitted to it under paragraph (c)(2)(i) of this section.

(e)(1) After the Advisory Committee or subcommittee reviews the presentations, it shall issue an opinion in which it—

(i) Makes findings of fact based upon the evidence presented;

(ii) Recommends whether a limitation, suspension, or termination of the agency's recognition is warranted; and

(iii) Provides the reasons for that recommendation.

(2) The Advisory Committee or subcommittee shall—

(i) Transmit its written opinion to the Secretary; and

(ii) Provide a copy of its opinion to the designated Department official and the accrediting agency.

(f)(1) Unless the Advisory Committee's or subcommittee's recommendation is appealed, after receiving the recommendation, the Secretary issues a decision on whether to limit, suspend, or terminate the agency's recognition, based upon the Advisory Committee's or subcommittee's recommendation and the full record before the Advisory Committee or subcommittee.

(2) Either the accrediting agency or the designated Department official may appeal the Advisory Committee's or subcommittee's recommendation by filing a notice of appeal with the Secretary within 10 days of receipt of the Advisory Committee's or subcommittee's recommendation. If either party files an appeal with the Secretary, that party shall simultaneously provide a copy of the notice of appeal to the other party.

(3) The party appealing the Advisory Committee's or subcommittee's recommendation has 30 days after its receipt of the recommendation to make a written submission to the Secretary challenging the recommendation. However, the appealing party may not submit any evidence that was not submitted to the Advisory Committee or subcommittee. The appealing party shall simultaneously provide a copy of the submission to the other party.

(4) The nonappealing party has 30 days from the date it receives the appealing party's submission to file a written response to the Secretary regarding the submissions of the appealing party and shall simultaneously provide the appealing party with a copy of its response. The nonappealing party may not submit any evidence that was not submitted to the Advisory Committee or subcommittee.

(5) If the Advisory Committee's or subcommittee's recommendation is appealed, the Secretary renders a final decision after taking into account that recommendation and the parties' written submissions on appeal.

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

§ 602.15 Appeals procedures.

An accrediting agency may appeal the Secretary's final decision under this part regarding the agency's recognition to the Federal courts as a final decision in accordance with applicable Federal law.

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

§ 602.16 Publication of list of recognized agencies.

(a) The Secretary periodically publishes in the **Federal Register** a list of recognized accrediting agencies and each agency's scope of recognition.

(b) If the Secretary denies recognition to a previously recognized accrediting agency, or limits, suspends, or terminates its recognition during a previously granted recognition period, the Secretary publishes a notice of that action in the **Federal Register** and makes available to the public, upon request, the Secretary's determination.

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

Subpart C—Criteria for Secretarial Recognition

§ 602.20 Geographic scope of accrediting activities.

To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that the geographical scope of its accrediting activities covers—

(a) A State, if the agency is a component of a State government;

(b) A region of the United States that includes at least three States that are contiguous or in close geographical proximity to one another; or

(c) The United States.

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

§ 602.21 Administrative and fiscal responsibility.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it has the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition.

(b) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if it has, and will likely continue to have—

(1) Adequate administrative staff to—

(i) Carry out its accrediting responsibilities effectively; and

(ii) Manage its finances effectively;

(2) Competent and knowledgeable individuals, qualified by experience and training, responsible for on-site evaluation, policy-making, and decision-making regarding accreditation and preaccreditation status;

(3) Representation on its evaluation, policy, and decision-making bodies of—

(i) For an institutional accrediting agency, both academic and administrative personnel; and

(ii) For a programmatic accrediting agency, both educators and practitioners;

(4) Representation of the public on all decision-making bodies;

(5) Clear and effective controls against conflicts of interest or the appearance of conflicts of interest by the agency's board members, commissioners, evaluation team members, consultants, administrative staff, and other agency representatives;

(6) Adequate financial resources to carry out its accrediting responsibilities, taking into account the funds required to conduct the range of accrediting activities specified in the requested scope of recognition and the income necessary to meet the anticipated costs of its activities in the future; and

(7) Complete and accurate records of—

(i) Its last two full accreditation or preaccreditation reviews of each institution or program, including on-site evaluation team reports, institution or program responses to on-site reports, periodic review reports, any reports of special reviews conducted by the agency between regular reviews, and the institution's or program's most recent self-study report; and

(ii) All preaccreditation and accreditation decisions, including all adverse actions.

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

§ 602.22 Accreditation experience.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it has adequate experience in accrediting institutions, programs, or both.

(b) The Secretary considers that an accrediting agency satisfies the requirements of paragraph (a) of this section if it has—

(1) Granted accreditation or preaccreditation status to institutions or programs in the geographical area for which it seeks recognition;

(2) Conducted accreditation activities covering the range of the specific degrees, certificates, and programs for which it seeks recognition, including—

(i) Granting accreditation or preaccreditation status; and

(ii) Providing technical assistance related to accreditation to institutions, programs, or both; and

(3) Established policies, evaluative criteria, and procedures, and made evaluative decisions, that are accepted throughout the United States by—

(i) Educators and educational institutions; and

(ii) Licensing bodies, practitioners, and employers in the professional or vocational fields for which the educational institutions or programs within the agency's jurisdiction prepare their students.

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

§ 602.23 Application of standards.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it consistently applies and enforces written standards that ensure that the education or training offered by an institution or program is of sufficient quality to achieve, for the duration of any accreditation period granted by the agency, the stated objective for which it is offered.

(b) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if—

(1) The agency's written standards and procedures for accreditation and preaccreditation, if that latter status is offered, comply with the requirements of this part;

(2) The agency's preaccreditation standards, if offered, are appropriately related to the agency's accreditation standards, with a limit on preaccreditation status of no more than five years for any institution or program;

(3) The agency's organizations, functions, and procedures include effective controls against the inconsistent application of its criteria and standards;

(4) The agency bases its decisions regarding accreditation or preaccreditation on its published criteria; and

(5) The agency maintains a systematic program of review designed to ensure that its criteria and standards are valid and reliable indicators of the quality of the education or training provided by the institutions or programs it accredits and are relevant to the education or training needs of affected students.

(6) The agency demonstrates to the Secretary that, as a result of its program of review under paragraph (b)(5) of this section, each of its standards provides—

(i) A valid measure of the aspects of educational quality it is intended to measure; and

(ii) A consistent basis for determining the educational quality of different institutions and programs.

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

§ 602.24 Accreditation processes.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it has effective mechanisms for evaluating compliance with its standards and that those mechanisms cover the full range of an institution's or program's offerings, including those offerings conducted at branch campuses and additional locations.

(b) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if—

(1) In determining whether to grant initial or renewed accreditation, the accrediting agency evaluates whether an institution or program—

(i) Maintains clearly specified educational objectives consistent with its mission and appropriate in light of the degrees or certificates it awards;

(ii) Is successful in achieving its stated objectives;

(iii) Maintains degree and certificate requirements that at least conform to commonly accepted standards; and

(iv) Complies with the agency's criteria;

(2) In reaching its determination to grant initial or renewed accreditation, the accrediting agency—

(i) Requires an in-depth self-study by each institution or program, in accordance with guidance provided by the agency, that includes the assessment of educational quality and the institution's or program's continuing efforts to improve educational quality;

(ii) Conducts at least one on-site review of the institution or program at which the agency obtains sufficient information to enable it to determine if the institution or program complies with the agency's criteria;

(iii) Conducts its own analyses and evaluations of the self-study and supporting documentation furnished by the institution or program, and any other appropriate information from other sources, to determine whether the institution or program complies with the agency's standards; and

(iv) Provides to the institution or program a detailed written report on its review assessing—

(A) The institution's or program's compliance with the agency's standards, including areas needing improvement; and

(B) The institution's or program's performance with respect to student achievement;

(3) In addition to the on-site visit described in paragraph (b)(2)(ii) of this section, an institutional accrediting agency whose accreditation enables the institutions it accredits to seek eligibility to participate in Title IV, HEA programs conducts—during the interval between the agency's award of accreditation or preaccreditation to the institution or program and the expiration of the accreditation or preaccreditation period—at least one unannounced on-site inspection at each institution that provides vocational education or training for the purpose of determining whether the institution has the personnel, facilities, and resources it claimed to have either during its previous on-site review or in subsequent reports to the accrediting agency;

(4) The accrediting agency—

(i) Monitors institutions or programs throughout the accreditation or preaccreditation period to ensure continuing compliance with the agency's standards or criteria; and

(ii) Conducts special evaluations, site visits, or both, as necessary; and

(5) The accrediting agency regularly reevaluates institutions or programs that have been granted accreditation or preaccreditation.

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

§ 602.25 Substantive change.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an institutional accrediting agency must demonstrate to the Secretary that it maintains adequate substantive change policies that ensure that any substantive change to the educational mission or program(s) of an institution after the agency has granted accreditation or preaccreditation to the institution does not adversely affect the capacity of the institution to continue to meet the agency's standards.

(b) The Secretary considers that an accrediting agency meets the requirements of paragraph (a) of this section if—

(1) The agency requires prior approval of the substantive change by the agency before the change is included in the agency's previous grant of accreditation or preaccreditation to the institution; and

(2) The agency's definition of substantive change includes, but is not limited to, the following types of change:

(i) Any change in the established mission or objectives of the institution;

(ii) Any change in the legal status or form of control of the institution;

(iii) The addition of courses or programs that represent a significant departure, in terms of either in the content or method of delivery, from

those that were offered when the agency most recently evaluated the institution;

(iv) The addition of courses or programs at a degree or credential level above that included in the institution's current accreditation or preaccreditation;

(v) A change from clock hours to credit hours or *vice versa*; and

(vi) A substantial increase in—

(A) The number of clock or credit hours awarded for successful completion of a program; or

(B) The length of a program.

(c) The agency has discretion to determine the procedures it will use to grant prior approval of the substantive change, which may, but need not, require an on-site evaluation before approval is granted.

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

§ 602.26 Required accreditation standards.

(a)(1) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that its accreditation or preaccreditation standards, or both, are sufficiently rigorous to ensure that the agency is a reliable authority as to the quality of the education or training provided by the institutions or programs it accredits.

(2) For a programmatic accrediting agency that does not serve as an institutional accrediting agency for any of the programs it accredits, the standards must address the areas contained in paragraph (b) of this section in terms of the type and level of the program rather than in terms of the institution.

(3) If none of the institutions an agency accredits participates in any Title IV, HEA program, or if the agency only accredits programs within institutions accredited by an institutional accrediting agency recognized by the Secretary, the accrediting agency is not required to have the standards described in paragraphs (b)(7), (b)(8), (b)(10), and (b)(12) of this section.

(b) In order to assure that an accrediting agency is a reliable authority as to the quality of the education or training provided by an institution or program it accredits, the agency must have standards that effectively address the quality of an institution or program in the following areas:

(1) Curricula.

(2) Faculty.

(3) Facilities, equipment, and supplies.

(4) Fiscal and administrative capacity as appropriate to the specified scale of operations.

(5) Student support services.

(6) Recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising.

(7) Program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered.

(8) Measures of program length in clock hours or credit hours.

(9) Success with respect to student achievement in relation to mission, including, as appropriate, consideration of course completion, State licensing examination, and job placement rates.

(10) Default rates in the student loan programs under Title IV of the Act, based on the most recent data provided by the Secretary.

(11) Record of student complaints received by, or available to, the agency.

(12) Compliance with the institution's program responsibilities under Title IV of the Act, including any results of financial or compliance audits, program reviews, and such other information as the Secretary may provide to the agency.

(c)(1) An accrediting agency shall take appropriate action if its review of an institution or program under any standard indicates that the institution or program is not in compliance with that standard.

(2) If the agency believes that the institution or program is not in compliance with the standards, the agency shall—

(i) Take prompt adverse action against the institution or program; or

(ii) Require the institution or program to take appropriate action to bring itself into compliance with the agency's standards within a time frame specified by the agency.

(3) The accrediting agency has sole discretion to determine the course of action it chooses under paragraph (c)(2) of this section and, if it selects the option specified in paragraph (c)(2)(ii) of this section, the time frame for the institution or program to bring itself into compliance with agency standards. However, except as indicated in paragraph (c)(4) of this section, the specified period may not exceed—

(i) Twelve months, if the program is less than one year in length;

(ii) Eighteen months, if the program is at least one year, but less than two years, in length; or

(iii) Two years, if the program is at least two years in length.

(4) If the institution or program does not bring itself into compliance within the specified period, the agency must take adverse action unless the agency extends the period for achieving compliance for good cause.

(d) An accrediting agency shall have a reasonable basis for determining that the information it relies on for making the assessments described in paragraphs (b) and (c) of this section is accurate.

(e) An accrediting agency that has established and applies the standards in paragraph (b) of this section may establish any additional accreditation standards as it deems appropriate.

(Authority: 20 U.S.C. 1091, 1099b)

§ 602.27 Additional required operating procedures.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that it satisfies the procedural requirements contained in other provisions of this part and the additional requirements contained in paragraphs (b) through (h) of this section.

(b) If the accrediting agency accredits institutions and that accreditation enables those institutions to seek eligibility to participate in Title IV, HEA programs—

(1) The agency requires the institution to—

(i) Notify the agency if the institution plans to establish a branch campus; and

(ii) Submit a business plan described in paragraph (b)(2) of this section for the branch campus;

(2) The business plan that an institution submits under paragraph (b)(1)(ii) of this section must contain a description of—

(i) The educational program to be offered at the branch campus;

(ii) The projected revenues and expenditures and cash flow at the branch campus; and

(iii) The operation, management, and physical resources at the branch campus;

(3) The agency extends accreditation to the branch campus only after evaluating the business plan and taking other necessary actions to permit the agency to determine that the branch campus has sufficient educational, financial, operational, management, and physical resources to satisfy the accrediting agency's standards for accreditation;

(4) The agency undertakes a site visit of the branch campus as soon as practicable, but no later than six months after the establishment of that branch campus;

(5) The agency undertakes a site visit of an institution that has undergone a change of ownership that resulted in a change of control as soon as practicable, but no later than six months after the change of ownership; and

(6) The agency requires any institution it accredits that enters into a teach-out agreement with another

institution to submit that teach-out agreement to the agency for approval and approves the teach-out agreement if the agreement—

(i) Is consistent with applicable standards and regulations; and

(ii) Provides for the equitable treatment of students by ensuring that—

(A) Students are provided, without additional charge, all of the instruction promised by the closed institution prior to its closure but not provided to the students because of the closure; and

(B) The teach-out institution is geographically proximate to the closed institution and can demonstrate compatibility of its program structure and scheduling to that of the closed institution.

(c) The accrediting agency maintains and makes publicly available written materials describing—

(1) Each type of accreditation and preaccreditation granted by the agency;

(2) Its procedures for applying for accreditation or preaccreditation;

(3) The criteria and procedures used by the agency for determining whether to grant, reaffirm, reinstate, deny, restrict, revoke, or take any other action related to each type of accreditation and preaccreditation that the agency grants;

(4) The names, academic and professional qualifications, and relevant employment and organizational affiliations of the members of the agency's policy and decision-making bodies as well as the agency's principal administrative staff; and

(5) The institutions or programs that the agency currently accredits or preaccredits and the date when the agency will review or reconsider the accreditation or preaccreditation of each institution or program.

(d) In accordance with agency policy, the accrediting agency publishes the year when an institution or program subject to its jurisdiction is being considered for accreditation or preaccreditation and provides an opportunity for third-party comment, either in writing or at a public hearing, at the agency's discretion, concerning the institution's or program's qualifications for accreditation or preaccreditation.

(e) The accrediting agency provides advance public notice of proposed new or revised criteria, giving interested parties adequate opportunity to comment on these proposals prior to their adoption.

(f) The accrediting agency—

(1) Reviews any complaint it receives against an accredited institution or program, or the agency itself, that is related to the agency's standards, criteria, or procedures; and

(2) Resolves the complaint in a timely, fair, and equitable manner.

(g) The accrediting agency ensures that, if an institution or program elects to make a public disclosure of its accreditation or preaccreditation status granted by the agency, the institution or program discloses that status accurately, including the specific academic or instructional programs covered by that status and the name, address, and telephone number of the accrediting agency.

(h) The accrediting agency provides for the public correction of incorrect or misleading information released by an accredited or preaccredited institution or program about—

(1) The accreditation status of the institution or program;

(2) The contents of reports of site team visitors; and

(3) The agency's accrediting actions with respect to the institution or program.

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

§ 602.28 Due process for institutions and programs.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, an accrediting agency must demonstrate to the Secretary that the procedures it uses throughout the accrediting process satisfy due process requirements.

(b) The Secretary considers that an accrediting agency's procedures satisfy due process requirements if—

(1) The agency sets forth in writing its procedures governing its accreditation or preaccreditation processes;

(2) The agency's procedures afford an institution or program a reasonable period of time to comply with agency requests for information and documents;

(3) The agency notifies the institution or program in writing of any adverse accrediting action;

(4) The agency's notice details the basis for any adverse accrediting action;

(5) The agency permits the institution or program the opportunity to appeal an adverse accrediting action, and the right to representation by counsel during an appeal, except that the agency, at its sole discretion, may limit the appeal to a written appeal; and

(6) The agency notifies the appellant in writing of the result of the appeal and the basis for that result.

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

§ 602.29 Notification of accrediting agency decisions.

(a) To be listed by the Secretary as a nationally recognized accrediting agency, except as provided in paragraph (b) of this section, an accrediting agency must demonstrate to the Secretary that its written policies, procedures, and practices require it to notify the Secretary, the appropriate State postsecondary review entity, the appropriate accrediting agencies, and the public of the following types of decisions, no later than 30 days after a decision is made:

(1) A decision by the agency to award initial accreditation or preaccreditation to an institution or program.

(2) A final decision by the agency to—

(i) Deny, withdraw, suspend, or terminate the accreditation or preaccreditation of an institution or program; or

(ii) Take other adverse action against an institution or program.

(3) A decision by the agency to place an institution or program on probation.

(4) A decision by an accredited institution or program to withdraw voluntarily from accreditation or formal preaccreditation status.

(5) A decision by an accredited institution or program to let its accreditation or preaccreditation lapse.

(b) If the agency's final decision is to deny, withdraw, suspend, or terminate the accreditation or preaccreditation of an institution or program or to take other adverse action against an institution or program, the agency must notify the Secretary of that decision at the same time it notifies the institution or program.

(c) No later than 60 days after a final decision, the accrediting agency makes available to the Secretary, the appropriate State postsecondary review entity, and the public upon request, a brief statement summarizing the reasons for the agency's determination to deny, withdraw, suspend, or terminate the accreditation or preaccreditation of an institution or program, and the comments, if any, that the affected institution or program may wish to make with regard to that decision.

(d)(1) For purposes of the decisions described in paragraph (a)(4) of this section, the date of the decision is the date on which the accrediting agency receives notification by the institution or program that it is voluntarily withdrawing from accreditation or preaccreditation.

(2) For purposes of the decisions described in paragraph (a)(5) of this section, the date of the decision is the date on which accreditation or preaccreditation lapses.

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

§ 602.30 Regard for decisions of States and other accrediting agencies.

(a) To be listed by the Secretary as a nationally recognized accrediting

agency, an accrediting agency must demonstrate to the Secretary that—

(1) If the accrediting agency accredits institutions—

(i) The agency accredits only those institutions that are legally authorized under applicable State law to provide a program of education beyond the secondary level;

(ii) The agency does not renew, under the conditions described in paragraph (b) of this section, the accreditation or preaccreditation of an institution during a period in which the institution—

(A) Is the subject of an interim action by a recognized institutional accrediting agency potentially leading to the suspension, revocation, or termination of accreditation or preaccreditation;

(B) Is the subject of an interim action by a State agency potentially leading to the suspension, revocation, or termination of the institution's legal authority to provide postsecondary education;

(C) Has been notified of a threatened loss of accreditation, and the due process procedures required by the action have not been completed; or

(D) Has been notified of a threatened suspension, revocation, or termination by the State of the institution's legal authority to provide postsecondary education, and the due process procedures required by the action have not been completed;

(iii) In considering whether to grant initial accreditation or preaccreditation to an institution, the agency takes into account actions by—

(A) Recognized institutional accrediting agencies that have denied accreditation or preaccreditation to the institution, placed the institution on public probationary status, or revoked the accreditation or preaccreditation of the institution; and

(B) A State agency that has suspended, revoked, or terminated the institution's legal authority to provide postsecondary education;

(iv) If the agency grants accreditation or preaccreditation to an institution notwithstanding the actions described in paragraph (a)(1)(ii) or (a)(1)(iii) of this section, the agency provides the Secretary a thorough explanation, consistent with its accreditation standards, why the previous action by a recognized institutional accrediting agency or the State does not preclude the agency's grant of accreditation or preaccreditation; and

(v) If a recognized institutional accrediting agency takes an adverse action with respect to a dually-accredited institution or places the institution on public probationary status, or if a recognized programmatic accrediting agency takes an adverse action for reasons associated with the overall institution rather than the specific program against a program offered by an institution or places the program on public probation, the agency promptly reviews its accreditation or preaccreditation of the institution to determine if it should also take adverse action against the institution.

(2) If the accrediting agency accredits programs—

(i) The agency does not renew, under the conditions described in paragraph (b) of this section, the accreditation or preaccreditation status of a program during any period in which the institution offering the program—

(A) Is the subject of an interim action by a recognized institutional accrediting agency potentially leading to the suspension, revocation, or termination of accreditation or preaccreditation;

(B) Is the subject of an interim action by a State agency potentially leading to the suspension, revocation, or termination of the institution's legal authority to provide postsecondary education;

(C) Has been notified of a threatened loss of accreditation, and the due process procedures required by the action have not been completed;

(D) Has been notified of a threatened suspension, revocation, or termination by the State of the institution's legal authority to provide postsecondary education, and the due process procedures required by the action have not been completed;

(ii) In considering whether to grant initial accreditation or preaccreditation to a program, the agency takes into account actions by—

(A) Recognized institutional accrediting agencies that have denied accreditation or preaccreditation to the institution offering the program, placed the institution on public probationary status, or revoked the accreditation or preaccreditation of the institution; and

(B) A State agency that has suspended, revoked, or terminated the institution's legal authority to provide postsecondary education;

(iii) If the agency grants accreditation or preaccreditation to a program notwithstanding the actions described in paragraph (a)(2)(ii) of this section, the agency provides to the Secretary a thorough explanation, consistent with its accreditation standards, why the previous action by a recognized institutional accrediting agency or the State does not preclude the agency's grant of accreditation or preaccreditation; and

(iv) If a recognized institutional accrediting agency takes adverse action with respect to the institution offering the program or places the institution on public probationary status, the agency promptly reviews its accreditation or preaccreditation of the program to determine if it should take adverse action against the program.

(3) The agency routinely shares with other appropriate recognized accrediting agencies and State agencies information about the accreditation or preaccreditation status of an institution or program and any adverse actions it has taken against an accredited or preaccredited institution or program.

(b) An accrediting agency is subject to the requirements contained in paragraph (a) of this section if the accrediting agency knew, or should have known, of the actions being taken by another recognized accrediting agency or State agency.

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

Appendix

Analysis of Comments and Changes

(**Note:** This appendix will not be codified in the Code of Federal Regulations.)

An analysis of the comments and the changes to the regulations follows. General comments that refer to broad issues rather than a specific section or sections of the proposed regulations are discussed first, followed by a discussion of other issues in the order in which they appeared in the NPRM.

It should be noted that not all comments are discussed in this appendix. There are several reasons for this. First, many of the concerns expressed by commenters were directed to the statute, not the proposed regulations. In some instances, those comments are mentioned in the discussion that follows because of the importance of the issues that were raised. In most instances, however, they are not mentioned because the Secretary is not legally authorized to make the changes suggested by commenters. Second, many commenters made excellent suggestions for editorial and technical changes, as well as other minor changes, that, in the Secretary's opinion, strengthened the regulations; the Secretary has merely incorporated these suggestions without comment. For example, in § 602.11(b)(1)(ii) the Secretary received a comment that it was better to include third-party information received by the Secretary, in addition to that solicited by the Secretary. Third, some comments appeared to be based on misunderstandings of what was actually in the NPRM. For example, a few commenters expressed concern about the absence of a particular provision

that was, in fact, included in the NPRM. Fourth, several comments appeared to be directed toward specific practices of currently recognized accrediting agencies that commenters believed violated either the proposed regulations or what the commenters believed to be established accrediting practices. In general, these comments are not discussed here, but Department staff will investigate these complaints as part of the Department's ongoing monitoring of agencies.

General Comments

The Secretary received numerous comments about the overall impact of the proposed regulations. In general, commenters opposed to the proposed regulations believed that the NPRM did not achieve the coordinated balance of responsibilities among the triad members that it sought to achieve, and that it provided for extensive and duplicative data collection and reporting requirements that created a costly and unnecessary burden on the entire higher education community. Further, they believed that the regulations did not regulate "narrowly to the law," as they purported to do. In general, these commenters suggested that the Secretary should review each requirement in the proposed regulations to determine if it was required by the statute and should further ensure that all requirements that meet this test and are included in the final regulations are implemented in the most reasonable and cost effective manner. This, they believed, would ensure the Department's compliance with Executive Order 12866.

The more specific concerns of commenters opposed to the proposed regulations may be summarized as follows:

(1) The proposed regulations are overly prescriptive and excessive in detail and either exceed the statutory authority of the Secretary or significantly expand the statute beyond Congressional intent.

(2) The proposed regulations will force institutions to engage in excessive and duplicative information gathering and reporting, at considerable cost, with no net increase in the quantity or quality of information available to the public, and will result in the diversion of institutions' already scarce resources away from their primary mission of providing a quality education.

(3) The proposed regulations compromise the integrity of accreditation as a voluntary system of peer review and institutional improvement; they dilute the focus and purpose of accreditation by requiring accrediting agencies to assume responsibilities that are more appropriate to the State or Federal government.

(4) The proposed regulations will create undue, duplicative, and costly burdens on accrediting agencies for which they will receive no reimbursement from the Federal government.

(5) The proposed regulations give the Secretary approval authority over accrediting agencies' standards, which commenters believe is expressly forbidden by the statute.

(6) The proposed regulations threaten the diversity of American higher education and fail to focus oversight properly on vocational institutions.

In addition to receiving comments in opposition to the proposed regulations, the Secretary received many comments supportive of the NPRM. Some commenters, for example, believed the accreditation process needed a major overhaul, that accrediting agencies were far too secretive in their actions, and there was genuine need for substantially increased accountability of accrediting agencies to students and the general public.

Finally, the Secretary received suggestions from several commenters that the Department should strongly encourage all triad members to work together and adopt the same or similar language for the various standards, should collect the necessary data through a common source such as readily available public information or IPEDS, and should use common methodologies for various calculations such as completion or withdrawal rates.

Discussion: As suggested by several commenters, the Secretary has carefully reviewed each requirement in the proposed regulations in light of statutory intent. The Secretary has also carefully considered both the burden of the proposed regulations on institutions and accrediting agencies, in terms of cost, duplication of effort, and the added recordkeeping and reporting requirements. Similarly, the Secretary has considered the benefits of the proposed regulations, not just to institutions and accrediting agencies but to students and the general public as well. A particular concern of the Secretary has been how to ensure that the regulations hold the three members of the triad accountable for the manner in which they fulfill their responsibilities under the HEA yet still provide each member of the triad the flexibility to determine the appropriate means to carry out those responsibilities.

In general, the Secretary has responded to the concerns of commenters by eliminating much of what was perceived as excessive detail in the NPRM, thus providing accrediting agencies more flexibility to meet a particular requirement in the manner that best suits their needs and the needs and individual circumstances of the institutions or programs they accredit. At the same time, however, the Secretary has increased the accountability of agencies, as, for example, by strengthening the requirements that accrediting agencies must have effective standards and must monitor institutions or programs carefully for continued compliance with those standards. The final regulations make it quite clear that the Secretary regards accrediting agencies as having primary responsibility for educational quality, but they also make it clear that the Secretary holds accrediting agencies accountable for the quality of the institutions or programs they accredit.

The Secretary has also responded to the concerns of commenters by eliminating a number of the specific reporting and recordkeeping requirements the proposed regulations would have imposed on both accrediting agencies and institutions and by allowing agencies and institutions to work together to determine realistic requirements for reporting and recordkeeping. At the same time, the Secretary holds agencies accountable for the effectiveness of those requirements.

The Secretary believes this overall approach retains the principal strength of the current accrediting system—a system of peer review that focuses on the unique mission of each institution or program and that fosters educational improvement consistent with that mission—but effectively addresses the concerns with the current system that Congress raised when it created the Program Integrity Triad to strengthen institutional oversight.

To illustrate the effect of this overall strategy, the Secretary offers as an example the changes to § 602.26, Required accreditation standards. This section now contains only the statutory language for the 12 required standards. In this "minimalist" approach, the regulations achieve the objectives of Executive Order 12866. By no longer requiring institutions to provide annual audits to accrediting agencies, the regulations reduce the paperwork burden on both accrediting agencies and institutions at the same time they remove a major source of costly duplication of effort by accrediting agencies and the Department. By

allowing agencies flexibility in establishing standards for the 12 required areas, the regulations minimize any added costs to institutions necessitated by the new requirements. Accrediting agencies are no longer required to establish and maintain costly and duplicative systems for collecting and maintaining specific information about the institutions or programs they accredit. Now agencies may tailor their systems to the mission, needs, and circumstances of those institutions or programs and the students they serve. The overall effect of the changes to this one section of the regulations is to reduce cost, reduce burden, reduce paperwork, reduce duplication of effort, and free accrediting agencies and institutions to focus on the quality of education in all its manifestations.

The Secretary acknowledges that there is a potential risk with this strategy, however. By giving accrediting agencies maximum flexibility in these regulations, by giving SPREs corresponding flexibility in the regulations for the State Postsecondary Review Program, and by retaining authority for the Secretary to set specific requirements implementing the certification process, the danger exists that institutions will be burdened with reporting requirements that are similar, but not identical, thus increasing not only the reporting requirement but the recordkeeping requirement and cost as well. For this reason, the Secretary strongly urges a coordinated approach to any reporting requirement that may be imposed on institutions by the regulations implementing the Program Integrity Triad. Specifically with respect to accrediting agencies, the Secretary urges agencies to impose reporting requirements on the institutions or programs they accredit only after they carefully examine any publicly available information related to those requirements, any similar reporting requirements imposed on institutions by either the Department or the State Postsecondary Review Entities under the State Postsecondary Review Program, and any methodologies currently used, or mandated for use, by institutions in calculating the required information. The Secretary hopes that by bringing this potential risk of increased burden on institutions to the attention of the entire higher education community—without specifically addressing it in regulation—the community can work together to prevent undue burden at the same time it ensures proper accountability. The Secretary expects to take a leadership role in implementing a coordinated strategy to manage the triad, with the goal of maximizing effectiveness while minimizing burden, duplication, and inconsistencies among accrediting agencies, SPREs, and the Department.

As several commenters raised the issue of Secretarial approval authority over an accrediting agency's standards, the Secretary believes it is necessary to respond. It is the Secretary's belief that section 496(a) of the HEA statute gives the Secretary explicit approval authority over an agency's standards in the context of the Secretary's overall responsibility for determining whether the agency is a reliable authority as to the quality of education or training offered by the institutions and programs it accredits.

Finally, with regard to the issue of whether the regulations properly focus on vocational institutions, the Secretary wishes to note that Congress found abuses in all sectors of higher education, not just the vocational sector. For this reason, the regulations apply to all institutions, with the exception of the requirement of unannounced inspections to institutions that provide vocational education.

Changes: The specific changes to the regulations are discussed below.

Subpart A—General Provisions

Section 602.1 Purpose.

Comments: The Secretary received several comments about the requirement that Secretarial recognition is now limited to those accrediting agencies that accredit institutions of higher education or higher education programs for the purpose of enabling those institutions or programs to establish eligibility to participate in programs administered either by the Secretary or by other Federal agencies. In general, commenters expressed concern that the requirement would cause many of the currently recognized specialized or programmatic accrediting agencies to lose recognition. Commenters believed that failure to include these agencies on the list of nationally recognized accrediting agencies was counter to the purpose of the list, which they believed was to inform the public of those accrediting agencies that the Secretary determined to be reliable authorities as to the quality of education or training provided by the institutions or programs they accredit. Commenters also believed that, in general, institutional accrediting agencies did not examine in depth the individual programs offered by an institution and that the only assurance of the quality of these programs was provided by the programmatic agencies that accredited them. It was suggested by some commenters that the Federal purpose would be better served if the specialized or programmatic accrediting agencies and the institutional accrediting agencies worked together to assess the quality of education.

One commenter urged a broad interpretation of the phrase "for other Federal purposes" in section 496(a) of HEA to include a whole range of benefits that accrue to the Federal Government by virtue of the Secretary's recognition of an accrediting agency, including the use of an individual's graduation from a program accredited by a nationally recognized accrediting agency for entry-level qualifications for Federal employment.

Some commenters expressed concern that the language in § 602.1(b)(1) and (2) was misleading because the purpose of accreditation was not to enable institutions or programs to establish eligibility to participate in Federal programs. A number of these commenters provided specific suggestions for amending the language to address this concern.

Finally, the Secretary received a suggestion to reorganize this paragraph so that it, rather than § 602.3, provided a summary of the recognition requirements an accrediting agency must meet in order to be recognized by the Secretary.

Discussion: The Secretary acknowledges that the many fine programmatic accrediting agencies currently on the list of nationally recognized accrediting agencies provide an excellent measure of quality assurance in their respective fields of specialization. However, section 496(m) of the HEA makes it clear that the Secretary may recognize only those agencies that accredit institutions of higher education or higher education programs for the purpose of enabling those institutions or programs to establish eligibility to participate in programs administered either by the Secretary or by other Federal agencies.

The Secretary does not believe that the broader interpretation of the phrase "for other Federal purposes" in section 496(a) suggested by the one commenter is legally supportable because section 496(m) clearly defines the purpose an agency's accreditation must serve it if is to be recognized by the Secretary, namely the agency's accreditation must enable the institutions or programs it accredits to establish eligibility to participate in Federal programs.

The Secretary understands that the purpose of accreditation is not to enable institutions or programs to establish eligibility to participate in Federal

programs but rather to publicly recognize those institutions or programs that meet an accrediting agency's standards for educational quality. The Secretary appreciates the various suggestions for clarifying this in the regulations and has changed these regulations accordingly.

Finally, the Secretary appreciates the suggestion for reorganizing this paragraph to summarize the recognition requirements and believes it is helpful.

Change: The language in § 602.1(b) has been modified to clarify that an agency's accreditation of an institution or program must be a required element in enabling the institution or program to establish eligibility to participate in Federal programs. The section has been reorganized to clarify the recognition requirements accrediting agencies must meet if they wish to be recognized by the Secretary.

Section 602.2 Definitions

Accreditation

Comments: Several commenters noted that the word "qualifications" was either misleading or redundant and that the word "policies" or "procedural requirements" would be more appropriate.

Discussion: The word "qualifications" in the definition, which is the same definition as that used in previous regulations, does not refer to either policies or procedural requirements. Rather, it refers in general to the various requirements for accreditation that an accrediting agency might have. For example, an institution located in New York might meet all of the accreditation standards of the New England Association of Schools and Colleges (NEASC), but it is ineligible for accreditation by NEASC because it is not located in New England.

Change: The term "qualifications" has been replaced by the term "requirements."

Adverse Accrediting Action

Comments: One commenter felt the definition could be strengthened to ensure that agencies had a variety of useful sanctions, the application of which were not automatically appealable under § 602.28(a)(5). Another felt that the term should be uniformly defined by all accrediting agencies to reduce the possibility of misunderstanding arising from the use of different definitions.

Discussion: For purposes of these regulations, the Secretary has defined the term "adverse accrediting action" to include, as a minimum, those actions initiated by an accrediting agency that result in an institution or program losing its accreditation. However, the Secretary believes accrediting agencies should be free both to define other actions they consider to be adverse accrediting actions and to establish other sanctions that are not automatically appealable by the institution or program.

Change: None.

Branch Campus

Comments: In general, commenters expressed concern that the definition of "branch campus" was inconsistent with its use in § 602.27 and that there was no statutory basis for including "additional locations" in the requirement for special actions by accrediting agencies when an institution opened a branch campus.

Discussion: Under 498(j) of the HEA, the Secretary is charged with defining the term "branch campus" for purposes of Title IV of the HEA. Generally, when the Secretary defines a term, the term is defined in the same manner for any and every Title IV, HEA purpose. Accordingly, the Secretary adopted the definition of the term "branch campus" that was proposed in the Institutional Eligibility regulations, 34 CFR Part 600, in the proposed accreditation regulations. However, the Secretary realized that particular definition was too narrow to carry out the purposes of sections 496(c) (2) and (3) of the HEA, under which an institution that establishes a branch campus must file a business plan with its accrediting agency and the agency must conduct a site visit at the branch campus within six months of its establishment. Therefore, in § 602.27 of the NPRM, the Secretary imposed the requirements relating to branch campus on "additional locations" as well.

For program and administrative reasons, the Secretary has determined to keep the narrow definition of the term "branch campus" in the Institutional Eligibility regulations. However, the Secretary has adopted a different definition of "branch campus" for these regulations because that different definition is more in keeping with the statutory requirements of section 496(c). The Secretary believes this different definition is preferable because it provides assurances to students who enroll at any location of an institution that offers a substantial portion of an educational program that the location has the resources to operate, and is operating, in compliance with accrediting agency standards.

Change: The definition has been revised to include locations that meet the definition of this term in 34 CFR 600.2, which is basically the same definition as in the NPRM, and any other locations at which an institution offers at least 50 percent of an educational program. Section 602.27 has been revised to eliminate any reference to "additional location."

Prebaccalaureate Vocational Education

Comments: The Secretary received numerous comments on the definition of this term and the corresponding term, "vocational education." Many commenters believed there was no statutory basis for the distinctions in the NPRM and that the use of the term improperly targeted a particular segment of higher education for burdensome and unwarranted sanctions. Among commenters who expressed an opinion on the various definitions under consideration, responses were divided. Some preferred a definition that excluded any type of vocational education that led to a degree, while others felt the definition should include all prebaccalaureate vocational education regardless of the credential awarded.

Discussion: See discussion below under "vocational education."

Change: The term "prebaccalaureate vocational education" has been deleted from the regulations.

Representative of the Public

Comments: The Secretary received two suggestions for changing this definition. One was to allow members of the governing board of affiliated nonprofit institutions to represent the public. The other was to exclude close relatives of students or employees at affiliated institutions.

Discussion: The Secretary believes that members of the governing board of affiliated non-profit institutions can make valuable contributions to an accrediting agency but should not do so in the capacity of a representative of the public. The Secretary also believes the exclusion of spouses, parents, children, and siblings of employees of affiliated institutions is appropriate and that the exclusion ought to extend to close relatives of other individuals listed in the definition. On the other hand, the Secretary believes students, who are the consumers in this instance, and their families can serve a useful role as representatives of the public.

Change: The definition has been revised to exclude close relatives of individuals listed in the definition from serving as representatives of the public.

Teach-out Agreement

Comments: The Secretary received a suggestion to include in the definition specific criteria for what constitutes the

"equitable treatment of students." The Secretary also received a suggestion to delete the definition because the Department's previous teach-out regulations, issued January 1993, were rescinded.

Discussion: The requirement that accrediting agencies have standards for teach-out agreements is specified in section 496(c)(4) of the HEA and is independent of any Department regulation that may or may not be in effect regarding teach-out agreements. The Secretary believes the inclusion of provisions for what constitutes equitable treatment of students under a teach-out agreement is a useful addition to the regulations but believes these provisions should be included in § 602.27(b)(6), where the requirement for teach-out agreements is described, rather than in the definition section.

Change: None. However, the specific criteria for what constitutes equitable treatment of students have been added to § 602.27(b)(6).

Vocational Education

Comments: The Secretary received numerous comments on the definition of this term and the corresponding term, "prebaccalaureate vocational education." Many commenters preferred a broad definition that treated all institutions offering any type of vocational education the same way. Others preferred a definition that excluded programs leading to any type of degree. Some commenters suggested a definition similar to that in the Carl D. Perkins Vocational and Applied Technology Education Act. Others suggested different approaches to the issue, including the use of the term "nonacademic education program," which they defined to be the opposite of an academic education program, as they believed that term was defined in the Department's clock hour/credit hour regulations. Still others preferred a definition that restricted the term to institutions whose predominant offerings were vocational, with "predominant" defined to mean more than 75 percent of an institution's offerings. Almost all commenters preferred that the same definition be used in both the accreditation and SPRE regulations.

Discussion: The Secretary has carefully considered all comments received on this issue, as well as those on the broader issue of the burden these regulations would impose on institutions and accrediting agencies. While the Secretary agrees that it would be best if these regulations and those for the State Postsecondary Review Program used both the same term and the same definition of that term, the Secretary is aware that the statute uses the term "vocational education" for accreditation and "vocational program" for the State Postsecondary Review Program. Consequently, the Secretary believes the appropriate term for the accreditation regulations is "vocational education" and for the SPRE regulations "vocational program." However, despite the difference in the specific term used, the Secretary believes that the definition of both terms should be the same.

The Secretary has examined all of the proposed definitions for the accreditation and SPRE regulations and believes that the IPEDS glossary definition of an "occupationally specific program" most closely meets the needs of both regulations. The Secretary has modified this definition slightly, however, to meet the specific needs of accreditation and the State Postsecondary Review Program. Thus, in the accreditation regulations, the term "vocational education" is defined to be an instructional program, below the bachelor's level, designed to prepare individuals with the skills and training required in a specific trade, occupation, or profession related to the instructional program. The identical definition is used in the SPRE regulations for a "vocational program." While the definition differs slightly from the exact wording in the IPEDS definition, the Secretary wishes to make clear that the list of occupationally specific programs provided by IPEDS defines the instructional programs that, if offered by an institution, cause the institution to be subject to unannounced inspections by the institution's accrediting agency, as specified in § 602.24.

Change: The term "vocational education" has been redefined as indicated above under the Discussion section.

Section 602.3 Organization and Membership

Comments: A few commenters expressed concern about the requirement in section 496(a) of the HEA that accrediting agencies whose accreditation enables the institutions they accredit to participate in programs authorized under the HEA must be administratively and financially separate from and independent of any related, associated, or affiliated trade association or membership organization. These commenters believed that this requirement would force many agencies to undergo a major restructuring simply to come into technical compliance with this provision despite the fact that there was no evidence their present structure in any way compromised the integrity of their accrediting decisions.

The Secretary also received some comments about the provisions for a waiver of the "separate and independent" requirements. Most of these were directed to specific circumstances that exist, or might exist, in the case of a particular accrediting agency seeking a waiver. The Secretary also received a suggestion that accrediting agencies should have to seek the waiver each time they applied for recognition, or renewal of recognition, by the Secretary.

Discussion: The general concern about the new organization and membership requirements is directed to the law, not the regulations. As the language in § 602.3 merely restates the requirements of the law, it cannot be changed.

With regard to the waiver of the "separate and independent" requirements, the Secretary believes the specific circumstances described by various commenters about a particular accrediting agency should be addressed in the context of that agency's application for the waiver, not through regulation. The Secretary accepts the suggestion to stipulate in regulation that an agency must seek a waiver each time it applies for recognition or renewal of recognition.

Change: A requirement has been added that accrediting agencies must seek a waiver of the "separate and independent" requirement each time they apply for recognition or renewal of recognition.

Section 602.4 Submission of Information to the Secretary by Recognized Accrediting Agencies

Comments: The Secretary received numerous comments that the proposed requirement in § 602.4(e)—that an accrediting agency had to submit to the Secretary, upon request, information to assist the Secretary in resolving problems with any institution or program accredited by the agency—exceeded the statute and failed to distinguish adequately between public and private information maintained by accrediting agencies. Commenters generally believed that this requirement put accrediting agencies in the position of being required to do the Secretary's work and threatened to compromise the inherent value of the peer review system on which accreditation is based. Some of these commenters believed that § 602.4(e) should be deleted in its entirety, while others suggested that the information to be provided by accrediting agencies should be restricted either to the accreditation status of an institution or program or to the

minimum information needed to fulfill the intent of the law.

Not all commenters were opposed to § 602.4(e), however. Some supported it as written. Some stated their opinion that the less confidential information accrediting agencies kept the better. Several of these commenters suggested that a protocol be developed for the sharing of information and that there should be a single office within the Department that served as contact with accrediting agencies for the purpose of information sharing. One commenter suggested that accrediting agencies be given time to negotiate a new understanding of the information sharing concept with institutions because, as important as the concept was, it was generally in conflict with most agencies' policies on confidentiality. One commenter, while expressing general support for information sharing, cautioned against requiring information to be shared before it was confirmed in fact, the institution had received due process, and any applicable appeals were complete. Many commenters suggested that a possible solution that would allow the Secretary access to the information the Secretary needed without placing agencies in the position of doing the Secretary's work was the use of an administrative subpoena by the Department.

Of general concern to all commenters on the issue of information sharing was the kind of information shared by an accrediting agency about an accredited institution or program that would be obtainable by anyone under the Freedom of Information Act (FOIA).

With regard to the comment in the NPRM that the Secretary was considering adding to this section a requirement that an accrediting agency must refer to the Department's Office of Inspector General any fraudulent activities it discovers on the part of an institution or program it accredits, provided that institution or program participates in Title IV, HEA programs, the Secretary received strong support for the general concept but some concern about agencies' liabilities should the institution or program be subsequently found not to have engaged in fraud. Commenters also urged the Secretary to substitute for the term "fraud," which has a very precise legal definition, something more general like "substantial wrongdoing" or "serious abuse."

Finally, several commenters noted that there was no provision in the proposed regulations that paralleled the proposed requirement in 34 CFR part 667 that the Secretary notify the State postsecondary review entity of Federal actions against an institution. Commenters also suggested that the State postsecondary review entity should be required to notify an accrediting agency of the outcome of any review of an institution accredited by the agency that it makes under the State Postsecondary Review Program.

Discussion: The Secretary is aware that most accrediting agencies currently have confidentiality policies that prevent them from releasing information about an accredited institution or program to a third party without the prior approval of the institution. The Secretary is also aware that confidentiality is an important aspect of the peer review system on which accreditation is based.

However, the Secretary notes that under section 487(a)(15) of the HEA, by entering into a Title IV, HEA program participation agreement, an institution acknowledges the authority of the Secretary, accrediting agencies, State postsecondary review entities, and others to share with each other information pertaining to the institution's eligibility to participate in Title IV, HEA programs and any information on fraud or abuse by the institution. Therefore, institutions can have no genuine expectation that information they provide to their accrediting agencies pertaining to their Title IV, HEA program responsibilities, fraud, or abuse will be kept confidential from the Secretary or these other entities. Accordingly, the Secretary has revised § 602.4(e) to reflect that statutory provision. Thus, the information the Secretary may request from an accrediting agency under § 602.4(e) is limited to information concerning an accredited or preaccredited institution's compliance with its Title IV, HEA program responsibilities, including its eligibility to participate in Title IV, HEA programs. As a result, an agency does not have to provide the Secretary with copies of an institution's self-study report, reports of on-site evaluations of the institution by the accrediting agency, or other documents maintained by the agency about the institution for the purpose of determining the institution's compliance with the agency's standards. However, the agency must provide any information contained in those documents that is relevant to the institution's compliance with its Title IV, HEA program responsibilities. The Secretary notes that, as discussed in connection with § 602.10, an accrediting agency must provide any document the Secretary requests relating to whether the agency is complying with the requirements of this part.

The Secretary appreciates the suggestion to develop a protocol for information sharing. As this suggestion relates to the Secretary's management of a regulatory provision, however, it does not need to be addressed in regulation. The Secretary intends to work with agencies to develop an appropriate protocol for information sharing, which will address the concerns raised about both the types of information releasable under a FOIA request and a central point of contact within the Department for the exchange of information.

The Secretary acknowledges the difficulties in requiring accrediting agencies to report "fraud" or "suspected fraud." As the statutory provision for information sharing specifically refers to fraud and abuse, however, the Secretary has added a provision to § 602.4 that requires agencies to notify the Secretary if they have reason to believe that an institution may be engaged in fraud or abuse. The Secretary has also added a provision requiring agencies to notify the Secretary if they have reason to believe an institution or program is not meeting its Title IV, HEA program responsibilities.

The Secretary acknowledges the importance of sharing with accrediting agencies information about Federal actions against accredited institutions but believes that information sharing goes beyond the cases identified by commenters to include notification to agencies when an accredited institution is referred for review under the State Postsecondary Review Program. The Secretary also acknowledges the importance of having the State postsecondary review entity notify accrediting agencies of the results of its reviews but believes this requirement is more appropriately placed in 34 CFR Part 667 rather than 34 CFR Part 602. The Secretary notes that an accrediting agency's responsibility for notifying State postsecondary review entities about its decisions is discussed in § 602.29 of these regulations. *Changes:* Section 602.4(e) has been revised to indicate that any agency must comply with the Secretary's request for information that is related to the institution's or program's compliance with its Title IV, HEA program responsibilities, including its eligibility to participate in Title IV, HEA programs. The Secretary has removed the limitation on an agency's duty to share information only in those situations where it does not conflict with accrediting agencies' policies on confidentiality. A requirement has been added that an accrediting agency must

notify the Secretary if the agency has reason to believe an institution or program is not meeting its Title IV, HEA program responsibilities or is engaged in fraud and abuse. A new section (§ 602.5) has been added outlining the Secretary's responsibilities for notifying accrediting agencies of Federal actions against accredited institutions or programs or referral of institutions to States under the State Postsecondary Review Program.

Subpart B—Recognition and Termination Procedures

Section 602.10 Application for Recognition.

Comments: The Secretary received many comments that the statute only allows the Secretary access to an accrediting agency's records, personnel, and facilities, on an announced or unannounced basis, during the application and review process, not during the entire recognition period. Some commenters described the Secretary's access as so broad that it constituted unwarranted search and seizure without probable cause. Some commenters were especially concerned about the possible release under a FOIA request of an agency's confidential materials that Department personnel examined as part of the Secretary's evaluation of an agency's application for recognition. With regard to the provision for unannounced visits by the Secretary, the Secretary received suggestions both to limit and not limit the use of these visits.

The Secretary received a number of comments that the application process and related recordkeeping requirements were particularly burdensome on accrediting agencies and that the burden reported in the **Federal Register** grossly underestimated the burden imposed by the regulations. Other commenters, however, believed that the application and recordkeeping requirements were not in any way burdensome and that the Secretary was requesting only the minimum amount of information needed to determine whether an agency was a reliable authority as to the quality of education or training provided by the institutions or programs it accredited.

With regard to the suggestion in the NPRM that the Secretary was considering allowing agencies to provide a simple statement of assurance that they complied with the requirements for recognition so as to reduce the burden on agencies applying for recognition, there was mixed reaction. Some commenters welcomed the simplification as a reduction in burden, but others thought it invited abuse and provided no protection of the public interest. Still others felt that the first review of an agency under the new regulations should be extremely thorough, but thereafter the simple assurance approach was reasonable.

Finally, the Secretary received a request to include in the regulations the provision contained in the statute that the Secretary shall give priority for review to those agencies whose institutions participate most extensively in Title IV, HEA programs and those agencies that are subject to the most complaints or legal actions.

Discussion: The Secretary believes that the statute requires the Secretary to ensure that recognized accrediting agencies stay in compliance with the requirements for recognition throughout the recognition period. Consequently, the Secretary believes the statute authorizes the Secretary to have access to an accrediting agency's records, personnel, and facilities not only during the application and review process but throughout the recognition period as well.

Regarding concerns about possible release of confidential agency materials under a FOIA request, the Secretary wishes to assure agencies that there are provisions under FOIA that protect most of the types of information the Secretary expects to obtain from agencies for purposes of § 602.10(b). For example, if the Secretary determined that an accrediting agency's actions with respect to three institutions clearly demonstrated the agency's failure to comply with the recognition requirements, the Secretary would not be required to release the names of the three institutions under a FOIA request. The Secretary would, of course, identify the institutions to the accrediting agency so that the agency would have a clear understanding of the basis on which the Secretary reached the determination that it failed to meet the criteria for recognition. While the Secretary will protect confidential agency materials to the full extent allowed under FOIA, the Secretary wishes to make it clear that this does not prevent the Secretary from using those materials against an agency should the Secretary determine that the agency is in violation of the criteria for recognition.

Regarding unannounced visits by the Secretary, which are authorized by the statute, the Secretary believes the use of such visits is a managerial decision and need not be regulated.

With regard to the overall burden reported in the **Federal Register**, the Secretary wishes to note that the estimate was based in part on information provided to the Secretary by various accrediting agencies as to the time required to complete an application and to meet other requirements contained in the NPRM. It was also based on the assumption that the Secretary would adopt the simple assurance approach described in the NPRM.

Finally, with regard to both the use of a simple assurance statement to simplify the application process and the inclusion of a set of review priorities, the Secretary believes these relate to the management of the recognition process and do not need to be addressed in regulation. The Secretary wishes to make it clear, however, that it is the Secretary's intent to minimize the overall burden to agencies through a simplification of the entire application process.

Change: The section that detailed the conditions under which the Secretary uses unannounced visits to determine an agency's compliance with the recognition requirements has been deleted. The phrase "analysis of" in § 602.10(a)(2) has been replaced with "evidence of" to conform to the simple assurance approach.

Section 602.11 Preliminary Review by the Secretary

Comments: Section 602.11(b)(2) of the proposed regulations provided that the Secretary's evaluation of an agency should include a review of information directly related to the institutions or programs accredited by the agency, as this information relates to the institution's or program's compliance with the agency's standards, the effectiveness of those standards, or the agency's application of those standards. The Secretary received a number of comments that supported this provision. In general, these commenters felt that it was important for the Secretary to monitor the extent to which individual agencies continued to accredit institutions that engage in fraud or abuse, particularly abuse of the Title IV, HEA programs. The Secretary received many more comments, however, that this provision was inappropriate and also redundant, given the provisions contained in § 602.11(b)(1)(i-iii). These commenters also believed the provision gave the Secretary approval authority over an agency's accreditation standards, which, in their opinion, was contrary to the statute.

The Secretary also received some comments related to the sharing of information used by the designated Department official to reach conclusions regarding an agency's compliance with the requirements for recognition. In

general, these commenters wanted the regulations to specify time frames for an agency's written response to the Department staff analysis concerning its application for recognition, to require the designated Department official to share with the agency all information used in reaching a decision about the agency's application, to require the Department to forward to an agency written reports on any announced or unannounced site visits, file reviews, or other reviews of the agency, and to allow the agency the opportunity for response to all these reports.

Finally, a number of commenters suggested that the regulations should include a requirement that the Secretary must publish a notice in the **Federal Register** when an accrediting agency is being considered for recognition and must also notify the State postsecondary review entities.

Discussion: The Secretary believes that the designated Department official's review of information directly related to institutions or programs accredited by an agency is central to the issue of whether the agency is a reliable authority as to the quality of the institutions of programs it accredits. Therefore, this provision must be retained. The Secretary notes that any information provided by the agency in accordance with § 602.4(e) of these regulations may also be reviewed by the designated Department official during any evaluation of the agency for compliance with the requirements for recognition.

With regard to the suggestion for including various time frames in this section, the Secretary appreciates the concerns that led commenters to request time frames and, consequently, agrees to include them in this section. The Secretary does not believe that agencies should have the right to receive a written report after every monitoring activity conducted by the designated Department official as these activities are conducted for the general purpose of gathering information about an agency's compliance with the requirements for recognition and, in that sense, are "predecisional."

Finally, it is already a requirement, under the Federal Advisory Committee Act, that the Secretary must publish an announcement of each Advisory Committee meeting, including those at which accrediting agencies are considered for recognition, but the Secretary acknowledges the importance of making that practice clear in these regulations. The Secretary also acknowledges the importance of notifying the State postsecondary review entities whenever an agency is being considered for recognition.

Changes: Time frames have been added for providing analyses and supporting documentation to an accrediting agency before the Advisory Committee meets on that agency's application for recognition. A provision for notifying State postsecondary review entities and other appropriate organizations of an agency's application for recognition has also been added. Finally, a provision has been added requiring the Secretary to publish a notice of the Advisory Committee meeting in the **Federal Register** and to invite interested parties to make presentations before the Advisory Committee.

Section 602.13 Review and Decision by the Secretary

Comments: Some commenters objected to the provision that the Secretary could decide to recognize an agency even if it did not meet all of the requirements for recognition, provided the Secretary determined that the noncompliance did not impair the agency's effectiveness. These commenters were particularly concerned that an accrediting agency that failed to meet a particular requirement might be recognized even though the reasons it failed to meet that requirement were within its control to correct. Other commenters, however, commended the Secretary's willingness to determine the appropriateness of a waiver when an agency's noncompliance with one or more requirements for recognition did not limit the effectiveness of the agency. To these commenters, the Secretary's flexibility was a demonstration that the Secretary sought a working partnership with accrediting agencies that was based on performance and trust.

With regard to an appeal of an Advisory Committee recommendation, some commenters felt that the 30-day time frame was too short. Other commenters requested that, in addition to the designated Department official and the agency, third parties be allowed to contest an Advisory Committee's recommendation concerning the recognition of an agency.

Finally, several commenters felt that the regulations should contain a time frame for the Secretary to make a decision regarding an agency's application for recognition.

Discussion: While the Secretary appreciates the concern of the commenters about granting recognition to an agency that does not meet all of the requirements for recognition, the Secretary believes that some flexibility is needed so that the Secretary may grant recognition to an agency that fails to meet all of the requirements, even if the circumstances are within the agency's ability to control.

The Secretary understands the concerns raised about the 30-day time frame for appealing an Advisory Committee recommendation. However, the Secretary wishes to note that an agency already has two opportunities prior to the Advisory Committee's recommendation during which it may state its case as to why a negative recommendation concerning its application for recognition is unwarranted. First, the agency may respond in writing to a negative recommendation by the designated Department official before that recommendation is forwarded to the Advisory Committee. Second, agency representatives have an opportunity to appear in person before the Advisory Committee to argue against a negative recommendation. Because of these two opportunities, the Secretary does not believe the 30-day time frame after the Advisory Committee makes its formal recommendation is unrealistic.

With regard to third parties appealing an Advisory Committee recommendation, the Secretary believes that the appropriate place for third-party comment is before the Advisory Committee reaches its decision on a recommendation, not after. With regard to a time frame for the Secretary's decision, the Secretary believes that this is appropriately a management issue and does not need to be specified in regulation.

Change: None.

Section 602.14 Limitation, Suspension, or Termination of Recognition

Comments: The Secretary received a suggestion from several commenters that any agency subject to the limitation, suspension, or termination of its recognition should be allowed to challenge the membership of the subcommittee that conducts a hearing on its case if, in fact, a subcommittee, rather than the full Advisory Committee, hears the case. Commenters believed a challenge should be allowed on the grounds of either conflict of interest or lack of expertise in either the type of agency subject to the action or its scope of accrediting activity. The Secretary also received a suggestion that the subcommittee should consist of five, rather than three, members and another suggestion that all negative actions recommended by the subcommittee should be discussed and acted upon by the full Advisory Committee. One

commenter suggested that an agency, rather than the Secretary, should be allowed to select members of the subcommittee.

Finally, the Secretary received several comments that the 30-day frame for an agency to respond to the designated Department official's notice of intent to limit, suspend, or terminate the agency's recognition was too short.

Discussion: Given the seriousness of the situation that would prompt the use of a subcommittee rather than the full Advisory Committee, the Secretary accepts the suggestion to expand its size. However, the Secretary believes the same seriousness that necessitates the use of a subcommittee demands prompt resolution by the subcommittee. Similarly, the Secretary does not accept the suggestion that the agency should be allowed to choose members of the subcommittee. Regarding an agency's right to challenge the composition of the subcommittee, it is the Secretary's intent to appoint to the subcommittee individuals who have no known conflict of interest. However, the Secretary acknowledges that there may be instances unknown to the Secretary in which a conflict of interest may exist with a subcommittee member. For this reason, the Secretary believes a challenge to the membership of the subcommittee on grounds of conflict of interest is warranted. The Secretary does not believe that a challenge on the basis of lack of expertise is justified because the members of the Advisory Committee from which the membership of the subcommittee is chosen have general expertise in the areas that come under the purview of the committee.

With regard to the 30-day time frame for responding to a notice of intent to limit, suspend, or terminate recognition, the Secretary believes that the seriousness of the situation that prompts such a notice demands equally prompt resolution to protect the public interest.

Changes: The size of the subcommittee has been increased from three to five members. Agencies are now allowed to challenge the composition of the subcommittee on grounds of conflict of interest.

Section 602.15 Requests for Reconsideration of the Secretary's Decision

Comments: In response to the Secretary's question in the NPRM as to whether this provision should be retained, given the additional appeal opportunities for an agency before the Secretary decides on its application, the Secretary received mixed responses. Several commenters felt the provision was superfluous. Those who did not had various suggestions for changing the procedures, from changing the time frames to clarifying the grounds for reconsideration.

Discussion: The Secretary concurs with the assessment of the commenters who believed that the provision for reconsideration was superfluous in light of the additional appeals procedures provided to agencies before the Secretary reaches a decision.

Change: The section has been deleted.

Section 602.16. Appeals Procedures

Comments: One commenter felt that this section was unnecessary because agencies can always appeal to the courts. Other commenters expressed concern that the NPRM did not provide for a meaningful appeal of adverse recognition decisions, as required by the statute. These commenters generally suggested using an intermediate administrative appellate body, such as an administrative law judge, to hear appeals. Other commenters supported the provision as written, fearing that an alternative administrative process within the Department would deplete the Department's resources inappropriately.

Discussion: The Secretary continues to believe, as described in the NPRM, that there can be no administrative appeal within the Department of a Secretarial decision since the Secretary, as head of the Department, makes all final decisions on behalf of the Department. The only appeal is through the courts. The Secretary wishes to note, however, that an agency for which the Advisory Committee recommends denial of recognition is afforded an opportunity to contest that recommendation before the Secretary reaches a final decision. To delay the Secretary's final decision by adding still another layer of appeal is, in the Secretary's opinion, unwarranted.

Change: None.

Subpart C—Criteria for Secretarial Recognition

Section 602.20 Geographic Scope of Recognition

Comments: The Secretary received one comment on this section from an individual who was concerned that the regulations might be construed to preclude a State from accrediting foreign and out-of-state institutions.

Discussion: Any accrediting agency, including a State, is free to define the geographic area for which it seeks recognition. In granting recognition, the Secretary defines the geographic area included in the agency's scope of recognition, which may or may not be the full geographic area requested by the agency. The Secretary bases the decision regarding the agency's geographical area of recognition on whether the agency is a reliable authority regarding the quality of education provided by the institutions it accredits throughout its geographic region.

Change: None.

Section 602.21 Administrative and Fiscal Responsibility

Comments: A number of commenters described the recordkeeping burden imposed by the proposed regulations as unduly onerous and in violation of Office of Management and Budget (OMB) guidelines that limit record retention requirements to three years. Several commenters indicated that the requirement to keep self-study reports for two complete accreditation or preaccreditation cycles was especially burdensome because of the large volume of materials typically included with these reports.

On other issues related to this section, one commenter felt that, to avoid conflicts of interest, members of the agency's decision making body should not also be members of the agency's governing board. Another believed that the Secretary should not have authority to determine whether an agency's staff is adequate, knowledgeable, and competent.

Discussion: With regard to the record retention requirement, the Secretary wishes to note that the requirement to keep records for two complete accreditation or preaccreditation cycles first appeared in the 1988 regulations governing the recognition of accrediting agencies. The NPRM for those regulations had initially included a provision for the indefinite retention of records. This was subsequently reduced to the current two-cycle requirement as a result of public comment on the recordkeeping burden.

The Secretary also wishes to note that the specific comment about the burden of keeping self-study reports for two full cycles was made by negotiators during the negotiated rulemaking sessions for these regulations. As a result, the Secretary carefully monitored the review of self-study reports by Department staff members conducting file reviews at agencies' headquarters during the past year and has determined that only the most recent self-study reports are particularly useful to staff. Consequently, the recordkeeping requirement for self-study reports has been reduced to the most recent report only.

With regard to the potential conflict of interest when the same individuals

serve as members of both the decision making body and the governing board of an agency, the Secretary appreciates the concern but believes that agencies should be allowed the flexibility to determine the composition of these bodies that best suits their needs. Further, as all agencies are required to have adequate policies dealing with conflicts of interest, the Secretary believes there is adequate protection of the public interest.

Concerning the issue of the Secretary's review of an agency's staff, the Secretary believes that the adequacy, knowledge, and capability of an accrediting agency's staff are appropriate factors to be considered in making a determination regarding whether the agency has the administrative responsibility to carry out its accrediting activities.

Change: Agencies must keep only the most recent self-study report.

Section 602.22 Demonstration of Accreditation Experience

Comments: Several commenters requested that accrediting agencies be required to demonstrate that their policies, evaluation methods, and decisions are accepted throughout the United States by recognized accrediting agencies. Their rationale was that acceptance by recognized agencies provided an important measure of an agency's reliability.

Discussion: The commenters' rationale was presented to the Department by the non-Federal negotiators during negotiated rulemaking, and the Secretary acknowledges that demonstration of acceptance by recognized accrediting agencies can be an important factor to consider when evaluating an agency seeking recognition, particularly one seeking initial recognition. On the other hand, those interested in forming new accrediting agencies have expressed concern that this requirement imposes unfair hurdles for them and unduly stifles competition among accrediting agencies. The Secretary believes that agencies should not be required to demonstrate acceptance by recognized accrediting agencies but may certainly do so in their application for recognition, if they wish.

Change: None.

Section 602.23 Application of Standards

Comments: The Secretary received several suggestions for changes to this section. For example, one suggestion was to change the wording in § 602.23(a) from "[the agency] consistently applies and enforces written standards that ensure that the quality of education or training offered is of sufficient quality to achieve * * * the stated objective for which it is offered" to "[the agency] has written standards that it consistently applies to ensure that the education or training offered * * *." Another was to change the wording in § 602.23(b)(5) from "to ensure that its criteria and standards are appropriate and sufficiently comprehensive to evaluate the quality of the education of training provided * * * and are relevant to the education or training needs of affected students" to "to ensure that its criteria and standards are comprehensive and appropriate to the agency's objective of ensuring the quality of the institutions or programs it accredits."

The Secretary also received a number of comments directed to the requirement that agencies must have a systematic program of review to ensure what in previous regulations was described as the "validity and reliability" of its standards. Some commenters believed the wording in the NPRM was preferable to the phrase "validity and reliability" because of the various technical interpretations often given to those words. Others, however, found the wording in the NPRM vague and generally not as strong as the original wording. All commenters, regardless of their concerns about the specific wording, agreed that the requirement was exceedingly important in assessing whether the agency is a reliable authority as to educational quality.

Finally, several commenters requested that the limit on preaccreditation status be extended from five to six years to accommodate some agencies' practice of granting preaccreditation for six years and then reviewing the preaccredited institution or program every two years during the six-year period.

Discussion: The Secretary believes that the various wording changes suggested by commenters for § 602.23, of which two are described above, substantially reduce the effectiveness of the section by shifting the emphasis away from agencies' overall responsibility to have effective standards that ensure educational quality. With regard to the request that the maximum preaccreditation period be lengthened to six years, the Secretary understands the rationale presented by those agencies that conduct very thorough, and in some cases on-site, reviews of preaccredited institutions or programs throughout the preaccreditation period. However, the Secretary notes that not all agencies follow this practice of conducting thorough on-site reviews throughout the preaccreditation period. In these instances, the Secretary believes that the addition of another year of preaccreditation is not justified. For this reason, the Secretary does not accept the suggestion to extend the maximum preaccreditation period to six years.

With respect to the "validity and reliability" issue, the Secretary has carefully considered all of the comments, especially those directed to the level of technical and statistical precision that is often associated with the words. However, in light of the Secretary's decision to list the twelve required accreditation standards in § 602.26 as they appear in the law, with no elaboration, the Secretary believes the strongest possible language is necessary in this section to make very clear the importance of this requirement in establishing sound accreditation standards. For the same reason, the Secretary believes it is necessary to add to this section a requirement that an agency must demonstrate that each of its standards provides both a consistent basis for determining the educational quality of different institutions and programs and a valid measure of the aspects of educational quality that it is intended to measure.

Changes: The requirement in § 602.23(b)(5) has been revised to incorporate the "validity and reliability" language. A requirement has been added that an agency must demonstrate that each of its standards is effective in determining educational quality.

Section 602.24 Accreditation Processes

Comments: The Secretary received numerous comments about the provision pertaining to unannounced site visits, most of which were directly related to the definitions of "prebaccalaureate vocation education" and "vocational education." Many commenters preferred that unannounced visits be restricted to those institutions offering non-degree vocational education, while others felt that all institutions offering vocational education, regardless of the credential awarded, should be subject to the requirement. Many commenters suggested that the term "institution that offers vocational education" should be restricted to those institutions whose predominant offerings are vocational. The word "predominant" was defined by these commenters to mean more than 75 percent of an institution's course offerings.

Several commenters also believed that the purpose of the unannounced site

visit as stated in the NPRM—to determine whether or not the institution or program continued to be in compliance with the agency's standards—was inappropriate. One commenter wanted the regulations to require accrediting agencies to publish clear guidelines for when and how an agency will conduct an unannounced visit.

Discussion: The Secretary has carefully considered all comments received on this issue, as well as those on the broader issue of the burden these regulations would impose on institutions and accrediting agencies. The Secretary has also reexamined the House-Senate Conference Report regarding the requirement for unannounced inspections of institutions that offer vocational education. This report describes the House language as requiring unannounced inspections of institutions that are predominately vocational in nature, while the Senate language speaks more generally of requiring these inspections for all institutions that offer vocational education. As this report also notes that the House deferred to the Senate on this issue, the Secretary believes it is the clear intent of Congress to require accrediting agencies to conduct unannounced inspections at all institutions that offer vocational education or training. The Secretary also believes that Congress' use of the term "inspection" rather than "review" or "evaluation" is evidence that the purpose of the unannounced visit is not necessarily to conduct a full review of the institution but to determine whether, at a minimum, the institution actually has the personnel, facilities, and resources it claimed to have, or appeared to have, either during its last evaluation by the accrediting agency or in subsequent reports to the agency. The Secretary wishes to point out that an accrediting agency has the flexibility to determine how best to carry out these unannounced inspections in a manner that achieves the purpose of these inspections but minimizes the cost to institutions and the burden to accrediting agencies. The agency also has the flexibility to examine, during the unannounced inspection, other aspects of an institution, such as whether it maintains adequate records or whether it actually provides the programs and support services it advertises. As agencies are responsible for monitoring institutions throughout their accreditation period, as described in § 602.24(b)(4), the Secretary wishes to point out that these unannounced inspections can and should serve a useful purpose in helping agencies meet this responsibility.

Changes: The term "unannounced site visit" has been replaced with "unannounced inspection," and the purpose of the unannounced inspection has been defined as indicated in the Discussion section.

Section 602.25 Additions to or Substantive Changes in Educational Programs

Comments: The Secretary received numerous comments regarding this section. Many commenters felt that there was no substantive change requirement in the statute so the requirement should be eliminated from the regulations. Other commenters, however, cited a different reason why the requirement should be eliminated: most accrediting agencies already have substantive change policies so there is no need for the Department to regulate the content of those policies. A host of commenters observed that, as worded, the requirement placed an undue reporting requirement on both accrediting agencies and institutions and an unnecessary burden on agencies by requiring them to grant prior approval to even the most insignificant of program changes or additions. Many also noted that the prior approval process would severely inhibit institutions' ability to respond in a timely manner to changing needs, as, for example, in health-related fields. Finally, commenters noted that many programs, such as those in community colleges, were routinely reviewed and approved by various State review boards before they could be offered, so requiring additional prior approval by accrediting agencies would only increase costs without any added benefit.

Discussion: The Secretary firmly believes that an agency cannot be a reliable authority as to the quality of education or training offered by an institution if the agency does not have a substantive change policy that requires prior approval by the accrediting agency before a substantive change can be included in the agency's grant of accreditation to an institution. At the same time, the Secretary acknowledges the burden the requirement proposed in the NPRM imposed on institutions and accrediting agencies. While the least burdensome approach would be to allow agencies simply to use their existing substantive change policies to meet this requirement, the Secretary believes this is unworkable and does not adequately protect the public interest because there is considerable variation among agencies as to what constitutes substantive change. Furthermore, as the NPRM documents, there have been several significant abuses in this area because of an agency's unwillingness to evaluate an institution's substantive change before including that change in the institution's grant of accreditation. Consequently, the Secretary believes that the Federal interest, as well as the interest of the general public, is best protected if a common core of changes that must be considered substantive is defined in regulation. To determine what should constitute this common core, the Secretary examined the topics institutional accrediting agencies typically include in their list of substantive changes that require prior approval and has included in this section only those that reflect the Secretary's principal concerns regarding institutions that undergo substantive change. The Secretary believes that the revised substantive change policy, which now applies only to institutional accrediting agencies, considerably reduces the burden on both accrediting agencies and institutions at the same time it provides adequate protection to the public.

The Secretary recognizes that there are many variables that must be taken into account in determining the type of review that an agency conducts before granting prior approval to an institution's substantive change. For this reason, the Secretary has decided to give accrediting agencies the flexibility to determine the procedures they will use in granting prior approval to an institution's substantive change. In some instances, this may involve a full-scale on-site evaluation of the entire institution. In others, it may involve a focused visit to examine the particular circumstances surrounding the change. In still others, it may involve simply a thorough review by agency staff of the institution's report on its ability to implement the substantive change without adversely affecting the institution's ability to continue to meet the agency's standards.

Changes: The substantive change requirement has been modified to limit the types of changes that must be given prior approval by an accrediting agency. The requirement now applies to institutional accrediting agencies only.

Section 602.26 Required Accreditation Standards

Comments: The Secretary received numerous comments about the required accreditation standards. Most commenters felt that the Federal government should not mandate how accrediting agencies defined their

standards. They also felt that the proposed regulations intruded on the autonomy of accrediting agencies, exceeded the statute, and were contrary to Executive Order 12866. In their opinion, the Secretary overreached his authority by specifying anything in this section that went beyond a mere restatement of the law on the required standards. These same commenters applauded the removal of the language on curricula, faculty, facilities, equipment and supplies, and student support services that had appeared in early drafts of the proposed regulations and urged the Secretary to do the same for the other eight standards specified in the law.

Several commenters argued that many of the specific responsibilities assigned to accrediting agencies by the various standards would force agencies into becoming government regulators. They also argued that these new requirements would require accrediting agencies to duplicate the efforts of the Department and the States and would substantially increase the paperwork burden on institutions and accrediting agencies. In their opinion, these requirements would be so burdensome to accrediting agencies in terms of time and personnel that they would shift the focus of accreditors away from their primary function—that of reviewing educational quality—to a role in which they served merely as investigative and enforcement agencies for the Federal government.

While the opinions expressed above were shared by the majority of commenters on this issue, they were by no means unanimous. Some commenters from the proprietary sector, for example, had no serious objection with the standards, noting that most of what was contained in the standards was already being examined to the degree of specificity contained in the proposed regulations by either their accrediting agencies, the State, or both. Others commenters felt that the standards, as written, protected students as well as Federal dollars. One commenter thought the introductory paragraph to the required standards section should be strengthened by requiring agencies to have quantitatively validated standards that were based on a rigorous assessment of the value added by the education or training.

Finally, one commenter expressed concern that the Secretary was exceeding the statute by requiring institutional accrediting agencies whose accreditation does not serve Title IV, HEA purposes to meet the student outcomes requirements of § 602.26(b)(9).

Discussion: The Secretary has given very careful thought to all the concerns raised with regard to this section. Of particular concern to the Secretary is how best to achieve an appropriate balance between the need for agencies to have rigorous standards in order to protect students' interests and the need for agencies to have flexibility in addressing these standards in order to reduce cost and burden to both agencies and institutions. Another important factor, in the Secretary's opinion, is the need to build a partnership among triad members that is based on mutual trust and allows each member the flexibility to determine the appropriate means to carry out its responsibilities under the HEA.

After considering all of these factors, the Secretary has decided to eliminate all but the statutory language for each of the 12 required standards. This approach eliminates many requirements that commenters found especially burdensome, such as that in § 602.26(b)(4) concerning annual financial audits. In addition, it allows accrediting agencies that already have rigorous standards in these areas to continue operating as they have, thus eliminating the need for additional cost to agencies and institutions to comply with the requirements of this section.

While the Secretary believes it is appropriate not to prescribe specific minimum regulatory standards elaborating on the standards in the statute, the Secretary also believes that the standards contained in the NPRM provide a sound framework for a thorough assessment of these areas. For this reason, the Secretary summarizes below the major provisions contained in the NPRM concerning the statutory standards. The Secretary believes these provisions are appropriate for agencies to address in their own standards for these areas. In addition, the Secretary believes that, in addressing the development of their own standards, accrediting agencies should consider any comparable Title IV, HEA program standards and any relevant and applicable State standards developed under the State Postsecondary Review Program. However, the Secretary wishes to make it clear that this does not prevent an accrediting agency whose standards do not include all of these provisions from being recognized by the Secretary, provided the agency can justify the appropriateness of its standards as reasonable applications of the statutory standards in light of its needs, the needs and circumstances of the institutions or programs it accredits, and the students they serve. Finally, the Secretary wishes to emphasize the importance of accrediting agencies' developing their standards in such a way that they minimize burden, overlap, and duplication at the same time they ensure overall educational quality.

The Secretary notes that for most of the standards discussed below there are comparable, or very similar, standards in section 494 and some in 498 of the HEA. The Secretary expects to take a leadership role in working with accrediting agencies and SPREs to ensure that the standards for all three members of the triad are complementary, rather than redundant.

Fiscal and administrative capacity as appropriate to the specified scale of operations. An accrediting agency's standard for assessing this area should generally address the overall quality of an institution's or program's fiscal and administrative capacity. The assessment should examine in particular whether the institution's or program's finances are sufficiently strong to enable it to meet, and appear likely to continue to meet for the foreseeable future, all of the agency's standards for accreditation. The assessment should also include some provision for the ongoing monitoring of an institution's or program's finances throughout any period of accreditation or preaccreditation granted by the agency.

The Secretary notes that section 494(d)(5) of the HEA contains a comparable SPRE review standard and sections 498 (c) and (d) of the HEA contain comparable Department standards.

Recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising. An accrediting agency's standard for assessing these areas should generally address whether they are reasonable in light of an institution's or program's educational mission, reflect good practice, and accurately reflect actual practice.

The Secretary notes that sections 494(d) (1), (2), and (12) of the HEA contain comparable SPRE review standards.

Program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered. An accrediting agency's standard for assessing this area should generally address the appropriateness of an institution's program length and tuition and fees, taking into account such factors as program objectives and content, the types and locations of instructional delivery, the knowledge and skills necessary for students to reach competence in the field being taught, and generally accepted practices in higher education.

The Secretary notes that section 494(d)(7) of the HEA contains a comparable SPRE review standard.

Measures of program length in clock hours or credit hours. An accrediting agency's standard for assessing this area should generally address the appropriateness of an institution's or program's measurement of program length, taking into account such factors as program objectives and content, the types and combinations of instructional methodologies and delivery systems (including outside preparation as appropriate), the knowledge and skills necessary for students to reach competence in the field being taught, and generally accepted practices in higher education.

The Secretary notes that section 494(d)(9) of the HEA contains a comparable SPRE review standard.

Success with respect to student achievement in relation to mission, including, as appropriate, consideration of course completion, State licensing examination, and job placement rates. An accrediting agency's standard for assessing this area should generally address the success of an institution or program in meeting its educational objectives, as measured by the achievement of its students. Typically under this standard, an agency should require the institution or program to document and assess the educational achievement of students in verifiable and consistent ways, such as student grades, grade point averages, theses or portfolios, the results of admissions tests for graduate or professional school or other standardized tests, transfer rates to institutions offering higher level programs, job placement rates, completion rates, results of licensing examinations, evaluations by employers, follow-up studies of alumni, and other recognized measures of educational outcomes. The agency should also typically require the institution or program to use effectively the information obtained in this manner to improve student achievement with respect to the degrees or certificates offered. Finally, the agency should typically monitor in a systematic way the institution's or program's performance with respect to student achievement, including, as appropriate, completion rates, job placement rates, and pass rates on State licensing examinations, or other appropriate measures of occupational competency, to determine if performance is consistent with both the institution's or program's mission and objectives and any measures the agency may have for institutions' or programs' performance with respect to student achievement. For programs that provide vocational education, agencies should establish quantitative standards for completion rates, job placement rates, and pass rates on State licensing examinations.

The Secretary notes that section 494(d)(14) of the HEA contains a comparable SPRE review standard.

Default rates in the student loan programs established under Title IV of the Act, based on the most recent data provided by the Secretary. An accrediting agency's standard for assessing this area should generally address an institution's default rates in relation to the institution's overall ability to meet the agency's standards. Typically, an agency might evaluate an institution to determine whether the institution is out of compliance with its accrediting standards if the institution's latest cohort default rate under the Federal Stafford Loan or Federal Supplemental Loans for Students program equals or exceeds 25 percent or if it has increased significantly in relation to its rate the previous year. Under this standard, an agency is not expected to do the work of the Federal government with respect to institutional default rates. Rather, the agency is expected to review the default rate information provided by the Secretary, determine if that information calls into question the institution's compliance with agency standards, and take follow-up action as appropriate.

Record of student complaints received by, or available to, the agency. An accrediting agency's standard for assessing this area should generally address an institution's or program's record of student complaints received by or made available to the agency. Under this standard, the agency should typically review student complaints that relate to the agency's standards and take appropriate follow-up action with regard to those complaints. If necessary, the agency would refer complainants to appropriate Federal, State, and other agencies if the complaints do not relate to the agency's standards. Finally, it would require institutions or programs to make available to students the agency's mailing address or telephone number for complaints.

The Secretary notes that section 494(d)(11) of the HEA contains a comparable SPRE review standard.

Compliance with the institution's program responsibilities under Title IV of the Act. An accrediting agency's standard for assessing this area should generally address an institution's compliance with its Title IV, HEA program responsibilities in relation to the institution's overall ability to meet the agency's standards. The agency's assessment under this standard is based on program reviews, financial and compliance audits, audited financial statements, and any other information that the Secretary provides. Under this standard, the agency is not expected to do the work of the Federal government in reviewing institutions for compliance with their Title IV, HEA program responsibilities. Rather, the agency is expected to review the information provided by the Secretary, determine if that information calls into question the institution's compliance with agency standards, and take follow-up action as appropriate.

With regard to the concern raised by one commenter about the need for quantitatively validated standards, the Secretary notes that § 602.23(b)(5) requires agencies to have in place a program for the systematic evaluation of the validity and reliability of its standards. In light of the Secretary's decision to eliminate all but the statutory language for the required standards, this "validity and reliability" provision takes on added importance, as described in the discussion of the changes to § 602.23.

Finally, with regard to the concern about extending the requirement to have a standard assessing student achievement to institutions whose accreditation does not serve Title IV, HEA program purposes, the Secretary wishes to note that the overriding concern of the statute, as expressed in section 496(a) of the HEA, is that accrediting agency standards must contain a measure or measures of student achievement. Therefore, it is the Secretary's belief that extending the requirement to all agencies, not just those whose accreditation serves Title IV, HEA purposes, is warranted.

Changes: Paragraph 602.26(b) contains only the statutory language for the 12 required standards. Other changes to § 602.26 are discussed below.

Section 602.26(b)(13) The Institution's Practice of Making Refunds to Students

Comments: Many commenters objected to the inclusion of this requirement in the regulations on the grounds that section 496(g) of the HEA explicitly states that the Secretary may not establish standards for accrediting agencies that are not required by section 496. This point was argued by non-Federal negotiators during negotiated rulemaking as well.

Discussion: The Secretary has carefully reviewed the statutory provision on which this requirement was based and has also reexamined the requirement in light of refund policies established in the Student Assistance

General Provisions, 34 CFR part 668. It is the Secretary's belief that the regulatory language contained in 34 CFR part 668 is sufficient by itself to ensure that an institution's refund policy meets the requirements of the statute. Thus, there is no need for a requirement that accrediting agencies must have a standard that assesses institutions' refund policies.

Changes: The section has been deleted.

Section 602.26(c) Time Limit on Correcting Deficiencies

Comments: Many commenters expressed concern about the proposed 18-month time limit for institutions to come into compliance with an accrediting agency's standards. Some argued that in many instances, such as when an institution's financial situation is cause for concern, it takes considerably longer for an institution to come into compliance. Others argued that, for some programs, 18 months was too long.

Many commenters expressed concern about the requirement under consideration that accrediting agencies would have to take adverse action if they determined that an institution was unlikely to continue to be able to meet agency standards for the foreseeable future. This requirement, they argued, was totally unrealistic because agencies would have no objective basis on which to make such a determination. According to these commenters, the requirement would result in a determination that was pure conjecture on the part of accrediting agencies and would leave agencies vulnerable to lawsuits. Several commenters expressed an opposing view about this requirement, however, stating it was necessary to protect students who attended institutions whose ability to continue to provide a quality education was clearly questionable.

Discussion: The Secretary believes that some definitive time frame is necessary to ensure that institutions and programs make serious efforts to improve the quality of their offerings and to ensure that accrediting agencies take adverse actions when institutions fail to make those efforts. However, the Secretary also recognizes that, because of differing lengths of programs, the 18-month time frame is unrealistic for all types of institutions.

With regard to the provision that agencies should be required to take action if it appears that an institution or program will be unlikely to continue to meet an agency standard, the Secretary understands the concerns of commenters who opposed the requirement. However, because there is potential for serious harm to students enrolled in an institution or program the quality of whose education or training appears to be declining, the Secretary remains concerned about a marginal institution or program that might be accredited by an agency despite the agency's very serious concerns about its enrollment or financial trends. While the Secretary has not added to these regulations the specific requirement under consideration in the NPRM, the Secretary wishes to impress upon agencies the importance of the requirement, contained in § 602.24(b)(4) of these regulations, that they monitor institutions and programs throughout any accreditation or preaccreditation period to ensure that they give prompt and serious attention to any degradation in an institution's or program's ability to provide a quality education.

Changes: Different time frames for corrective action have been incorporated for different lengths of programs.

Section 602.27 Required Operating Procedures

Comments: The Secretary received many comments about the special actions accrediting agencies are required to take whenever institutions establish new branch campuses. Of particular concern to most commenters was the apparent inconsistency between the definition of "branch campus" in § 602.2 and the use of that term in this section. Also of concern to many commenters was the added requirement that accrediting agencies must visit "additional locations," which many felt went beyond the statute. One commenter felt that the required submission of a business plan for a new branch campus was unwarranted, burdensome and costly and had no intrinsic value.

The Secretary also received a number of comments about the requirement that accrediting agencies provide an opportunity for public comment about an institution's or program's qualifications for accreditation. Many felt this would subvert the accreditation process by evoking unjustified complaints. Others felt it required the agency to hold a public hearing every time an institution or program was evaluated for accreditation or reaccreditation. One commenter held an opposing view, however, preferring that agencies be required to hold public hearings for all accrediting decisions.

Finally, the Secretary received a number of suggestions for strengthening the various public disclosure requirements contained in this section, although a few commenters questioned the statutory authority for these requirements.

Discussion: The branch campus-additional location issue has already been discussed under the definition of "branch campus."

The Secretary notes that the additional information collection requirement related to the establishment of branch campuses—the submission of a business plan—is a statutory requirement and cannot be eliminated.

With regard to the issue of public comment when an institution or program is being considered for accreditation, the Secretary believes there should be opportunity for such comment but that there need not be a public hearing to obtain it. The Secretary believes further that an agency should be free to determine both the manner in which it publicizes that an institution is scheduled for review and the method it uses to obtain public comment.

With regard to the other public disclosure issues in this section, the Secretary believes that the more open an accrediting agency is with regard to its policies and practices, as well as the individuals involved in its accrediting activities, the better it is for the consumer. However, the Secretary believes it is best left up to the agency to determine its actual practice in this regard.

Changes: The term "branch campus" has been redefined, and the phrase "additional location" has been deleted from this section. The public disclosure requirements have been modified to clarify that a public hearing is not required to obtain public comment on an institution's or program's application for accreditation.

Section 602.28 Due Process for Institutions and Programs

Comments: One commenter expressed concern that the proposed regulations allowed an accrediting agency to deny an institution or program the right to appeal in person any adverse accrediting action. Another commenter noted that the regulations did not address the provision in section 496(e) of the HEA that prohibits the Secretary from recognizing the accreditation of an institution unless the institution agrees to submit any dispute involving the final denial, withdrawal, or termination of the institution's accreditation to initial arbitration prior to any other legal action. This same commenter felt that accrediting agencies should be required to adopt an initial arbitration procedure for handling disputes involving the loss of accreditation.

Discussion: With regard to the commenter's concern that institutions have the right to appeal an adverse action in person, the Secretary believes it is best to give agencies the flexibility to determine the appropriate procedures for appealing adverse actions. As the cost to an agency when an institution or program appeals an adverse action is generally substantial, the Secretary believes this approach minimizes the cost without causing undue harm to institutions that are subject to an adverse action.

With respect to the issue of arbitration, the Secretary recognizes that the statute does not specifically require an accrediting agency to agree to binding arbitration. However, the Secretary anticipates that many accrediting agencies will agree to arbitration since it significantly limits the cost and length of appeals of their final decisions. Moreover, if an accrediting agency does not agree to binding arbitration, an institution will be free to appeal a final adverse decision by the agency in the federal courts.

Change: None.

Section 602.29 Notification of Accrediting Decisions

Comments: The Secretary received several comments endorsing the addition of a requirement that an accrediting agency must notify the Secretary and the appropriate State postsecondary review entity of any final adverse accrediting action at the same time the agency notifies the institution or program. On another issue, most commenters believed it was inappropriate to require an accrediting agency to notify the Secretary and others prior to making a final decision that involved the denial or termination of accreditation, although some supported this provision. Some commenters believed that the time frame for requiring accrediting agencies to make available to the public the comments of an institution that loses its accreditation was unrealistic. Finally, one commenter requested clarification as to which agencies should be included in the phrase "the appropriate accrediting agencies" that an agency must notify of its decisions.

Discussion: As mentioned in the NPRM, the Secretary believes that accrediting agencies should be required to notify the Secretary and others at the same time they notify an institution or program of a final adverse action in order to prevent excessive draw-down of Federal funds by the institution or program. The Secretary appreciates the comments received in support of this position. With regard to the issue of notification before an adverse action is final, the Secretary shares the concerns of those who support the inclusion of a requirement to this effect but agrees with those commenters who expressed the concern that notification prior to final action could cause serious harm to institutions that subsequently had the adverse action reversed.

With regard to the 60-day time frame for obtaining the comments of an institution or program that is subject to a final adverse action, the Secretary believes it is in the best interest of the public to publish as soon as possible the reasons why the agency has denied, withdrawn, suspended, or terminated the accreditation of the institution or program. If the institution or program chooses not to make its comments about that action available to the accrediting agency within 60 days, then the accrediting agency is free to publish its statement of reasons without the accompanying statement of the institution or program.

With regard to "appropriate accrediting agencies," the Secretary believes that accrediting agencies should be free to determine which agencies should be notified but that, at a minimum, an agency should notify all recognized agencies that accredit an institution, or a program offered by the institution, if the agency takes an adverse action against the institution or one of its programs.

Changes: A requirement has been added that accrediting agencies must notify the Secretary and others at the same time they notify the institution or program of a final adverse accrediting action.

Section 602.30 Regard for Decisions of States and Other Accrediting Agencies

Comments: The Secretary received many comments opposing the requirement that institutional accrediting agencies must review their accreditation or preaccreditation of an institution if a programmatic accrediting agency takes adverse action against a program offered by the institution. Some commenters also expressed opposition to the requirement that programmatic accrediting agencies had to review an accredited program at an institution if the institutional accrediting agency took adverse action against the institution. Many commenters objected to the phrase "or should have known" in § 602.30(b).

Discussion: The Secretary believes that all agencies, including those that accredit only programs, should be required to take into account the decisions of States and other accrediting agencies when making any accreditation or preaccreditation decision involving an institution or program. The Secretary also believes that there may be occasions when a programmatic agency is the first agency to discover a serious problem that threatens the overall ability of the institution to provide a quality education. For this reason, the Secretary believes it is important for an institutional accreditor to review an institution for compliance with its accreditation standards if a programmatic agency takes adverse action against a program offered by the institution. The Secretary allows the institutional accrediting agency the flexibility to determine what an appropriate "review" is, however. It does not have to be a full on-site review of the institution.

With regard to agencies being accountable for actions about which they "should have known," the Secretary understands the concerns of commenters that agencies could be held accountable for knowing about the actions of another agency that failed to inform other agencies of its adverse actions. However, there are instances where information about an agency's adverse action against an institution or program becomes a matter of public record, and the Secretary believes that in these instances accrediting agencies should not be absolved from their responsibility to review the institution simply because another entity failed to notify them.

Changes: None.

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Friday
April 29, 1994

Part IV

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Interim Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AC09

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Interim final regulations with invitation for comment.

SUMMARY: On December 20, 1993, the President signed the Higher Education Technical Amendments of 1993. These interim final regulations implement certain provisions of the technical amendments relating to the determination of institutional cohort default rates in the Federal Family Education Loan program. The Secretary invites comments on these regulations.

DATES: *Effective date:* These regulations take effect either 45 days after publication in the **Federal Register** or later if Congress takes certain adjournments, with the exception of § 668.17 (f) and (h) which will become effective after the information collection requirements contained in this section have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**. Comments on these interim final regulations must be received on or before June 13, 1994.

ADDRESSES: All comments concerning these regulations should be addressed to Pamela A. Moran, Acting Chief, Loans Branch, Division of Policy Development, Policy, Training, and Analysis Service, U.S. Department of Education, 400 Maryland Avenue, SW. (room 4310, ROB–3), Washington, DC 20202–5449.

FOR FURTHER INFORMATION CONTACT: Doug Laine, Program Specialist, Loans Branch, Division of Policy Development, Policy, Training, and Analysis Service, U.S. Department of Education, 400 Maryland Avenue, SW. (room 4310, ROB–3), Washington, DC. 20202–5449. Telephone (202) 708–8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 2(c)(55) of Public Law 103–208 amended section 435 of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1085. This section modified the process governing institutions' appeals of their cohort default rates based on allegations of improper loan servicing and collection.

In a **Federal Register** Notice published March 22, 1994, 59 FR 13606, the Secretary requested comments on the procedures that should be established to implement the statutory amendments.

The Secretary indicated in the Notice that he intended to issue regulations establishing procedures for schools to appeal their default rates based on allegations of improper loan servicing or collection. The notice solicited public help in developing those procedures. The Secretary invited public comment on any aspect of implementing the statute, but in particular, the Secretary solicited comments on the following issues:

1. What procedures should the Secretary use in determining whether to exclude from the calculation of cohort default rates loans, the inclusion of which due to improper servicing or collection, would result in an inaccurate or incomplete calculation of a school's cohort default rate?

2. What procedures should be used for sampling of loan servicing and collection records?

3. What procedures should the Secretary provide for schools to review the information provided by the guaranty agencies to the Secretary for use in determining cohort default rates prior to calculation of the final rates?

The Secretary received 54 comments in response to the request for comments. Many of the comments are reflected in these rules. The Secretary's response to the suggestions made by the commenters that were not accepted is provided after the following discussion of the procedures established by these rules.

Appeals Based on Allegations of Improper Loan Servicing

Public Law 103–208 added section 435(a)(3) to the HEA to specifically provide certain institutions with an opportunity to appeal the calculation of their cohort default rates on the basis of allegations of improper loan servicing or collection. In particular, this opportunity will be available to institutions that: (1) Are subject to loss of eligibility for the FFEL Program under section 435(a)(2) of the HEA; (2) are subject to loss of eligibility for the Federal Supplemental Loans for Students (SLS) Program under section 428A(a)(2) of the HEA; or (3) have cohort default rates that equal or exceed 20 percent for the most recent year for which data are available. The statute requires the Secretary to take steps to ensure that these institutions have access to a representative sample of relevant loan servicing and collection records for a reasonable period of time, not to exceed 30 calendar days. Upon completion of the appeal, the Secretary will reduce an institution's cohort default rate to reflect the percentage of defaulted loans in the sample that are required to be excluded under section 435(m)(1)(B) of the HEA.

Public Law 103–208 also amended section 435(m)(1)(B) of the HEA to clearly provide that the Secretary would consider allegations of improper loan servicing or collection only in considering appeals of cohort default rate determinations filed by institutions. This change was made in response to certain court rulings which suggested that the Secretary was required to determine whether loans were properly serviced prior to making initial determinations of and releasing cohort default rates. Section 435(m)(1)(B) of the HEA now provides that, in considering appeals of cohort default rates under section 435(a)(3) of the HEA, the Secretary should exclude any loans which, due to improper servicing or collection, would, as demonstrated by the evidence submitted in support of the institution's timely appeal to the Secretary, result in an inaccurate or incomplete calculation of the cohort default rate.

These regulations establish the procedures for implementing the appeal process provided by sections 435(a)(3) and 435(m)(1)(B) of the HEA. The regulations specify that an institution which is subject to the loss of participation in the FFEL program because of default rates equal to or in excess of 25 percent for the three most recent years for which rates are calculated or which has a cohort default rate which equals or exceeds 20 percent may appeal the calculation of the rate based on allegations of improper loan servicing or collection. These regulations do not specifically include institutions that are subject to the loss of participation in the Federal SLS Program because that program has been repealed by Congress effective July 1, 1994. See Public Law 103–66, section 4047(b) and (d). These regulations replace the former regulatory provision which related to the loss of SLS participation because that subsection becomes moot on the elimination of the SLS program. However, an institution that is currently subject to a loss of participation in the SLS program will have the opportunity to pursue an appeal under these procedures.

Under these regulations, once an institution receives notice from the Secretary that its cohort default rate or rates exceed the levels specified in section 435(a)(3) of the HEA, the institution will have 10 working days to initiate an appeal of the rate based on allegations of improper loan servicing or collection. The Secretary's default rate notification to the institution will include a list of all borrowers included in the calculation of the cohort default rate. To initiate an appeal, the institution must include the list of borrowers in its notification to the guaranty agencies that it is appealing the calculation of the cohort default rate based on allegations of improper loan servicing or collection.

Once the guaranty agency receives the institution's appeal, it must provide the institution with the loan servicing or collection records for a representative sample of the loans insured by the guaranty agency and included in the institution's cohort default rate. The sample must be identified by the guaranty agency and the universe estimate derived from the sample results must be acceptable at a 95 percent confidence level with a plus or minus 5 percent confidence interval. In some cases, the result may be that servicing and collection records for all the loans guaranteed by the agency and included in the institution's default rate will be sent to the institution. Once the sample is identified, the guaranty agency must send the loan servicing and collection records to the institution within 15 working days of receiving the institution's request. The guaranty agency's response to the institution must also include a list of certain dates that will assist the institution in reviewing the records and the Department in resolving the appeal. An agency may charge the institution a reasonable fee for copying and production of the records, not to exceed $10 per borrower file. The Secretary will charge a similar fee in response to a request for records maintained by the Department on behalf of the Higher Education Assistance Foundation.

After receiving the records from the guaranty agency, the institution has 30 calendar days to file its appeal with the Secretary. The regulations identify the material that must be submitted by the institution. The Secretary will review the appeal and issue a decision. The Secretary will assume that the records maintained by the guaranty agency in the normal course of business in the FFEL Program are correct unless the institution provides substantial evidence to the contrary. If the Secretary finds that the evidence submitted by the institution shows that some of the loans included in the sample of loans should be excluded from calculation of the cohort default rate, the Secretary will adjust the institution's cohort default rate to reflect the percentage of defaulted loans that should be excluded. The Secretary will use a statistically valid methodology to determine the estimate of the number of loans that should be excluded from the calculation of the cohort default rate and the confidence interval of the estimate. In determining the exact methodology, the Secretary will need to consider the number of loans in the sample, the number of guaranty agencies involved and other appropriate factors. The Secretary will notify the institution, in writing, of his decision on the appeal.

Section 435(m)(1)(B) of the HEA includes two prerequisites for exclusion of a loan from the cohort default rate calculation. Under the law, the institution must prove both (1) that the loans were serviced or collected improperly and (2) that the improper loan servicing and collection caused the student loan default. If either of these two requirements is not proven, the loan will not be excluded from the cohort default rate calculation.

These regulations reflect the Secretary's view, based on consideration of past appeals of cohort default rate determinations that, for purposes of a cohort default rate appeal, a loan is considered to have been serviced or collected improperly only if, under applicable rules, the Department would decline to pay reinsurance on the principal of the loan by reason of the improper servicing or collection. The HEA does not define the term "improper servicing or collection" used in section 435(m). Therefore, to determine what constitutes improper loan servicing and collection, the Secretary looks to its due diligence regulations, its published policies such as Appendix D to 34 CFR part 682 and other applicable policies and practices. There is no indication that the 1993 amendments to section 435(m) were intended to establish new concepts regarding what does and does not constitute improper loan servicing and collection. For that reason, the Secretary construes section 435(m) by reference to concepts developed over a period of years in the administration of the FFEL Program.

Section 435(m) of the HEA also specifies that a loan which has been subject to improper servicing or collection is excluded from calculation of the cohort default rate only if the default on the loan was "due to" improper servicing or collection and results in an inaccurate or incomplete calculation of the cohort default rate. The statute does not explain how improper servicing or collection could cause a cohort default rate to be inaccurate or incomplete. In *Atlanta College of Medical and Dental Careers, Inc.* v. *Riley*, 987 F.2d 821, 830 (D.C. Cir. 1993), however, the Court of Appeals assumed that a cohort default rate would be inaccurate or incomplete if it contained loans which defaulted due to improper servicing or collection. The Secretary considers that interpretation to be reasonable. The Court of Appeals in *Atlanta College* also concluded that the type of causal link between improper servicing and default on a loan is properly left to the Secretary. The Secretary believes that a stringent showing of default causation is appropriate. Section 435(m) of the HEA does not include any general "causation" challenge that would permit an institution to appeal the calculation of its default rates on the basis that its students defaulted for reasons beyond the institution's control. Moreover, Congress set tight constraints on the time periods for challenges to the calculation of the cohort default rates and clearly did not contemplate a time-consuming, heavily burdensome process for determining default causation.

Based on these factors, the Secretary has determined that section 435(m) should be interpreted to allow only a limited loan servicing challenge. Accordingly, these regulations reflect the Secretary's determination that, for purposes of the calculation of a cohort default rate, improper servicing or collection is considered to have caused a default only if the improper servicing or collection resulted in a lack of notification to the borrower that he or she must begin repaying the loan. The Secretary believes that once the borrower has been informed of the obligation to repay the loan, the institution cannot show that a resulting default was due to the alleged improper servicing. The position reflected in these regulations has its genesis in certain decisions of the Secretary which resolved appeals of cohort default rate determinations on a case-by-case basis. Case-by-case adjudication is a permissible approach to decision making under applicable law. See *NLRB* v. *Bell Aerospace Corp.*, 416 U.S. 267, 294 (1974). However, the Secretary's adjudications resolving individual appeals have not established rules of general applicability. As explained in more detail in the comment and response section of this document, the Secretary has considered a variety of

proposed standards for adjudication of appeals based on allegations of improper servicing and collection. Some of these approaches would arguably broaden the appeal standard for institutions, while others reflect a more narrow scope than is reflected in the Secretary's adjudications to date. After careful consideration of these alternatives, the Secretary concludes that the general construction of section 435(m) of the HEA reflected in his most recent appeal decisions faithfully implements Congressional intent and fairly balances the rights of all those affected by those decisions. The Secretary particularly invites comments as to whether there are other types of improper servicing that should be considered to have "caused" a default for purposes of calculation of a cohort default rate and the rationale for any such suggestion. Review of cohort default rate information.

Public Law 103–208 also amended section 435(m)(1)(A) of the HEA to provide, effective October 1, 1994, that institutions will have an opportunity to review and correct errors in the information provided by the guaranty agencies to the Secretary for use in calculating cohort default rates. These regulations add paragraph (h) to § 668.17 to establish procedures for this review.

Under the regulations, the Secretary will provide each institution which has a draft default rate equal to or in excess of 20 percent with a copy of the records provided by each guaranty agency in regard to loans made to borrowers for attendance at the institution which were insured by that guaranty agency. Institutions with draft default rates under 20 percent may request copies of the records. These records will be accompanied by a notice indicating the institution's draft default rate. This draft default rate will not be considered a final agency decision and will not be otherwise voluntarily released by the Secretary.

After receiving the information from the Secretary, the institution will have 30 calendar days to review the information and notify, in writing, the appropriate guaranty agency of any information included in the cohort default rate which it believes is incorrect. The institution should also send the agency any evidence which it believes supports its contention that the information provided by the guaranty agency to the Secretary is inaccurate. The guaranty agency shall review the institution's challenge and respond within 30 calendar days. If the guaranty agency agrees with the institution, the information used to calculate the cohort default rate will be adjusted prior to the release of the official cohort default rates. If the guaranty agency does not confirm the error alleged by the institution, the institution may use the data provided by the guaranty agency as part of an appeal of the calculation of the default rate based on the allegedly erroneous data after the rates are released.

The Secretary intends to continue his practice of allowing institutions with a cohort default rate equal to or in excess of 20 percent for the most recent year for which rates have been calculated to challenge the calculation of the rate based on allegations that erroneous data were included in the calculation. However, all institutions must satisfy the time deadlines for filing challenges under the regulations.

The Secretary believes that section 435 only provides an opportunity for the institution to review and correct errors in the information provided to the Secretary by the guaranty agency. The statute does not contemplate that all allegations of error will be resolved prior to release of the final default rates. The regulations, therefore, allow an institution to appeal the calculation of a cohort default rate based solely on allegations of erroneous data. However, to ensure that appeals can be decided on a timely basis, the regulations provide that an institution can only base an appeal on allegations that were raised to the guaranty agency during the review of the draft cohort default rate. The Secretary believes that this process will benefit the institutions, guaranty agencies and the public by shortening delays that have been experienced in the appeal process and will result in more timely decisions.

Effect on Pending Default Rates

The Secretary received a number of comments regarding the effect of the changes to section 435(a)(3) and (m) on the current official cohort default rates. As the Secretary noted in the **Federal Register** notice, Public Law 103–208 does not specifically provide for reopening prior final determinations. However, the Secretary has been convinced by the commenters to allow institutions to challenge their current cohort default rates on the basis of allegations of improper loan servicing or collection. Accordingly, the regulation allows institutions identified in section 435(a)(3) of the HEA to file an appeal of the current cohort default rates based on allegations of improper loan servicing. Thus, institutions with cohort default rates equal to or in excess of 20 percent for fiscal year 1991 (including institutions subject to the loss of SLS participation based on a fiscal year 1991 cohort default rate in excess of 30 percent) may challenge the 1991 cohort default rate. Similarly, institutions which are subject to the loss of FFEL program participation based on cohort default rates for fiscal years 1989, 1990 and 1991 may challenge those rates. The regulation specifies that the time limits for challenging these rates will begin on the date that the regulations become effective. The Secretary intends to notify institutions of the effective date of these regulations once that date is determined. The prior default rates will be considered effective until the appeal process is completed and a new rate issued.

The Secretary notes that cohort default rates for fiscal year 1992 will be issued during the summer of 1994. Institutions which are interested in challenging their current cohort default rates may want to wait until after the new rates are issued. An institution with a cohort default rate in excess of one of the threshold levels for fiscal year 1991 may find that its fiscal year 1992 cohort default rate is below the threshold and that the institution is no longer subject to sanctions based on excessive cohort default rates. Thus, an institution may want to consider whether filing a challenge of the current default rates is worth the time, expense and resources needed to prepare and submit an appeal of a rate that may soon be irrelevant. The Secretary also notes that the regulations provide that once an institution has challenged a cohort default rate for a particular year and received a final decision from the Secretary, that decision is binding in any future challenge to the default rate filed by the institution.

Analysis of Comments and Responses

Comment: The commenters provided a number of different definitions of the term "improper servicing or collection" of a loan. A number of respondents to the request for comments suggested that the Secretary should remove from the calculation of the cohort default rate any loan that was not serviced in strict compliance with the Department's due diligence requirements in 34 CFR 682.411. Some commenters suggested that a loan on which a default claim has been paid should be considered properly serviced or collected on the grounds that a claim would not have been paid if servicing was not proper. Other commenters suggested that the Secretary should consider a lender's failure to grant a deferment to be improper loan servicing or collection. Some commenters also suggested that guaranty agency collection efforts

should be considered in evaluating whether improper servicing or collection has occurred.

Response: The Secretary's view of the satutory term "improper servicing or collection" is discussed earlier in this document. The Secretary does not agree with the suggestion that Congress intended to establish a new standard for proper servicing or collection. Instead, the Secretary believes it is appropriate to rely on the concepts and requirements developed and applied by the Department over the years. The requirements in § 682.411 are designed to ensure that lenders and guaranty agencies that are requesting Federal benefits meet certain standards in collection as a requirement for receiving those benefits. These requirements have never been intended to set forth standards which if not followed in their entirety provide an excuse for borrowers to refuse to repay their loans. Similarly, they are not intended to provide protection for institutions that fail to meet the statutory requirements for continued participation in the loan programs. Congress has determined that the institutions bear a significant responsibility for defaults in the FFEL program. The Secretary does not believe that a lender's failure to strictly satisfy the requirements for Federal benefits should excuse the institution from the statutory consequences of its high default rate.

The Secretary also does not agree that it would be appropriate to assume that all claims which have been paid as defaults have been properly serviced or collected. While failure to pay a default claim may be based on a finding of improper servicing or collection, payment of a default claim is not absolute proof of compliance with the Secretary's requirements. Accordingly, institutions should have the opportunity to review servicing and collection records relating to these loans.

In regard to the issue of a lender's failure to respond to deferment requests, the Secretary notes that he has consistently treated deferment errors as "erroneous data" in adjudicating appeals of cohort default rate determinations. This treatment benefits the appealing institution since a determination that erroneous data was reported results in the affected loan being removed from the calculation of defaulted loans (the numerator), but it remains in the calculation of loans in repayment (the denominator). In contrast, loans which are excluded from the calculation of the cohort default rate based on improper servicing or collection are excluded from both the numerator and the denominator. The Secretary does not believe there is any reason to change his treatment of deferment errors.

Finally, the Secretary notes that guaranty agency servicing is not relevant to the default rate calculation. A guaranty agency does not begin to service a loan until it has already defaulted and, thus, its servicing does not affect the institution's cohort default rate.

Comment: Some commenters proposed that the Secretary remove from the calculation of the cohort default rate loans on which the lender did not request preclaims assistance from the guaranty agency or on which the agency did not provide notice of the request to the institution.

Response: A lender's failure to request preclaims assistance could, in certain circumstances, be considered improper servicing or collection if it would result in the loss of reinsurance on the principal of the loan based on the applicable rules and policies and if the borrower defaulted due to lack of notification that the time for repayment had begun.

Comment: Some commenters suggested that an institution should remain eligible to participate in the FFEL program during the appeal process.

Response: As provided in current regulations, an eligible institution that files and pursues an appeal in accordance with the regulatory requirements will be able to continue to participate in the FFELP until and unless the Secretary issues a decision determining that the institution's cohort default rates remain above the threshold limits.

Comment: Some commenters urged the Secretary to allow all institutions to challenge their default rates on the basis of improper servicing or collection.

Response: Section 435(a)(3) specifically allows only institutions with cohort default rates above certain threshold levels to challenge their rate based on allegations of improper loan servicing. The Secretary believes that this limitation was intentional and reasonable in light of the significant burdens placed on guaranty agencies and the Secretary in reviewing challenges based on allegations of improper loan servicing or collection.

Comment: Some commenters urged the Secretary to require institutions to provide evidence of improper loan servicing prior to requesting access to loan servicing records.

Response: The HEA does not require institutions to provide evidence of improper loan servicing or collection prior to filing a challenge of its cohort default rates.

Comment: Some commenters requested that institutions be required to submit a complete appeal before the guaranty agency is required to meet the time deadlines required by the regulations.

Response: These comments were based on the assumption by the commenters that the institution would be required to submit evidence of improper loan servicing before the guaranty agency would be required to respond to the institution's appeal. Under these regulations, the institution will only need to notify the guaranty agency that it is appealing the calculation of the cohort default rate and provide a copy of the list of borrowers included in the calculation of the rate. Accordingly, the Secretary believes it is unlikely that an institution will not submit a complete notification to the guaranty agency. However, an institution which does not submit the notice and list to the guaranty agency as required by the regulation may be barred from pursuing an appeal.

Comment: Some commenters suggested that loans serviced by lenders or servicers who have been designated as exceptional performers under section 428I of the HEA should not be included in any loans reviewed for improper servicing or collection on the ground that these loans are presumed to be serviced or collected properly.

Response: The Secretary does not believe that it is appropriate to exclude loans serviced by exceptional performers from the process for determining appeals based on allegations of improper servicing or collection. The exceptional performer designation is related only to the lender's receipt of payments from the guaranty agency. It should not be used to limit the institution's opportunity to challenge the calculation of its cohort default rate.

Comment: A number of commenters urged the Secretary to provide institutions more time to complete and submit appeals to the guaranty agencies and the Secretary.

Response: The Secretary believes that the regulations provide sufficient time for an institution to complete and submit appeals. The Secretary believes that the regulations are consistent with the tight time constraints on the time period for appeals included in the HEA.

Comment: Some commenters recommended that the Secretary consider the quality of education provided by an institution in determining whether an institution

should be sanctioned based on its excessive default rates.

Response: The statute sets forth specific grounds for challenges to an institution's cohort default rates. The quality of education is not included as a basis for appeal of a default rate based on allegations of improper loan servicing or collection. The Secretary notes, however, that institutions which are subject to the loss of FFEL Program participation under section 435(a)(2) of the HEA may appeal on the grounds of exceptional mitigating circumstances as defined by the Secretary's regulations.

Comment: Some commenters recommended that the Secretary grant an institution's appeal if the guaranty agency does not provide the servicing and collection records within the time set forth in the regulations.

Response: The Secretary does not believe it is appropriate to automatically grant an institution's appeal if the guaranty agency misses a deadline to provide records to the institution. In most cases, the institution continues to participate in the program and is not harmed by a short delay. The Secretary believes that the guaranty agencies must take appropriate steps to provide records within the regulatory time frames. However, in appropriate cases, the Secretary may consider taking action to levy a financial penalty or limit, suspend or terminate a guaranty agency's participation in the FFEL program based on violations of the regulatory time frames.

Comment: One commenter recommended that loans which have been improperly serviced or collected be removed only from the numerator of the calculation of the cohort default rate but not from the denominator.

Response: The Secretary construes section 435(a)(3) to require that loans which are determined to have defaulted due to improper loan servicing or collection be "exclude[d]" from the calculation of the cohort default rate entirely.

Executive Order 12866

The contents of this final rule have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Secretary has assessed the potential costs and benefits of the procedures in this rule.

The potential costs associated with the contents of this rule are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the FFEL program effectively and efficiently. In assessing the potential costs of these procedures, the Secretary has determined that the benefits of these procedures justify the costs.

The Secretary has also determined that the contents of this rule do not unduly interfere with State, local and tribal governments in the exercise of their governmental functions.

The contents of this rule are consistent with the requirements of the HEA and promote the President's priorities.

Sections 668.17 (f) and (h) contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review. These regulations affect institutions of higher education and guaranty agencies that participate in the Federal Family Education Loan Program. The Secretary needs the information to properly administer certain aspects of that program. The collection and reporting burden for the 300 institutions which challenge the calculation of their cohort default rates under these provisions is expected to increase by 15,600 hours. The collection and reporting burden for the 46 guaranty agencies which must respond to the institutions' requests under these regulations is expected to increase by 2,576 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. Comments on the burden estimate must be received on or before May 31, 1994.

Invitation to Comment

The Secretary recognizes that many participants in the FFEL program have an interest in these procedural rules. In light of that interest, the Secretary is requesting comment on these rules. The Secretary will consider any comments received within the designated comment period in determining whether to make any changes in these rules. After reviewing any comments received during the comment period, the Secretary will publish changes to the regulation or will publish a notice in the **Federal Register** indicating that no further changes will be made.

Waiver of Rulemaking

It is the practice of the Secretary to offer interested parties an opportunity to comment on proposed regulations. However, the Secretary has determined that the public interest requires the immediate issuance of this interim final rule.

Under the Administrative Procedure Act, 5 U.S.C. section 551, *et seq.*, procedural amendments to regulations do not require prior public notice and an opportunity for public comment. The changes being made by this rule do not affect the substantive requirements or the underlying laws or rules; nor do they modify or revoke existing rights or obligations, or create new ones. These regulations merely establish procedures to implement the requirements of sections 435(a)(3) and 435(m)(1)(B) of the HEA. Therefore, public comment is not required under 5 U.S.C. 553(b)(A).

In addition, the Secretary has determined that notice and comment is impracticable, unnecessary and contrary to the public interest. The procedures included in these rules are needed to adjudicate appeals from the initial determinations of cohort default rates for institutions. The Secretary is required by section 435(m)(4) of the HEA to publish cohort default rates for each institution for which a rate is calculated at least every fiscal year. The cohort default rates to be released for the current fiscal year are currently scheduled to be released during the summer of 1994. For the appeal procedures to be in place prior to the release of the default rates, the procedures must be published by May 1, 1994. Moreover, the Secretary invited public comment on what the procedures should be and received and considered the comments received in preparing this interim final rule. Accordingly, the Secretary has determined that public comment on this interim final rule is not required under 5 U.S.C. 553(b)(B).

List of Subjects in 34 CFR Part 668

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

(Catalog of Federal Domestic Assistance Number 84.032, Federal Family Education Loan Program.)

Dated: April 21, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

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

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

1. Section 668.17 is amended by adding paragraphs (f), (g) and (h) as follows:

§ 668.17 Default reduction measures.

* * * * *

(f) *Appeal based on allegations of improper loan servicing or collection*—(1) *General.* An institution that is subject to loss of participation in the FFEL programs under paragraph (a)(1) of this section or has been notified by the Secretary that its cohort default rate equals or exceeds 20 percent for the most recent year for which data are available may include in its appeal of that loss or rate a challenge based on allegations of improper loan servicing or collection. This challenge may be raised in addition to other challenges permitted under this section.

(2) *Standard of review.* An appeal based on allegations of improper loan servicing or collection must be submitted to the Secretary in accordance with the requirements of this paragraph. The Secretary excludes any loans from the cohort default rate calculation which, due to improper servicing or collection, would, as demonstrated by the evidence submitted in support of the institution's complete and timely appeal to the Secretary, result in an inaccurate or incomplete calculation of the cohort default rate.

(3) *Procedures.* (i) The following procedures apply to appeals from cohort default rates issued by the Secretary during Federal fiscal year 1994 and subsequent years. Upon receiving notice from the Secretary that the institution's cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section or that its most recent cohort default rate equals or exceeds 20 percent, the institution may appeal the calculation of the cohort default rate based on allegations of improper loan servicing or collection. The Secretary's notice includes a list of all borrowers included in the calculation of the institution's cohort default rate.

(ii) To initiate an appeal under this paragraph, the institution must notify, in writing, each guaranty agency that guaranteed loans included in the institution's cohort default rate that it is appealing the calculation of the cohort default rate. The notification must be received by the guaranty agency within 10 working days of the date the institution received the Secretary's notification. The institution's notification to the guaranty agency must include a copy of the list of students provided by the Secretary to the institution.

(iii) Within 15 working days of receiving the notification from the institution, the guaranty agency must provide the institution with a representative sample of the loan servicing and collection records relating to borrowers whose loans were guaranteed by the guaranty agency and that were included as defaulted loans in the calculation of the institution's cohort default rate. In selecting the representative sample of records, the guaranty agency must use the following procedures:

(A) The guaranty agency shall list in social security number order all loans made to borrowers for attendance at the institution and guaranteed by the guaranty agency and included as defaulted loans in the calculation of the cohort default rate which is being challenged by the institution.

(B) From the population of loans identified by the guaranty agency, the guaranty agency shall identify a sample of the loans. The sample must be of a size such that the universe estimate derived from the sample is acceptable at a 95 percent confidence level with a plus or minus 5 percent confidence interval. The sampling procedure must result in a determination of the number of loans that should be excluded from the calculation of the cohort default rate under this paragraph.

(C) Once the sample of loans has been established, the guaranty agency shall provide a copy of all servicing and collection records relating to each loan in the sample to the institution in hard copy format unless the guaranty agency and institution agree that all or some of the records can be provided in another format.

(D) The guaranty agency may charge the institution a reasonable fee for copying and providing the documents, not to exceed $10 per borrower file.

(E) After compiling the servicing and collection records for the loans in the sample, the guaranty agency shall send the records, a list of the loans included in the sample, and a description of how the sample was chosen to the institution. The guaranty agency shall also send a copy of the list of the loans included in the sample and the description of how the sample was chosen to the Secretary at the same time the material is sent to the institution. The list of loans included in the sample must include the following information:

(*1*) The loans included in the sample listed in order by social security number;

(*2*) For each loan listed, the last date of attendance, the date entered repayment, the date of the first payment missed by the borrower and the default date listed in the guaranty agency's records.

(iv) After receiving the relevant loan servicing and collection records from all of the guaranty agencies that insured loans which are included in the cohort default rate calculation, the institution has 30 calendar days to file its appeal with the Secretary. An appeal is considered filed when it is received by the Secretary. If the institution is also filing an appeal under paragraph (d)(1)(i) of this section, the institution may delay submitting its appeal under this paragraph until the appeal under paragraph (d)(1)(i) is submitted to the Secretary. As part of the appeal, the institution must submit the following information to the Secretary:

(A) A list of the loans which the institution alleges would, due to improper loan servicing or collection, result in an inaccurate or incomplete calculation of the cohort default rate.

(B) Copies of all of the loan servicing or collection records and any other evidence relating to a loan that the institution believes has been subject to improper servicing or collection. The records must be in hard copy or microfiche format.

(C) An explanation of how the alleged improper servicing or collection resulted in an inaccurate or incomplete calculation of the cohort default rate.

(D) A summary of the institution's appeal, listing the number of loans insured by each guaranty agency that were included in the calculation of the institution's cohort default rate, and the number of loans that would be excluded from the calculation of that rate by application of the results of the review of the sample of loans provided to the institution to the population of loans for each guaranty agency.

(E) A certification by an authorized official of the institution that all information provided by the institution in the appeal is true and correct.

(v) The Secretary or his designee reviews the information submitted by the institution and issues a decision.

(A) In making a decision under this paragraph the Secretary presumes that the information provided by the guaranty agency is correct unless the institution provides substantial evidence showing that the information maintained by the guaranty agency is not correct.

(B) If the Secretary finds that the evidence presented by the institution shows that some of the loans included in the sample of loan records reviewed by the institution should be excluded from calculation of the cohort default rate under paragraph (f)(2) of this section, the Secretary reduces the institution's cohort default rate, in accordance with a statistically valid

methodology, to reflect the percentage of defaulted loans in the sample that should be excluded.

(vi) The Secretary notifies the institution, in writing, of the decision.

(vii) An institution may not seek judicial review of the Secretary's determination of the institution's cohort default rates until the Secretary or his designee issues the decision under paragraph (f)(3)(v) of this section.

(viii) For purposes of this paragraph a loan is considered to have been serviced or collected improperly only if, under applicable rules, the Department would decline to pay reinsurance on the principal of the loan.

(ix) For purposes of this paragraph, improper servicing or collection is considered to have caused a loan to default for purposes of the calculation of the cohort default rate only if the improper servicing or collection resulted in a failure to notify the borrower that he or she must begin repaying the loan.

(x) For cohort default rates issued by the Secretary for federal fiscal years from 1989 to 1991, the procedures in this paragraph apply, except that the 10-day period for initiating an appeal with the guaranty agency starts on the effective date of these regulations.

(g) *Effect of decision.* An institution may challenge the calculation of a cohort default rate under this section no more than once. The Secretary's determination of an institution's appeal of the calculation of a cohort default rate is binding on any future appeal by the institution. An institution that fails to challenge the calculation of a cohort default rate under this section within 10 working days of receiving notice of the determination of the cohort default rate is prohibited from challenging that rate in any other proceeding before the Department.

(h) *Review of default rate data.* Effective on October 1, 1994, an institution has an opportunity to review and correct the information provided to the Secretary by the guaranty agencies for the purpose of calculating a cohort default rate on the loans to be included in the calculation of the institution's cohort default rate before the final rate is calculated.

(1) (i) Once the Secretary has received the information used in calculating the cohort default rates from the guaranty agencies, the Secretary calculates draft cohort default rates for each institution.

(ii) The Secretary sends all institutions with draft cohort default rates equal to or in excess of 20 percent a copy of the information provided by the guaranty agencies in regard to loans included in the institution's cohort default rate.

(iii) An institution with a draft cohort default rate less than 20 percent will receive a notice of the draft default rate and may request a copy of the information provided by the guaranty agencies within 10 working days of receiving the notice from the Secretary. Upon receiving the request from the institution, the Secretary will send the institution a copy of the information requested. The time frames provided in this paragraph will not start until the institution receives or should have received the information from the Secretary.

(2) Within 30 calendar days of receiving the default rate information from the Secretary, the institution must notify the guaranty agency of any information included in the default rate data that it believes is incorrect. The institution must also provide the guaranty agency with any evidence that it believes supports its contention that the default rate data are incorrect.

(3) Within 30 calendar days of receiving the institution's challenge under paragraph (h)(2) of this section, the guaranty agency shall respond to the institution's challenge. The guaranty agency's response must include a response to each allegation of error made by the institution and any evidence supporting the agency's position.

(4) The guaranty agency shall provide a copy of its response to the institution to the Secretary and identify any errors in the information previously submitted to the Secretary.

(5) The information used to calculate cohort default rates will be changed to reflect allegations of error made by an institution and confirmed by the guaranty agency prior to releasing final cohort default rates.

(6) The draft default rate issued by the Secretary under paragraph (h)(1) of this section may not be considered public information and may not be otherwise voluntarily released by the Secretary or the guaranty agency.

(7) An institution may not appeal a cohort default rate under paragraph (d)(1) of this section on the basis of any alleged errors in the default rate information unless errors were identified by the institution in a challenge to its preliminary default rate under paragraph (h) of this section.

[FR Doc. 94–10132 Filed 04–28–94; 8:45 am]

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Friday
April 29, 1994

Part V

Department of Education

34 CFR Part 667

State Postsecondary Review Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 667

RIN 1840–AB89

State Postsecondary Review Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary publishes final regulations to implement the State Postsecondary Review Program (SPRP) authorized under title IV, part H, subpart 1 of the Higher Education Act of 1965, as amended (HEA). Under the SPRP, the Secretary enters into an agreement with a State under which the State designates a State postsecondary review entry (SPRE) to be responsible for conducting or coordinating reviews of institutions of higher education referred to the State by the Secretary under specific statutory provisions. The purpose of the SPRE reviews is to determine whether those institutions should continue to participate in the student financial assistance programs authorized under Title IV of the HEA (Title IV, HEA programs). The SPRE reviews institutions on the basis of State standards developed in consultation with institutions located in the State. The Secretary reimburses SPREs for costs they incur under the SPRP from appropriated funds.

EFFECTIVE DATE: These regulations take effect July 1, 1994, with the exception of §§ 667.3, 667.4, 667.8, 667.12, 667.15, 667.21, 667.22, and 667.26. Sections 667.3, 667.4, 667.8, 667.12, 667.15, 667.21, 667.22, and 667.26 will become effective after the information collection requirements contained in those sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: John Kolotos, U.S. Department of Education, 400 Maryland Avenue SW., room 4318, ROB–3, Washington, DC 20202–5244. Telephone: (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: These regulations implement the changes made to the HEA by the Higher Education Amendments of 1992 (Pub. L. 102–325) and the Higher Education Technical Amendments of 1993 (Pub. L. 103–208).

On January 24, 1994 the Secretary published a notice of proposed rulemaking (NPRM) for this program in the **Federal Register** (59 FR 3604). The NPRM included a discussion of the major issues surrounding the proposed changes that will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the NPRM on which a discussion of those issues may be found:

Statement of the scope and purpose of the SPRP (page 3606);

Definitions of terms used in this part, including *education and general expenditures, professional program*, and *vocational program* (page 3606);

Elements contained in the agreement between a State and the Secretary (pages 3607–3608);

Criteria the Secretary uses to refer institutions to a SPRE for review (page 3608);

SPRE selection of institutions for review (pages 3608–3609);

Notice to SPRE of Federal actions (page 3609);

Situations in which an institution has locations in more than one State (page 3609);

Allotment formula to determine each State's annual allotment of funds (page 3609);

Procedures under which a State applies for funds (pages 3609–3610);

Procedures under which the Secretary approves a State's application for funds (pages 3610–3611);

Allowable costs and activities reimbursable under the SPRP (page 3611);

State review standards for referred institutions (pages 3611–3613);

Procedures for the disapproval by the Secretary of State review standards (pages 3613–3614);

Procedures regarding SPRE reviews of referred institutions (page 3614);

Peer reviews of institutions (pages 3614–3615);

Procedures that a SPRE must follow to effect the termination of an institution's participation in the Title IV, HEA programs (page 3615); and

Due process requirements (page 3615).

In order to approve a postsecondary education institution to participate in the Title IV, HEA programs and many other Federal programs, the Secretary must determine, in part, that the institution satisfies the statutory definition of an "institution of higher education." Under the HEA, one element of that definition requires an eligible institution of higher education to be accredited or preaccredited by an accrediting agency recognized by the Secretary as a reliable authority as to the quality of the education or training provided by the institution. Another element requires an eligible institution to be legally authorized to provide an education program beyond the secondary level in the State in which it is located. In addition, to participate in the Title IV, HEA programs, the institution must be certified by the Secretary as administratively capable and financially responsible. Thus, the HEA provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the "gate" to Title IV, HEA programs is opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three "gatekeepers" sharing this responsibility have traditionally been referred to as "the triad."

While the concept of a triad of entities responsible for gatekeeping has had a long history, originating in 1952, the Higher Education Amendments of 1992, Pub. L. 102–325, significantly increased the gatekeeping responsibilities of each member of the triad. Specifically, Congress amended the HEA to provide for a new part H of Title IV entitled "Program Integrity Triad." Under the new part H, the requirements that accrediting bodies must meet if they are to be recognized by the Secretary as "gatekeepers" for Title IV are specified in detail. Part H also provides a new oversight responsibility for States: the State Postsecondary Review Program. Altogether, part H establishes a set of responsibilities for accrediting agencies, States, and the Secretary that creates a stronger and more coordinated evaluation of institutions that participate, or wish to participate, in the Title IV, HEA programs.

The Secretary recognizes that the approach to significantly increased gatekeeping activity outlined in the statute for the three members of the triad is a new one. This approach will require leadership in both implementation and evaluation if it is to achieve the effectiveness that Congress intended. The Secretary will take steps to assure that the various responsibilities of the triad members are carried out in a manner that, in fact, results in the identification of institutions that should not be eligible to participate in the Title IV, HEA programs, on the basis of either the quality of education they offer or their inability to handle program funds. At

the same time, the Secretary is committed to carrying out the responsibility for coordinating the activities of the triad members that are inherent in the statute in a manner that causes the least burden to institutions participating in the Title IV, HEA programs.

To these ends, the Secretary is committed to effective management of the gatekeeping function. The Secretary will review carefully the applications on accrediting bodies and the standards and operating plans proposed by State Postsecondary Review Entities (SPREs) under the State Postsecondary Review Program to insure that they meet the requirements of the statute and these regulations and will enable these triad agencies to fulfill their statutory purposes. The Secretary will also place a priority on the completion of the "Postsecondary Education Participation System," the Department's new integrated data base, which will contain the information that the Secretary generates in the course of the Secretary's oversight of institutions participating in Title IV, HEA programs. The Secretary will use the data base to inform accrediting bodies and SPREs of actions taken by the Secretary so that they may in turn carry out their responsibilities. This expanded data base is also critical to the Secretary's effective selection of institutions for program review.

Monitoring the results of the gatekeeping process is a very important key to effective management. The Secretary will evaluate the activities of accrediting agencies, SPREs, and the Department to determine their effectiveness in improving the integrity of institutions participating in Title IV programs and will take such steps as may be indicated to improve the results. Finally, as provided in the statute, the Secretary will seek the advice and counsel of the National Advisory Committee on Institutional Quality and Integrity in evaluating the effectiveness of the triad.

The Secretary believes that the approach best suited to achieving the objectives of the statute is a complementary one, with each member of the triad focusing its evaluation on its obligations within the context of the HEA. Thus, the focus for accrediting agencies is the quality of education or training provided by the institutions or programs they accredit. States, in addition to providing the legal authority to operate within the state required for participation in the Title IV, HEA programs, will review institutions that meet certain statutory review criteria related to institutional performance in the Title IV, HEA programs. The focus of the Secretary's evaluation of institutions is on the administrative and financial capacity of those institutions to participate in the Title IV, HEA programs.

While the functions and responsibilities of each of the triad members are generally different, the statute does require, in some instances, that all members of the triad evaluate similar areas. For the most part, the principle of complementary functions will lead to the members evaluating those same areas from different perspectives for different purposes. For example, all three of the triad members are required to examine the finances of an institution. If each looks at financial strength from a perspective complementary to that of the others, accrediting agencies would focus principally on the capacity of the institution to continue to offer programs at a level of quality sufficient to meet accrediting agency standards and to fulfill the institution's mission over a 5–10 year period of accreditation. The emphasis of a review by a SPRE would be on whether or not the institution possesses the full range of resources needed to serve students currently attending the institution. The Secretary's responsibilities focus on the institution's finance in light of its ability to provide the services described in its official publications and statements, to provide the administrative resources necessary to comply with its Title IV, HEA program responsibilities, and to meet all of its financial obligations, including, but not limited to, refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.

Despite the Secretary's efforts to encourage complementary functions for each of the triad members, it is theoretically possible that, in some instances, an institution could be subject to three different standards regulating the same area of operation. For this reason, where a Title IV standard has been promulgated at the Federal level, the Secretary expects accrediting agencies and States to take this into account in establishing their own standards to insure that varying standards do not pose an unnecessary burden on institutions. It is also important that accrediting agencies and States not impose any standard that is weaker than a comparable Title IV, HEA program standard. The Secretary believes coordination of this is a federal responsibility.

In view of the complementary approach to the functions of the triad members, the Secretary believes, for example, that institutions should not have to develop different methodologies to provide data that the three members of the triad may require. The Secretary also believes that, to the extent feasible, any other requests for data about the institution, its students, or its graduates should rely on information already in the institution's possession. To that end, the Secretary expects accrediting agencies and States either to accept student data based on the methodology that will be specified in the regulations governing "Student Right to Know," also mandated by the Higher Education Amendments of 1992, or, where the institution may have other methodologies for calculating data, such as a system designed to provide data to a State higher education commission or other State agency, to accept data in the format already being used by the institution. Similarly, the Secretary expects accrediting agencies and SPREs to use the audited financial statements institutions are now required to provide to the Secretary on an annual basis to the extent those statements are compatible with the nature of the reviews conducted under their respective standards.

The Secretary also recognizes that other Federal agencies, such as the Department of Labor and the Veterans Administration, also regulate institutions in some areas that are similar to those included in part H. The suggestion has been made that the Secretary should promulgate Federal standards in the areas of overlap so that institutions would not be subject to varying standards developed by other Federal agencies and the triad members. However, the Secretary interprets part H as permitting States and accrediting agencies to establish their own standards, as opposed to using a Federal standard, and also believes that this is the most effective approach. In addition, it is not clear how the requirements of the different agencies are capatible with the requirements of part H. The purposes of these programs administered by other agencies may be very different. As a result, the Secretary has not pursued this alternative. The Secretary does believe that it would be useful to explore how the varying requirements of other Federal agencies that are similar to those of part H might be coordinated to reduce any burden on institutions and will initiate such exploration.

The Secretary believes that, where possible, data developed at the national level should be made available to institutions, as well as to States and accrediting agencies to assist them in carrying out their responsibilities under

part H. In particular, data concerning labor markets and compensation for specific fields and information concerning graduation and withdrawal rates at various types of institutions may be helpful to both triad members and institutions. The Secretary will facilitate the development of this type of information and, where possible under the auspices of the Department, will coordinate the development of data that will be helpful to institutions and the triad.

Finally, as part of the commitment to providing leadership to the triad, the Secretary will convene representatives of the triad members and institutions to exchange information about the gatekeeping process and to discuss how the triad is functioning, both in identifying institutions whose performance is questionable and in reporting requirements that have proven to be unreasonably burdensome. The Secretary invites comments concerning the functioning of the triad, as it is implemented through these and other regulations governed by part H. The Secretary will seek improvement, where possible, within existing regulations and will propose modifications to regulations and to the statute itself if experience indicates those changes are both necessary to achieve effective gatekeeping, with minimal burden, and compatible with the need to maintain, and assure the public of, the integrity of the Title IV, HEA programs.

The following is a summary of the significant changes from the NPRM:

Section 667.1 Scope and purpose. Section 667.1(a)(1) has been revised to clarify that the purpose of the SPRP is to reduce fraud and abuse in the Title IV, HEA programs. This section also has been revised to clarify that under the SPRP a State's standards apply only to referred institutions and a State may review only referred institutions under those standards.

Section 667.2 Definitions. The proposed definition of *professional program* has been revised to maintain a clear distinction between the terms *vocational program* and *professional program* in view of the changes made to the definition of *vocational program*. A professional program is therefore an undergraduate or graduate educational program that prepares individuals for an occupation, if that occupation (1) is listed in a Federal classification manual, (2) requires at least a bachelor's degree to qualify for entry; (3) involves the independent practice or application of a defined or organized body of competencies that is unique to the occupation; and (4) is formally recognized and regulated under a national or State licensure, accreditation, or permit system. Also, the definition is expanded to allow a SPRE to use its State's statutory definition of the term "professional program."

The proposed definition of *vocational program* has been revised to be consistent with that used in IPEDS. A vocational program is therefore defined as an educational program that is below the bachelor's level and is designed to prepare individuals with skills and training for employment in a specific trade, occupation, or profession related to that educational program.

Section 667.3 State agreement. Paragraph (b)(3) of this section has been revised to clarify the type of records that a SPRE must keep or have access to, and the type of information that must be provided to the Secretary. Thus, paragraph (b)(3)(iii) has been revised to indicate that a SPRE must keep or have access to records of referred institutions, related to activities under this part, and must provide requested information to the Secretary for financial or compliance audits of referred institutions. Paragraph (b)(3)(iv) has been added to indicate that the SPRE must keep or have access to records relating to its activities under this part, and must provide such information to the Secretary upon request when the Secretary evaluates the SPRE's performance under the SPRP.

Section 667.4 State postsecondary review entity. This section has been revised to make clear that the SPRP does not authorize a SPRE to (1) grant State authorization to provide postsecondary education to an institution, or (2) require nonreferred institutions to comply with the standards established under § 667.21.

Section 667.5 Criteria the Secretary uses to refer institutions to a SPRE for review. The criterion in paragraph (b)(11) of this section has been revised to limit complaints the Secretary considers in determining whether to refer an institution to a SPRE for review to student complaints. This section has also been revised to allow an institution an opportunity to challenge the accuracy of the information that the Department uses to refer the institution to a SPRE for review before the Department refers that institution to a SPRE.

Section 667.6 SPRE selection of institutions for review. This section has been revised to allow an institution that has not been referred by the Secretary an opportunity to challenge the accuracy of the information that a SPRE uses to select the institution for review.

Section 667.8 Notice to nationally recognized accrediting agencies of SPRE actions. A new section is added to these final regulations to require a SPRE to notify the appropriate nationally recognized accrediting agency before the SPRE conducts a review of an institution the agency accredits. The SPRE is also required to notify that accrediting agency of significant and relevant decisions, reports, or actions taken as a result of the review.

Section 667.21 State review standards. The standard requiring a State to evaluate whether the tuition and fees that are charged a student for an educational program are reasonable given the expected amount of money that the student can earn upon completion of the program is revised to apply only to vocational programs.

Section 667.23 SPRE reviews of referred institutions. Paragraph (d)(2) has been added to allow a SPRE, if an institution presents compelling evidence that its failure to satisfy a SPRE standard does not warrant further SPRE action, to forego any further action.

This section has been revised to require a SPRE to make available information regarding its priority system for selecting institutions to review.

Section 667.24 Peer reviews of institutions. This section has been revised to require a State to apply minimum, specified criteria to determine whether a peer review system other than a nationally recognized accrediting agency has demonstrated competence in assessing educational programs.

Section 667.26 Due process requirements. This section has been revised to require a State's due process procedures to specify a minimum time within which an institution may appeal an adverse action, and to designate an impartial hearing official to consider certain appeals by institutions.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, approximately 1500 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix to these final regulations. Substantive issues are discussed under the section of the regulations to which they pertain.

Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently. Burdens specifically associated with information collection requirements, if any, were identified in the preamble to the NPRM under the heading

Paperwork Reduction Act of 1980.

Sections 667.3, 667.4, 667.8, 667.12, 667.15, 667.21, 667.22, and 667.26 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h)). These regulations contain records that will affect States and State postsecondary review entities. An estimate of the total annual reporting and recordkeeping burden that will result from the collection of the information is 2000 hours per response for 57 respondents for a total burden of 114,000 burden hours for this package.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. Comments on this burden estimate should be submitted by May 31, 1994.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 667

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

(Catalog of Federal Domestic Assistance Number: 84.267, State Postsecondary Review Program)

Dated: April 20, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by adding a new part 667 to read as follows:

PART 667—STATE POSTSECONDARY REVIEW PROGRAM

Subpart A—General

Sec.
667.1 Scope and purpose.
667.2 Definitions.
667.3 State agreement.
667.4 State postsecondary review entity.
667.5 Criteria the Secretary uses to refer institutions to a SPRE for review.
667.6 SPRE selection of institutions for review.
667.7 Notice to SPRE and nationally recognized accrediting agency of Federal actions.
667.8 Notice to nationally recognized accrediting agency of SPRE actions.
667.9 Institutions with locations in more than one State.

Subpart B—Allotment Formula and Funding Procedures

667.11 Allotment formula.
667.12 Application for funds.
667.13 Approval of funding application.
667.14 Allowable costs and activities.
667.15 Fiscal procedures and records.
667.16 Supplement, not supplant, requirement.

Subpart C—State Review Standards, SPRE Reviews, and Termination of Institutional Participation

667.21 State review standards.
667.22 Disapproval of State review standards.
667.23 SPRE reviews of referred institutions.
667.24 Peer reviews of institutions.
667.25 Termination of an institution's participation in the title IV, HEA programs.
667.26 Due process requirements.

Authority: 20 U.S.C. 1099a through 1099a–3, unless otherwise noted.

Subpart A—General

§ 667.1 Scope and purpose.

(a)(1) This part establishes the rules and procedures that govern the State Postsecondary Review Program, which is authorized by title IV, part H, subpart 1 of the Higher Education Act of 1965, as amended (HEA). The purpose of the program is to reduce fraud and abuse in the title IV, HEA programs through development of State standards for, and State oversight and review under those standards of, institutions referred by the Secretary under § 667.5 or selected by a State postsecondary review entity under § 667.6.

(2) Under this part, if a State finds that an institution it reviews does not satisfy the State standards, the State may—

(i) Require the institution to take prompt actions to bring itself into compliance with the State's standards; or

(ii) Determine that the institution should no longer participate in a title IV, HEA program.

(b) A State must carry out activities under this part only to the extent that the costs of those activities will be reimbursed by Federal funds.

(c) As used in this part, "an institution" includes—

(1) An institution of higher education as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education as defined in 34 CFR 600.5; and

(3) A postsecondary vocational institution as defined in 34 CFR 600.6.

(d)(1) The provisions in the Education Department General Administrative Regulations, 34 CFR parts 76 and 80, do not apply to this part except for the provisions in—

(i) 34 CFR 76.2, and 76.50 of subpart A;

(ii) 34 CFR 76.500 through 76.534, 76.560, 76.561, 76.563, and 76.580 through 76.592 of subpart F;

(iii) 34 CFR 76.701, 76.702, 76.703, 76.707, 76.720, 76.730, 76.731, 76.734, 76.760, and 76.761 of subpart G;

(iv) 34 CFR 80.22 of subpart A;

(v) 34 CFR 80.43 and 80.44 of subpart C; and

(vi) 34 CFR 80.50 through 80.52 of subpart D.

(2) For purposes of this part, the term "grantee," as defined and used in 34 CFR parts 76 and 80, refers only to a State Postsecondary Review Entity.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.2 Definitions.

(a) The following terms used in this part are defined in the regulations governing Institutional Eligibility under the Higher Education Act of 1965, as amended, 34 CFR part 600:

Branch campus
Educational program
Federal Family Education Loan (FFEL) programs
Nationally recognized accrediting agency
Recognized occupation
Regular student
Secretary
State

(b) The following terms used in this part are defined in the Student

Assistance General Provisions regulations, 34 CFR part 668:

Award year
Clock hour
Eligible program
Enrolled
Federal Direct Student Loan Program
Federal Pell Grant Program
Federal Perkins Loan Program
Federal PLUS Program
Federal Stafford Loan Program Federal Supplemental Loans for Students (SLS) Program
Federal Supplemental Educational Opportunity Grant (FSEOG) Program
Federal Work-Study (FWS) Program
National Early Intervention Scholarship and Partnership (NEISP) Program
State Student Incentive Grant (SSIG) Program

(c) The following definitions apply to terms used in this part:

Classification of Instructional Programs (CIP): A manual published by the U.S. Department of Education, National Center for Education Statistics, that lists the codes, titles, and descriptions of educational programs used by institutions and States for reporting and analyzing education data at the national level. (This manual can be obtained at the United States Department of Education, Outreach Division, OERI, 55 New Jersey Ave., NW., room 300, Washington, DC 20208.)

Education and general expenditures: The total amount expended by an institution for institution for instruction, research, public service, academic support (including library expenditures), student services, institutional support, scholarships and fellowships, operation and maintenance expenditures for the physical plant, and any mandatory transfers which the institution is required to pay by law.

National Occupational Information Coordinating Committee (NOICC): An agency jointly sponsored by the U.S. Departments of Education and Labor to facilitate comparisons between educational programs and related occupations and to provide information to State employment counseling services.

NOICC Master Crosswalk: A computerized database that shows the relationships among major occupational and educational systems used by the Federal government. (This database can be obtained from the National Crosswalk Service Center, Iowa SOICC, 200 East Grand Ave., Des Moines, IA 50309. Telephone: (515) 242–4881.)

Professional program: An undergraduate or graduate educational program that—

(1)(i) Is listed in the CIP; and

(ii) Prepares individuals for an occupation, if that occupation—

(A) Requires at least a bachelor's degree to qualify for entry;

(B) Involves the independent practice or application of a defined or organized body of competencies that is unique to the occupation; and

(C) Is formally recognized and regulated under a national or State licensure, accreditation, or permit system; or

(2) Satisfies a State's statutory definition of the term *professional program.*

Referred institution: An institution that a SPRE reviews as a result of—

(1) A referral by the Secretary under § 667.5; or

(2) State selection under § 667.6.

State Postsecondary Review Entity (SPRE): The entity described in § 667.4.

Title IV, HEA program: One of the programs identified in 34 CFR 668.1.

Vocational program: An educational program, below the bachelor's level, designed to prepare individuals with the skills and training required for employment in a specific trade, occupation, or profession related to the educational program.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.3 State agreement.

(a) To participate in the State Postsecondary Review Program, a State must enter into an agreement with the Secretary.

(b) In the agreement, the State—

(1) Designates a SPRE;

(2) Describes the organizational structure of the SPRE;

(3) Assures that the SPRE—

(i) Has the legal authority under State law to carry out the functions required of it under this part;

(ii) Will perform the functions required of it under this part;

(iii) Will keep records or have access to records of referred institutions that relate to activities under this part and will provide information to the Secretary as may be requested by the Secretary for financial and compliance audits of referred institutions;

(iv) Will keep records or have access to records that relate to its activities under this part, and will provide information to the Secretary as may be requested by the Secretary for program evaluations of the manner in which the SPRE carries out its responsibilities under this part; and

(v) Will review referred institutions on a schedule that coincides with the Secretary's schedule for recertifying those institutions to participate in the title IV, HEA programs;

(4) Describes the relationship between the SPRE, the State approving agency for Veterans Affairs, the State guaranty agency under the FFEL programs, the State agency responsible for administering the SSIG Program, any State entity that provides a license to institutions to operate in the State or otherwise legally authorizes institutions to provide postsecondary education in the State, any State-level entity that approves service providers under the Job Training Partnership Act, and any State-level entity that certifies vocational education;

(5) Indicates that the SPRE—

(i) Shall contract with a nationally recognized accrediting agency or a peer review system for purposes of § 667.24; and

(ii) May contract with a private agency, nationally recognized accrediting agency, or peer review system for assistance in performing the SPRE's functions; and

(6) Includes the SPRE's plan for performing the functions described in § 667.12.

(c) The agreement between the State and the Secretary goes into effect when it is signed by the Secretary and remains in effect until it is terminated by the Secretary or the State. The Secretary or the State terminates an agreement under the provisions of that agreement.

(d) The sanctions set forth in paragraph (e) of this section follow if the State—

(1) Does not enter into an agreement with the Secretary;

(2) Fails to comply with the terms of the agreement and the Secretary terminates that agreement;

(3) Terminates the agreement with the Secretary; or

(4)(i) Does not submit to the Secretary by December 31, 1995, State review standards under § 667.21, that are approvable by the Secretary under § 667.22, if the State received Fiscal Year 1993 funds to carry out activities under the State Postsecondary Review Program; or

(ii) Does not submit to the Secretary by December 31, 1996, State review standards under § 667.21, that are approvable by the Secretary under § 667.22, if the State did not receive Fiscal Year 1993 funds to carry out activities under the State Postsecondary Review Program.

(e) If any of the events listed in paragraph (d) of this section occurs—

(1) The State is ineligible to receive—

(i) Any funds appropriated to carry out this program;

(ii) Its allotment of any funds appropriated under the SSIG Program; and

(iii) Any funds appropriated to carry out the NEISP Program; and

(2) The Secretary—

(i) Does not designate as eligible for participation in a title IV, HEA program any institution in the State seeking initial participation in that program, any branch campus in the State for which an institution seeks an initial designation of eligibility under 34 CFR part 600, or any institution in the State that has undergone a change in ownership that results in a change in control as determined in 34 CFR part 600;

(ii) Grants only provisional certification, as determined in 34 CFR part 668, to an institution or a branch campus in that State not described in paragraph (e)(2)(i) of this section; and

(iii) May—

(A) Establish the review standards for that State described in § 667.21; and

(B) Carry out, or arrange to carry out, the State's other responsibilities and requirements under this part.

(Authority: 20 U.S.C. 1099a–1)

§ 667.4 State postsecondary review entity.

(a) The SPRE is the entity designated by the State in the agreement between the State and the Secretary under § 667.3, to—

(1) Represent all existing State entities that are, and all future State entities that will be, responsible for—

(i) Granting State authorization to provide postsecondary education in that State; and

(ii) Ensuring that all institutions in the State that participate in a title IV, HEA program remain in compliance with the State review standards established under § 667.21;

(2) Keep records or have access to records of referred institutions that relate to activities under this part and provide information to the Secretary as may be requested by the Secretary for financial and compliance audits of referred institutions; and

(3) Keep records or have access to records that relate to its activities under this part, and provide information to the Secretary as may be requested by the Secretary for program evaluations of the manner in which the SPRE carries out its responsibilities under this part.

(b) Under this part, a SPRE is not authorized to—

(1) Grant State authorization to provide postsecondary education in that State; or

(2) Require an institution in the State that is not referred to the State by the Secretary under § 667.5 or selected by the State under § 667.6 to comply with State review standards established under § 667.21.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.5 Criteria the Secretary uses to refer institutions to a SPRE for review.

(a)(1) The Secretary refers an institution that participates in a title IV, HEA program to a SPRE for review if the institution meets one or more of the criteria contained in paragraph (b) of this section.

(2) In determining whether an institution meets one or more of the criteria contained in paragraph (b) of this section, the Secretary uses the most recently available data.

(b) Except as provided in paragraph (c) of this section, the Secretary refers an institution to a SPRE if—

(1) The institution has a cohort default rate (defined in 34 CFR 668.17) equal to or greater than 25 percent;

(2)(i) The institution has a cohort default rate (defined in 34 CFR 668.17) equal to or greater than 20 percent; and

(ii) During the latest completed award year for which data are available—

(A) More than two-thirds of the institution's regular undergraduate students who were enrolled as at least half-time students received assistance under any title IV, HEA program, excluding assistance received from the SSIG, NEISP, and Federal PLUS programs; or

(B) The amount that the institution's students received under the title IV, HEA programs, excluding funds from the SSIG, NEISP, and Federal PLUS programs, is equal to or greater than two-thirds of the institution's education and general expenditures;

(3) The amount that the institution's students received under the Federal Pell Grant Program is equal to or greater than two-thirds of the institution's education and general expenditures;

(4) The Secretary initiated a limitation, suspension, or termination action against the institution under 34 CFR part 668, subpart G, within the preceding 5 years;

(5) An audit finding in the institution's 2 most recent audits under 34 CFR 668.23 resulted in a required repayment by the institution of an amount greater than 5 percent of the funds the institution received under the title IV, HEA programs for any 1 award year covered by those audits;

(6) The Secretary cited the institution for its failure to submit an acceptable audit report by the deadlines established under 34 CFR 668.23;

(7)(i) The amount that the institution's students received under the Federal Pell Grant Program during any award year differed by more than 25 percent from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program;

(ii) The amount that the institution's students received under the Federal Stafford Loan Program during any award year differs by more than 25 percent from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program; or

(iii) The amount that the institution's students received under the Federal SLS Program during any award year differs by more than 25 percent from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program;

(8) The institution failed to meet the factors of financial responsibility in 34 CFR part 668, subpart B;

(9) The institution underwent a change in ownership that resulted in a change of control as defined in 34 CFR 600.31;

(10) Except with regard to any public institution affiliated with a State system of higher education, the institution has participated for less than 5 years in—

(i) The Federal Pell Grant Program;

(ii) The FFEL Program;

(iii) The FSEOG Program;

(iv) The FWS Program;

(v) The Federal Perkins Loan Program; or

(11) The institution has been subject to a pattern of complaints from students related to its management or conduct of the title IV, HEA programs or to misleading or inappropriate advertising and promotion of the institution's educational programs that, in the Secretary's judgment, based on information available to the Secretary, including information provided to the Secretary by the SPRE, is sufficient to warrant review.

(c)(1) Before the Secretary refers an institution to a SPRE for meeting one or more of the referral criteria contained in paragraph (b) of this section, the Secretary notifies the institution of that intended referral and the reasons for the referral.

(2) The Secretary delays the referral if the Secretary receives from the institution a notice of its intent to challenge the accuracy of the information upon which the referral was based no later than seven days after the institution receives the notice from the Secretary.

(3)(i) If an institution challenges the accuracy of the information on which its referral was based, the institution has

the burden of proving that the information was inaccurate.

(ii) For purposes of paragraph (c)(3)(i) of this section, the Secretary presumes that records maintained in the normal course of business by the U.S. Department of Education, a guaranty agency under the FFEL Program, a SPRE, a State licensing agency, or another State agency are accurate.

(4)(i) If an institution challenges the accuracy of the information on which its referral was based, other than the accuracy of its cohort default rate for a particular year, the Secretary must receive the institution's submission, along with any supporting document or record, no later than 30 days after the institution receives the notice described in paragraph (c)(1) of this section.

(ii) If an institution challenges the accuracy of its cohort default rate for a particular year under 34 CFR 668.17(d)(1)(i) (A) and (B), it must file a timely appeal of that rate under those provisions.

(d) If the institution timely challenges its referral under paragraph (c) of this section, the Secretary refers the institution to a SPRE for review unless the institution convinces the Secretary that its referral was based upon inaccurate information for all of the referral criteria.

(e)(1) Documents referenced in this section may be hand-delivered or mailed. If documents are mailed, they must be mailed certified mail, return receipt requested, or by next-day mail service.

(2) If documents are mailed, proof of receipt shall be evidenced by the delivery date indicated on the United States Postal Service return receipt card (green card), or the pickup date indicated on the next day mail service's bill.

(3) For purposes of paragraph (e)(2) of this section, if any submission is sent by next-day mail service, the Secretary presumes that the document was delivered the day after the date on which it was picked up for delivery.

(Authority: 20 U.S.C. 1099a–3)

§ 667.6 SPRE selection of institutions for review.

(a) A SPRE may review an institution under this part that was not referred by the Secretary if—

(1) The SPRE—

(i)(A) Determines that the institution meets a referral criterion in § 667.5 based on more recent data available to the SPRE; or

(B) Has reason to believe the institution is engaged in fraudulent practices; and

(ii) Requests the Secretary to approve its review of that institution; and

(2) The Secretary—

(i) Approves that request; or

(ii) Does not respond to the SPRE's request within 21 days after the date the Secretary receives that request; and

(b) If, under paragraph (a)(1)(i)(A) of this section, a State selects an institution for review, before the SPRE may request the Secretary to approve that review, the SPRE must—

(1) Notify the institution of the selection and provide the institution with the reasons for its selection;

(2) Delay its review request to the Secretary if the State receives a notice from the institution no later than seven days after the institution receives the notice from the State challenging the accuracy of the information on which the selection was based.

(3)(i) If an institution challenges the accuracy of the information on which its selection was based, the institution has the burden of proving that the information was inaccurate.

(ii) For purposes of paragraph (c)(3)(i) of this section, the State shall presume that records maintained in the normal course of business by the U.S. Department of Education, a guaranty agency under the FFEL programs, a SPRE, a State licensing agency, or another State agency are accurate.

(4) To challenge the accuracy of the information on which its referral was based, the State must receive no later than 30 days after the institution receives the notice described in paragraph (c)(1) of this section the institution's submission, along with any supporting document or record.

(c) If the institution timely challenges its referral under paragraph (b) of this section, the State requests a review of the institution from the Secretary unless the institution convinces the State that its selection was based upon inaccurate information.

(d)(1) Documents referenced in this section may be hand-delivered or mailed. If documents are mailed, they must be mailed certified mail, return receipt requested, or by next-day mail service.

(2) If documents are mailed, proof of receipt shall be evidenced by the delivery date indicated on the United States Postal Service return receipt card (green card), or the pick up date indicated on the next day mail service's bill.

(3) For purposes of paragraph (e)(2) of this section, if any submission is sent by next-day mail service, the State shall presume that the document was delivered the day after the date on which it was picked up for delivery.

(Authority: 20 U.S.C. 1099a–3)

§ 667.7 Notice to SPRE and nationally recognized accrediting agency of Federal actions.

(a)(1) If the Secretary takes an action against an institution, the Secretary notifies the SPRE of the State in which the institution is located, and the appropriate nationally recognized accrediting agency, within 10 days of taking that action.

(2) For purposes of this part, an action taken by the Secretary includes, but is not limited to, the actions described in 34 CFR part 668, subpart G.

(b) If the Secretary is informed that another Federal agency is taking an action against an institution, the Secretary notifies the SPRE of the State in which the institution is located, and the appropriate nationally recognized accrediting agency, as soon as possible but not later than 10 days after learning of that action.

(Authority: 20 U.S.C. 1099a–3)

§ 667.8 Notice to nationally recognized accrediting agency of SPRE actions.

(a) A SPRE shall notify a nationally recognized accrediting agency when it plans to conduct a review of an institution accredited or preaccredited by that agency; and

(b) After conducting a review of the institution, the SPRE shall notify the accrediting agency of its findings and the actions the SPRE takes, or plans to take, as a result of those findings.

(Authority: 20 U.S.C. 1099a–3)

§ 667.9 Institutions with locations in more than one State.

(a) If an institution that is subject to a referral has locations in more than one State, the Secretary refers the institution to the SPRE in each State in which the institution is located and informs each SPRE of the other States in which the institution is located.

(b) The SPRE of the State in which the main campus of the institution is located has the principal responsibility for reviewing that institution.

(c) If a branch campus or additional location of an institution is in a State other than the State in which the institution's main campus is located, the SPRE of the State in which that branch campus or additional location is located—

(1) May review that branch campus or additional location before a SPRE review is conducted of the main campus of that institution;

(2) May delay its review of that branch campus or additional location until a SPRE review is conducted of the main campus of that institution; or

(3) May choose not to review that branch campus or additional location if—

(i) The SPRE of the State in which the main campus of that institution is located reviews that institution and makes no significant findings; and

(ii) The allotment of the State in which the branch campus or additional location is located is insufficient to allow the SPRE to review all referred institutions.

(d) An institution and its branch campuses and additional locations are subject to the review standards of the State in which they are located, respectively.

(e) Notwithstanding paragraphs (b) and (c) of this section, to review a referred institution that has locations in more than one State, the SPREs of those States may enter into an agreement under which the SPREs may alter the review responsibilities set forth in paragraphs (b) and (c) of this section.

(Authority: 20 U.S.C. 1099a–3)

Subpart B—Allotment Formula and Funding Procedures

§ 667.11 Allotment formula.

(a) For each fiscal year for which funds are appropriated to carry out this part, the Secretary—

(1) Allots $30,000 to Guam, $30,000 to American Samoa, $30,000 to the Northern Mariana Islands, $30,000 to the Virgin Islands, and $30,000 to the Trust Territory of the Pacific Islands;

(2) Calculates each remaining State's allotment of the remaining funds under paragraph (b)(2) of this section; and

(3) Notifies each State of its allotment.

(b) Except for the funds allotted under paragraph (a)(1) of this section to Guam, American Samoa, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands, the Secretary allots to a State those remaining funds appropriated to carry out this part by—

(1) Determining the percentage of institutions participating in a title IV, HEA program that are in each State by dividing the number of institutions located in that State that are certified to participate in a title IV, HEA program by the total number of institutions that are certified to participate in all States;

(2) For the latest award year for which information is available, determining the percentage of title IV, HEA program funds by dividing the total amount of title IV, HEA program funds that were made available to students who enrolled in the institutions in that State that participate in a title IV, HEA program, or to those students' parents, by the total amount of title IV, HEA program funds that were made available to students, or to those student's parents, who enrolled in institutions that participate in a title IV, HEA program in all States;

(3) Averaging the two percentages determined in paragraph (b) (1) and (2) of this section;

(4) Calculating an "initial distribution" by multiplying the average percentage determined in paragraph (b)(3) of this section by the amount appropriated to carry out this part, less the total amount allotted to Guam, American Samoa, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(5)(i) Determining which States receive less than $75,000 under the initial distribution;

(ii) Providing each of those States with $75,000; and

(iii) Calculating the difference between the $75,000 provided to each of those States and those States' initial distribution;

(6)(i) Determining which States receive more than $75,000 under the initial distribution; and

(ii) Calculating the difference between each of those States' initial distribution and $75,000;

(7) Calculating a "reduction percentage" by dividing the total amount obtained in paragraph (b)(5)(iii) of this section by the total amount obtained in paragraph (b)(6)(ii) of this section; and

(8) Reducing the initial distribution of each State in paragraph (b)(6)(i) of this section by the product of the amount obtained in paragraph (b)(6)(ii) of this section and the reduction percentage in paragraph (b)(7) of this section.

(c) If the Secretary determines that a SPRE will not spend its entire allotment during the period for which those funds are made available, or if a SPRE does not spend its allotment by the end of the period for which those funds are made available, the Secretary reallots those funds to other SPREs—

(1) For unanticipated and extraordinary legal expenses; or

(2) In a manner the Secretary determines best carries out the purposes of the State Postsecondary Review Program.

(d) Federal and State matching funds under the SSIG and NEISP programs are excluded from the calculations in this section.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.12 Application for funds.

(a)(1) *General.* For each fiscal year for which funds are appropriated to carry out this part, a State that has entered into an agreement with the Secretary under § 667.3 shall apply to the Secretary to receive its allotment. The State's application must contain the information required in paragraph (b), (c), or (d) of this section, as appropriate. The Secretary publishes in the **Federal Register** the date by which a State must submit its application.

(2) *Established review standards.* A State has established review standards if those standards met the requirements in § 667.21 and the Secretary did not disapprove those standards under § 667.22.

(b) *Application before standards are established.* (1) If a State has not established review standards, to receive its allotment, the State—

(i) Must submit a plan to develop—

(A) The review standards described in § 667.21, in consultation with the institutions in that State. The plan must describe the manner in which consultation will take place; and

(B) The procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State, in consultation with institutions in that State. The plan must describe the manner in which consultation will take place;

(ii) May submit a plan to—

(A) Identify information maintained by institutions and State agencies, other than the information institutions are required to maintain under the Student Right-to-Know and Campus Security Act, that is relevant to developing the State review standards;

(B) Identify systems in which the information described in paragraph (b)(1)(ii)(A) of this section is maintained; and

(C) Provide estimates of the costs of coordinating the institutions' and State's information systems with an information system developed by the SPRE; and

(iii) Must submit a budget for developing the standards and the complaint procedures and, if relevant, for providing cost estimates for the SPRE's information system. The budget cannot exceed the State's allotment.

(2) If the State's allotment is less than the State's anticipated cost of carrying out the activities described in paragraph (b)(1) (i) and (ii) of this section, the State shall first use its allotment to develop the review standards. If a portion of the allotment remains after the State develops its review standards, the State may develop procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State. The State may use any remaining portion of its allotment to provide cost estimates for the SPRE's information system only after it has completed developing its

review standards and complaint procedures.

(c) *Application after standards are established.* (1) If the Secretary has not disapproved the State's review standards under § 667.22, to receive its allotment, the State must submit to the Secretary—

(i) Its plan to review referred institutions; and

(ii) A budget for those reviews that does not exceed the State's allotment calculated under § 667.11, less any amount expended by the SPRE in carrying out the activities under paragraph (b) of this section.

(2)(i) If a SPRE anticipates that the cost of reviewing all the referred institutions will exceed the State's allotment, the SPRE shall, as part of its plan, submit a priority system for selecting institutions to review from among the referred institutions; and

(ii) The SPRE shall have discretion in developing its priority system, except that the SPRE must make its top priority for review, referred institutions that the Secretary has scheduled for recertification under 34 CFR part 668, subpart B.

(iii) A SPRE may establish the lowest reveiw priority for an institution if—

(A) The institution is referred to the SPRE for a reason described in § 667.5(b)(6) concerning the timely submission of an audit report or § 667.5(b)(9) concerning a change of ownership that results in a change of control; and

(B) The SPRE previously conducted a review of the institution as a result of a referral for the same reason in § 667.5(b)(6) or (b)(9), respectively, and found no significant violations of the State's standards.

(d) *Timely submission.* A State may submit to the Secretary the information required in paragraph (c) of this section at the same time that it submits to the Secretary the information and documentation required under paragraph (b) of this section.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.13 Approval of funding application.

(a) *Before standards are established.* The Secretary approves a State's plan and budget submitted before the State establishes review standards if—

(1) The plan provides a reasonable basis, and adequate budget justification, for carrying out the activities described in § 667.12(b)(1);

(2) If applicable, the plan includes a priority system for using the State's allotment as described in § 667.12(b)(2); and

(3) The budget includes only reasonable allowable costs within the State's allotment.

(b) *After standards are established.* After the State establishes review standards, the Secretary approves a State's plan and budget for the allowable activities described in § 667.14 if—

(1) The plan provides adequate budget justification for those activities;

(2) The plan provides for a reasonable scheme for reviewing referred institutions;

(3) The plan includes a priority system for review of institutions as described in § 667.12(c)(2);

(4) The proposed contracts with private agencies, nationally recognized accrediting agencies, or peer review systems to carry out SPRE functions included in the plan are reasonable and appropriate; and

(5) The budget includes only reasonable allowable costs within the State's allotment.

(c) *Failure to submit an acceptable application.* If a State does not submit an application for funds under § 667.12 or its application is not approved under this section—

(1) The State is ineligible to receive—

(i) Any funds appropriated to carry out this program;

(ii) Its allotment of any funds appropriated under the SSIG Program; and

(iii) Any funds appropriated to carry out the NEISP Program; and

(2) The Secretary—

(i) Does not designate as eligible for participation in a title IV, HEA program any institution located in that State seeking initial participation in that program, any branch campus located in that State for which an institution seeks an initial designation of eligibility under 34 CFR part 600, or any institution located in that State that has undergone a change in ownership that results in a change in control as determined in 34 CFR part 600; and

(ii) Grants only provisional certification, as determined in 34 CFR part 668, to an institution in that State not described in paragraph (c)(2)(i) of this section.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.14 Allowable costs and activities.

(a) If included in a State's approved plan, the Secretary pays, by reimbursement, direct costs as described in paragraph (c) of this section and in Office of Management and Budget (OMB) Circular A–87, and indirect costs as determined in paragraph (b) of this section, of—

(1) Establishing State review standards in consultation with institutions in the State, publicizing the State review standards, and providing initial and continuing training to State and other personnel in the State, including personnel at the institution subject to review;

(2) Establishing and implementing, in consultation with institutions in that State, the procedures for receiving and responding to complaints from students, faculty, and others regarding institutions in the State;

(3) Reviewing referred institutions; and

(4) Developing and maintaining an information system for SPRE review activities.

(b) If a State seeks reimbursement for indirect costs, the State shall—

(1) Use the restricted indirect cost rate, computed under 34 CFR 75.564 and approved by the Secretary under 34 CFR 75.561; and

(2) Not charge as a direct cost any cost that qualifies as an indirect cost.

(c) The direct costs of carrying out the activities described in paragraph (a) of this section include, but are not limited to—

(1) The salary of State employees engaged in allowable activities;

(2) Travel costs incurred—

(i) Consulting with institutions in developing standards and complaint procedures; and

(ii) Reviewing referred institutions;

(3) Training for—

(i) State employees to perform reviews of referred institutions; and

(ii) Institutional and other personnel regarding the State review standards;

(4) Contracting with private organizations, nationally recognized accrediting agencies, and peer review systems to carry out required activities;

(5) Costs incurred by the State for administrative actions and legal proceedings; and

(6) Costs incurred by the SPRE in that State in sharing information with other SPREs, the Secretary, other State agencies, nationally recognized accrediting agencies, institutions, private organizations, and others.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.15 Fiscal procedures and records.

(a) A state must account for the funds it receives under this part in accordance with the procedures it uses to account for the expenditure of its own funds and must keep fiscal and accounting records that support, on audit, its expenditure of funds under this part.

(b)(1) Except as provided in paragraph (b)(2) of this section, the State must keep intact and accessible records

relating to its activities under this part for five years after the end of the period for which funds were provided.

(2) The State shall keep records on any claim or expenditure questioned on audit until any audit question is resolved.

(c) A State must have an audit performed of the SPRE's activities under this part at least once every two years and must submit the report of that audit to the Secretary. An audit conducted under the Single Audit Act satisfies this requirement.

(Authority: 20 U.S.C. 1099a–1099a–3)

§ 667.16 Supplement, not supplant, requirement.

The Secretary reimburses a State for the costs of necessary SPRE activities which supplement, but do not supplant, existing licensing or review functions conducted by the State.

(Authority: 20 U.S.C. 1099a–2)

Subpart C—State Review Standards, SPRE Reviews, and Termination of Institutional Participation

§ 667.21 State review standards.

(a) Each State participating under this part must develop standards, in consultation with institutions in the State, under which the SPRE reviews referred institutions. The State-developed review standards must evaluate, with regard to a referred institution—

(1) The extent to which the institution makes available to its students and prospective students its catalogs, admission requirements, course outlines, tuition-and-fee schedules, refund policy, course cancellation policy, rules and regulations, and enrollment agreement, if appropriate;

(2) Whether the institution's descriptions of its courses and educational programs are accurate;

(3) Whether the institution has a method to assess that a student has the ability to complete successfully the educational program for which he or she applies;

(4) Whether the institution maintains and enforces standards relating to satisfactory academic progress;

(5) Whether the institution maintains adequate student and other records;

(6) Whether the institution complies with relevant safety, and health standards, such as fire, building, and sanitation codes;

(7) The extent to which the institution's financial and administrative capacity is appropriate to its scale of operations, and whether the institution maintains adequate financial and other information to determine the adequacy of its financial and administrative capacity;

(8) For an institution that the SPRE determines is at financial risk, the adequacy of the institution's plans to provide for, if the institution closes—

(i) Instruction to enrolled students; and

(ii) Retention of and access to academic and financial aid records;

(9) If an institution provides a vocational program—

(i) Whether the tuition and fees charged for that vocational program are excessive given the amount of money that a student who successfully completes the program may reasonably be expected to earn; and

(ii) Whether the vocational program provides students with quality training that leads to useful employment in an occupation recognized in that State. In making this evaluation, one of the factors the SPRE shall consider is the appropriateness of the length of the vocational program in terms of both the number of days of instruction and the number of credit or clock hours the program offers;

(10) The extent to which the institution provides to its students relevant information regarding—

(i) Market and job availability for students in its occupational, professional, and vocational programs; and

(ii) The relationship between the institution's educational programs and State licensing standards for specific occupations;

(11) The appropriateness of the number of semester, trimester, or quarter credit or clock hours required for the completion of an educational program;

(12) The appropriateness of the length of 600-clock-hour educational programs;

(13) Whether, and the extent to which, the actions of any owner or shareholder of the institution, or any person exercising control over the institution may adversely affect its participation in a title IV, HEA program;

(14) The extent to which the institution's procedures for investigating and resolving student complaints are adequate;

(15) The extent to which the institution's advertising promotion, and student recruiting practices are appropriate;

(16) Whether the institution has a fair and equitable refund policy; and

(17) The extent to which the institution's educational programs are successful as measured by—

(i) The completion and graduation rates of the students enrolled in those programs, taking into account the length of the programs and the selectivity of the institution's admission policy (for the purpose of this provision, a completion rate is the same as a graduation rate);

(ii) The institution's withdrawal rate;

(iii) With respect to the institution's vocational and professional programs, the placement rate of the institution's graduates in occupations related to their educational programs, with related programs and occupations determined by reference to the *NOICC Master Crosswalk*;

(iv) Where appropriate, the rate at which the institution's graduates pass licensure examinations; and

(v) The success of the institution's students who express other completion goals, such as transferring to another institution, obtaining full-time employment in their field of study, or qualifying for military service, in meeting those goals.

(b) In developing the review standards in paragraph (a) of this section, a State—

(1) May establish different standards for different types or categories of institutions or educational programs;

(2)(i) Shall specify the records and information that a referred institution would need to maintain to demonstrate to a SPRE the institution's compliance with those standards; and

(ii) If a referred institution was not, before the institution was referred, otherwise required to keep records relating to its compliance with State review standards, and did not keep those records, must allow the institution a reasonable period of time to obtain those records to enable the institution to demonstrate its compliance with the State standards;

(3) Except for standards regarding prospective students in paragraph (a)(1) of this section, shall establish standards that apply at least to all regular students;

(4) Shall quantify the standards described in paragraph (a)(9)(i) and (a)(17)(i), (ii), (iii), and (iv) of this section by establishing—

(i) Criteria under which a SPRE determines if the tuition and fees charged by an institution for a vocational program are excessive compared to the amount of money that a student who successfully completes that program may reasonably be expected to earn;

(ii) Acceptable completion and graduation rates of students enrolled in educational programs offered by an institution;

(iii) An acceptable withdrawal rate of students at an institution;

(iv) With respect to an institution's vocational and professional programs,

an acceptable placement rate of the institution's graduates in occupations related to their educational programs; and

(v) An acceptable rate or rates at which the institution's graduates pass licensure examinations; and

(5) Shall determine the extent to which it is appropriate to base a State review standard on a related title IV, HEA program standard or requirement or establish as the State's review standard the comparable title IV, HEA program standard or requirement.

(Authority: 20 U.S.C. 1099a–3)

§ 667.22 Disapproval of State review standards.

(a)(1) Each State shall submit to the Secretary for evaluation the review standards that the State developed under § 667.21.

(2) The State shall also submit to the Secretary an explanation of how each standard was established, including—

(i) An explanation of the relationship between each of the State's review standards and the related or comparable title IV, HEA standards and requirements;

(ii) If applicable, an explanation of the reasons for establishing different review standards for different types of institutions or educational programs; and

(iii) A description of the manner in which institutions were consulted in developing the review standards.

(b) The Secretary disapproves a State's review standards if—

(1) The State does not comply with, or provide adequate information regarding, the provisions in paragraph (a) of this section;

(2) The State does not assure the Secretary that the State's review standards are consistent with the laws and constitution of that State;

(3) The State does not submit evidence that the State's review standards were developed in consultation with the institutions in that State;

(4) The State's review standards do not meet or exceed all of the requirements and cover all the areas described in § 667.21; or

(5) The standards developed under § 667.21(b)(4)—

(i) Do not specify the methods and procedures that an institution must use to calculate the graduation or completion rates, withdrawal rate, placement rates, and licensure examination pass rates of the institution's students or graduates;

(ii) Do not specify statistically valid methods and procedures that an institution must use if that institution conducts surveys of its graduates to obtain data regarding the type of employment and placement of the institution's graduates; and

(iii) Do not specify the methods and data, and the source of that data, that a SPRE uses to determine if the tuition and fees charged by an institution for a vocational program are excessive compared to the amount of money that a student who successfully completes that program may reasonably be expected to earn.

(c) If the Secretary disapproves a State's review standards, the Secretary gives the State the reasons for that disapproval and gives the State an opportunity to—

(1) Demonstrate why the Secretary's disapproval was incorrect; or

(2) Submit revised review standards that address the reasons for the Secretary's disapproval.

(Authority: 20 U.S.C. 1099a–3)

§ 667.23 SPRE reviews of referred institutions.

(a)(1) Except as provided in paragraph (a)(2) of this section, if the Secretary refers an institution to a SPRE for review under § 667.5 or the SPRE selects an institution for review under § 667.6, the SPRE reviews, or arranges for the review of that institution, to determine whether the institution is in compliance with the State review standards described in § 667.21.

(2) The Secretary may determine that a SPRE need not review an institution that is referred only because it meets the conditions of § 667.5(b)(10) if the SPRE previously conducted a review of that institution and found no violations of the State's standards.

(b)(1) The SPRE shall provide written notice to all institutions in the State that participate in a title IV, HEA program of the review standards approved by the Secretary under § 667.22 before it may conduct reviews of referred institutions.

(2) Each year the SPRE shall make available information regarding its review priority system after its plan is approved by the Secretary under § 667.13 and before conducting reviews of referred institutions under that plan and priority system.

(c) After a SPRE completes its review of a referred institution, the SPRE must issue an initial report of the SPRE's findings and provide it to the institution no later than 45 days after the SPRE completes its review. If the SPRE finds that the institution is in violation of a standard, for each finding, the SPRE must—

(1)(i) Cite the standard violated and the nature of the violation; and

(ii) Except as provided in paragraph (d)(2) of this section, prescribe a course of action the institution must follow to correct the violation. The SPRE has sole discretion to determine an appropriate period for the institution to correct the violation and bring itself into compliance with the State's review standards; or

(2) Initiate a proceeding under § 667.25 to affect the termination of the institution's participation in the title IV, HEA programs.

(d)(1) The SPRE must give the institution an opportunity to respond to its findings and required actions; and

(2) The SPRE may determine, based on compelling evidence provided by the institution, that the institution's failure to satisfy a State standard does not warrant any further action by the SPRE.

(e) If the institution chooses to respond to the SPRE's report within the time permitted by the SPRE, the SPRE must evaluate the institution's response and issue a final report to the institution that includes its findings and required action.

(f)(1)(i) The SPRE must provide to the Secretary a copy of its final report to an institution within 30 days of its issuance to the institution; or

(ii) If the institution did not respond to the SPRE's initial report by the date permitted by the SPRE, the SPRE must provide to the Secretary a copy of its initial report. The SPRE's initial report becomes its final report on the day after the date provided to the institution for responding to that report; and

(2) If the SPRE did not prescribe a course of action the institution must follow to correct a violation of the State's standards under paragraph (d)(2) of this section, the SPRE must include in its report to the Secretary an explanation of why no action was prescribed.

(g) In addition to the reasons for initiating a proceeding to effect the termination an institution's participation in a title IV, HEA program under paragraph (c) of this section, the SPRE may determine that the institution should no longer participate in that title IV, HEA program if that institution—

(1) Does not respond to the SPRE's findings or comply with the SPRE's required actions within the time permitted by the SPRE, and the SPRE's findings show violations of the State's standards;

(2) Does not allow SPRE personnel at the institution; or

(3) Fails to provide SPRE officials with prompt access to its documents and records.

(Authority: 20 U.S.C. 1099a–3)

§ 667.24 Peer reviews of institutions.

(a)(1) To carry out a review of a referred institution, the SPRE must contract with a nationally recognized accrediting agency or other peer review system the SPRE determines demonstrates competence in assessing educational programs.

(2) In determining whether a peer review system is competent in assessing educational programs, the SPRE must, at a minimum, determine that the system has—

(i) An established basis for evaluating educational quality;

(ii) Review procedures that include the selection of peer reviewers who have experience in evaluating the types of programs offered by the institution; and

(iii) Established policies and procedures that guard against bias in conducting reviews of institutions.

(b)(1) Under the contract described in paragraph (a) of this section, the nationally recognized accrediting agency or peer review system shall carry out a review or provide information from its previous grant of accreditation or preaccreditation or previous review to the SPRE regarding the agency's or system's assessment of the quality and content of the institution's educational programs in relation to achieving the stated objectives for which the programs were offered.

(2) In making its assessment under paragraph (b)(1) of this section, for each educational program, the agency or system shall take into account the adequacy of the space, equipment, instructional materials, staff, and student support services, including student orientation and counseling provided for each program, and any other areas specified in the agency's contract with the SPRE.

(Authority: 20 U.S.C. 1099a–3)

§ 667.25 Termination of an institution's participation in the title IV, HEA programs.

(a)(1) If a SPRE determines that a referred institution should no longer participate in a title IV, HEA program, based upon its review, because the institution is in violation of State standards, or based upon a report or review of that institution by a nationally recognized accrediting agency or peer review system under § 667.24, or has not complied with the SPRE requirements such as those listed in § 667.23(g), the SPRE must provide the institution with the opportunity to contest that determination in accordance with procedures the Secretary has approved for that purpose under § 667 26.

(2) If the SPRE still concludes, after affording the institution the opportunity to challenge the SPRE's initial determination under paragraph (a)(1) of this section, that the institution should no longer continue to participate in a title IV, HEA program, the SPRE notifies the Secretary of those findings and that determination.

(b)(1) Upon notice by the SPRE that the institution should no longer participate in a title IV, HEA program, the Secretary immediately terminates that institution's participation in that program and notifies the institution, the SPRE, and the appropriate accrediting agency of the effective date of that termination.

(2) If an institution's participation in a title IV, HEA program is terminated under this section—

(i) The institution may not appeal that termination to the Secretary; and

(ii) The institution may not reapply to the Secretary to participate in that program until 18 months have expired from the effective date of its termination.

(Authority: 20 U.S.C. 1099a–3)

§ 667.26 Due process requirements.

(a) Each State shall submit to the Secretary for approval the procedures it uses to allow an institution to challenge a SPRE's finding that the institution is in violation of the State's review standards and should no longer continue to participate in a title IV, HEA program.

(b) The Secretary approves a States' procedures described in paragraph (a) of this section if—

(1) The State review standards are in writing; and

(2) The procedures require the SPRE to—

(i) Notify an institution of any required action and the bases for that action;

(ii) Permit the institution the opportunity to challenge that adverse action before an impartial official designated by the State for this purpose, in writing or in a hearing, within a specified time;

(iii) Notify the institution in writing of the result of its challenge, and the basis for that result; and

(iv) Follow other applicable procedural requirements of State law.

(Authority: 20 U.S.C. 1099a–3)

Appendix—Analysis of Comments and Changes

(**Note:** This appendix will not be codified in the Code of Federal Regulations.)

General Comments

The Secretary received numerous comments about the overall impact of the proposed regulations. In general, commenters opposed to the proposed reguations believed that the NPRM did not achieve the coordinated balance of responsibilities among the triad members that it sought to achieve, and that it provided for extensive and duplicative data collection and reporting requirements that created a costly and unnecessary burden on the entire higher education community. Further, they believed that the regulations did not regulate "narrowly to the law," as they purported to do. In general, these commenters suggested that the Secretary should review each requirement in the proposed regulations to determine if it was required by the statute and should further ensure that all requirements that meet this test and are included in the final regulations are implemented in the most reasonable and cost effective manner. This, they believed, would ensure the Department's compliance with Executive Order 12866.

Specifically, many commenters were concerned that:

(1) The proposed regulations will force institutions to engage in excessive and duplicative information gathering and reporting, at considerable cost, with no net increase in the quantity or quality of information available to the public, and will result in the diversion of institutions' already scarce resources away from their primary mission of providing a quality education; and

(2) The proposed regulations threaten the diversity of American higher education and fail to focus oversight properly on vocational institutions.

In addition, the Secretary received suggestions from several commenters that the Department should strongly encourage all triad members to work together and adopt the same or similar language for the various standards, should collect the necessary data through a common source such as readily available public information or IPEDS, and should use common methodologies for various calculations such as completion or withdrawal rates.

Discussion: As suggested by several commenters, the Secretary has carefully reviewed each requirement in the proposed regulations in light of statutory intent. The Secretary has also carefully considered both the burden of the proposed regulations on institutions and SPREs, in terms of cost, duplication of effort, and the added recordkeeping and reporting requirements. Similarly, the Secretary has considered the

benefits of the proposed regulations, not just to institutions and SPREs but to students and the general public as well. A particular concern of the Secretary has been how to ensure that the regulations hold the three members of the triad accountable for the manner in which they fulfill their responsibilities under the HEA yet still provide each member of the triad the flexibility to determine the appropriate means to carry out those responsibilities.

The Secretary acknowledges that there is a potential risk with this strategy, however. By giving SPREs maximum flexibility in these regulations, by giving accrediting agencies corresponding flexibility in the regulations for Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, and by retaining authority for the Secretary to set specific requirements implementing the certification process, the danger exists that institutions will be burdened with reporting requirements that are similar, but not identical, thus increasing not only the reporting requirement but the recordkeeping requirement and cost as well. For this reason, the Secretary strongly urges a coordinated approach to any reporting requirement that may be imposed on institutions by the regulations implementing the Program Integrity Triad. Specifically with respect to States, the Secretary urges SPREs to impose reporting requirements on referred institutions only after they carefully examine any publicly available information related to those requirements, any similar reporting requirements imposed on institutions by either the Department or accrediting agencies under the regulations governing the Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, and any methodologies currently used, or mandated for use, by institutions in calculating the required information. The Secretary hopes that by bringing this potential risk of increased burden on institutions to the attention of the entire higher education community—without specifically addressing it in regulation—the community can work together to prevent undue burden at the same time it ensures proper accountability. The Secretary expects to take a leadership role in implementing a coordinated strategy to manage the triad with the goal of maximizing effectiveness while minimizing burden, duplication, and inconsistencies among SPREs, accrediting agencies, and the Department.

The discussion that follows addresses the commenters concerns and the Secretary's response to those concerns.

Section 667.1 Scope and Purpose

Comments: Many commenters interpreted this section as applying State oversight to all institutions in a State. As a result, these commenters believed that the Secretary expanded the SPRP beyond that authorized in the statute. The commenters believed that the NPRM's stated purpose of the program, "to strengthen State oversight of institutions participating in the title IV, HEA programs through development of State standards for those institutions," was inaccurate and "unduly alarming" because it suggested that a SPRE was authorized to establish review standards for all institutions in a State. Many of these commenters believed the primary purpose of the program was to reduce fraud and abuse in the title IV, HEA programs through State oversight of selected institutions. Many other commenters believed that Congress intended the program to focus exclusively on "problem institutions" identified by the Secretary, i.e., those institutions that have serious academic or financial problems or those institutions that have otherwise failed to fulfill their fiduciary responsibilities in administering the title IV, HEA programs.

Discussion: The Secretary notes that § 667.1, as proposed, was not intended to apply to all institutions in a State but only to institutions in a State that were participating in the title IV, HEA programs. The Secretary agrees that a SPRE only has authority to review "referred institutions" under the standards it develops under this program, and therefore agrees that the provisions of § 667.1(a) could be viewed as overbroad. The Secretary also agrees that a primary purpose of the SPRP is to reduce fraud and abuse in the title IV, HEA programs.

Changes: Section 667.1(a)(1) has been revised to clarify the purpose of the SPRP, and to clarify that under the SPRP a State's standards apply only to referred institutions and that a State may review only referred institutions under those standards.

Comments: One commenter urged the Secretary to indicate that a SPRE could take an action against an entire institution or one of the institution's branch campuses, additional locations, or educational programs. The commenter believed there would be instances where a SPRE could determine that a branch campus or an additional location of the institution, but not the entire institution, should be terminated from the title IV, HEA programs. The commenter also noted that several of the State's standards apply only to specific educational programs and argued that it could be inappropriate for a SPRE to take an adverse action against the entire institution if the basis for that action was a finding directly related to a specific educational program offered by that institution.

Discussion: The Secretary agrees that a SPRE has flexibility under the SPRP to craft a remedy along the lines suggested by the commenter. Thus, the SPRE can require an institution to stop offering a particular program or stop offering programs at particular locations or branch campuses. However, the Secretary believes that the authority of a SPRE under section 494C(h) of the HEA to determine that an institution should no longer participate in the title IV, HEA programs relates to terminating the institution as a whole, not to particular parts of the institution.

Changes: None.

Section 667.2 Definitions

Education and General Expenditures

Comments: One commenter recommended that instead of using the statutory definition of *education and general expenditures*, used for purposes of Title III of the HEA, which governs the Strengthening Institutions Program, the Secretary adopt the definition used by the American Institute of Certified Public Accountants. In addition, the commenter noted that two financial-standard-making bodies have issued or have under consideration changes that will modify the current accounting and reporting standards. The commenter suggested that the final regulations refer only to current generally accepted accounting principles and financial reporting requirements by source rather than provide a specific definition of education and general expenditures.

Discussion: The Secretary believes that it is most appropriate to use a definition of education and general expenditures for this program that is already included in the HEA.

Changes: None.

Professional Program

Comments: Several commenters agreed with the proposed definition of professional program.

Several other commenters argued that professional education is placed in the same category as occupational and vocational education with regard to the standards described in sections 494C (d)(8) and (d)(14)(C) of the HEA. The commenters contended that the use of professional education in this context implies a limited use of the term; namely, one that is closely related to

vocational education. These commenters suggested that the proposed definition of *professional program* be modified to include only programs at or below the associate degree level.

Several commenters suggested adopting the Integrated Postsecondary Education Data System (IPEDS) definition of *first professional degree* to ensure compatibility with data collected at the Federal level.

One commenter writing on behalf of a SPRE noted that *professional programs* are defined and governed under the State's education and judiciary Laws. The commenter urged that the definition of *professional program* recognize a State's statutory definition as provided under section 494C(d) of the HEA. (That section of the HEA requires a State to develop standards that are consistent with the constitution and laws of the State.)

Discussion: Secretary disagrees with those commenters that suggest that the term *professional program* be limited to programs at or below the associate degree level. The term *professional program* is commonly accepted as encompassing programs at higher degree levels.

The Secretary agrees with the commenter that the proposed definition of *professional program* be modified to recognize State law.

The Secretary believes that the IPEDS definition of *first professional degree* is too narrow. Under that definition, the term *profession program* would encompass only 10 fields of study. However, the Secretary also agrees that the proposed definition was overly broad in that it permitted overlap between what constitutes professional education and what constitutes vocational education. The final regulations need to make the distinctions between both types of education clear. See also the discussion of *vocational program*.

Changes: The Secretary has revised the second element of the proposed definition to maintain a clear distinction between the terms *vocational program* and *professional program*. Thus, a *professional program* is an educational program that prepares individuals for an occupation, if that occupation requires, in part, at least a bachelor's degree to qualify for entry. Also, the definition is expanded to allow a SPRE to use a State's statutory definition of the term *professional program*.

Vocational Program

Comments: All commenters agreed that the definition of the term *vocational program* under the SPRP be the same as the definition of *vocational education* under the *Accreditation* regulations, 34 CFR part 602. Several commenters agreed with the proposed definition of a *vocational program*. Most of these commenters preferred the SPRP definition to that proposed in the accreditation NPRM.

Many commenters writing on behalf of community colleges and universities believed the proposed definition of *vocational program* was too broad. Many of these commenters believed strongly that proprietary institutions were primarily responsible for abuses in the title IV, HEA programs, and it was unfair to classify associate degree programs as vocational programs or to include any degree programs offered by community colleges or universities within the scope and meaning of the term *vocational program*.

Many commenters writing on behalf of proprietary and vocational institutions believed strongly that the proposed definition was too narrow. These commenters noted that most postsecondary educational programs are employment or career oriented and that students who enroll in those programs should be treated equally, regardless of the institution they chose to attend. These commenters believe that the term *vocational program* should include all undergraduate programs.

One commenter agreed with the propositions that the commenter claimed were presented in the accreditation NPRM that (1) every postsecondary educational program is technically vocational, and (2) while all programs may be vocational in nature, not all programs are academic. This commenter suggested that a better case be made for classifying programs as "academic" or "nonacademic." Under this approach, the term *vocational program* would be replaced by the term *nonacademic program* and the term *academic program* would be defined to include any program described under proposed 34 CFR 668.8(c) (1) and (2), that (1) a program of at least two academic years in length that provides an associate degree, a bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary, or (2) a program in which each course is acceptable for full credit toward that institution's associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that the institution's degree requires at least two academic years of study.

Many commenters believed that the proposed definition was too vague. Several of these commenters suggested adopting the definition of an "occupationally specific program," as that term is defined in the CIP and used under IPEDS. These commenters noted that the National Center for Education Statistics and other Federal agencies use this definition to obtain data from institutions through IPEDS for research and other purposes.

Discussion: The Secretary agrees with the commenters that the definition of *vocational program* in this part should be the same as the definition of *vocational education* in the accreditation regulations, 34 CFR part 602.

The Secretary further agrees with those commenters that suggested that the IPEDS/CIP definition, with minor modifications, is the most appropriate definition to use in this part and in the accreditation regulations because under that definition, educational programs are classified in a manner that is congruent with various SPRP statutory provisions that require a clear identification and reporting of educational programs offered by an institution that are occupationally specific and employment related. *See*, for example, the standards described under section 494C(d)(7) of the HEA, "If the stated objectives of the courses or programs of the institution are to prepare students for employment * * *;" section 494C(d)(8) of the HEA, "Availability to students of relevant information by institutions of higher education, including * * * information related to market and job availability for students in occupational, professional, and vocational programs; and * * * information regarding the relationship of courses to specific standards necessary for State licensure in specific occupations;" and section 494C(d)(14)(C) of the HEA, "The success of the program at the institution, including * * * with respect to vocational and professional programs, the rates of placement of the institution's graduates in occupations related to their course of study."

The Secretary disagrees with the commenter who suggested classifying programs as "academic" and "nonacademic," because the Secretary disagrees with the commenter's premise that all vocational programs are "nonacademic" programs.

The Secretary disagrees with those commenters who suggest that the term *vocational program* excludes in some manner degree programs offered by colleges and universities. The statute does not exempt types of institutions; rather, as noted above, the statute clearly speaks in terms of vocational programs offered at institutions.

Changes: A vocational program is defined as "an educational program,

below the bachelor's level, designed to prepare individuals with skills and training required for employment in a specific trade, occupation, or profession related to the educational program." The Secretary notes that this definition is operationally consistent with the IPEDS/CIP definition of an "occupationally specific program."

Section 667.3 State Agreement

Comments: Several commenters suggested that the Secretary specify more clearly when sanctions would be imposed on a State that failed to establish review standards. These commenters recommended that the Secretary impose sanctions on a State that failed to establish review standards by the end of the second year. However, these commenters suggested different time periods for measuring the end of that second year. These suggestions included using the Federal fiscal year, the State fiscal year, the calendar year, and the planning year.

Discussion: The Secretary agrees to be more specific in these regulations with regard to when sanctions will fall on a State that fails to establish review standards. Because the Secretary encourages all States to participate in the program, the Secretary has chosen a deadline date for sanctions that should enable all States to avoid that sanction.

Changes: Section 667.3(d)(4) has been revised to provide that a State will have until December 31, 1995 to submit State review standards that are subsequently approved by the Secretary if the State received fiscal year 1993 funds to carry out SPRP activities, and until December 31, 1996 to submit those standards if the State that did not receive fiscal year 1993 funds to carry out SPRP activities. The deadline date for imposing sanctions has been changed from the date on which standards are approved to the date on which approvable standards are submitted to the Secretary for approval.

Comments: Several commenters writing on behalf of SPREs argued that the Secretary should not impose sanctions on a State that failed to establish review standards within two years if the reason for exceeding the proposed two-year limit was due to (1) a State requirement to codify those standards in State regulations, or (2) a condition beyond the control of the SPRE.

Discussion: The Secretary disagrees that codifying standards in State regulations is a valid reason for not imposing sanctions on a State that fails to establish review standards. Under § 667.12(a)(2), a State establishes review standards if those standards meet the requirements in § 667.21 and the Secretary does not approve those standards under § 667.22. This process of establishing standards is distinct from the process a SPRE may need to follow to codify standards in State regulations. Accordingly, a SPRE may submit the State's standards to the Secretary for evaluation while simultaneously beginning the process to codify those standards in State regulations as long as the State coordinates the two processes.

Moreover, as noted above, the Secretary has extended the deadline date for submitting approved standards to the Secretary. Therefore, the Secretary believes that no State codification process should prevent a State from submitting its standards in a timely manner. Similarly the Secretary believes that a State should be able to meet that deadline regardless of conditions outside its control.

Changes: None.

Comments: Several commenters were concerned that the provision in proposed § 667.3(b)(3)(iii) that stated that "the SPRE will keep records or have access to records * * *" implied that the SPRE had the authority to (1) require nonreferred institutions to submit financial and standards-related information to the SPRE, and (2) gain access to the records of nonreferred institutions without first obtaining authorization from those institutions for that access.

Discussion: It is not the Secretary's intention that a SPRE generally have records or access to records of nonreferred institutions, and the Secretary agrees to clarify this point.

Changes: Section 667.3(b)(3)(iii) is revised to require State assurance that a SPRE will keep records or have access to records of referred institutions, and will provide requested information to the Secretary for purposes of financial and compliance audits of referred institutions. A new § 667.3(b)(3)(iv) is added to require State assurance that SPRE will keep records or have access to records, related to its activities under this part, and will provide requested information to the Secretary, for purposes of program evaluations of the manner in which the SPRE carries out its SPRP responsibilities.

Comments; A few commenters suggested that the proposal to include in the State's agreement with the Secretary a description of the SPRE's relationship with State-level entities be removed on the grounds that it would unnecessarily divert SPRE resources.

Discussion: The Secretary disagrees that such relationships would unnecessarily divert SPRE resources. To the contrary, the Secretary believes strongly that to carry out effectively the purposes of this part, a SPRE must avail itself of relevant information regarding the actions that any State agency takes or plans to take with regard to a referred institution in the State.

Changes: None.

Comments: Many commenters acknowledged that the statute requires a SPRE to review referred institutions on a schedule that coincides with the Secretary's schedule for recertifying institutions. Several commenters urged the Secretary to require a SPRE to review only those institutions that represent the highest risk for fraud and abuse. A number of other commenters suggested that the SPRE develop additional priorities for the review of this set of institutions that would be compatible with the Secretary's schedule for recertifying these institutions.

Discussion: The Secretary acknowledges that a SPRE's allotment of funds may be inadequate to review all referred institutions on a schedule that coincides with the Secretary's schedule for recertifying institutions. For that reason, the Secretary proposed in § 667.12(c) and restates in that same section in these regulations, to allow a State to establish review priorities, giving States discretion to establish their own priorities, subject to the requirement for coordinating with the Secretary's schedule for recertification of institutions. The Secretary expects that, to the extent possible, States will select "high-risk" institutions for review.

Changes: None.

Section 667.4 State Postsecondary Review Entity

Comments: Many commenters believed strongly that this section of the regulations be amended to reflect unambiguously the NPRM preamble discussion that a SPRE merely represents certain State entities.

Discussion: Under section 494A(b)(1) of the HEA, the SPRE must represent any State entity that is responsible for (1) providing the legal authorizations to institutions to operate in the State, for the purposes of 1201 of the HEA, and (2) ensuring that each institution in the State remains in compliance with the State's review standards developed pursuant to section 494C of the HEA. The Secretary simply repeated these statutory provisions in proposed § 667.4. In the NPRM preamble, the Secretary indicated that these statutory provisions did not give a SPRE itself authority under this part to provide licenses to or legally authorize institutions to operate in a State, or

ensure that all institutions in the State remain in compliance with the State's standards. The Secretary agrees to accommodate the commenters by including these statements in the regulations.

Changes: Section 667.4(b) has been revised to indicate that under the SPRP, a SPRE is not authorized by the SPRP to (1) grant State authorization to provide postsecondary education in that State, or (2) require a nonreferred institution to comply with State review standards established under § 667.21.

Section 667.5 Criteria the Secretary Uses To Refer Institutions to a SPRE for Review

Comments: Many commenters objected strongly to the proposed procedures regarding the confirmation of the data used by the Secretary to refer an institution to a SPRE for review. These commenters urged the Secretary to discard those procedures and establish new procedures under which a referred institution would be provided an opportunity to challenge the referral data before the Secretary referred that institution to a SPRE. Under the suggested procedures, the Secretary would not refer an institution to a SPRE if that institution challenged the referral data within the time permitted by the Secretary. The Secretary would only refer an institution to a SPRE if the institution did not challenge the referral data or the Secretary confirmed the challenged referral data.

Discussion: Based on public comment and further review, the Secretary agrees with the commenters that an institution should be given an opportunity to challenge the accuracy of referral data before the Secretary refers that institution to a SPRE for review. Similarly, the Secretary agrees with the commenters that an institution should be given an opportunity to challenge the accuracy of referral data before a State notifies the Secretary that it wishes to review an institution on the basis of having more current information that the institution satisfies one or more of the referral criteria.

If an institution challenges the information on which the Secretary or the State based its referral, the Secretary and the State presume that records maintained in the normal course of business by ED, a guaranty agency under the FFEL programs, a SPRE, a State licensing agency, or another State agency are accurate unless the institution proves to the Secretary's satisfaction that the records are not properly maintained or are inaccurate. Thus, unless an institution can prove that the information on which its referral is based is inaccurate, the institution will be referred for SPRE review.

Changes: Section 667.5 has been revised to allow an institution to challenge the accuracy of referral data before the Secretary refers that institution to a SPRE.

Comments: With respect to the § 667.5(b)(11), under which the Secretary refers an institution that has been subject to a pattern of complaints, several commenters urged the Secretary to remove references to complaints from faculty, or persons other than students. These commenters argued that the statute requires the Secretary to consider only complaints from students. In addition, some commenters contended that statute does not authorize the Secretary to use complaint information collected by the SPRE for referral purposes.

Discussion: The Secretary agrees with the commenters regarding references to complaints from "faculty, or others." Under section 494C(b)(11) of the HEA, the referral criterion makes specific reference to the complaint system a State is to develop.

The Secretary believes that the most appropriate entity to provide to the Secretary information about a pattern of the complaints is the SPRE.

Changes: The Secretary has limited consideration of a pattern of complaints as a basis for referrals under § 667.5(b)(11) to a pattern of student complaints.

Comments: A number of commenters agreed that it would be wasteful continually to refer an institution to a SPRE for review for an event that happened once. In the NPRM, the Secretary proposed to reserve for future consideration whether to refer an institution to a SPRE for review under three criteria if on the basis of an earlier referral, the SPRE conducted a review of the institution and made no significant findings. These criteria were those relating to late audits, changes of ownership, and the first five years of participating in a title IV, HEA program. These commenters also suggested that this consideration ought to be given to more or all of the referral criteria.

Discussion: The Secretary attempted to resolve this problem by proposing remedies through legislation. However, in the Higher Education Technical Amendments of 1993, Public Law 103–208, only one of the three subject criteria, the criterion set forth in § 667.5(b)(10) was addressed. With regard to that criterion, an institution participating for less than five years in a title IV, HEA program must be referred to a SPRE, but the Secretary may determine that the SPRE need not review the institution if the institution was referred solely under § 667.5(b)(10), and the SPRE previously conducted a review of that institution and found no violations of the State's standards. For the other two criteria, the Secretary believes that section 494C(b) of the HEA requires the Secretary to refer institutions that meet those other two requirements. However, to avoid wasting a SPRE's time and effort, the Secretary will allow a SPRE to place institutions on the lowest review priority if the institutions were referred because of a late audit or a change in ownership and a previous SPRE review found no significant violations of State standards.

Changes: Section 667.23(a)(2) is changed to provide that the Secretary may determine that a SPRE need not review an institution that was referred only because it meets § 667.5(b)(10), if the SPRE previously conducted a review of that institution and found no violations of the State's standards. In addition, a new § 667.12(c)(3)(ii) is added to permit a SPRE to place an institution in the lowest priority for review if the institution was referred because of a late audit or a change in ownership and a previous SPRE found no significant violations of State standards.

Comments: A few commenters noted that the Secretary did not have complete data pertaining to several of the referral criteria and were concerned that the Secretary would nevertheless refer institutions to a SPRE based on this incomplete data or on assumptions regarding this data.

Discussion: The Secretary acknowledges that complete data for all the referral criteria are not available. However the Secretary assures commenters that no referral will be made based on assumptions or incomplete data.

Changes: None.

Comments: Several commenters noted that the Secretary sometimes withdraws an action to limit, suspend, or terminate an institution's participation in a title IV, HEA program because the Secretary concludes retrospectively that such an action was not warranted. Therefore, these commenters argued that the proposed language for this referral criterion be modified to reflect that the Secretary would not refer an institution subject to limitation, suspension, or termination until the Secretary completes that action.

Discussion: If the Secretary withdraws a limitation, suspension, or termination action solely because the Secretary determines that there was no factual

basis for that action, the Secretary will not consider that action as triggering a referral. However, if the Secretary withdraws a limitation, suspension, or termination action against an institution because of an action on the part of the institution, or the promise of some current or future action on the part of the institution, the initiation of the Secretary's action will trigger a referral.

Changes: None.

Section 667.6 SPRE Selection of Institutions for Review

Comments: Many commenters were concerned about the SPRE's authority under the statute to select an institution for review if the SPRE had "reason to believe" that the institution was engaged in fraudulent practices. Some of these commenters believed that SPREs would abuse this authority by using it as the basis to review any institution. A number of commenters believed strongly that the regulations should clarify what is meant by the phrase "reason to believe" and define the term "fraud."

Discussion: The Secretary disagrees with the commenters that SPREs would abuse the statutory authority that allows SPREs to review institutions that they have reason to believe are engaged in fraudulent practices.

With regard to a definition of fraud, in general, fraud involves intentional misconduct to obtain a benefit.

Changes: None.

Comments: Many commenters believed that an institution selected by the SPRE on the basis of "more recent data" should be afforded the opportunity to challenge that data before the SPRE may conduct a review of that institution. In addition, several commenters urged that institutions selected by the State for review under proposed § 667.6 should be afforded the opportunity to challenge the State's data. A few of these commenters believed that the confirmation procedures should be waived in cases where the State has reason to believe that institutions were engaged in fraudulent practices.

Discussion: The Secretary agrees based on the reasons in the discussion under § 667.5.

Changes: A change has been made similar to the change in § 667.5.

Section 667.7 Notice to SPRE of Federal Actions; and § 667.8 Notice to Nationally Recognized Accrediting Agency of SPRE Actions

Comments: A number of commenters believed that the Secretary should shorten the time period proposed in the NPRM for notifying SPREs of Federal actions. Several of these commenters suggested shortening the time period to 5 days, while others suggested notification within 48 hours in cases where the Secretary intended to terminate an institution's participation in a title IV, HEA program.

A few commenters suggested that the Secretary notify the SPRE in writing of the applicable action.

Several commenters suggested that the Secretary make clear that an action includes a limitation, suspension, or termination proceeding.

A number of commenters urged the Secretary to (1) provide to accrediting agencies the same information provided to SPREs, and (2) require States to provide to accrediting agencies information regarding SPRE reviews of referred institutions.

Discussion: The Secretary proposed 10 days in the NPRM because in some instances the Secretary may need to confirm information before providing it to a SPRE. The Secretary agrees that accrediting agencies should also be notified by the Secretary and by SPREs. Accordingly, the Secretary (1) intends to notify SPREs and accrediting agencies of Federal actions as soon as possible and provide this notification orally in writing, and (2) will require States to notify accrediting agencies of SPRE actions. The Secretary further agrees to include as Federal actions those identified by the commenters.

Changes: Section 667.7 is revised to describe an action taken by the Secretary against an institution as one that includes a limitation, suspension, or termination proceeding. A new § 667.8 is added to require SPREs to notify appropriate accrediting agencies of SPRE reviews of referred institutions and SPRE findings and planned and actual corrective actions. This section is also revised to provide that the Secretary notifies the appropriate nationally recognized accrediting agency of actions taken by the Secretary or another Federal agency against an institution.

Section 667.9 Institutions With Locations in More Than One State

Comments: Many commenters objected to the proposed requirement that an institution's branch campuses or additional locations be subject to the standards of the State in which those branch campuses or additional locations are located. These commenters believed strongly that an institution's branch campuses and additional locations be subject only to the standards of the State in which the main campus of that institution is located. The commenters argued that it is unreasonable and burdensome to require an institution's branch campuses and locations to comply with different State standards.

Discussion: The Secretary disagrees with the commenters. This provision is consistent with the requirements that an institution must satisfy to obtain institutional eligibility under the HEA for locations or branch campuses in States different from the main campus. For institutional eligibility purposes, the institution must obtain a license or other legal authority to provide postsecondary education at the branch campus or additional location from the State in which the branch campus or other location is physically located, not the Senate in which the main location is physically located.

Changes: None.

Section 667.11 Allotment Formula

Comments: Two commenters writing on behalf of States that would receive the minimum allotment under the proposed formula believed strongly that a SPRE could not conduct reviews of referred institutions and carry out its other responsibilities under this part within that allotment. One of these commenters suggested the minimum allotment be increased from $50,000 to $75,000. The other commenter contended that a SPRE's actual costs in carrying out its responsibilities would be five to ten times the proposed minimum amount.

A few commenters writing on behalf of States were concerned that unanticipated and extraordinary expenses a SPRE could incur as a result of a legal challenge from a referred institution to the SPRE's determination that the institution should no longer participate in the title IV, HEA programs, could prevent the SPRE from carrying out its planned activities under this part. These commenters suggested that the final regulations provide for an appeal to the Secretary by the SPRE for additional funds to meet those legal costs and unanticipated and extraordinary expenses.

Discussion: The Secretary agrees with the commenters that the proposed minimum allotments were too low and has raised that minimum, as suggested by one of the commenters, from $50,000 to $75,000. The Secretary also raised the minimum allotment from $20,000 to $30,000 for Guam, American Samoa, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands.

The Secretary also agrees with the commenters that a SPRE should be allowed to petition the Secretary for additional funds for unanticipated and extraordinary legal expenses. The

Secretary use funds available for reallotment for this purpose.

Changes: The formula in § 667 is revised to provide an allotment of $30,000 each to Guam, American Samoa, the Northern Mariana Islands, the Virgin Islands, and the Trust Territory of the Pacific Islands, and to provide a minimum allotment of $75,000 to each of the other States. This section has also been revised to provide that funds available for reallotment may be used to pay for a SPRE's unanticipated and extraordinary legal expenses.

Comments: Several commenters writing on behalf of States disagreed with the proposed provision under which the Secretary would reallot, to other SPREs, funds not spent by a SPRE by the end of the period for which those funds were made available. These commenters suggested that a SPRE be allowed to carry over to the next allotment period any unspent funds from the current allotment period if the SPRE could demonstrate that it was making progress in carrying out allowable activities.

Discussion: The Secretary believes that funds allotted to a State for a specific period be spent by the SPRE during that period. If a SPRE cannot spend its allotment for that period, the Secretary believes that those funds are best used by carrying out SPRP activities during that period through reallotment to other States.

Changes: None.

Section 667.12 Application for Funds

Comments: A few commenters writing on behalf of States noted that it would be wasteful to require a SPRE to prepare and submit on two different occasions plans and budgets to receive its entire allotment for a fiscal year if the SPRE was unable to complete the development of review standards during the previous fiscal year for which it received an allotment.

Discussion: The Secretary agrees with the comments but points out that while this procedure can be modified, under § 667.3 a State must have submitted by December 31, 1995 or, in some instances, December 31, 1996, standards that can be approved by the Secretary.

Changes: Proposed § 667.12(d) is revised to allow any SPRE that did not complete development of review standards to submit simultaneously in its application for funds a plan and budget to complete developing review standards and a plan and budget to review referred institutions.

Comments: A commenter writing on behalf of a number of associations suggested that each State should be required to submit a plan, not only to develop the review standards and complaint procedures, but also to identify information maintained by institutions and State agencies that is relevant to the development the State review standards. Additionally, the commenter suggested that the plan should also include the costs of coordinating information systems and should identify information not currently collected that is needed to demonstrate compliance with review standards. The commenter recommended that the proposed regulations be revised to require a State to provide the estimated total cost to develop the SPRE's information system if the total cost exceeds the State's fiscal year 1993 allotment. The commenter also suggested that a State be required to provide the total estimated cost to review all referred institutions even if the total estimated cost of reviews exceeds the State's allotment. The commenter believes these costs are among those that President Clinton's Executive Order 12866 requires the Secretary to identify and consider in determining, when developing regulations, the costs and benefits of collecting and maintaining regulatory information.

Discussion: The Secretary disagrees with the commenter. The statute governing the SPRP does not require a SPRE to perform the activities suggested by the commenter, and the Secretary believes that SPREs should not be forced to engage in those activities.

The Secretary considers these regulations to satisfy section 1(b)(6) of Executive Order 12866 that requires each agency to assess both the costs and benefits of the intended regulations. The Secretary further believes that it is unnecessary to require a State to provide the estimated costs to carry out any functions of the SPRP that exceed the State's allotment since the SPRE is not required to perform functions in excess of that allotment.

Changes: None.

Comments: One commenter was concerned that a student or other party may try to hold a SPRE liable for alleged harm based on his or her reliance on an institution's continued eligibility for title IV, HEA program funds in a case where the institution is referred to a SPRE because the SPRE did not have sufficient funds to conduct that review. The commenter suggested that a provision preventing any liability from falling on the SPRE for failing to review an institution because of inadequate funding be added to the regulations.

Discussion: While nothing can prevent a person from suing a SPRE for the reasons cited by the commenter, in the Secretary's view, there would be no legal basis for charging a SPRE with any liability under the facts described by the commenter.

Changes: None.

Comments: Most commenters agreed with the Secretary that the SPRE's review priorities should reflect the objectives of protecting students, saving tax dollars, and promoting educational quality, but differed on the methods to best accomplish those objectives. Many of these commenters agreed strongly with the proposal in the NPRM that a SPRE be provided maximum flexibility in selecting institutions to review, except as provided by the statute; i.e., under section 494A(b) of the HEA, a SPRE must review referred institutions on a schedule that coincides with the Secretary's schedule for recertifying those institutions. Several of these commenters suggested that the SPRE be required to publicize its review priority system to assure consistent selection of referred institutions under that system.

Many commenters believed strongly that a SPRE should first review referred institutions that meet multiple referral criteria. Many other commenters believed strongly that a SPRE should consider, in addition to the referral criteria, other factors, such as data measuring student outcomes (for instance, graduation and placement rates), and other information a State might have that would indicate that a referred institution was not properly providing its educational programs. Several commenters suggested that the Secretary set the review priorities to ensure that all SPREs select institutions on the same basis. A number of commenters contended that an overwhelming number of institutions scheduled by the Secretary for recertification would also meet a referral criterion. Those commenters feared that this pool of institutions would be so great that a SPRE would never be able to select institutions under the State's review priority system. To alleviate this problem, the commenters recommended that the NPRM be revised to allow a SPRE to select institutions for review under the State's priority system from among the pool of referred institutions the Secretary scheduled for recertification.

Discussion: If a State's allotment is less than will be needed to review all referred institutions, the Secretary believes that a SPRE is in a better position than the Secretary to determine which institutions to select for review from among all the referred institutions. The Secretary also believes that any of the review priorities suggested by the

commenters could be effective in selecting "problem institutions" for review under this program, provided that those priorities reflect the objectives of protecting students, saving tax dollars, and promoting educational quality. Therefore, the Secretary will not require a SPRE to adopt any of the commenters priority suggestions for establishing priorities.

The Secretary agrees with the commenter who noted that for some States for some years, the number of institutions scheduled for recertification by the Secretary may exceed the money allotted to the State for reviews. Under that circumstance, the SPRE will use its priority criteria to select for review only institutions scheduled for recertification by the Secretary.

The Secretary agrees with the commenters who recommended that a SPRE should make known its review priorities.

Changes: Section 667.(23)(b) is revised to require a SPRE to make available information regarding its review priority system after its plan submitted under § 667.12 is approved by the Secretary and prior to conducting reviews of referred institutions. Also, in response to comments regarding review priorities under § 667.5, a new § 667.12(c)(3)(ii) is added to permit a SPRE to place an institution in the lowest priority for review if the institution was referred because of a late audit or a change in ownership and a previous SPRE review found no significant violations of State standards.

Comments: Several commenters suggested that the final regulations contain procedures, in addition to the reallotment procedures, under which a State could request a supplemental allotment to carry out the requirements of the State Postsecondary Review Program.

Discussion: The Secretary disagrees with the commenters. If a State needs additional funds and those funds are available through reallotment, the Secretary will allow States to apply for those funds. Funds for the program's purposes are provided through annual, discretionary appropriations from Congress. The program is not an entitlement. The Secretary does not have the authority to award "supplemental allotments" beyond reallotment through these regulations.

Changes: None.

Section 667.14 Allowable Costs and Activities

Comments: Several commenters suggested that information sharing be added to the list of allowable activities.

Discussion: The Secretary agrees.

Changes: Section 667.14(c) is revised to include as an allowable direct cost sharing of information by a SPRE with other SPREs, the Secretary, other State agencies, accrediting agencies, institutions, private organizations, and others.

Comments: Several commenters suggested that the training of employees of private organizations, nationally recognized accrediting agencies, and peer review systems by considered allowable activities when the training is necessary for those employees to perform required activities contracted by a SPRE.

Discussion: The Secretary believes that in establishing a contract with a private organization, nationally recognized accrediting agency, or peer review system, the SPRE may include in the contract any training that is required for the contracted organization to carry out required activities, and the SPRE may pay for that training with SPRP funds.

Changes: None.

Section 667.15 Fiscal Procedures and Records

Comments: One commenter recommended that an audit of a SPRE's activities be performed annually instead of at least once every two years as proposed in the NPRM. The commenter indicated that annual audits are needed to protect Department and taxpayer interests in light of the fact that the SPRP is a new program.

The commenter also stated that annual audits would ensure that SPRE funds supplement, not supplant, existing licensing or review functions conducted by the State. The commenter further argued that SPREs should have annual audits because the HEA now requires institutions and others to have audits performed annually.

Discussion: The Secretary disagrees. The Secretary believes that more frequent audits are not necessary to monitor adequately the activities of a SPRE. The Secretary believes that requiring a SPRE to have an annual audit would divert funds away from performing reviews or referred institutions. Also, in the case of States that receive the minimum allotment, the cost of an audit would represent a significant portion of the allotment.

Changes: None.

Section 667.16 Supplement, Not Supplant, Requirement

Comments: A few commenters recommended that the Secretary review compliance with this requirement on a case-by-case basis. Several commenters suggested that a State document its activities and functions that are in place prior to the implementation of the program and be able to demonstrate to the Secretary that SPRE activities did not replace those activities or functions. A few commenters recommended that the Secretary monitor the allocation of general State funds to ensure that those funds either matched or exceeded the State's expenditure levels before the establishment of the SPRE.

Discussion: The Secretary believes that a State should maintain adequate documentation to show, on audit, that the funds spent for SPRE activities supplemented, but did not supplant, existing State licensing or review functions.

Changes: None.

Section 667.21 State Review Standards

The Secretary received many comments regarding the framework, proposed in § 667.21(b), under which a State develops review standards. In proposing the framework, the Secretary intended to achieve the following objectives:

(1) To recognize and account for the diversity of institutions that would be subject to the standards by allowing States to establish different standards for those institutions;

(2) To facilitate effective enforcement of State standards by requiring States to quantify certain standards, and by requiring States to specify the records and information an institution would need to maintain for those standards;

(3) To limit the scope of the quantitative standards by allowing a State to apply those standards only to regular students, i.e., students enrolled at an institution for the purpose of obtaining a degree, certificate, or other recognized credential offered by the institution; and

(4) To introduce a level of rigor in the standards by requiring a State to determine whether a comparable title IV, HEA program standard would be an acceptable State standard.

Quantified Standards

Comments: Many commenters writing on behalf of institutions and several accrediting bodies objected to the requirement proposed in the NPRM that a State quantify certain review standards by establishing "acceptable percentages" for those standards. Many of these commenters believed strongly that this requirement constitutes an "enforcement mechanism" and thus violates section 494C(k) of the HEA. A number of commenters acknowledged that the statute allows a State to establish quantitative standards but did not believe that the Secretary has the

authority under the statute to require a State to develop quantitative standards. A number of commenters believed that quantitative standards were too restrictive and feared that States would develop such standards without regard to the mission of institutions. Several commenters believed that enforcement of quantified standards would impinge on institutional autonomy and force institutions to shift their missions away from serving high-risk students. A number of commenters believed that standards reduced to "acceptable percentages" would either by arbitrary, and probably without legal defense, or statistical, and would, be definition, place a number of institutions below the acceptable levels, regardless of whether the performance of those institutions is otherwise outstanding. Still other commenters argued that standards based on minimum "acceptable percentages" would create a safe harbor for institutions that might otherwise be judged to be substandard. By achieving the numerical minimum, such institutions would be able to tie the SPREs' hands and escape adverse action that might otherwise be warranted because, under the NPRM, the SPRE must consider those institutions to be in compliance with the review standard.

Commenters writing on behalf of States and student legal services organizations agreed with the proposal. These commenters believed strongly that objective, quantified standards are essential for meaningful enforcement and regulatory review.

Discussion: The Secretary disagrees strongly with the commenters who contend that the proposed requirement that a State quantify certain review standards by establishing acceptable percentages for those standards, constitutes an "enforcement mechanism" in violation of section 494C(k) of the HEA. That section of the HEA states, "Nothing in this subpart shall restrict the authority of the States to establish mechanisms to enforce the standards established under subsection (d) or require the States to establish specific mechanisms recommended by the Secretary."

The restriction on the enforcement of standards in section 494C(k) is based upon the establishment of standards under section 494C(d). Therefore, the restriction on the enforcement of standards has no bearing on the establishment of those standards.

The Secretary disagrees with those commenters who indicated that the Secretary is without authority to require States to develop quantitative standards. The nature of the standards imposed by statute is such that without quantifiable measures, the standards would be meaningless.

While the Secretary understands the concerns of some of the commenters that States might develop standards without regard to institutional mission or that enforcement of quantified standards could either force institutions away from serving high-risk students, or allow some institutions that would otherwise be judged to be substandard under other measures to escape State oversight, the Secretary believes that quantitative student outcome standards are an extremely valuable measure of the success of an institution. Quite the contrary to the views of the commenters, the Secretary believes that the imposition of quantifiable standards will have the effect of improving institutional quality and will protect high-risk students from unscrupulous substandard institutions. Further, quantifiable standards will assist prospective students and their parents in making choices about attendance at institutions. The Secretary further notes there is nothing in this part that would preclude a State from taking into account the fact that an institution serves high-risk students.

Changes: No changes were made regarding the quantifiable standards in § 667.21(a)(17). However, the reader is referred to the discussion under the heading "Relationship between tuition-and-fee charges and remuneration" for information regarding changes made to the standard described in § 667.21(a)(9).

Different Standards for Different Types of Institutions

Comments: Many commenters writing on behalf of proprietary institutions objected strongly to the proposal to allow a State to develop different standards for different types or categories of institutions. These commenters argued that Congress intended that all institutions be judged under the same standards, except as explicitly provided in the statute.

Many other commenters agreed strongly with the proposal. A number of these commenters urged the Secretary to require, not simply allow, States to develop different standards for different types of institutions to ensure that all SPREs take into consideration the nature and mission of institutions.

Several comments urged the Secretary to allow States to develop different standards only for different categories of institutions to protect institutions from being placed in arbitrary categories by States and to promote nationwide consistency in identifying categories. The commenters recommended that institutions be categorized according to (1) their for- or not-for-profit status, (2) whether they grant degrees, and (3) the levels and types of degrees or educational programs they offer.

Discussion: The Secretary believes that State standards should reflect the mission of institutions and that enforcement of such standards will allow SPREs to accomplish most effectively the purpose of the SPRP. The fact that the SPRP is a program designed to strengthen the State role in the program integrity triad means that the program is intended to foster the flexibility that inevitably results from differences among the States. The Secretary reiterates that States are provided flexibility in developing standards. Thus, a State may categorize institutions or educational programs in a manner that the State deems appropriate.

Changes: None.

Regular Students

Comments: Commenters generally agreed that a State's standards should be applied only to regular students at institutions. A few commenters opined that quantified standards would be misleading and irrelevant to institutions that offer open admissions because many students who attend those institutions do not aspire to attain a certificate or a degree, yet have a specific educational goal.

Discussion: The Secretary believes that in evaluating student outcomes of an institution, and most particularly with regard to institutions offering open enrollment, the evaluation should be based on regular students because they are the ones who can qualify for title IV, HEA funds, the protection of which is one of the primary purposes of SPRP.

Changes: None.

Comparable Title IV, HEA Program Standard as an Acceptable State Standard

Comments: Several commenters objected to the proposal to require a SPRE to consider the relevance of a title IV, HEA program standard as a requirement in establishing the State's standards. The commenters believed that acceptance of Federal standards, and application of those standards, by a SPRE would have an adverse effect on institutions at which a small percentage of students receive assistance under the title IV, HEA programs.

Several other commenters believed the proposal is a reasonable approach because institutions that participate in the title IV, HEA programs already have to comply with these standards.

Several other commenters believed that this provisions should be expanded

to require a SPRE to adopt comparable State licensure standards if those standards are more rigorous than comparable title IV, HEA program standards. The commenters argued that if a SPRE adopts review standards that are less rigorous than the State licensing standards, institutions might later argue persuasively to the State legislature to reduce the State licensing standards to the level of lower SPRE standards on the grounds that varying standards would be onerous and confusing. At the very least, these commenters suggested that the Secretary require States to establish standards that are at least as rigorous as the comparable title IV, HEA program standards.

Discussion: The Secretary is giving SPREs latitude to develop standards and expects States to take into account comparable title IV, HEA program standards as they develop their own standards. The Secretary does not agree that this program will have an adverse impact on institutions at which only a few students receive title IV, HEA program assistance (1) because the SPRP only requires a SPRE to establish standards for referred institutions, and (2) because any standard that a SPRE establishes that is comparable to a title IV, HEA program requirement already applies to those institutions as title IV, HEA program participants. The Secretary agrees, however, with the commenters who noted that it does not make sense for a State to adopt standards under the SPRP that are weaker than its State licensing standards. Nevertheless, this is a matter that must be resolved among the appropriate State authorities.

Changes: None

Records and Information an Institution Must maintain to Demonstrate to SPRE its Compliance With the State's Standards

Comments: Many commenters strongly urged the Secretary to make clear in the final regulations that a SPRE may not require an institution that has not been referred by the Secretary to the SPRE for review to maintain these records and information. A number of these commenters suggested if that institution is later referred by the Secretary to the SPRE for review, the SPRE should be required to assist the institution in generating the required information, or that the SPRE should be required to allow the institution a reasonable time to comply with the State's standards and recordkeeping requirements.

Discussion: If an institution is referred to a State for review under the SPRP, the institution must satisfy the State's standards. If the institution was not otherwise required to keep records relating to its compliance with State Standards, and it did not keep those records, the Secretary agrees that the State should allow an institution a reasonable period of time to obtain records and information to enable the institution to demonstrate its compliance with the State's standards.

Changes: Section 667.21(b) is revised to require that if a referred institution was not otherwise required to keep records relating to its compliance with State standards, and it did not keep those records, the SPRE allow the institution a reasonable period of time to obtain those records to enable it to demonstrate its compliance with the State's standards.

Relationship Between Tuition-and-Fee Charges and Remuneration

Comments: Many commenters objected to the proposal that a State establish an acceptable percentage for the relationship between the tuition and fees charged by an institution for an educational program and the amount of money that a student who successfully completes that program actually earns. A number of commenters believed strongly that this approach would be administratively unmanageable for comprehensive institutions that offer a broad spectrum of programs, including programs in liberal arts, sciences, teacher education, engineering, and nursing.

Many commenters believed that the Secretary does not have the authority under the statute to require a SPRE to make a judgment regarding the reasonableness of the tuition and fees charged by an institution. Many of these commenters contended that the standard, as proposed in the NPRM, was tantamount to price-fixing. The commenters argued that this standard, as articulated in the statute, simply requires an institution to disclose to students and prospective students information on program costs and on earnings that a graduate of that program could reasonably be expected to make in an occupation related to that program.

Other commenters asserted that relating the amount of tuition and fees to the amount of money a graduate of an educational program earns assumes incorrectly that (1) the institution alone is responsible for a student's education and employment, and (2) salary is the only reason for education. The commenters pointed out that a student is also responsible for his or her education and that the student may choose a job that is rewarding in ways other than money.

A few commenters pointed out that States sometimes establish the tuition and fees for certain programs at public institutions. The commenters urged the Secretary to exempt these programs from this standard.

Many commenters contended that States do not have adequate data on wages and salaries either to establish an acceptable percentage or determine that an institution met that percentage. These commenters were concerned that the results of surveys conducted by an institution of its graduates' earnings would not be reliable. Finally, many commenters argued that any formula governing the relationship between tuition and remuneration consider State subsidies provided to public institutions to ensure a fair comparison of tuition and fees between like programs offered by all types of institutions.

A number of commenters agreed with the proposal.

Discussion: The Secretary notes that this requirement only applies to vocational programs and therefore does not apply to programs such as liberal arts programs.

The Secretary acknowledges that commenters are correct when they note that many variables influence whether a person obtains a particular job. However, the Secretary believes that one of the most important factors is the job training of that individual. Further, institutions that purport to offer education to prepare students for occupations ought to be able to substantiate that the education they provide does just that. In addition, for students who receive loans for their education, it is reasonable to expect that they will qualify for positions that will enable them to repay those loans. For these reasons, the Secretary disagrees with the commenters who categorized this standard merely as a student consumer information disclosure requirement or that it is tantamount to price fixing. More appropriately, under this standard, a SPRE must determine whether an institution's tuition and fees are too high, given the remuneration that its graduates can reasonably expect to receive.

Finally, based on public comment and further review, the Secretary has decided that an institution should not be required to survey its graduates to obtain employment and wage data; rather, a SPRE may rely on local, State, or Federal employment and wage data to determine the institution's compliance with this standard.

Changes: Section 667.21(b)(4)(i) is revised to require a State to quantify this standard by establishing criteria (rather than just a percentage, as in proposed

§ 667.21(b)(4)(i)) under which a SPRE determines if the tuition and fees charged by an institution for a vocational program are excessive compared to the amount of money that a student who successfully completes that program may reasonably be expected to earn. Section 667.21(a)(9)(i) is changed to clarify that this is the purpose of the standard. In addition, § 667.22(b)(5) is revised to require a State to specify the methods and data used by the SPRE to determine if the tuition and fees charged by an institution for a vocational program are excessive.

Assessing a Student's Ability to Complete the Program

Comments: Many commenters objected to the proposal that a SPRE judge the effectiveness of an institution's method to assess that a student has the ability to complete successfully the educational program for which he or she applied. Many commenters argued that there is no correlation between an institution's assessment method and the graduation rate of students in an educational program. The commenters cited many reasons that a student might fail to complete a program that is unrelated to the student's academic ability, including motivation, personal finances, family obligations, a change in employement, and others, and suggested that the proposed requirement be removed. Many other commenters contended that the Secretary exceeded statutory authority in proposing this requirement. A number of these commenters argued that requiring a SPRE to judge the effectiveness of an institution's assessment method could lead to the use of mandatory, standardized tests, or other methods that require profiles of program completers, for determining a student's admission into a program. These commenters believed the use of these methods would lead institutions whose mission is to serve high-risk students to change their mission.

Several other commenters suggested that the proposed standard be expanded to (1) include other positive outcome measures, or (2) allow a SPRE to consider the rigor, fairness, and consistent application of an institution's assessment method in judging that method.

A number of commenters agreed with the proposal but suggested that an SPRE's judgment regarding the effectiveness of an institution's assessment method should be limited to vocational programs. Like many other commenters, these commenters contended that there is little direct correlation between student success and admissions standards for degree programs. One of these commenters argued that there is a much stronger correlation between student success and admissions criteria in vocational programs than in degree programs because of the shorter length and more narrow focus of vocational programs. The commenter believed there is a greater need to assess the adequacy of the admission standards for vocational programs because the population served by those programs tends to be less prepared for postsecondary education than students in degree programs. Another commenter believed strongly that an extraordinarily high student drop-out rate (1) may indicate other serious problems with an educational program, including the poor quality of its teachers or the lack of necessary equipment, and (2) invariably indicates enrollment of students unable to understand or handle course material.

A few other commenters believed that the "ability-to-benefit" provision in the title IV, HEA program regulations satisfies the statutory requirement under this part that an institution have a method to assess a student's ability to complete successfully an educational program.

Discussion: The Secretary is convinced that many points made by the commenters are valid, and that other standards adequately accomplish the Secretary's originally stated objectives in proposing this standard. The Secretary clarifies, however, that the standard described in § 667.21(a)(3) applies to all regular students at an institution, not just those students who qualify to receive financial assistance under the title IV ability-to-benefit provisions.

Changes: Proposed § 667.21(a)(4) is removed.

Suggestion to Augment the Standard Proposed in § 667.21(a)(7) Concerning Compliance With Health and Safety Standards

Comments: Most commenters objected to the suggestion in the preamble to the NPRM for views on whether a SPRE, as part of its review, should determine an institution's compliance with statutes and regulations governing access to disabled individuals. They considered the proposal to be beyond the scope and purpose of the SPRP.

Discussion: Based on comments and further review, the Secretary agrees not to include this provision. Disabled individuals are protected under applicable statutes without the additional provision for a SPRE review in that area.

Changes: None.

Standard in Proposed § 667.21(a)(9) Governing Institutional Plans for Closure

Comments: A number of commenters, including several commenters writing on behalf of States, urged the Secretary to define the term "financially at risk" as that term applies to the standard under which a SPRE would require an institution to provide for the instruction of students and the retention of records in the event the institution closes.

Discussion: The Secretary believes that a SPRE may view an institution to be financially at risk if it does not satisfy the factors of financial responsibility in § 668.15 of the Student Assistance General Provisions regulations, 34 CFR part 668.

Changes: None.

Standard in Proposed § 667.21(a)(14)

Comments: A number of commenters suggested specific methods for establishing acceptable percentages for student completion and graduation rates, placement rates, withdrawal rates, and licensure examination pass rates.

One commenter opined that it was critical that quantitative measures be consistent within and among all States and believed that the Student-Right-to-Know regulations, when published, will provide a uniform basis for calculating student graduation rates. The commenter recommended a coordinated study by the research community to develop acceptable percentages for the quantified standards and suggested that the implementation of those standards should be delayed for 12 to 18 months pending the results of that study.

Several commenters urged the Secretary to remove the proposed references to the *NOICC Master Crosswalk* in the standard regarding the placement rate of an institution's graduates in occupations related to their educational program. The commenters believed that any method under which the *NOICC Master Crosswalk* could be used to code employment status would be extremely complex and likely to yield false precision at great cost.

Discussion: The Secretary agrees that the Student-Right-to-Know methodology will provide a uniform basis for calculating student graduation rates, and encourages States to develop consistent methods for calculating student withdrawal rates, placement rates, and licensure examination pass rates to reduce burden on institutions. The Secretary acknowledges, however, that some States have developed robust

student information systems, and does not intend to force those States to use specific methodologies for computing rates to measure student outcomes. Therefore, the Secretary disagrees with the commenters who suggest (1) that it is critical that all States adopt the same quantitative measures, or (2) a delay in implementing those measures is warranted.

Finally, the Secretary disagrees that using the *NOICC Master Crosswalk* (Crosswalk) to code employment status would either be complex or costly. The Secretary intends that institutions and SPREs use the Crosswalk as it is currently used by State agencies—as a reference source and guide to evaluate the relationship between an educational program and a job.

Changes: None.

Standard in Proposed § 667.21(a)(11) Governing Market, Job Availability, and Licensing Standards

Comments: A few commenters suggested that the Secretary should expand this standard. The commenters were concerned that the standard does not specify the geographical scope of the labor market information to be provided, nor does it specify that average entry-level earnings should be provided. In addition, the commenters believed that the proposed provision regarding the disclosure of State licensing requirements should be more specific. According to the commenters, some of the most egregious title IV, HEA program abuses have involved institutions that, by enrolling a student in a program that required a State license, implied that the program met, and the student would meet, the State's licensing requirements when in fact the institution failed to provide adequate training to meet those requirements. The commenters suggested that the standard be revised to require an institution to describe in clear and specific terms how its educational program meets, and a student in the program would be able to meet, the relevant State licensing requirements.

Discussion: The Secretary believes that a SPRE's standards in this area will only be acceptable if they are applied in a meaningful manner that meets the demands of these last commenters, but the criterion in these regulations does not have need to be revised to accomplish this purpose. With regard to the comments concerning the geographical scope of labor market information on the determination of entry-level earnings based on averages, the Secretary does not disagree that these might be relevant and valid considerations. The Secretary does not believe, however, that these regulations need to specify all the factors that contribute to making disclosures meaningful. Instead, these factors are best considered when a SPRE consults with the institutions in its State to develop the standard for applying this provision.

Changes: None.

Section 667.22 Disapproval of State Review Standards

Comments: A number of commenters opined that the NPRM would empower the Secretary to exercise control over an institution in a manner that is contrary to section 103(b) of the Department of Education's Organization Act (Pub. L. 98–88). The commenters believed that the Secretary would exercise control over the direction, supervision, or curriculum, program of instruction, administration, or personnel or an institution through the evaluation of State review standards. According to the commenters, given the influence of States over institutions by virtue of State review standards, evaluation of those standards by the Secretary enables the Secretary to exercise the direction, supervision, and control over institutions that is prohibited by law.

Discussion: The Secretary disagrees with the commenters. First, section 494C(d) of the HEA provides that the standards shall be subject to the Secretary's disapproval. Second, under the same statutory provision, these standards must be developed by the SPRE in consultation with institutions in the SPRE's State, and these regulations provide in § 667.22(a) for the Secretary to take that consultation into consideration in determining whether the standards may be disapproved. The Secretary believes that institutional participation in the development of standards does not constitute interference in institutional areas protected by the Department of Education Organization Act.

Changes: None.

Comments: A few commenters writing in response to the request in the NPRM for additional criteria the Secretary should use to evaluate a State's review standards, suggested the following criteria:

(1) An explanation by the State of the rationale for each standard;

(2) If applicable, an explanation of the reasons for deviating from applicable provisions in State law;

(3) Information that is necessary to demonstrate compliance with the review standards, including information not already collected by institutions or other State agencies; and

(4) A provision that would allow an institution to provide directly to the Secretary comments of third parties regarding the State's review standards within a specified time.

Several commenters requested that the Secretary clarify the proposed criterion regarding the use of statistically valid methods and procedures to obtain employment-related data through the conduct of surveys of an institution graduates. A few commenters suggested that the Secretary substitute for that requirement a provision to use "representative sampling." The commenters contended that representative sampling would be a less onerous requirement, especially for smaller institutions.

Discussion: The Secretary thanks the commenters for their suggestions for additional criteria for reviewing standards. The Secretary has decided not to accept the first one because it imposes an unnecessary burden on a State to include a rationale for a standard where the rationale would be self-evident from the standard. However, the Secretary will use the commenters' suggestion as a useful guideline for determining whether to disapprove a particular standard.

The Secretary has decided not to adopt the second suggestion because a State could not adopt a standard that was in violation of its State law. The Secretary has decided not to adopt the third suggestion because that information is not necessary to determining whether a standard is not acceptable. It is left to a SPRE to establish how an institution complies specifically with a standard. Finally, the Secretary did not adopt the fourth suggestion because it is the responsibility of a State in consulting with institutions in the development of those standards, to obtain and consider all relevant comments.

The Secretary considers "representative sampling" to be a valid statistical method for conducting surveys.

Changes: None.

Comments: One commenter writing on behalf of an accrediting commission, urged the Secretary to make a State's review standards subject to third party review. The commenter also recommended this treatment for a SPRE's plan and budget for carrying out the activities under this part. The commenter believed that the statute and the proposed regulations require the Secretary to exercise informed judgment on whether a number of broad standards have been met. Third-party comment would provide valuable input to the Secretary's exercise of informed

judgment. In addition, the commenter offered the view that if the Secretary's key goal for the Program Integrity Triad is to reduce redundancy and promote complimentary input from interested parties, notably other members of the triad and affected institutions, would help the Secretary determine whether State plans, budgets, and standards are in fact complementary to the efforts of the Department and nationally recognized accrediting agencies and not unduly burdensome to institutions. Finally, in the commenters opinion, input from third parties would also help prevent the Secretary from mistake or embarrassment. For example, if the consultative process in a State has been inadequate, it is highly unlikely that the State will reveal the inadequacies in its submission to the Secretary. Institutions that have been adversely affected, however, could point out those deficiencies before Federal funds are wasted on SPRE efforts to apply standards that may later legitimately be challenged. Similarly, nationally recognized accrediting agencies may provide useful information to the Secretary about proposed contracts with other "peer review systems" that are inadequate to the tasks that they would be given. The commenter maintained that according to interested parties the right to review and comment need not be burdensome or time-consuming, and recommended procedures under which the Secretary would provide for and receive third-party comment on a State's review standards, and the SPRE's plans and budgets, before determining whether to approve those standards and plans.

Discussion: The Secretary disagrees strongly that the suggested procedures for third-party comment would not be burdensome or time-consuming. Under the suggested procedures, the Secretary would need to publish in the **Federal Register** each State's application for funds and each State's review standards, and allow a 30 day comment period and consider that comment, before determining whether to approve a State's application or disapprove a State's standards. These procedures would delay unnecessarily decisions the Secretary must make to ensure proper and timely administration of the SPRE. Moreover, the Secretary believes that inadequate consultation with all affected parties will likely be revealed in deficient standards, which the Secretary will have the authority to review and disapprove.

Changes: None.

Comments: A number of commenters believed that SPREs, not institutions, should be required to calculate student completion rates, withdrawal rates, placement rates, and licensure examination pass rates, and other related data. The commenters contended that the statute does not require or imply that institutions should be required to collect or maintain this information. Other commenters suggested that an institution be required to generate data regarding these rates only when the institution is reviewed by a SPRE.

Discussion: The Secretary disagrees with the commenters. It is clear under the SPRE that referred institutions must satisfy SPRE standards, and must be able to demonstrate that they satisfy those standards.

Changes: None.

Section 676.23 SPRE Reviews of Referred Institutions

Comments: A few commenters believed that a SPRE should be able to conduct an unannounced review of a referred institution if the SPRE has reason to believe that the institution is engaged in fraudulent practices.

Other commenters suggested that, except where fraud is suspected, the Secretary require a SPRE to provide notice to a referred institution before conducting a review of that institution. The commenters argued that advance notice of a SPRE review would enable the institution to prepare adequately for the review, including having required records and personnel at the institution during the review.

Discussion: In general, the Secretary believes strongly that a SPRE is in the best position to determine the actions it should take in carrying out its review responsibilities. If the SPRE determines that an unannounced review of any referred institution is necessary, the SPRE may conduct that review.

Change: None.

Comments: Several commenters suggested that a SPRE be allowed to determine, based on the referral criteria or based on a preliminary review of the institution, whether to conduct a comprehensive review of the institution under all of the State's standards or conduct a more limited review designed to identify and correct certain problems at the institution. The commenters argued that this would provide for efficient use of SPRE resources and reduce the burden on referred institutions.

Discussion: Section 494C(d) of the HEA requires a SPRE, in conducting its review of a referred institution, to determine the institution's compliance with all of the State's standards. The Secretary believes, however, that a SPRE may devise review procedures under which the SPRE decides the manner or level of review required to determine an institution's compliance with each of the State's standards.

Changes: None.

Comments: A few commenters suggested a change in the amount of time a SPRE should have to issue an initial report of its findings to an institution. Some commenters suggested increasing the time from 45 days to 60 days; other commenters suggested decreasing the time to 30 days. Another commenter asked the Secretary to clarify what constitutes the completion of a review and recommended that a SPRE issue its initial report no later than 45 days after it has completed its review of the institutions under all of the State's standards and has received a report from the relevant accrediting agency or peer review system.

Discussion: The Secretary believes that 45 days provides a SPRE with sufficient time to prepare a report of findings. The Secretary considers the 45-day period to begin at the time a SPRE has completed its review of all of the documentation and information it needs in order to prepare the report, including information provided by an accrediting agency or peer review system. The Secretary notes, however, that this does not preclude a SPRE from issuing a partial report of its findings to an institution, if, for example, the SPRE determines that the institution must, or should, take immediate actions in response to the SPRE's findings.

Changes: None.

Comments: Several commenters took issue with the proposal that a SPRE may prescribe a course of action a referred institution must follow to correct a violation of the State's standards. One of the commenters believed that a SPRE should be allowed to recommend, but not prescribe, the course by which an institution brings itself into compliance with State standards. The commenter argued that allowing a SPRE to prescribe a course of action would constitute an inappropriate interference with normal institutional governance and management.

Some commenters were concerned that the Secretary set the wrong tone in the NPRM by suggesting that a SPRE take actions to effect the termination of an institution only when the SPRE finds that the institution "continuously or egregiously violated the State's standards." The commenters believed that SPREs will not be the overzealous terminators that institutions and many others fear; more likely, SPREs will generally be disinclined to take forceful actions against institutions in their State for fear of litigation and other

repercussions that would result from those actions. The commenters urged the Secretary to change the regulations to make clear that in all cases where a referred institution fails to meet a State standard, the SPRE would be required to prescribe a course of action the institution would need follow to correct the violation. The commenters further believed that a SPRE should be required to initiate a proceeding under § 667.25 to effect the termination of an institution, if the institution did not bring itself into compliance with the State standards within a time specified in regulations unless the SPRE extended that time for good cause.

Discussion: The Secretary disagrees strongly with the first series of comments because a SPRE would not be able to enforce the State's standards if it could not require an institution to take the corrective action it determined the institution needed to take to bring the institution into compliance with its standards.

While the Secretary agrees strongly with the commenters that SPREs take consistent and appropriate actions against institutions that fail to comply with the State's standards, the Secretary does not believe that it is necessary or prudent to require a SPRE, on an absolute basis, to prescribe a course of action an institution must follow to correct a violation and bring itself into compliance with State standards, particularly with the State's quantified standards. An institution's compliance with acceptable percentages established for those standards is not inviolate; the acceptable percentage reflects, or should reflect, whether the institution is successfully providing its educational programs, rather than whether the institution should be terminated because it failed to satisfy that percentage. In the NPRM, the Secretary acknowledged that developing such standards will be difficult, and in fairness to institutions, proposed that a SPRE provide an institution the opportunity to present compelling evidence that would demonstrate to the SPRE that its failure to meet a State standard would not warrant any further action by the SPRE. Thus, in § 667.23(c), the Secretary permits the SPRE to determine whether to prescribe a course of action and the nature of that action.

Changes: Section 667.23(d) is revised to make clear that a SPRE must provide an institution the opportunity to present compelling evidence that its failure to satisfy a State standard does not warrant any further action by the SPRE.

Comments: One commenter suggested that the Secretary initiate an emergency action proceeding against an institution based on a SPRE's report of serious problems at an institution.

Discussion: Certainly, the Secretary will examine the findings contained in the SPRE's report and may investigate the matter further to determine whether an emergency action is warranted. If the Secretary determines that an emergency action is warranted, the Secretary initiates that action under 34 CFR part 668, subpart G.

Changes: None.

Comments: Numerous commenters recommended that a SPRE be required to give an institution a minimum number of days to respond to the findings and required actions contained in the SPRE's report to the institution. The commenters recommended that the minimum number be set at 30, 40, 45, 60, or 90 days, or be set by the Secretary in regulations. Most of the commenters argued that the setting of a minimum number of days was needed because the regulations did not provide for an appeal by an institution of the SPRE's findings to the Secretary.

Discussion: The Secretary understands the commenters' concerns that a SPRE could take a precipitous action against an institution by not allowing the institution sufficient time to respond to its report. As stated previously, however, the Secretary believes strongly that a SPRE is in the best position to determine the actions it should take in carrying out its review responsibilities, and, in view of the change made to § 667.23(d), the Secretary has no reason to believe that a SPRE would not afford an institution a reasonable time to respond to its report.

Changes: None.

Comments: Several commenters were concerned that a SPRE might punish an institution by initiating a proceeding to effect the termination of the institution's participation in a title IV, HEA program if the institution did not respond "quickly enough" to the SPRE's request for information, access to the institution, or access to personnel at the institution. The commenters agreed, in principle, that an institution should not be able to thwart the efforts of a SPRE to obtain necessary information by refusing to provide to the SPRE information or access to the institution, but believed that the NPRM provided the SPRE too much authority. The commenters recommended removing two parts of the provision and modifying the third part so that a SPRE would take an action if "* * * the institution exhibits a documented pattern of failure to allow SPRE personnel at the institution or repeated failure to provide SPRE officials with access to documents or records."

A number of commenters believed that, although the proposed provisions were appropriate, some changes should be made. A few commenters argued that a SPRE should view all violations of the State's standards as serious violations and recommended that the term "serious" be removed from the phrase "* * * the SPRE's findings show serious violations of the State's standards."

Discussion: The Secretary does not agree that a SPRE must request repeatedly, and be denied repeatedly, information or access by an institution before taking an action. The Secretary agrees to remove the term "serious," but in doing so does not intend that a SPRE take an action under these provisions for because of a technical violation by an institution.

Changes: Proposed § 667.23(g) is revised to remove the word "serious."

Comments: A number of commenters responded to the request in the NPRM regarding specific areas where SPRE performance standards should be established and how that performance should be evaluated.

Several commenters suggested that the Secretary should consider a SPRE's performance to be seriously deficient if the SPRE exhibits a pattern of (1) allowing reviewed institutions an excessive time to correct violations, or (2) not initiating termination proceedings against institutions for serious violations of the State's standards.

Other commenters suggested that the Secretary evaluate a SPRE's performance based on the SPRE's success in completing its objectives under the plan the SPRE submits annually to the Secretary, and on other areas related to the SPRE compliance with statutory requirements.

Discussion: The Secretary appreciates the commenters suggestions. Based on these suggestions, and upon further review, the Secretary has decided not to promulgate specific SPRE performance criteria because the Secretary already has, or will have, access to all of the information or records pertaining to the suggested criteria. In addition, the Secretary intends that on occasion Department of Education officials and representatives will accompany SPRE personnel in conducting reviews of referred institutions.

Changes: None.

Section 667.24 Peer Review of Institutions

One commenter, writing on behalf of an accrediting commission, objected

strongly to the regulations and views expressed in the NPRM. The commenter argued that if States wish to use peer review systems other than recognized accrediting agencies, those peer review systems should be subject to an approval process established and administered by the Secretary along the lines of the proposal noted in the NPRM preamble. The commenter submitted that ceding the choice of peer review systems to the States would be an abdication of the Secretary's responsibilities and an invitation to abuse. According to the commenter, the goals of Congress for ensuring integrity in the title IV, HEA programs will not be met if, in the future, instances come to light where the quality reviews performed by "peer review systems" on behalf of SPREs have been found to be inadequate, politicized, or abused. In addition, the commenter believed that it could not be assumed that every SPRE would appropriately choose or create peer review systems that will be competent to assess institutions and programs. For these reasons, the commenter urged the Secretary to define in final regulations a "peer review system" and the process by which such systems are to have shown "demonstrated competence in assessing programs." Many commenters echoed this commenter's views.

Several commenters suggested that the Secretary permit a SPRE the use of a "peer review system" only in cases where there is substantial reason to doubt the reliability of the accrediting agency's evaluation of an institution.

A number of commenters agreed that a SPRE should determine the competence of a peer review system and agreed that the criteria listed in the NPRM preamble are appropriate for making that determination. Some of these commenters suggested the following additional criteria:

(1) The system has clear and effective controls against conflicts of interest or the appearance of conflicts of interest; and

(2) The system is independent administratively and financially of the SPRE, and is able to make decisions and recommendations free from undue influence by the SPRE.

Several commenters believed that a SPRE should have the flexibility to determine, on a case-by-case basis, whether to sue the services of an accrediting agency or a peer review system. The commenters offered, however that a SPRE should have defensible procedures in place for selecting a peer review system, and suggested that final regulations require a SPRE to publicize and submit to the Secretary the criteria and procedures it uses to select an appropriate accrediting body or peer review system.

Another commenter suggested that a SPRE should be required to develop its own mechanism to assure that a peer review system meets the same level of quality as a recognized accrediting agency.

Still other commenters believed that a peer system should have the same qualifications and meet the same criteria required of nationally recognized accrediting agencies.

Discussion: The Secretary disagrees with the comments of the first commenter because the Secretary believes SPREs will select competent peer review systems. Moreover, the Secretary disagrees with the suggestion of the second set of commenters because section 494C(d)(15) of the HEA does not contain that limitation.

Based upon the suggestions of the other commenters and further review, the Secretary believes that a peer review system (1) must have an established basis for evaluating educational quality, (2) must have review procedures that include the selection of peer reviewers who have experience in evaluating the types of programs offered by the institution, and (3) must have established policies and procedures that guard against bias in conducting reviews of institutions.

Changes: Proposed § 667.24(a) is revised to require a SPRE to evaluate a peer review system using these criteria described in the discussion above.

Section 667.25 Termination of an Institution's Participation in the Title IV, HEA Programs

Comment: A few commenters were concerned that providing termination authority to a SPRE represented a potential conflict with title VI of the Civil Rights Act of 1964 and perhaps with the equal protection clause of the Constitution of the Untied States.

Discussion: The Secretary disagrees. If the SPRE took an action against a referred institution because the institution violated a SPRE standard and treated that institution in the same manner as it treated other institutions that had the same or similar violations, the SPRE's action would not violate title VI of the Civil Rights Act nor the equal protection clause of the Constitution.

Change: None.

Comment: One commenter questioned whether a SPRE could provide notice to the Secretary to terminate an institution's participation in a title IV, HEA program based solely on findings resulting from a review conducted by a nationally recognized accrediting agency or other peer review system.

Discussion: It depends. First, it depends on whether the institution was a referred institution. Second, it depends on the nature of those accrediting agency or peer review findings. Moreover, before it could recommend termination, the SPRE would have to give the institution a hearing at which the institution could challenge the findings of the accrediting agency or peer review.

Changes: None.

Comments: Many commenters believed strongly that the Secretary should allow an institution to appeal to the Secretary a SPRE's determination that the institution should no longer participate in the title IV, HEA programs. A number of these commenters recommended that the Secretary establish procedures under which the Secretary would review cases where a SPRE's decision was clearly biased.

Discussion: As the Secretary indicated in the NPRM, it is the Secretary's view that section 494C(h)(1) of the HEA does not allow an appeal to the Secretary of the SPRE's termination determination.

Changes: None.

Section 667.26 Due Process Requirements

Comments: Many commenters believed that a State could develop due process procedures that met the minimum requirements outlined in the NPRM, but those procedures would not be adequate or provide for a meaningful appeal. The commenters suggested that final regulations (1) specify the time within which an institution could challenge an adverse action taken by a SPRE, and (2) require a State to provide an institution the opportunity to present its case in a hearing before a third party or impartial hearing official.

Discussion: The Secretary agrees with the commenters' suggestions.

Changes: Section 667.26 is revised to require a State to (1) identify a minimum time within which it will allow an institution to challenge its actions, and (2) provide for a hearing before an impartial official.

[FR Doc. 94–10206 Filed 4–28–94; 8:45 am]

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Friday
April 29, 1994

Part VI

Department of Education

34 CFR Part 668

Student Assistance General Provisions, Campus Safety; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AB98

Student Assistance General Provisions; Campus Safety

AGENCY: Department of Education.

ACTION: Final Regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations. These regulations are needed to implement statutory changes to the Higher Education Act of 1965, as amended by the Student Right-to-Know and Campus Security Act (Pub. L. 101–542), the Higher Education Technical Amendments of 1991 (Pub. L. 102–26), the Higher Education Amendments of 1992 (Pub. L. 102–325), and the Higher Education Technical Amendments of 1993 (Pub. L. 103–208). These regulations require an institution of higher education to disclose information about its campus safety policies and procedures, and statistics concerning whether certain crimes took place on campus. These regulations also make technical changes to Subpart F of the Student Assistance General Provisions regulations, which governs misrepresentation. Encouraging students to pursue high quality postsecondary education is an important element of the National Education Goals; a safe campus environment facilitates such education.

EFFECTIVE DATE: These regulations take effect July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Paula M. Husselmann or Kimberly L. Goto, U.S. Department of Education, 400 Maryland Avenue, SW. (Regional Office Building 3, room 4318), Washington, DC 20202–5346. Telephone: (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Institutions should note that some of the provisions of these regulations may relate to the provisions of the Family Educational Rights and Privacy Act (FERPA). If an institution has questions concerning FERPA, the institution should contact Ellen Campbell at (202) 732–1807.

SUPPLEMENTARY INFORMATION: The Student Assistance General Provisions regulations implement requirements that are common to the participation of postsecondary institutions in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA programs). These programs include the Federal Pell Grant, Federal Stafford Loan, Federal PLUS, Federal Supplemental Loans for Students (SLS), Federal Direct Student Loan (FDSL), State Student Incentive Grant (SSIG), Federal Perkins Loan, Federal Work-Study (FWS), Federal Supplemental Educational Opportunity Grant (FSEOG), Presidential Access Scholarship (PAS), and National Early Intervention Scholarship and Partnership (NEISP) programs.

On July 10, 1992 and October 22, 1993 the Secretary published two notices of proposed rulemaking (NPRMs) for 34 CFR part 668 in the **Federal Register** (57 FR 30826–30833 and 58 FR 54902–54905, respectively). Both of these proposed regulations included a discussion of the major issues surrounding the proposed changes that will not be repeated here. The list below summarizes those issues and identifies the pages of the preambles to the NPRMs on which a discussion of those issues may be found. The final regulations to implement the Student Right-to-Know Act, proposals for which were also included in the July 10, 1992 NPRM, are not included in these regulations. With the passage of the Higher Education Amendments of 1992, and its proliferation of completion and graduation rate provisions, it became necessary to write a second NPRM regarding these rates. The Secretary expects to publish the second NPRM this year. The Secretary does not want to delay publication of final regulations regarding campus security and is, therefore, proceeding with this publication separately. As indicated above, here is a summary of proposed issues relating to crime prevention and statistical disclosure:

Addition to student consumer provisions to require the disclosure of an annual security report (57 FR 30828 and 58 FR 54903);

Addition of list of actual disclosures to be made (57 FR 30828 and 58 FR 54903–54904);

Addition of time periods for collection of crime statistics (57 FR 30829 and 58 FR 54904, but superseded by subsequent statutory change reflected in these final regulations); and

Addition of a definition of *campus* for the purpose of section 668.47 of the Student Assistance General Provisions regulations (FR 57 30829 and FR 58 54904).

Substantive Changes Reflected in These Final Regulations Changes Pursuant to the Higher Education Amendments of 1992, Public Law 102–325

Sex Offenses, Forcible or Nonforcible

Section 668.47(a)(12) of the final regulations has been changed to provide for the disclosure of certain policies and procedures, the purpose of which is to prevent forcible and nonforcible sex offenses and address various issues relating to these offenses. Institutions are required to establish campus sexual assault programs to prevent sex offenses and procedures for a victim to follow when a sex offense occurs.

Section 668.47(a)(6)(i) of the final regulations has been changed to provide that for the purpose of disclosing statistics about campus crimes, institutions must compile and disclose statistics on rape for periods of time prior to August 1, 1992 and sex offenses, forcible and nonforcible, for periods of time on or after August 1, 1992. This change reflects an amendment to section 485(f)(1)(F)(ii) of the HEA made by section 486(c)(1) of Public Law 102–325. An institution must use the definition of rape through July 31, 1992 found in the Uniform Crime Reporting (UCR) Handbook. In addition, an institution must use the definitions of forcible and nonforcible sex offenses found in the National Incident-Based Reporting System (NIBRS) Edition of the UCR Handbook for collection of these statistics on or after August 1, 1992.

Reporting of Crime Statistics

Section 668.47(d)(1) of these final regulations, relating to the periods of time for which statistical data on campus crime must be compiled and disclosed, is changed to reflect § 486(c)(3) of Public Law 102–325.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRMs, approximately 300 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRMs follows.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority are not addressed.

Section 668.47 Institutional Security Policies and Crime Statistics

Definition of Campus Security Authority

Comments: Several commenters supported the intent of the statute and applauded the efforts to accurately collect and report information on crime and educate consumers, and believe the regulations are a deterrent towards criminal activity. The majority of commenters affirmed their support of the Secretary's removal of the term counselors from the proposed definition of campus security authority.

A number of commenters believed that the proposed regulatory definition of campus security authority struck the appropriate balance between the needs of a crime victim and the need for crime reporting. Other commenters defended the inclusion of deans and residence directors in the proposed definition, maintaining that the definition allows victims to be served properly by reducing accusations concerning interference and coverup of crimes and, most importantly, reducing the risk of someone else becoming a victim of crime.

Many commenters believed that the proposed definition was too broad, particularly because it included deans and residence directors. The commenters offered a variety of reasons for this belief, the most common reason being the belief that a student who is a victim of rape, date rape, or similar crime will often solicit a dean or residence director to help him or her work through the trauma of the event; the victim may decide not to file an official action with the legal authorities. In these instances, the commenters believe the proposed rules could limit the victim's ability to receive immediate assistance and would most likely prolong his or her trauma. Several commenters indicated that deans and residence directors should play a strong role in educating students in security matters and in developing a disciplinary environment that refuses to support criminal behavior.

Several commenters said that the regulations should not define the term campus security authority at all, thereby ensuring maximum institutional flexibility with respect to the reporting of crimes and the allocation of counseling responsibilities. The commenters suggested this course of action, stating that because of the variety of campus administrative structures (size, complexity, structure, and staffing patterns), an all-inclusive definition would be difficult to achieve. Other commenters said that the regulations should define the term but include only specific campus officials, such as the chief law enforcement official on campus or the dean of students, or specific offices, such as the campus security office.

Many commenters specifically objected to including campus officials such as deans and residence directors within the definition of campus security authority. These commenters advanced several arguments: Some commenters said that students should be able to seek confidential counseling from such administrators before deciding whether to report a campus crime and that by requiring these administrators to report possible crimes brought to their attention by students, would undermine the usefulness of the administrators as student advisors and advocates; other commenters noted that deans and residence directors are not trained in criminal law and that requiring them to report possible crimes would probably lead to double-counting of crimes, once by the dean or other campus official and once by the campus police. Several commenters noted that under the Federal Bureau of Investigation's (FBI's) Uniform Crime Reporting System, determining the number of crime counts is based on law enforcement investigation and does not include determinations by persons, such as those that might be made by deans and residence directors, who are not law enforcement personnel. Other commenters said it is unethical to require deans and residence directors to report crimes, that doing so is inconsistent with the intent of Congress, and that the proposed definition does not clearly exclude campus religious authorities, such as chaplains.

Many commenters asked for clarification as to how the definition of a campus security authority relates to the Family Educational Rights and Privacy Act (FERPA).

Discussion: Section 485(f)(1)(F) of the HEA requires institutions to disclose statistics of certain campus criminal offenses reported to campus security authorities and local police agencies. As noted in the preamble to the first NPRM, the proposed definition of campus security authority, which the statute does not define, represented an attempt to strike an appropriate balance between the need of individual crime victims for confidential counseling and the need of the broader campus community for prevention and a complete reporting of campus crime.

The Secretary continues to believe that to achieve this balance, and to ensure consistent reporting of crime statistics, it is necessary to define the term campus security authority and to include within the definition a wider range of campus administrators than those exclusively devoted to criminal or security matters. Therefore, the definition of a campus security authority includes a campus law enforcement unit, an individual or organization specified in an institution's statement of campus security policy as the individual or organization to whom students and employees should report criminal offenses, and an official of an institution who has significant responsibility for student and campus activities, but does not have significant counseling responsibilities. The Secretary does not agree that including a broader range of administrators is unethical or unauthorized by the statute; neither is it inappropriate by virtue of their lack of specific training in criminal law, nor is it likely to lead to double-counting. The function of these administrators is not to determine authoritatively whether a crime took place—that is the function of law enforcement professionals working within the criminal justice system—but, with respect to these regulations to report to the appropriate law enforcement personnel, either campus or local police, those allegations of campus crimes that the administrators conclude are made in good faith. These administrators would, of course, be free to seek advice from legal experts before reporting any allegations. In addition, there is no penalty for reporting allegations of campus crime to the appropriate law enforcement personnel if those allegations turn out to be baseless. If the law enforcement personnel, upon further investigation, conclude that the allegations reported are not substantiated by the facts or the law, no campus crime need be disclosed as a statistic.

Because of the wide variety of institutions participating in the Title IV, HEA programs, the Secretary acknowledges that it is not appropriate to identify particular administrators, such as deans and residence directors, by their titles as being either included or excluded from the definition of campus security authority. Instead, the identifications must be made in terms of the functions of particular administrators. Institutions are expected to determine which officials have significant responsibility for student and campus activities and do not have significant counseling responsibilities for the purpose of this definition and to make this information known to the campus community. The Secretary notes that it was never the intent of the

proposed rule to include chaplains within the meaning of the term campus security authority.

Records created and maintained by a campus law enforcement unit, for the purpose of law enforcement, are not education records and are not protected from disclosure by FERPA. The definition of campus security authority also includes (1) an individual or organization specified in an institution's statement of campus security policy as the individual or organization to whom students and employees should report criminal offenses; and (2) an official of an institution who has significant responsibility for student and campus activities, but does not have significant counseling responsibilities.

Information on crimes reported to these officials could be included in records classified as protected from non-consensual disclosure under FERPA regulations. However, FERPA does not prohibit the disclosure of statistical, non-personally identifiable information. The Secretary does not interpret FERPA to prevent compliance with the timely warning provision, as in a case of an emergency involving the safety of others—even where the identity of an individual may be disclosed.

Changes: The Secretary has revised the definition of campus security authority to include, in addition to those individuals or organizations specified by the institution's statement of campus security policy as those to whom criminal offenses should be reported, other officials of the institution who have significant responsibility for student and campus activities, but only if those officials do not have significant counseling responsibilities. The definition has also been revised expressly to include a campus law enforcement unit.

Victim's Rights

Comments: A number of commenters said that victims should have the option of consulting with student affairs personnel before deciding whether or not to report the occurrence of a crime. Some commenters said that the victim of a crime on campus should be allowed to report the crime anonymously.

Discussion: Under these final regulations, victims of a crime on campus remain free to seek confidential counseling from campus administrators who have significant counseling responsibilities. Section 485(f)(1)(F) of the HEA and these regulations require the statistical reporting of crimes to the campus community, not personally identifiable accounts of crimes. A victim who reports a crime to a campus security authority may, of course, request anonymity to the extent practicable and permitted by local law.

Changes: None.

Monitoring Crimes On-Campus and Off-Campus

Comments: A few commenters requested that the Secretary require institutions to monitor crimes that take place in areas other than those proposed in the NPRM. For example, the commenters believe it is within the spirit of the statute to monitor crime on public and private property that is not owned or controlled by an institution, but that is frequented by the institution's students. This recommendation would include the neighborhood surrounding the campus. One commenter indicated that there are many unidentifiable properties within the institution's area that are controlled by recognized organizations, but that the properties of the organizations are not officially recognized by the institution.

Discussion: Neither the HEA nor these regulations require institutions to gather data and report to the campus community about off-campus crime. Section 485(f)(1)(F) of the HEA and these regulations require institutions to disclose statistics about particular crimes that occur on campus. The statute includes in the definition of "campus" any building or property owned or controlled by student organizations recognized by the institution. Institutions should note, however, that an institution can be considered to control certain space that may be owned by a third party. For example, some institutions rent space in building owned by a third party; the institution controls the space that it occupies and that space is covered under these provisions of the HEA.

Changes: None.

Timely Warning to the Campus Community

Comments: A few commenters requested a clear definition of "timely reports" for the purpose of section 485(f)(3) of the HEA and these regulations, which require an institution to make timely reports to the campus community on crimes that are reported to campus security authorities or local police and that are considered a threat to other students and employees. Some commenters believed that timely warnings made by those who are not enforcement personnel could jeopardize a criminal investigation and allow a suspect to be released. Other commenters believe that the campus community must be informed of these threats and these provisions allow the law enforcement authorities to receive the evidence to build a case.

Discussion: The Secretary does not believe that a definition of "timely reports" is necessary or warranted. Rather, the Secretary believes that timely reporting to the campus community for this purpose must be decided on a case-by-case basis in light of all the facts surrounding a crime, including factors such as the nature of the crime, the continuing danger to the campus community, and the possible risk of compromising law enforcement efforts. Campus security authorities should consult the local law enforcement agency for guidance on how and when to release "timely reports" to the campus community.

Changes: None.

Coordination With State Requirements

Comment: One commenter said that State and Federal requirements pertaining to the disclosure of crime statistics by institutions should be coordinated with respect to both the types of crimes reported and the dates for disclosure.

Discussion: The Secretary supports coordinated efforts to disclose all required statistical disclosures to the extent they are consistent with specific requirements of section 485(f) of the HEA and these regulations.

Changes: None.

Distribution of Annual Security Report

Comments: One commenter requested clarification as to the means of distribution of the annual security report. The commenter wondered whether the institution would be required to mail the security report to current students and employees or could simply notify them about how to obtain the security report. Another commenter requested the Secretary to identify those to whom an annual security report is given only upon request.

Discussion: These regulations require that the annual security report be distributed to all current students and employees, and to any prospective student and employee upon request. As defined in § 668.41(b), a prospective student is one who has requested information concerning admission to the institution. However, because of the importance of this information regarding personal safety, the Secretary believes that any person requesting information on admission should be notified of the availability of the report, given a summary of the report, and given an opportunity to request it. A prospective employee requesting an application for employment from the

institution or information about employment at the institution should be treated in the same manner as a prospective student. The Secretary agrees that these regulations need to clarify how the report is distributed.

Changes: The regulations have been changed to clarify the methods of distribution that are to be used to ensure individual delivery of the security report. An institution may choose to distribute the report by any of the following means: (1) Directly mailing of the report to each individual through the U.S. Postal Service, campus mail, or computer network; or (2) providing the report directly to each individual (by hand-delivery). Institutions may include the security report as a part of an institutional publication that is distributed to each individual, such as a catalog, student handbook, registration materials, or tuition bill. An institution must provide prospective students and employees information about the availability of the report and a summary of the information in it.

Reporting Crime Data

Comments: Some commenters asked if there is a form or format for reporting and disclosing crime data.

Discussion: With respect to a prescribed format or form on which to disclose and report crime statistics, the Secretary notes that an institution may voluntarily participate in the Uniform Crime Reporting (UCR) System of the FBI. In this system, there are prescribed forms for the reporting of crime. The Secretary notes that while the HEA does not mandate participation in the UCR System, the HEA does, however, require use of the UCR definitions in determining whether a crime has been committed.

Changes: None.

Institutional Security Policies

Comments: Several commenters asked whether an institution that does not have programs to promote the awareness of rape, acquaintance rape, and other forcible and nonforcible sex offenses is required to establish these programs itself. They asked whether an institution could use as educators, in those areas, personnel who are experts in their respective fields.

Discussion: Section 485(f) of the HEA requires an institution to provide education programs to promote the awareness of rape, acquaintance rape, and other sex offenses. An institution may contract with experts in these areas, such as rape crisis intervention experts, local law enforcement officials, and social service personnel to provide training to students and staff.

Changes: None.

Comments: Two commenters questioned the change in terminology from sexual assault to sex offense with regard to procedures students should follow if a sex offense occurs. Two commenters were concerned over the issue of preserving evidence of a criminal offense: one commenter believed that this requirement could place the institution in the position of interpreting laws regarding evidence. The institutions asked for guidance with respect to preserving evidence. Two commenters agreed that a student should retain the right, under the regulations, to decide whether to report a sex offense.

Discussion: The Secretary changed the term sexual assault to sex offense to conform with the statutory provision requiring institutions to use the definitions of the FBI's UCR System; forcible and nonforcible sex offenses are defined. During negotiated rulemaking sessions with the academic community, many non-Federal negotiators recommended that institutions be required to define what is meant by "preserving evidence". The Secretary urges institutions to consult with their campus security officials, local law enforcement officials, and the local prosecutor's office in addressing what constitutes the preservation of evidence. The Secretary further encourages institutions to develop working relationships with the emergency rooms of local hospitals and local rape crisis programs.

Changes: None.

Comments: One commenter asked to what extent an institution is required to assist a student in notifying proper authorities of the occurrence of a sex offense, if the student requests the institution's assistance.

Discussion: The Secretary expects an institution to accommodate a victim's request for assistance reasonably.

Changes: None.

Comments: Fifteen commenters addressed the requirement for an institution to notify students that the institution will change a victim's academic and living situations after an alleged sex offense and of the options for such changes, if changes are requested by the victim and are reasonably available. Some of the commenters recommended that this should apply only to institutions that have control over on- and off-campus housing. Some community colleges indicated that they do not have the experience or resources to handle such a request. Some commenters were concerned that this requirement could impose an unlimited liability on institutions. Some of the commenters asked the Secretary to specify what constitutes acceptable accommodation by an institution.

Discussion: With regard to those commenters who expressed concern over potential legal liability and those who wish to limit the scope of this provision to institutions that control housing, it is important to recognize that these requirements provide an institution flexibility. Moreover, section 485(f)(7)(c) of the HEA provides that no private right of action is created by this statute. A change to accommodate a victim must be reasonably available. If a change of living or academic situation requested by a victim is unreasonable, an institution is not required to make the change. As examples, an institution could allow a victim out of a housing contract with the institution so that the student may pursue off-campus housing; on the other hand, if would not be reasonable to expect the institution to pay for the rental of a private apartment for the student. The Secretary does not believe that it is useful to list in these regulations all examples of acceptable accommodation. Institutions are expected to make reasonable efforts at acceptable accommodation.

Changes: None.

Comments: Four commenters expressed concern that the Secretary has not specified how an institution must ensure due process for the accused in a campus disciplinary proceeding. The commenters were concerned that the institution not take punitive action against the accused until all of the evidence is weighed and there is a conviction.

Discussion: The commenters are correct that the HEA does not provide due process requirements under these provisions; due process is a matter of local law and other requirements. The purpose of this provision is to provide disclosure of an institution's disciplinary procedures with certain minimum requirements.

Changes: None.

Other Comments

Comments: A few commenters warned that the distribution of campus security policies could be dangerous because criminal elements might use the information provided to evade detection and plan further crimes.

Discussion: The Secretary expects institutions to consider the needs of the campus community for which they are providing a statement of campus security policies and to be judicious in the selection of information to be provided. The Secretary does not believe the required disclosures will aid

crime. Rather, the disclosures will serve to discourage crime on campus.

Changes: None.

Comments: A few commenters said the statistics disclosed of campus crimes should represent only verifiable crimes or convictions.

Discussion: The occurrence of a crime on campus need not be disclosed to students and staff under these regulations unless the appropriate law enforcement officials conclude that the crime did occur with the same degree of certainty they would require for purposes of reporting under the FBI's Uniform Crime Reporting System. Convictions, however, are not required, because an acquittal means only that a specific defendant did not commit the crime charged, not that a crime did not occur. For information concerning "Unfounded Complaints" an institution should refer to the UCR Handbook. The Secretary provided this clarification as a guide to disclosure requirements. It is in no way to be interpreted as discouraging the reporting of crime to the proper law enforcement agencies.

Changes: None.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently. Burdens specifically associated with information collection requirements were identified and explained in the NPRM. (Approved by the Office of Management and Budget under control number 1840–0537)

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal government in the exercise of their governmental functions.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

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

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.032 Federal Consolidation Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.226 Income Contingent Loan Program; 84.268 Federal Direct Student Loan Program; and 84.27 National Early Intervention Scholarship and Partnership Program. Catalog of Federal Domestic Assistance number for the Presidential Access Scholarship Program has not been assigned.)

Dated: April 22, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—[AMENDED]

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

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

2. Section 668.43 is amended by removing the word "and" at the end of paragraph (c)(4); removing the period in paragraph (c)(5) and adding, in its place, the term "; and"; and adding a new paragraph (c)(6) to read as follows:

§ 668.43 Financial assistance information.

* * * * *

(c) * * *

(6) The institution shall provide and collect exit counseling information as required by 34 CFR 674.42 for borrowers under the Federal Perkins Loan Program, by 34 CFR 685.303 for borrowers under the Federal Direct Student Loan Program, and by 34 CFR 682.604 for borrowers under the Federal Stafford Loan and Federal SLS programs.

* * * * *

3. Section 668.44 is amended by removing the word "and" at the end of paragraph (a)(6); removing the period at the end of paragraph (a)(7) and adding, in its place, the term "; and"; and adding a new paragraph (a)(8) to read as follows:

§ 668.44 Institutional information.

(a) * * *

(8) A statement that a student's enrollment in a program of study abroad approved for credit by the home institution may be considered enrollment at the home institution for the purpose of applying for assistance under the Title IV, HEA programs.

* * * * *

§ 668.46 [Reserved]

4. Section 668.46 is reserved.

5. A new § 668.47 is added to subpart D to read as follows:

§ 668.47 Institutional security policies and crime statistics.

(a) An institution shall, by September 1, 1992, and by September 1 of each year thereafter, publish and distribute, through appropriate publications and mailings, an annual security report that contains, at a minimum, the following information:

(1) A statement of current campus policies regarding procedures and facilities for students and others to report criminal actions or other emergencies occurring on campus and policies concerning the institution's response to those reports, including policies for making timely reports to members of the campus community regarding the occurrence of crimes described in paragraph (a)(6) of this section. This statement shall include a list of the titles of each person or organization to whom students and employees should report the criminal offenses described in paragraph (a)(6) for the purpose of making timely reports.

(2) A statement of current policies concerning security of and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.

(3) A statement of current policies concerning campus law enforcement, including—

(i) The enforcement authority of security personnel, including their working relationship with State and local police agencies and whether those security personnel have the authority to arrest individuals; and

(ii) Policies that encourage accurate and prompt reporting of all crimes to the campus police and the appropriate police agencies.

(4) A description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others.

(5) A description of programs designed to inform students and employees about the prevention of crimes.

(6)(i) Statistics concerning the occurrence on campus of the following criminal offenses reported to local police agencies and to any official of the institution who has significant responsibility for student and campus activities:

(A) Murder.

(B) Rape (prior to August 1, 1992) or sex offenses, forcible or nonforcible (on or after August 1, 1992).

(C) Robbery.

(D) Aggravated assault.

(E) Burglary.

(F) Motor-vehicle theft; and

(ii) Statistics concerning the criminal offenses of murder, forcible rape, and aggravated assault, as listed in paragraph (a)(6)(i) of this section, that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, as prescribed by the Hate Crimes Statistics Act (28 U.S.C. 534).

(7) A statement of policy concerning the monitoring and recording through local police agencies of criminal activity in which students engaged at off-campus locations of student organizations recognized by the institution, including student organizations with off-campus housing facilities.

(8)(i) Statistics concerning the number of arrests for the following crimes occurring on campus:

(A) Liquor-law violations.

(B) Drug-abuse violations.

(C) Weapons possessions.

(ii) Statistics concerning those crimes listed in paragraph (a)(8)(i) of this section that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, as prescribed by the Hate Crimes Statistics Act (28 U.S.C. 534).

(9) A statement of policy regarding the possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws.

(10) A statement of policy regarding the possession, use and sale of illegal drugs and enforcement of Federal and State drug laws.

(11) A description of any drug or alcohol-abuse education programs, as required under section 1213 of the HEA. For the purpose of meeting this requirement, an institution may cross-reference the materials the institution uses to comply with section 1213 of the HEA.

(12) A statement of policy regarding the institution's campus sexual assault programs to prevent sex offenses, and procedures to follow when a sex offense occurs. The statement must include—

(i) A description of educational programs to promote the awareness of rape, acquaintance rape, and other forcible and nonforcible sex offenses;

(ii) Procedures students should follow if a sex offense occurs, including procedures concerning who should be contacted, the importance of preserving evidence for the proof of a criminal offense, and to whom the alleged offense should be reported;

(iii) Information on a student's option to notify proper law enforcement authorities, including on-campus and local police, and a statement that institutional personnel will assist the student in notifying these authorities, if the student requests the assistance of these personnel;

(iv) Notification to students of existing on- and off-campus counseling, mental health, or other student services for victims of sex offenses;

(v) Notification to students that the institution will change a victim's academic and living situations after an alleged sex offense and of the options for those changes, if those changes are requested by the victim and are reasonably available;

(vi) Procedures for campus disciplinary action in cases of an alleged sex offense, including a clear statement that—

(A) The accuser and the accused are entitled to the same opportunities to have others present during a disciplinary proceeding; and

(B) Both the accuser and the accused shall be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense. Compliance with this subsection does not constitute a violation of the Family Educational Rights and Privacy Act (20 U.S.C. 1232g). For the purpose of this paragraph, the outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused; and

(vii) Sanctions the institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, or other forcible or nonforcible sex offenses.

(b) An institution shall distribute the security report required by paragraph (a) of this section annually to all—

(1) Current and prospective students and employees by appropriate publication and mailings, through—

(i) Direct mailing to each individual through the U.S. Postal Service, campus mail, or computer network; and

(ii) Publications provided directly to each individual; and

(2) Prospective students as defined in § 668.41(b) and prospective employees as defined in paragraph (f) of this section, upon request, provided that such individuals are informed of the availability of the security report, given a summary of its contents, and given the opportunity to request a copy.

(c) An institution shall comply separately with the requirements of this section for each campus. A branch, school, or administrative division within an institution that is not within a reasonably contiguous geographic area with the institution's main campus is considered to be a separate campus.

(d)(1)(i) An institution's first annual security report (due September 1, 1992) must contain the statistics described in paragraph (a)(6) of this section covering the period January 1, 1991, through December 31, 1991, and the two preceding calendar years, or the portion thereof for which data are reasonably available. The first annual security report must contain those statistics covering at least the period from August 1, 1991, through July 31, 1992.

(ii) An institution's second and third annual security reports (due September 1, 1993 and September 1, 1994, respectively) must contain the statistics described in paragraph (a)(6) of this section covering the most recent calendar year and the two preceding calendar years, or the portion thereof for which data are reasonably available. The second annual security report must contain those statistics covering at least the period from August 1, 1991, through December 31, 1991, and calendar year 1992. The third annual security report must contain those statistics covering at least the period from August 1, 1991, through December 31, 1991, and calendar years 1992 and 1993.

(iii) An institution's annual security report due September 1, 1995, and each subsequent report, must contain the statistics described in paragraph (a)(6) of this section covering the three calendar years preceding the year in which the report is disclosed.

(iv) In each annual security report due on or after September 1, 1993, September 1, 1994, September 1, 1995, an institution must, in accordance with paragraphs (d)(1) (ii) and (iii) of this section, report statistics covering rape for periods of time prior to August 1, 1992, and statistics concerning sex

offenses, forcible or nonforcible, for periods of time on or after August 1, 1992.

(v) In all subsequent annual security reports, an institution shall report statistics for sex offenses, forcible and nonforcible.

(2)(i) An institution's first annual security report (due September 1, 1992) must contain the statistics described in paragraph (a)(8) of this section covering the period January 1, 1991, through December 31, 1991, or the portion thereof for which those statistics are available. The first annual security report must contain that data covering at least the period August 1, 1991, through December 31, 1991.

(ii) An institution's second annual security report (due September 1, 1993) and each subsequent report must contain the statistics described in paragraph (a)(8) of this section, covering the calendar year preceding the year during which the report is to be disclosed.

(3) An institution shall compile crime statistics required under paragraph (a)(6) and (8) of this section in accordance with the definitions used in the Federal Bureau of Investigation's Uniform Crime Reporting Program as provided in Appendix E to this part.

(4) Upon the request of the Secretary, an institution must submit to the Secretary the statistics required by paragraphs (a)(6) and (a)(8) of this section.

(e) An institution shall, in a manner that is timely and will aid in the prevention of similar crimes, report to the campus community on crimes that are—

(1) Described in paragraph (a)(6) of this section;

(2) Reported to campus security authorities as identified under the institution's statement of current campus policies pursuant to paragraph (a)(1) of this section or local police agencies; and

(3) Considered by the institution to represent a threat to students and employees.

(f) The following definitions apply to this section:

Campus: (1) Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes.

(2) Any building or property owned or controlled by a student organization recognized by the institution.

(3) Any building or property controlled by the institution, but owned by a third-party.

Campus security authority: (1) A campus law enforcement unit.

(2) An individual or organization specified in an institution's statement of campus security policy as the individual or organization to whom students and employees should report criminal offenses.

(3) An official of an institution who has significant responsibility for student and campus activities, but does not have significant counseling responsibilities.

Prospective employee: An individual who has contacted an institution participating in any Title IV, HEA program for the purpose of requesting information concerning employment with the institution.

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

(Authority: 20 U.S.C. 534, 1092, and 1232g)

6. Section 668.72 is amended by revising paragraph (l) to read as follows:

§ 668.72 Nature of educational program.

* * * * *

(l) Any matters required to be disclosed to prospective students under §§ 668.44 and 668.47 of this part.

7. A new Appendix E is added to part 668 to read as follows:

Appendix E to Part 668: Crime Definitions in Accordance With the Federal Bureau of Investigation's Uniform Crime Reporting Program

The following definitions are to be used for reporting the crimes listed in § 668.47, in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting Program. The definitions for *murder, robbery, aggravated assault, burglary, motor vehicle theft, weapon law violations, drug abuse violations and liquor law violations* are excerpted from the *Uniform Crime Reporting Handbook.* The definitions of forcible and nonforcible sex offenses are excerpted from the National Incident-Based Reporting System Edition of the *Uniform Crime Reporting Handbook.*

Crime Definitions From the Uniform Crime Reporting Handbook

Murder

The willful (nonnegligent) killing of one human being by another.

Robbery

The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Aggravated Assault

An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)

Burglary

The unlawful entry of a structure to commit a felony or a theft. For reporting purposes this definition includes: unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts to commit any of the aforementioned.

Motor Vehicle Theft

The theft or attempted theft of a motor vehicle. (Classify as motor vehicle theft all cases where automobiles are taken by persons not having lawful access even though the vehicles are later abandoned—including joyriding.)

Weapon Law Violations

The violation of laws or ordinances dealing with weapon offenses, regulatory in nature, such as: manufacture, sale, or possession of deadly weapons; carrying deadly weapons, concealed or openly; furnishing deadly weapons to minors; aliens possessing deadly weapons; and all attempts to commit any of the aforementioned.

Drug Abuse Violations

Violations of State and local laws relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs. The relevant substances include: opium or cocaine and their derivatives (morphine, heroin, codeine); marijuana; synthetic narcotics (demerol, methadones); and dangerous nonnarcotic drugs (barbiturates, benzedrine).

Liquor Law Violations

The violation of laws or ordinances prohibiting: the manufacture, sale, transporting, furnishing, possessing of intoxicating liquor; maintaining unlawful drinking places; bootlegging; operating a still; furnishing liquor to a minor or intemperate person; using a vehicle for illegal transportation of liquor; drinking on a train or public conveyance; and all attempts to commit any of the aforementioned. (Drunkenness and driving under the influence are not included in this definition.)

Sex Offenses Definitions From the National Incident-Based Reporting System Edition of the Uniform Crime Reporting Program

Sex Offenses—Forcible

Any sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent.

A. *Forcible Rape*—The carnal knowledge of a person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity (or because of his/her youth).

B. *Forcible Sodomy*—Oral or anal sexual intercourse with another person, forcibly

and/or against that person's will; or not forcibly against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

C. *Sexual Assault With An Object*—The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

D. *Forcible Fondling*—The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will; or, not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental incapacity.

Sex Offenses—Nonforcible

Unlawful, nonforcible sexual intercourse.

A. *Incest*—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

B. *Statutory Rape*—Nonforcible sexual intercourse with a person who is under the statutory age of consent.

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Part VII

Department of Education

34 CFR Part 600

Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 600

RIN 1840–AB87

Institutional Eligibility Under the Higher Education Act of 1965, as Amended

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing institutional eligibility under the Higher Education Act of 1965, as amended (HEA). The regulations implement new HEA statutory provisions that were added by the Higher Education Amendments of 1992 and the Higher Education Technical Amendments of 1993. In general, these new statutory provisions tightened the eligibility requirements for institutions participating in the student financial assistance programs authorized under title IV of the HEA (title IV, HEA programs). The regulations also clarify existing provisions, and, in keeping with the statutory changes, tighten procedures governing institutional eligibility determinations.

EFFECTIVE DATE: These regulations take effect on July 1, 1994, with the exception of §§ 600.5, 600.7, 600.10, 600.20, 600.30, 600.31 which will become effective after the information collection requirements contained in these sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these provisions of the regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Cheryl Leibovitz, U.S. Department of Education, 400 Maryland Avenue, SW., room 4318, Regional Office Building 3, Washington, DC 20202. Telephone: (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Institutional Eligibility regulations contain requirements that apply to all postsecondary educational institutions that seek initial or continued eligibility to apply to participate in the programs authorized by the HEA.

On February 10, 1994, the Secretary published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register**, 59 FR 6446–6465. The NPRM included a discussion of major issues surrounding the proposed changes that will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the NPRM on which a discussion of those issues can be found.

Definitions in § 600.2 (pages 6446–6447).

Institution of higher education in § 600.4 (pages 6447–6448).

Proprietary institution of higher education in § 600.5 (pages 6448–6450).

Conditions of institutional ineligibility in § 600.7 (pages 6450–6451).

Treatment of a branch campus in § 600.8 (page 6451).

Written agreement between an eligible institution and another institution or organization in § 600.9 (page 6451).

Date, extent, duration, and consequence of eligibility in § 600.10 (pages 6451–6452).

Special rules regarding institutional accreditation or preaccreditation in § 600.11 (page 6452).

Change in ownership resulting in a change of control in § 600.31 (pages 6452–6454).

Eligibility of additional locations in § 600.32 (page 6454).

Loss of eligibility in § 600.40 (page 6454).

Termination and emergency action proceedings in § 600.41 (page 6454).

The following discussion describes the significant changes since publication of the NPRM and the manner in which certain critical provisions will be initially implemented. They are discussed in the order in which they appear in the text of the regulations. If a provision applies to more than one section or is included in more than one section, it is discussed the first time it appears with an appropriate reference to its other appearances.

Section 600.5 Proprietary Institution of Higher Education

With regard to the two-year rule, the Secretary provides exceptions to the requirement that the program an institution lists on its initial eligibility application be substantially the same as the program it offered for two years preceding that application. An institution may satisfy the two-year rule even if it substantially changed the subject matter of its program over the two-year period if that change was made because of new technology or the requirements of other Federal agencies. In addition, an applicant institution may count as part of the two-year rule any period during which it was a branch campus.

These changes also apply to the two-year rule for postsecondary vocational institutions in § 600.6.

The Secretary changed the manner in which an institution calculates whether it satisfies the 85 percent rule. Instead of determining the amount of title IV, HEA program funds it received over an award year and the amount of revenues it received over a fiscal year in the fraction set forth in § 600.5(d), institutions will use their latest fiscal year to determine both amounts. Instead of determining the amount of title IV, HEA program funds received on a cash basis of accounting and the amount of revenue received on an accrual basis of accounting, institutions will use a cash basis of accounting for both title IV, HEA program funds and revenues. Institutions must report to the Department of Education that they do not satisfy the 85 percent rule no later than 90 days after the last day of their fiscal year, and institutions that fail to satisfy the 85 percent rule will become ineligible on the last day of their fiscal year.

Institutions may choose to have either the auditor who prepares its financial statement audit or the auditor who prepares its title IV, HEA program compliance audit certify to the accuracy of its computations under the 85 percent rule, and the auditor must submit that certification as part of that audit report. If the auditor determines that the institution did not accurately calculate whether it satisfied the 85 percent rule, the auditor must include in the audit the correct amount of title IV, HEA program funds and revenues the institution received in the fiscal year, and the correct ratio under § 600.5(d).

The Secretary proposed in § 600.5(d)(2)(v) that title IV, HEA program funds will be presumed to be used to satisfy tuition, fees and other institutional charges unless these charges were satisfied with grant funds provided by sources independent of the institution. This provision is changed so that the presumption would also not apply to institutional charges that were satisfied with money provided through job training contracts under Federal, State, and local training programs described in § 600.7(d).

When these regulations become effective on July 1, 1994, a proprietary institution must determine whether it qualifies as an eligible proprietary institution for award year 1994–95 under the 85 percent rule. The Secretary

has developed special rules for this initial determination.

If an institution's latest complete fiscal year ended during the period of October 1, 1993 through June 30, 1994, the institution shall use that fiscal year to determine whether the institution satisfies the 85 percent rule. Such an institution must notify the Secretary no later than September 30, 1994 if it fails to satisfy the 85 percent rule, and if the institution fails to satisfy that rule, it becomes ineligible on June 30, 1994. Therefore, as a general matter, it will be liable for all title IV, HEA program funds it disbursed to its students for award year 1994–95.

If an institution's latest complete fiscal year ends before October 1, 1993, the institution shall use the fiscal year that ends between July 1, 1994 and September 30, 1994 as its latest fiscal year to determine whether the institution satisfies the 85 percent rule. The institution must notify the Secretary if it fails to satisfy the 85 percent rule within 90 days following the end of that fiscal year, and if it fails to satisfy that rule, it becomes ineligible on the last day of its fiscal year.

Section 600.7 Conditions of Institutional Ineligibility

In order to qualify as an eligible institution; starting in award year 1994–95, an institution must not, *inter alia*, be in violation of the limitations set forth in § 600.7. The provisions in that section implement the provisions in sections 481(a)(3) and 481(a)(4) of the HEA. The former section was effective on October 1, 1992 while the latter section was effective on July 23, 1992. Accordingly, institutions were subject to those provisions as of those dates. Until July 1, 1994, the Secretary will view an institution as not violating those statutory limitations if the institution can demonstrate, under a plausible interpretation of those statutory provisions, that it did not violate those limitations.

Section 600.7 becomes effective on July 1, 1994, and § 600.7(a)(1)(i) implements section 481(a)(3). Under § 600.7(a)(1)(i), the Secretary evaluates an institution's eligibility on the basis of the institution's actions over the latest complete award year. Accordingly, as of July 1, 1994, the latest complete award year is the 1993–94 award year. Thus, for determining whether an institution qualifies as an eligible institution during award year 1994–95, the institution will use award year 1993–94 for purposes of determining whether more than 50 percent of its courses were correspondence courses, whether 50 percent or more of its enrolled regular students were enrolled in correspondence courses, whether 25 percent or more of its enrolled regular students were incarcerated, and whether 50 percent or more of its enrolled regular students had neither a high school diploma or its recognized equivalent.

Waivers

An institution loses its eligibility if more than 50 percent of its regular students are enrolled in correspondence courses. However, an institution that offers a 2-year associate-degree or 4-year bachelor's-degree program may receive a waiver of that limitation for "good cause." To receive a waiver, an institution can demonstrate "good cause" if the students enrolled in the institution's correspondence courses receive no more than five (5) percent of the title IV, HEA program funds received by all the students at that institution during its latest award year.

An institution loses its eligibility if more than 50 percent of its regular students do not have a high school diploma or its recognized equivalent (ability to benefit [ATB] students). However, a nonprofit institution may receive a waiver of this limitation if its enrollment of ATB students exceeded 50 percent of its total enrollment because it served a substantial number of ATB students through contracts with Federal, State, or local government agencies during its latest complete award year.

To receive a waiver, the contract must provide job training for low-income individuals who are in need of that training. An example of such a contract is a job training contract under the Job Training Partnership Act (JTPA).

In addition, an institution may receive a waiver only if no more than 40 percent of its enrollment of regular students consists of ATB students who are not being served under the above-described contracts.

If the Secretary grants a waiver to an institution under § 600.7, the waiver will extend indefinitely provided that the institution satisfies the waiver requirements in each award year. If an institution fails to satisfy the waiver requirements for an award year, the institution becomes ineligible on June 30 of that award year.

Section 600.9 Written Agreements

This section has been changed to provide that an eligible institution may not contract with an ineligible institution for the latter to provide any portion of an educational program if the ineligible institution had ever been terminated from participation in the title IV, HEA programs, or had ever withdrawn from such participation while under a termination, show-cause, suspension, or similar type proceeding initiated by a State licensing agency, accrediting agency, guaranty agency, or the Department of Education.

Section 600.30 Institutional Notification Requirements

A substantial number of institutions are structured as, or owned by, partnerships or limited partnerships. Customarily, the governance of a partnership is vested in the "general partners" rather than in a "board of directors," and the management is under the control of one or more of the general partners rather than under an "executive officer." Accordingly, the term "a general partner" is added to § 600.30(a)(7)(iv) to clarify that the Secretary considers a person who is a general partner to be exercising substantial control over the institution.

Section 600.31 Change of Ownership Resulting in a Change in Control

Commenters expressed apprehension about how the change of ownership rules affect sales in which the parties make the sale conditional upon securing the Department of Education's certification for the institution under the new ownership. The regulation has been changed to provide that the Secretary will review an application filed with respect to a transfer that is subject to any contingency, provided that the sale was otherwise completed. A transfer that is otherwise final is considered completed even if the seller retains a security interest in the institution or its assets to assure satisfaction of payment of the purchase price.

Section 498(i)(3) of the HEA provides that the transfer of the interest of an owner upon his or her death to a family member or to a current owner may be excluded from its purview. This exclusion would apply readily to the kind of unexpected transfers of control that would occur of necessity upon the death of an actively-managing principal of an institution owned by a closely-held corporation. The regulation is changed to adopt the same description of the family of the owner as that used in § 600.30(f).

The regulation is modified to state that a change of ownership and control of a closely-held corporation occurs when a person who holds or acquires a legal or beneficial ownership interest in that corporation acquires or relinquishes control of 50 percent or more of the total outstanding voting stock of the corporation.

The regulation treats the change of control of a registrant with the Securities and Exchange Commission (SEC) as a change of ownership and control within the meaning of section 498(i) of the HEA. For other corporations not closely held, the regulation treats as a change of ownership and control any action by which a person who has or thereby acquires a legal or beneficial ownership interest in that corporation obtains both ownership of 25 percent of the voting stock of the corporation, or the right under a proxy, power of attorney, or similar agreement to vote that share, and actual control. Conversely, relinquishing that control would also constitute a change within the meaning of this section.

The regulation clarifies that a change from a taxable to a tax-exempt entity that qualifies under section 501(c)(3) of the Internal Revenue Code, or *vice versa*, constitutes a change of ownership and control under this section of the regulations.

Section 600.32 Eligibility of Additional Locations

Section 600.32 has been revised to clarify that the provisions of §§ 600.8 and 600.10 also apply to the eligibility of additional locations.

Section 600.40 Loss of Eligibility

The loss of eligibility because of a violation of the 85 percent rule was discussed earlier in connection with § 600.5.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 546 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. Substantive issues are discussed under the section of the regulations to which they pertain.

Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under applicable statutory authority—are not addressed.

Comments and Responses

Section 600.2. Definitions

Branch Campus

Comments: Nearly all commenters confused the definition of the term "branch campus" with the provisions governing additional locations. One commenter asked whether an institution's branch campus could be located in a foreign country.

Discussion: The Secretary defined the term "branch campus" narrowly in the NPRM and in this final regulation to enable institutions to expand to serve the legitimate needs of students and communities not in close proximity to their main campuses without having to undergo a full certification review. Under section 498(j) of the HEA, as amended by the Higher Education Technical Amendments of 1993, to participate in the title IV, HEA programs, a branch campus must be certified by the Secretary under the provisions of subpart 3 of part H of title IV of the HEA. Thus, it must separately meet all of the applicable requirements for participation contained in the Student Assistance General Provisions regulations, 34 CFR part 668. Because a full certification review is a complicated and lengthy process, the Secretary believes that a broad definition of branch campus would capture numerous off-campus sites of institutions and would seriously deter institutions from expanding to serve the legitimate needs of students and communities not in close proximity to their main campuses. The narrow definition avoids this adverse impact. Instead, additional locations of an institution will not necessarily be treated as branch campuses and thus will be subject to more moderate provisions elsewhere in this part, including in § 600.32.

A branch campus located in a foreign country may not qualify as an eligible branch campus under the HEA because one of the statutory requirements for eligibility (other than for purposes of the Federal Family Education Loan programs) is that the branch be located in a State.

Changes: None.

Correspondence Course

Comments: A commenter suggested that the Secretary classify a course offered partly by correspondence and partly in residential training as a correspondence course only if the course is more than 50 percent correspondence.

Discussion: In the preamble to the NPRM, the Secretary indicated that a program that is part correspondence and part residential is considered to be a correspondence program because "This straightforward interpretation eliminates the need for the Secretary to address all the troublesome issues involving the quantity of education that an institution claims to provide in a correspondence program." The Secretary is still of that view.

Changes: None.

Incarcerated Student

Comments: Two commenters commended the Secretary's exclusion of persons in half-way houses or home detention or sentenced to serve on weekends from the definition of "incarcerated student." They noted that this exclusion helps to reduce burden by eliminating the need to identify and track these individuals.

Discussion: The Secretary appreciates the support for this provision.

Changes: None.

Recognized Equivalent of a High School Diploma

Comments: A few commenters suggested broadening the definition of students who excelled academically in high school. They suggested that persons in the upper quartile of their high school graduating class and persons who have passed standardized tests be considered as having excelled in high school. One commenter asked the Secretary to remove this provision because it could potentially be open to abuse.

Other commenters noted that the Secretary proposed to consider an academic transcript resulting from the successful completion of a two-year transfer program to be the recognized equivalent of a high school diploma and suggested that the following transcripts also be so recognized: the transcript of a student who completed at least one semester or quarter of a two-year transfer program; and the transcript of a student enrolled in a two-year program if most of the credits in that program could be transferred to a bachelor's degree program.

Discussion: The Secretary believes that the recognized equivalent of a high school diploma is generally a GED and the two provisions discussed by the commenter apply only in exceptionally limited circumstances. Therefore, the Secretary does not believe it useful to expand either provision at this time. The Secretary has reconsidered his position and no longer believes that a student's class standing in high school is an adequate indication that the student excelled in high school. The final rules reflect the Secretary's current policy in this area.

Changes: None.

Sections 600.4, 600.5, and 600.6 Institution of Higher Education, Proprietary Institution of Higher Education, and Postsecondary Vocational Institution

Comments: Several commenters noted that while section 496(e) of the HEA required an institution to submit a

dispute with an accrediting agency regarding its loss of accreditation to initial arbitration prior to bringing other legal action, the NPRM proposed requiring the institution to agree to binding arbitration. Most of these commenters were concerned that requiring binding arbitration would violate an institution's right to have its case reviewed in court. Other commenters noted that while institutions have to agree to binding arbitration, accrediting agencies do not have to so agree. Another commenter asked whether an institution would retain its institutional eligibility under this part while it undergoes binding arbitration.

Discussion: In the NPRM, the Secretary stated that he proposed that an institution agree to binding arbitration "so that any legal action after arbitration would be limited to whether the arbitrator's decision was arbitrary or capricious. The Secretary believes that this approach best carries out the purpose of section 496(e) by limiting, to the maximum extent possible, litigation in this area." The Secretary is still of this view.

The Secretary recognizes that the HEA does not specifically require an accrediting agency to agree to binding arbitration but anticipates that accrediting agencies will agree to such arbitration without the necessity of a regulatory requirement since it significantly limits the cost and length of appeals of their final decisions. Moreover, if an accrediting agency does not agree to binding arbitration, institutions will be free to appeal their final adverse decisions in federal courts.

If an institution loses its accreditation as a result of a final accrediting agency action, it loses its eligibility under this part because of its lack of accreditation. If it takes that accrediting agency to binding arbitration, it will not regain that eligibility unless the arbitrator requires the agency to restore the institution's accreditation.

Changes: None.

Section 600.5 Proprietary Institution of Higher Education

Two-year rule

Comment: Several commenters questioned how the Secretary would determine whether a program offered for two years prior to an institution's initial eligibility application was substantially the same as a program it listed in its application for approval.

Other commenters were concerned that a new institution would not be able to make substantive changes in curriculum to keep up with new technology and changes in industry and marketplace requirements. One commenter explained that other Federal agencies may have regulations that affect course content and length and suggested that if the Secretary retained language prohibiting institutions from changing courses substantially in content and length, the provision be revised to allow for course content and length changes necessitated by regulations of other Federal agencies. Another commenter was concerned that a new institution would never be able to change its courses. Other commenters suggested that accrediting agencies and State Postsecondary Review Entities (SPREs) would monitor program integrity and quality and a shorter period than two years could be used.

Discussion: As the Secretary indicated in the preamble to the NPRM, the purpose behind this provision is to prevent an institution from offering a minimal program during the first two years of its existence and then expanding its programs when it becomes eligible to participate in the title IV, HEA programs. The Secretary believes that the best way to support this purpose is to require an institution to offer over the two-year period a training program that is substantially the same in terms of subject matter and length as the training program it offers when it applies for institutional eligibility. However, the Secretary agrees with the point made by some commenters that some flexibility should be provided with regard to the subject matter of a program to take into account new technology and requirements of other Federal agencies. The Secretary does not agree with the suggestion that an institution should be able to make substantive changes in the subject matter of a program because of changes in market conditions.

The Secretary considers programs to be substantially the same if they are listed within the same generic series and codes defined in Chapter I, Academic and Occupationally Specific Programs, published by the Secretary in the Classification of Instructional Programs, Second Edition (1990).

The Secretary considers a program to be substantially the same in terms of length as the program the institution is currently offering if the program offered over the two-year period would qualify the applicant to be an eligible proprietary institution of higher education or eligible postsecondary vocational institution. Thus, in general, the program must provide at least 20 weeks of instructional time and at least 16 semester hours, 24 quarter hours, or 600 clock hours.

Changes: The Secretary will permit an institution to demonstrate that the subject matter of its program changed substantially over the two-year period because of new technology or the requirements of other Federal agencies.

Comment: A number of commenters suggested that the institutional portions of programs, such as the Federal SEOG and Federal Perkins programs, should not be included in the numerator since the money comes from the institution and not the Federal Government.

Discussion: The Secretary agrees. An institution should not include institutional matching funds in the numerator as part of its title IV, HEA program funds.

Changes: None.

Comment: A number of commenters discussed the presumption that title IV, HEA program funds are used to satisfy tuition, fees and other institutional charges unless these charges were satisfied with grant funds provided by sources independent of the institution. Commenters suggested that the above presumption should not apply if the tuition, fees and other institutional charges were satisfied with money provided by other Federal agencies, such as the Department of Veterans Affairs, or through job training contracts under Federal, State, or local training programs, such as the Job Training Partnership Act (JTPA).

Discussion: The Secretary agrees with the commenters with regard to funds received by an institution under a job training contract under Federal, State, or local training programs since the Congress in the Higher Education Technical Amendments of 1993 provided for an exception to the ability to benefit (ATB) enrollment limitation for institutions serving ATB students under such contracts.

Changes: Section 600.5(d)(2)(v) has been amended to allow an institution to consider that a student's tuition, fees and other institutional charges were satisfied from funds provided under contracts described in § 600.7(d).

Comment: A number of commenters suggested that the definition of "revenue" in the denominator used in § 600.5(d)(1) is too narrow and should be expanded.

Discussion: As indicated in the preamble to the NPRM, the Secretary believes the definition of the term "revenue" establishes a reasonable middle ground between counting only the income received from students' tuition and fees and counting as revenue income from businesses that are owned and operated by the institution, regardless of the relationship between

the educational institution and the businesses.

Changes: None.

Comment: A number of commenters suggested that revenue from contract training (on or off-site) provided by the institution to business and industry be included as revenue in the denominator in § 600.5(d)(1) since this type of training is directly related to the curriculum offered by the institution.

Discussion: An institution can count as revenue only tuition, fees, and institutional charges for students enrolled in eligible programs at the institution, and funds received for activities that are necessary to the education or training of those students enrolled in eligible programs. Therefore, whether an institution can count as revenue in the denominator of the fraction in § 600.5(d)(1) the revenue described by the commenters depends on whether an institution's contract training programs qualify as eligible programs.

Changes: Section 600.5(d)(1) has been amended to clarify this requirement.

Comment: Several commenters suggested that an institution should be allowed to include institutional charges that were paid by institutional scholarships and loans as revenue in the denominator of the fraction contained in § 600.5(d)(1). One commenter said that his school awarded $1,000 institutional scholarships to all students in the second year of their program. The commenter felt strongly that his institution should be able to include these scholarships as institutional revenues.

Discussion: An institution is not prohibited from including institutional charges that were paid by institutional scholarships and institutional loans as revenue in the denominator of the fraction contained in § 600.5(d)(1), provided that the scholarships and loans are valid and not just part of a scheme to artificially inflate an institution's tuition and fee charges. For this purpose, the Secretary does not consider institutional loans to be real unless such loans are routinely repaid by the student borrowers. The Secretary does not consider institutional scholarships to be valid if every student receives such a scholarship so that no student ever pays the claimed tuition and fee charges. The Secretary considers the above-described practice of the commenter to be a classic example of this scheme.

In this connection, the Secretary will scrutinize institutions that raise their tuition and fee charges to avoid the 85 percent rule but can show no actual payment of those additional charges, or payment through "artificial" institutional scholarships and loans.

Changes: None.

Comment: A number of commenters suggested that non-need-based title IV, HEA program assistance, such as funds under the Federal PLUS Loan Program, the Federal SLS Program, and the unsubsidized Federal Stafford Loan Program, should not be included in the numerator of the 85 percent rule calculation because it is unrealistic to penalize an institution whose students chose to borrow under these programs.

Discussion: The statutory provision that established the 85 percent rule, section 481(b)(6) of the HEA, provides that an eligible proprietary institution must have at least 15 percent of its revenues that "are not derived from funds provided under this title," i.e., title IV of the HEA. Section 481(b)(6) does not differentiate between "need-based" title IV, HEA program funds and non-need-based title IV, HEA program funds. However, when determining the amount of title IV, HEA program funds derived from FFEL programs or the Federal Direct Loan Program, the institution should only include loan proceeds disbursed to students. It should not include the face amount of a loan because that amount includes loan origination fees and loan guarantee fees that are not disbursed to students.

Changes: None.

Comment: A number of commenters pointed out problems with the fraction the Secretary proposed to determine whether an institution satisfies the 85 percent rule. The commenters noted that the title IV, HEA program funds in the numerator were reported on an award year basis but the revenues in the denominator were reported on a fiscal year basis. The commenters indicated that when the institution's fiscal year does not coincide with an award year, the computation would not provide reliable results.

In addition, a number of commenters raised concerns that the information reported in the numerator and denominator would be produced under two different methods of accounting. Several auditing organizations noted that the title IV, HEA program funds must be reported in the numerator on a cash basis of accounting (received). They further noted that the revenue figure in the denominator would be verified through the use of a financial statement audit, and in accordance with Generally Accepted Accounting Principles (GAAP), financial statements are prepared on an accrual basis of accounting. The commenters concluded that it does not make sense to compare the amount determined in the numerator with the amount determined in the denominator when each number is determined under a different basis of accounting.

Discussion: The Secretary agrees with the commenters about the deficiencies in the proposed rule and has made the following changes. First, the Secretary agrees that there should be a common reporting period for the numerator and the denominator. The Secretary will not require institutions to change their fiscal year to parallel an award year. Therefore, although the Secretary will be giving up a degree of oversight, the Secretary will allow institutions to use their fiscal year as the reporting period for the numerator as well as the denominator.

Second, since institutions must report and account for title IV, HEA program funds on a cash basis, the institution must also account for revenue in the denominator on a cash basis. Under a cash basis of accounting, the institution reports revenues on the date that the revenues are actually received.

An institution's computation must be verified as part of the institution's title IV, HEA program compliance audit or as part of its financial statement audit. The institution may choose which audit will include the verification.

Changes: Section 600.5 is amended as follows: institutions will report title IV, HEA program funds in the numerator of the fraction set forth in § 600.5(d) on a fiscal year basis and that fiscal year will be the same fiscal year used to report revenues in the denominator of that fraction; institutions will report revenues in the denominator on a cash basis of accounting; and institutional computations will be verified in financial statement audits or title IV, HEA program compliance audits.

Comment: Several commenters suggested that 30 or 60 days after an award year or fiscal year does not provide enough time for an institution to compute its percentage of title IV, HEA program funds because of possible year-end adjustments and because the institution's computation must be verified by the financial audit.

Discussion: The Secretary agrees with the commenters that institutions may need an additional period to take possible year-end adjustments into account. Therefore, the Secretary will allow an institution up to 90 days from the last day of its fiscal year to report that it fails to satisfy the 85 percent rule. However, if an institution determines that it fails to satisfy the 85 percent rule, it will be ineligible as of the last day of that fiscal year; therefore the longer an institution takes to report its ineligibility, the greater its potential

liability for improperly disbursed title IV, HEA program funds.

The Secretary believes that an institution does not need to wait for an audit to determine the percent of its revenue that was derived from title IV, HEA program funds. The institution should be keeping track of these amounts over the course of its fiscal year to avoid becoming ineligible. Moreover, since an institution must now determine its revenues on a cash accounting basis, it is relatively easy for an institution to know its position relative to the 85 percent rule.

Changes: An institution will have 90 days from the last day of its fiscal year to report its ineligibility to the Department of Education under the 85 percent rule.

Comment: A number of commenters suggested that although an institution may give its best efforts to track revenues and keep within the guidelines of the 85 percent rule, the institution will not know positively of the result until its annual audited financial statement is completed. The commenters suggested that given the dire consequences of having title IV, HEA program funds exceed 85 percent of its revenues, and the fact that a great many students could be potentially harmed by such precipitous action, the Secretary should add a provision that allows an institution to voluntarily refund any excess money to bring its percentage in compliance with the 85 percent rule.

Discussion: The purpose of the 85 percent rule is to preclude the participation in the title IV, HEA programs of proprietary institutions of higher education whose overwhelming source of revenue is title IV, HEA program funds. The repayment of title-IV, HEA program funds to the Department of Education is not consistent with that statutory purpose. Moreover, since a refund of title IV, HEA program funds would reduce both the numerator and denominator of the fraction used to determine this rule, any conforming refund would involve a significantly large amount of money.

Changes: None.

Section 600.7 Conditions of Institutional Ineligibility

Comment: As a general rule, an institution may not have 50 percent or more of its students enrolled in correspondence courses and retain its eligibility under the HEA. However, as a result of the Higher Education Technical Amendments of 1993, the Secretary may waive this requirement for an institution that offers a 2-year associate-degree or 4-year bachelor's-degree program for "good cause." In the NPRM, the Secretary solicited comments as to what should be considered "good cause".

One comment was received on this provision. The commenter suggested that a waiver should be granted for "good cause" only if the students attending the institution's correspondence courses received a minimal percent of the title IV, HEA programs at that institution.

Discussion: The Secretary agrees with the commenter's suggestion.

Changes: Section 600. 7(b)(3) has been amended to provide that the Secretary will waive this requirement for an institution that offers a 2-year associate-degree or 4-year bachelor's-degree program if the students enrolled in the institution's correspondence courses receive no more than 5 percent of the title IV, HEA program funds received by students at that institution.

Comment: One commenter suggested that an institution should not permanently lose its eligibility if its current owner or Chief Executive Officer (CEO) has been found guilty of a crime involving title IV, HEA program funds and that owner or CEO disassociates himself or herself from the institution. The commenter also asked for clarification as to what is meant by "judicially determined to have committed fraud."

Discussion: The Secretary believes that if the current owner or CEO of an institution has been found guilty of a crime involving title IV, HEA program funds, that institution should no longer be eligible to participate in the title IV, HEA programs. The phrase "judicially determined to have committed fraud" means that a court of competent jurisdiction has made such a finding.

Changes: None.

Comment: Section 481(a)(3)(D) of the HEA provides that an institution that does not offer an associate or bachelor's degree is not an eligible institution if more than 50 percent of its enrollment consists of students without a high school diploma or its recognized equivalent (ATB students). As a result of an amendment by the Higher Education Technical Amendments of 1993, the Secretary may waive the limitation for nonprofit institutions. However, to receive a waiver, the institution must demonstrate to the satisfaction of the Secretary that it exceeds the limitation because it serves, through contracts with Federal, State, or local government agencies, significant numbers of ATB students.

In the NPRM, the Secretary requested comments regarding the conditions under which the Secretary should grant this waiver. Comments were particularly requested on the purpose of the referenced contracts, what constitutes a "significant" number of ATB students, and the duration of a waiver.

Two commenters suggested that an institution should receive a waiver if the purpose of the referenced contracts is to provide job training for low-income people who are in need of such services.

One commenter suggested that 20 to 25 percent of an institution's enrollment constitutes a significant number, another suggested 40 percent, and yet another suggested 50 percent.

One commenter suggested that a waiver should be issued for a period of one year at a time, renewable on a yearly basis, depending upon graduation and employment rates. A second commenter suggested that a waiver should be issued for the duration of the certification agreement period. A third commenter suggested that the waiver should be issued for the period in which the institution is in good standing with its accrediting agency.

Discussion: For purposes of granting this waiver, the Secretary agrees with the commenters regarding the type of contract that supports a waiver. The Secretary thus agrees that the contracts must provide job training for low-income individuals who are in need of such services. An example of such a contract is a job training contract under the Job Training Partnership Act (JTPA).

Further, to receive a waiver, an institution must demonstrate that its enrollment of ATB students exceeded 50 percent of its total enrollment because it served a substantial number of those students through contracts. That is, the institution must demonstrate cause and effect; it exceeded the statutory limit because it served a significant number of ATB students through contracts.

An institution cannot satisfy this waiver provision simply by demonstrating it served a large number of ATB students under a contract. For example, if an institution's enrollment of ATB students who were not served under contract exceeded 51 percent of its total enrollment, that institution would not satisfy the waiver requirement regardless of the number of additional ATB students it served under contract. Similarly, if an institution's enrollment of ATB students who were not served under contract equaled 50 percent of its total enrollment, so that one additional ATB student would put the institution over the 50 percent limitation, the institution would not satisfy the waiver requirement regardless of the number of additional

ATB students it served under contract. In neither case did the institution's enrollment of ATB students exceed 50 percent of its total enrollment because it served a significant number of ATB students under contract.

In view of the above, the critical factor in whether an institution qualifies for a waiver is the percentage of its enrollment who are ATB students not being served under contract.

An institution is evaluated to determine whether it falls within the limitation set forth in § 600.7(a)(1)(i) on an award-year basis. If the Secretary grants a waiver to an institution under this section, the waiver will extend indefinitely provided that the institution satisfies the waiver requirements in each award year. If an institution fails to satisfy the waiver requirements for an award year, the institution becomes ineligible on June 30 of that award year. (This policy is applicable to all waivers provided for under § 600.7.)

Changes: An institution may receive a waiver if the contracts provide job training for low-income individuals who are in need of such services. An institution may not receive a waiver if its enrollment of ATB students who are not being served under contract exceeds 40 percent of its total enrollment. If the Secretary grants a waiver to an institution under this section, the waiver will extend indefinitely provided that the institution satisfies the waiver requirements in each award year. If an institution fails to satisfy the waiver requirements for an award year, the institution becomes ineligible on June 30 of that award year.

Section 600.9 Written Agreement Between an Eligible Institution and Another Institution or Organization

Comment: One commenter suggested that the provision that requires an eligible institution to give credit to students enrolled in a contracted program on the same basis as if it provided that program itself be modified to make an exception in the case of study abroad programs approved for credit by the eligible institution.

Discussion: The Secretary believes that this rule should apply to all contracted programs, including contracted programs involving study abroad.

Changes: None.

Comment: One commenter noted that this section prevents an eligible institution from entering into an agreement with an ineligible institution if that institution had its eligibility to participate in the title IV, HEA programs terminated by the Secretary. The commenter suggested that this provision be expanded to prevent an eligible institution from entering into an agreement with an ineligible institution that withdrew from participating in the title IV, HEA programs under a show-cause or suspension order issued by the institution's State licensing agency, accrediting agency, guarantor, State Postsecondary Review Entity (SPRE), or the Secretary. On the other hand, another commenter suggested removing this provision entirely since it could eliminate teachout agreements when institutions close and could prevent students from participating in valuable educational programs.

Discussion: The Secretary agrees with the commenter's suggestion that it is inappropriate for an eligible institution to contract with an ineligible institution that had its eligibility to participate in the title IV, HEA programs terminated or that withdrew from participating in the title IV, HEA programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution's State licensing agency, accrediting agency, guarantor, or SPRE, or by the Secretary. Moreover, the Secretary believes that this limitation should also apply to contracts under which the ineligible institution provides 25 percent or less of the eligible institution's program. The Secretary believes that there are a sufficient number of eligible institutions to allow teachouts of students whose institutions closed.

Changes: Section 600.9 is amended to preclude an eligible institution from contracting any portion of its educational program to an ineligible institution that had its participation in the title IV, HEA programs terminated by the Secretary, or that withdrew from that participation under termination, show-cause, suspension, or similar type proceeding initiated by the institution's State licensing agency, accrediting agency, guarantor, or SPRE, or by the Secretary.

Section 600.10 Date, Extent, Duration, and Consequences of Eligibility

Comment: Several commenters suggested that it is unfair to require that certain new educational programs have to be approved by the Secretary as eligible programs before students enrolled in those programs would be eligible to receive title IV, HEA program funds. The commenters felt that this would place an undue burden on the institution and the students the institution is attempting to serve by creating delays in new program implementation.

Discussion: Prior to the issuance of the Institutional Eligibility regulations in April of 1988, it was the Secretary's practice to require institutions to apply to the Department of Education to have any new program designated as an eligible program before students enrolled in that program could receive title IV, HEA program funds. The Secretary changed this practice in the regulation to reduce the burden on institutions and the Department of Education.

Under current regulations, an institution could determine on its own whether a new educational program qualified as an eligible program. However, the institution would be liable for all title IV, HEA program funds it disbursed to students enrolled in a new program if the institution incorrectly determined that the program qualified as an eligible program.

The Secretary has found that this new practice has not worked out. The Secretary has found that when institutions have made incorrect determinations regarding whether a new educational program is an eligible program, the liability associated with that incorrect determination was usually too high to be repaid. Moreover, this practice is inconsistent with the new emphasis on "gatekeeping" as evidenced in Program Integrity Triad legislation, particularly with respect to the certification process.

The Secretary has found that most problems in this area come from an institution offering new, short-term vocational programs. Therefore in the NPRM, the Secretary has not required preapproval for new programs leading to an associate degree or higher, or new vocational programs similar to the ones the institution already provides. The Secretary retains this position in the final rule and believes that this procedure provides a proper balance between the need of institutions to provide title IV, HEA program funds to students enrolled in new programs, and the need to limit abusive practices of certain institutions.

Changes: None.

Section 600.20 Application Procedures

Comment: Several commenters expressed concern about when and how to apply for renewal of eligibility. One commenter believed that institutions should have to apply to have eligibility extended to educational programs.

Discussion: With regard to an institution's eligibility for purposes of the title IV, HEA programs, § 600.10(d)(1) provides that an institution's eligibility designation for the title IV, HEA programs will expire

when the institution's program participation agreement expires. Section 498(g) of the HEA requires the Secretary to establish a schedule for the expiration of those program participation agreements. When this schedule is established, the Secretary will notify each institution well in advance of the scheduled expiration of its program participation agreement of the need to reapply in order to continue its eligibility designation without interruption. Similarly, the Secretary will provide each institution with the necessary information about the forms to use and the date by which the application must be submitted.

Once an institution has undergone a reapproval review, if it is approved, it will receive a program participation agreement with a specific expiration date. Thereafter, it is the institution's responsibility to reapply for approval to continue its eligibility to participate in the title IV, HEA programs beyond the expiration date.

The Secretary has addressed the addition of new educational programs in connection with § 600.10(c).

Changes: None.

Section 600.30 Notification Requirements

Comments: Several commenters noted that institutions would be required to notify the Secretary of certain changes within 10 days of occurrence, but that it was unclear whether such changes would necessitate the filing of a new application and reestablishing eligibility, especially with respect to such changes as changes in boards of directors and percent of ownership interest.

Discussion: Section 600.30 specifies the institutional changes of which the Secretary must be advised. Upon receipt of the notification, the Secretary will advise the institution of any additional information that needs to be provided and whether the institution needs to file an application. Section 600.20 identifies those key circumstances in which an institution is always required to file an application. However, the Secretary retains the authority to request that an institution undergo a reevaluation of institutional eligibility and certification whenever warranted. It should be noted that the new institutional eligibility application will consist of a cover sheet plus separate schedules that deal with the institution's additional locations, educational programs, boards of directors, etc. Thus an institution that has a change in its board of directors or a change in the address of one of its locations may be asked to submit an application, but that application may consist only of the application cover sheet and the appropriate schedule(s).

In summary, §§ 600.20, 600.21, and 600.30 taken together explain what an institution is required to do and when.

Changes: None.

Section 600.31 Change in Ownership Resulting in a Change in Control

Comment: A commenter expressed the view that the statute did not require that divisions, mergers or consolidations of public or private non-profit institutions be treated as changes of ownership under section 498(i) of the HEA and objected to their inclusion in the requirements of this section of the regulation. The basis for the comment is the list of examples in section 498(e) of the HEA of an "ownership interest." The commenter noted that these examples are not typical of the ownership of public or non-profit entities.

Discussion: The Secretary disagrees with the commenter. As indicated in section 498(e) of the HEA, the list of examples provided is not exclusive, and the examples of change of ownership and control included in section 498(i) of the HEA include transactions that public and non-profit institutions undergo, such as sales, mergers, and divisions. Therefore, such changes of ownership and control are covered by § 600.31 and could cause the eligibility of those institutions to lapse.

With regard to changes of ownership of non-profit institutions, where the non-profit institution is incorporated as a stock corporation, the same bright lines used to identify changes of ownership constituting changes of control for other stock corporations will apply. For non-profit institutions organized as member corporations, the corresponding interest is the membership interest, and those rules should apply in the same way to changes in the membership of the non-profit institutions. Changes of ownership and control also occur with regard to institutions that are owned by non-profit corporations; changes in the persons or individuals who by virtue of their membership in the non-profit corporation own the institution can result in a change of ownership and control of that institution. The bright lines that identify changes of ownership and control of other corporations apply to changes in the membership of non-profit corporations as well.

In connection with any change of ownership, whether a transfer of the assets and educational enterprise of an institution to another institution is a change within this section, or is subject to § 600.32 turns on whether the institution continues to function as a separate educational enterprise after the transfer. If the entity that acquires the institution continues the operation of that institution not as a separate institution but as part of another institution, the transaction would be considered an acquisition of an additional location and would be subject to § 600.32.

Changes: None.

Comment: Commenters expressed apprehension about how the change of ownership rules affect sales in which the parties make the sale conditional upon securing the Department's certification for the institution under the new ownership. Commenters believed that the proposal that the Department would not review the school under the new ownership until the sale has been completed would tend to foster undesirable disruption of title IV, HEA program funding and pose a threat to continued training of students enrolled at the time of the sale. Commenters urged adoption of a procedure in which the Department would review a proposed transfer of ownership before the consummation of the sale, so that the sale could be aborted if certification were denied. A commenter suggested consideration of a preapproval procedure described as used by other agencies in which the Department would review a proposed sale, and, if the institution under the new ownership would qualify for certification, offer the certification on the condition that the sale be fully consummated promptly.

Discussion: The Secretary recognizes the importance of reducing possible interruption in funding to the extent consistent with the conduct of a responsible review of the financial and administrative capability of the school under new ownership.

The Department currently reviews only transfers that have taken effect, and thereby have caused the eligibility and certification of the institution to lapse, even if the transfer is subject to a condition *subsequent*, such as obtaining the Department's approval and certification. The Department has taken this position because it ensures that the parties submit only transfers under which the purchaser has conducted the requisite due diligence to ensure that approval and certification will be granted. The Secretary believes this position is fair because the regulations state fully the standards under which the qualifications of the school for certification will be measured, and because virtually all the information on which approval of the institution under new ownership depends is fully

available to, and in many instances derived directly from, the institution.

The Secretary sees no reason why a purchaser should not be able and expected to have made a fully informed decision to purchase before submitting the application for certification. Unfortunately, in the past, purchasers have often engaged in wholly inadequate due diligence, given scant professional attention to the requirements for participation in the student assistance programs, and presented seriously deficient applications for approval. These deficiencies unnecessarily consume Department review resources and needlessly delay approval decisions for the institution. Lack of competent due diligence also results in other purchasers purporting to be unaware of problems with the qualifications of the institution they have purchased that are serious enough to make Department approval impossible. The Secretary's procedure for review of change of ownership applications will foster responsible and effective due diligence by the purchaser.

Changes: The regulation provides that the Secretary will review an application filed with respect to a transfer that is subject to any contingency, provided that the sale was otherwise completed. A transfer that is otherwise final is considered completed even if the seller retains a security interest in the institution or its assets to assure satisfaction of payment of the purchase price.

Comment: Several commenters believed that a transfer of ownership to a person who had been engaged in management of the school should not be considered a change within the meaning of section 498(i) of the HEA. Others urged excluding transfers of ownership interests among current shareholders, particularly if the institution was owned by a close corporation and the shareholders had held those interests for several years or the shareholder acquiring the controlling interest had been engaged in managing of that institution. Other commenters urged that transfers of controlling ownership interests from the owner upon retirement to a shareholder currently involved in management of the school be excluded from changes in ownership within the meaning of section 498(i) of the HEA.

Discussion: Section 498(i) of the HEA requires an institution to reestablish its educational credentials and its administrative and financial capability after a change of ownership and control. Transfers of ownership commonly take place between those holding the controlling interest in the institution and individuals who have been managing the institution. While there may often be a continuity of management and administration through such transfers of ownership, the financial capability of the institution after the current managers assume controlling ownership interests may be dramatically different than under the prior owner, particularly where the transaction is structured as an asset sale rather than a stock transaction. The fact that the new owner already had an ownership interest, or was involved in management of the institution, or both, does not provide assurance that scrutiny can responsibly be waived for those reasons.

Section 498(i)(3) of the HEA does provide that the transfer of the interest of an owner upon his or her death to a family member or to a current owner *may* be excluded from its purview. This exclusion would apply readily to the kind of unexpected transfers of control that would occur of necessity upon the death of an actively-managing principal of an institution owned by a closely-held corporation. However, the rationale for deferring to this humanitarian objective of facilitating a smooth transition in this narrow circumstance does not support waiving otherwise-mandated scrutiny in a broader range of transfers involving corporations that are not closely held, or planned transfers to those who have neither an ownership interest nor any managerial involvement in the institution. The Secretary considers it prudent to limit the waiver at this time only to those transfers of the interest of a deceased or retiring owner either to one who is a current manager and owner of the institution or to an immediate family member, and to evaluate the consequences of this kind of waiver, before considering further waivers.

Changes: The regulation is changed to adopt the same description of the family of the owner as that used in § 600.31(f).

Comment: Most commenters welcomed the adoption of bright-line tests for identifying changes of ownership and control, and the use of the acquisition or relinquishment of a 50 percent interest in the institution or its owner was generally agreed as a suitable line. Some commenters stressed the importance of looking to control rather than simply percentage of ownership interest, and urged that a transfer of ownership interest between active and passive investors be disregarded if the transfer did not change the control of the institution.

Discussion: In proposing that the term "control" as used in section 498(i) of the HEA and current regulations be interpreted with reference to SEC regulations, 17 CFR part 230.405, the Secretary intended to recognize that "the power to direct or cause the direction of the management and policies, whether through the ownership of voting securities, by contract, or otherwise," included the power held by a managing partner or active investor to effectively direct the decisions and policies of the partnership or corporation. Therefore, the intent and effect of the proposed rule was to recognize that a transfer of an ownership interest to one who holds some ownership interest and who already had the power to direct the management of the entity does not constitute a change of ownership resulting in a change in control. Such transfers do not fall within the purview of this section.

Although there appeared to be general support for adoption of the 50 percent standard for identifying the possession of ownership and control of a closely-held corporation, the manner in which this was described suggested some need to reaffirm how the test would actually apply.

In interpreting section 498(i) of the HEA, which does not itself define change of ownership resulting in a change in control, but gives as examples of such changes a list taken almost verbatim from Department regulations in effect for many years, the Secretary considers Congress to have intended that the mandate of section 498(i) of the HEA be applied in situations that would have triggered changes under the Department's regulations. Like the SEC definition of control, with which businessmen and practitioners can be expected to be already thoroughly familiar, both the proposed rule and current Department regulations focus on the acquisition—through "any action"—of "new authority to control the actions of the institution" by one with a legal or beneficial ownership interest in the entity. A person may already have acquired an ownership interest and then acquire such new authority, or may in a single transaction acquire both an ownership interest and control. In either case, the transaction changes the control group for that institution to a degree that warrants the scrutiny mandated in section 498(i) of the HEA. Actions by which a person who has no legal or beneficial ownership interest gains or loses "control" are not changes of ownership and control within the meaning of the regulation unless the person acquires an ownership interest in that action.

Therefore, the 50-percent test is simply meant to identify those situations in which a person becomes owner or controller of the majority of the voting stock of a closely-held corporation. Conversely, the power to direct the management and decisions of the corporation can reasonably be presumed to change, and therefore to warrant scrutiny of the continued capability of the institution, when a person who held control of the majority of the stock loses that control, even if no other single person thereby gains that control. The test is met therefore when a person with an ownership interest in any amount acquires control of 50 percent of the outstanding voting stock of the corporation, or when a person who has an ownership interest and control of 50 percent of the voting stock relinquishes that degree of control. Very small changes in ownership and/or control can be enough to change control. To control a closely-held corporation, a person who already holds an ownership interest need not acquire an additional 50 percent share in order to control the corporation; a shareholder with ownership or control of 49 percent of the voting stock need only acquire either ownership or control of another percent of that stock to achieve at very least equal power with any other person, and by acquiring an added two percent, would hold greater power than any other person to direct the management and policies of the corporation. Relinquishing those minor shares of control results in the person having less than control of a majority of the voting stock of the corporation, and causes a change of ownership and control of the corporation.

Changes: The regulation is modified to state that a change of ownership and control of a closely-held corporation occurs when a person who holds or acquires a legal or beneficial ownership interest in that corporation acquires or relinquishes control of 50 percent or more of the total outstanding voting stock of the corporation.

Comments: Commenters generally agreed that for those corporations whose stock is registered with the SEC, using the events that would constitute a change of control of the corporation so as to trigger an obligation to file an SEC Form 8–K would be a suitable bright line for identifying changes of ownership and control within the meaning of section 498(i) of the HEA for institutions owned by those corporations. Commenters differed in their reactions to the proposal to adopt a 25 percent ownership interest with actual control as the test for corporations that are neither closely held nor registrants with the SEC. Still others thought that the 25 percent test should be used even for SEC registered corporations. Other commenters believed that the 50 percent test applied to closely-held corporations should be used for all others as well.

Discussion: As noted earlier and as apparent from a number of the comments, SEC registrants already have an obligation, with which they are presumably comfortable and familiar, to notify the SEC when management identifies a change of control, which presumably is invariably accompanied by, or presupposes, the acquisition of an ownership interest. Because of this obvious familiarity of the affected parties, the relative similarities of the objectives of the two rules, and the difficulty in creating any new bright line that would be meaningful in this area, adopting the SEC test makes good sense for publicly-traded corporations.

For corporations that are neither closely held nor publicly traded, creating a bright line is difficult, and it is desirable therefore to use, to the extent practical, regulatory standards that have already applied to this category of institutions. As the Secretary noted in proposing the rule, Department regulations have recognized that a person who holds or acquires the power to vote a 25 percent ownership interest may reasonably be presumed to have the ability to "affect substantially the actions of the institution." (See 34 CFR part 668.13(c)(5)(i), [or, in the words of the proposed § 668.15(c)(1), (f)(2), to "exercise substantial control over an institution." February 28, 1994, 59 FR 9568–69].) "Substantial" control may differ from control, and the presumptions in that section are warranted for persons with records of misfeasance with title IV, HEA program funds, but may not warrant the disruption of mandated scrutiny for transfers of ownership and control involving other persons. Because of the wide variety of circumstances and institutions that may be neither closely held nor publicly traded, the use of this same bright line where it is also accompanied by real control—judged by the facts of the particular case—seems a fair test that should be consistent with, and build on, current standards. Acquisition of a 25 percent ownership interest, or the right to vote such an interest, with actual control, constitutes a change within the meaning of section 498(i) of the HEA for these corporations. Holding or acquiring such an ownership share would not constitute a change of control if another person nevertheless had the power to control the corporation.

Changes: The regulation treats the change of control of a registrant with the SEC as a change of ownership and control within the meaning of section 498(i) of the HEA. For other corporations not closely held, the regulation treats as a change of ownership and control any action by which a person who has or thereby acquires a legal or beneficial ownership interest in that corporation obtains both ownership of 25 percent of the voting stock of the corporation, or the right under a proxy, power of attorney, or similar agreement to vote that share, and actual control. Conversely, relinquishing that control would also constitute a change within the meaning of this section.

Comment: Some commenters believe that a change from a for-profit to a nonprofit status should not be considered a change of ownership and control within the meaning of section 498(i) of the HEA at all; others thought that so long as management remained the same, or the facility, staff, and management remained the same, that the regulations should not treat changes in tax-filing status as significant under section 498(i) of the HEA. Other commenters felt strongly that a change from for-profit to nonprofit status should be considered a change of ownership and control within the scope of this section, and noted the various changes already made in the Higher Education Amendments of 1992, and in particular those proposed in regulations, that were designed to prevent program weaknesses and abuse among for-profit institutions. The commenter stated that these measures would readily be frustrated by unscrutinized conversion to nonprofit status, and would be contrary to the objectives of increasing protection for students and the public. The commenter believed that there was little reason to expect that the institution would improve its financial strength by such a conversion, and that it may in fact have increased its liabilities in the process, yet under the proposed financial responsibility standards, the school upon conversion would claim the benefit of a more lenient financial responsibility test than that which it would have faced had it remained a for-profit entity.

Discussion: The Secretary recognizes that institutions that change from for-profit to nonprofit status may well retain the very same faculty, management, programs and facilities. The very fact that the institution retains these characteristics through the conversion, however, points out the logic of ensuring that section 498(i) of the HEA be applied to these conversions

in a way that is consistent with congressional intent to impose a range of precautions and restrictions on for-profit vocational schools.

Based on the strong congressional intent evidenced in these statutory changes to restrict title IV, HEA program participation by proprietary trade schools, the Secretary considers it reasonable to treat changes in business form by such institutions to a status to which those restrictions do not necessarily apply as significant changes warranting the same scrutiny section 498(i) of the HEA dictates for other, perhaps far less consequential changes in governance by schools. Moreover, a change from taxable to nonprofit, tax-exempt status contains sufficient elements of a change in ownership and control to fall within the scope of section 498(i) of the HEA. Although changes in the form of incorporation from for-profit to nonprofit are governed by a variety of State laws, only those nonprofit organizations that meet the further restrictions of section 501(c)(3) of the Internal Revenue Code qualify to participate in the title IV, HEA programs as nonprofit institutions. (See 34 CFR 600.2 and 600.6(a).) To so qualify, a corporation must not merely ensure that its net earnings do not benefit private individuals, but that, unlike a general corporation that may engage in any lawful business, this nonprofit institution must be organized and operated exclusively for educational or other qualifying purposes. Furthermore, unlike other corporations, including those nonprofit institutions that are not tax-exempt, the incorporators or shareholders must forego any residual claim to a distribution of corporate assets upon dissolution of the corporation. Acceptance of these restrictions include relinquishment both of ownership rights and the independence in choice of business objectives and method of operation formerly enjoyed.

Therefore, although a corporation may affect the change in form from taxable to tax-exempt, nonprofit status with little formality, and may not be required, under local law, to reconstitute itself as a new or different corporation, these consequences of the change make it a change cognizable under section 498(i) of the HEA.

The Secretary is charged by section 498(h)(1)(B)(ii) of the HEA with provisionally certifying institutions that undergo a change of ownership and control. Provisional certification means, as the Department has spelled out in proposed § 668.13(c)(4)(ii), 59 FR 9564, certification subject to conditions, and the change from for-profit to nonprofit status warrants adopting as those conditions of the required provisional certification those restrictions that would have applied to the institution had it remained a for-profit entity. The Secretary therefore expects to include such provisions for a limited period in certifications given to converting schools.

Changes: The regulation clarifies that a change from a taxable to a tax-exempt entity that qualifies under 501(c)(3) of the Internal Revenue Code, or vice versa, constitutes a change of ownership and control under this section of the regulations.

Section 600.32 Eligibility of Additional Locations

Comments: Nine commenters expressed concern that the provisions governing the acquisition of an institution that owes a liability on improperly expended or unspent title IV, HEA program funds would discourage the practice of "teaching out." A commenter suggested that the Secretary should not apply the "two-year rule" to the acquisition of an institution owing a liability on title-IV, HEA program funds, even if the liability is not being paid properly. Another commenter suggested that the Secretary make clear that the eligibility of additional locations under this section is also subject to the provisions of §§ 600.8 (concerning the treatment of branch campuses) and 600.10 (which contains provisions governing the date, extent, duration, and consequences of the eligibility of an institution with respect to the institution's locations).

Discussion: The Secretary does not agree with the first two commenters for the same reasons that were given by the Secretary when this provision was originally published as a final regulation in the **Federal Register** of July 31, 1991. (See 56 FR 36685.) In the three years since the implementation of those regulations, the Secretary has seen no evidence that the provisions discourage "teach-outs" to students, or that the application of the "two-year rule" has not served its purpose. The Secretary agrees with the last commenter that clarification is necessary with regard to the relationship of this section to §§ 600.8 and 600.10.

Changes: This section has been revised to make clear that the provisions of §§ 600.8 and 600.10 also apply to the eligibility of additional locations.

Section 600.40 Loss of Eligibility

Comments: A number of commenters suggested that to avoid an institution's sudden closure and the consequent interruption of the education of currently enrolled students, there should be some provision for those students to receive aid to complete their educational program even after the institution has lost its eligibility.

Discussion: Under § 668.25 of the current Student Assistance General Provisions regulations, and proposed 34 CFR 668.26 (see 59 FR pages 9580–9581) that will go into effect on July 1, 1994, provisions have been made to pay title IV, HEA program funds to students enrolled in institutions that are terminated. Under those sections, if termination became effective during a payment period and a student had received a commitment to receive title-IV, HEA Program funds for that payment period before the effective date of termination, the student would receive those funds for that payment period as long as the institution continued to provide instruction to the student during that payment period.

Changes: None.

Comments: Several commenters suggested that the end of the applicable award or fiscal year should not be used as the effective date for loss of eligibility as a result of a violation of the requirement to derive more than 85 percent of an institution's revenues from title IV, HEA program funds. They pointed out that the loss of eligibility has the effect of causing an institution to be liable for any title IV, HEA program funds disbursed or delivered after that date but before a compliance audit substantiating the institution's calculations is performed. These commenters suggested that institutions not be held liable for any such disbursements or deliveries of those funds made before the date on which calculations are audited.

Discussion: These comments have been addressed in connection with § 600.5.

Changes: None.

Section 600.41 Termination and Emergency Action Proceedings

Comments: Three commenters supported the Secretary's proposed position in this section to use a show-cause proceeding for terminations of institutional eligibility only in instances where neither the facts nor the law would be in dispute during the proceeding. Two commenters objected to the use of a show-cause proceeding (in place of a proceeding under 34 CFR part 668, subpart G) for terminations of institutional eligibility for a violation under §§ 600.5(a)(8) or 600.7(a), claiming that violations of these provisions could involve questions of fact that are in dispute. A commenter also objected to the use of a show-cause

proceeding (in place of a proceeding under 34 CFR part 668, subpart G) for terminations for loss of accreditation, preaccreditation, or State legal authorization. One commenter suggested that the Secretary always use a proceeding under 34 CFR part 668, subpart G, for violations of provisions in part 600. One commenter suggested that the Secretary always use a show-cause proceeding, rather than a proceeding under 34 CFR part 668, subpart G, for terminations of institutional eligibility.

Discussion: The Secretary reiterates that because an institution itself reports that it is not in compliance with the applicable eligibility requirements of §§ 600.5 or 600.7, there is no question of fact in dispute in a termination action taken on those grounds. The Secretary continues to believe that a termination proceeding under 34 CFR part 668, subpart G, is neither necessary nor cost effective when facts are not in dispute. The Secretary agrees, however, that it is appropriate to use the provisions of 34 CFR part 668, subpart G, when the Secretary undertakes to terminate an institution's eligibility when the facts giving rise to that termination are in dispute. However, even with regard to these institutions, the Secretary may take an emergency action against such an institution if that action is considered warranted, and if the institution challenges the emergency action, that dispute is heard in a show-cause proceeding.

Changes: None.

Regulatory Flexibility Act Certification

Comment: In the NPRM, the Secretary certified that the proposed regulations would not have a significant economic impact on a substantial number of small entities. Several commenters suggested that this statement was erroneous and that these rules will definitely have a significant impact on institutions, especially the smaller ones that are not computerized.

Discussion: The Secretary recognizes that the regulations will have an impact on small institutions. However, based on Department estimates of the impact, the Secretary does not believe that the impact will be disproportionately or economically significant. The Secretary therefore reaffirms his certification that the regulations would not have a significant economic impact or a substantial significant economic impact on a substantial number of small entities. To the extent that commenters are able to provide additional information on the economic impact of the regulations, the Secretary invites the commenters to submit this information so that it may be considered in reviewing the regulations to reduce regulatory burden.

Changes: None.

Paperwork Reduction Act of 1980

Comment: In the NPRM, the Secretary provided an estimate for the total number of burden hours associated with these regulations. Several commenters suggested that this estimate was understated.

Discussion: In estimating the total number of burden hours associated with these regulations, the Secretary considers the best information that is available to the Department and computes the estimate based on that information. The commenters have complained about the burden but have not provided sufficient additional information to support a revised computation of burden hours. The Secretary appreciates the comments and recognizes that the requirements of the statute and regulations impose a burden. As a result of the comments and revisions to the regulations, the Department is modifying the burden estimates. The total annual reporting and recordkeeping burden that would result from the collection of the information is 20,375 burden hours for this package.

Changes: None.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently. Burdens specifically associated with information collection requirements were identified and explained in the NPRM.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal government in the exercise of their governmental functions.

Paperwork Reduction Act of 1980

Sections 600.5, 600.7, 600.10, 600.20, 600.30, and 600.31, contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h)).

These regulations contain records that will affect postsecondary institutions that wish to participate in the title IV, HEA programs. An estimate of the total annual reporting and recordkeeping burden that will result from the collection of the information is 1.96 hours per response for 10,720 respondents for a total burden of 21,035 burden hours for this package.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. Comments on this burden estimate should be submitted by May 31, 1994.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 600

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

(Catalog of Federal Domestic Assistance Number does not apply)

Dated: April 20, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends part 600 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. 1088, 1091, 1094, 1099b, 1099c, and 1141, unless otherwise noted.

2. Subparts A through D of part 600 are revised to read as follows:

Subpart A—General

Sec.
600.1 Scope.
600.2 Definitions.
600.3 [Reserved].
600.4 Institution of higher education.
600.5 Proprietary institution of higher education.
600.6 Postsecondary vocational institution.
600.7 Conditions of institutional ineligibility.
600.8 Treatment of a branch campus.
600.9 Written agreement between an eligible institution and another institution or organization.
600.10 Date, extent, duration, and consequence of eligibility.
600.11 Special rules regarding institutional accreditation or preaccreditation.

Subpart B—Procedures for Establishing Eligibility

600.20 Application procedures.
600.21 Eligibility notification.

Subpart C—Maintaining Eligibility

600.30 Institutional notification requirements.
600.31 Change in ownership resulting in a change of control.
600.32 Eligibility of additional locations.

Subpart D—Loss of Eligibility

600.40 Loss of eligibility.
600.41 Termination and emergency action proceedings.

Subpart A—General

§ 600.1 Scope.

This part establishes the rules and procedures that the Secretary uses to determine whether an educational institution qualifies in whole or in part as an eligible institution of higher education under the Higher Education Act of 1965, as amended (HEA). An eligible institution of higher education may apply to participate in programs authorized by the HEA (HEA programs).

(Authority: 20 U.S.C. 1088, 1094, 1099b, 1099c, and 1141)

§ 600.2 Definitions.

The following definitions apply to terms used in this part:

Accredited: The status of public recognition that a nationally recognized accrediting agency grants to an institution or educational program that meets the agency's established requirements.

Award year: The period of time from July 1 of one year through June 30 of the following year.

Branch Campus: A location of an institution that is geographically apart and independent of the main campus of the institution. The Secretary considers a location of an institution to be independent of the main campus if the location—

(1) Is permanent in nature;

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

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

(4) Has its own budgetary and hiring authority.

Clock hour: A period of time consisting of—

(1) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;

(2) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period; or

(3) Sixty minutes of preparation in a correspondence course.

Correspondence course: (1) A "home study" course provided by an institution under which the institution provides instructional materials, including examinations on the materials, to students who are not physically attending classes at the institution. When students complete a portion of the instructional materials, the students take the examinations that relate to that portion of the materials, and return the examinations to the institution for grading.

(2) A home study course that provides instruction in whole or in part through the use of video cassettes or video discs in an award year is a correspondence course unless the institution also delivers the instruction on the cassette or disc to students physically attending classes at the institution during the same award year.

(3) A course at an institution that may otherwise satisfy the definition of a "telecommunications course" is a correspondence course if the sum of telecommunications and other correspondence courses offered by that institution equals or exceeds 50 percent of the total courses offered at that institution.

(4) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

Educational program: A legally authorized postsecondary program of organized instruction or study that leads to an academic, professional, or vocational degree, or certificate, or other recognized educational credential. However, the Secretary does not consider that an institution provides an educational program if the institution does not provide instruction itself (including a course of independent study), but merely gives credit for one or more of the following: instruction provided by other institutions or schools; examinations provided by agencies or organizations; or other accomplishments such as "life experience."

Eligible institution: An institution that—

(1) Qualifies as—

(i) An institution of higher education, as defined in § 600.4;

(ii) A proprietary institution of higher education, as defined in § 600.5; or

(iii) A postsecondary vocational institution, as defined in § 600.6; and

(2) Meets all the other applicable provisions of this part.

Federal Family Education Loan (FFEL) programs: The loan programs (formerly called the Guaranteed Student Loan (GSL) programs) authorized by title IV–B of the HEA, including the Federal Stafford Loan, Federal PLUS, Federal Supplemental Loans for Students (Federal SLS), and Federal Consolidation Loan programs, in which lenders use their own funds to make loans to enable students or their parents to pay the costs of the students' attendance at eligible institutions. The Federal Stafford Loan, Federal PLUS, Federal SLS, and Federal Consolidation Loan programs are defined in 34 CFR part 668.

Incarcerated student: A student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, or other similar correctional institution. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends.

Legally authorized: The legal status granted to an institution through a charter, license, or other written document issued by the appropriate agency or official of the State in which the institution is physically located.

Nationally recognized accrediting agency: An agency or association that the Secretary recognizes as a reliable authority to determine the quality of education or training offered by an institution or a program offered by an institution. The Secretary recognizes these agencies and associations under the provisions of 34 CFR part 602 and publishes a list of the recognized agencies in the **Federal Register**.

Nonprofit institution: An institution that—

(1) Is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

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

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

One-academic-year training program: An educational program that is at least one academic year as defined under 34 CFR 668.2.

Preaccredited: A status that a nationally recognized accrediting agency, recognized by the Secretary to grant that status, has accorded an unaccredited public or private nonprofit institution that is progressing toward accreditation within a reasonable period of time.

Recognized equivalent of a high school diploma: The following are the equivalent of a high school diploma—

(1) A General Education Development Certificate (GED);

(2) A State certificate received by a student after the student has passed a State-authorized examination that the State recognizes as the equivalent of a high school diploma;

(3) An academic transcript of a student who has successfully completed at least a two-year program that is acceptable for full credit toward a bachelor's degree; or

(4) For a person who is seeking enrollment in an educational program that leads to at least an associate degree or its equivalent and who has not completed high school but who excelled academically in high school, documentation that the student excelled academically in high school and has met the formalized, written policies of the institution for admitting such students.

Recognized occupation: An occupation that is—

(1) Listed in an "occupational division" of the latest edition of the *Dictionary of Occupational Titles*, published by the U.S. Department of Labor; or

(2) Determined by the Secretary in consultation with the Secretary of Labor to be a recognized occupation.

Regular student: A person who is enrolled or accepted for enrollment at an institution for the purpose of obtaining a degree, certificate, or other recognized educational credential offered by that institution.

Secretary: The Secretary of the Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

State: A State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Telecommunications course: A course offered in an award year principally through the use of television, audio, or computer transmission, including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, computer conferencing, or video cassettes or discs. The term does not include a course that is delivered using video cassettes or disc recordings unless that course is delivered to students physically attending classes at an institution providing the course during the same award year. If the course does not qualify as a telecommunications course it is considered to be a correspondence course, as provided for in paragraph (c) of the definition of correspondence course in this section.

Title IV, HEA program: Any of the student financial assistance programs listed in 34 CFR 668.1(c).

(Authority: 20 U.S.C. 1071 *et seq.*, 1078–2, 1088, 1099b, 1099c, and 1141 and 26 U.S.C. 501(c).)

§ 600.3 [Reserved]

§ 600.4 Institution of higher education.

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

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

(2) Admits as regular students only persons who—

(i) Have a high school diploma;

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

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

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

(4) Provides an educational program—

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

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

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

(5) Is—

(i) Accredited or preaccredited; or

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

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

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

(Authority: 20 U.S.C. 1094, 1099b, and 1141(a))

§ 600.5 Proprietary institution of higher education.

(a) A proprietary institution of higher education is an educational institution that—

(1) Is not a public or private nonprofit educational institution;

(2) Is in a State;

(3) Admits as regular students only persons who—

(i) Have a high school diploma;

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

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

(4) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located;

(5) Provides an eligible program of training, as defined in 34 CFR 668.8, to prepare students for gainful employment in a recognized occupation;

(6) Is accredited;

(7) Has been in existence for at least two years; and

(8) Has no more than 85 percent of its revenues derived from title IV, HEA program funds, as determined under paragraph (d) of this section.

(b)(1) The Secretary considers an institution to have been in existence for two years only if—

(i) The institution has been legally authorized to provide, and has provided, a continuous educational program to prepare students for gainful employment in a recognized occupation during the 24 months preceding the date of its eligibility application; and

(ii) The educational program that the institution provides on the date of its eligibility application is substantially the same in length and subject matter as the program that the institution

provided during the 24 months preceding the date of its eligibility application.

(2)(i) The Secretary considers an institution to have provided a continuous educational program during the 24 months preceding the date of its eligibility application even if the institution did not provide that program during normal vacation periods, or periods when the institution temporarily closed due to a natural disaster that directly affected the institution or the institution's students.

(ii) The Secretary considers an institution to have satisfied the provisions of paragraph (b)(1)(ii) of this section if the institution substantially changed the subject matter of the educational program it provided during that 24-month period because of new technology or the requirements of other Federal agencies.

(3) In determining whether an applicant institution satisfies the requirement contained in paragraph (b)(1) of this section, the Secretary—

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

(ii) Except as provided in paragraph (b)(3)(i) of this section, does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school.

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

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

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

(2) Under the fraction contained in paragraph (d)(1) of this section—

(i) Except as provided in paragraph (h) of this section, the title IV, HEA program funds included in the numerator and the revenue included in the denominator are the amount of title IV, HEA program funds and revenues received by the institution during the institution's last complete fiscal year;

(ii) The title IV, HEA program funds included in the numerator do not include State Student Incentive Grant (SSIG) or Federal Work-Study (FWS) program funds. (The SSIG and FWS programs are defined in 34 CFR 668.2);

(iii) The title IV, HEA program funds included the numerator and revenue included the denominator do not include any refunds paid to or on behalf of students under the institution's refund policy;

(iv) The amount charged for books, supplies, and equipment is not included in the numerator or the denominator unless the amount is included in tuition, fees, or other institutional charges;

(v) With regard to the numerator, any title IV, HEA program funds disbursed or delivered to or on behalf of a student shall be presumed to be used to pay the student's tuition, fees, or other institutional charges, regardless of whether the institution credits those funds to the student's account or pays those funds directly to the student, except for tuition, fees, and other institutional charges that were satisfied by—

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

(B) Funds provided under a contractual arrangement described in § 600.7(d); and

(vi) With regard to the denominator, revenue generated by the institution from other activities conducted by the institution that are necessary for its students' education or training includes only revenue for those activities that—

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

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

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

(e)(1) An institution shall substantiate the calculation required in paragraph (a)(8) of this section by having the certified public accountant who prepares its audited financial statement under 34 CFR 668.15 or its title IV, HEA program compliance audit under 34 CFR 668.23 report on the accuracy of the institution's calculation based on performing an agreed-upon procedures attestation engagement in accordance with the American Institute of Certified Public Accountants (AICPA's) Statement on Standards for Attestation Engagements, and include that report as part of the audit report.

(2) If the certified public accountant cannot attest to the accuracy of the institution's calculations, the Secretary presumes that the institution does not satisfy the 85 percent rule and therefore does not satisfy the requirement contained in paragraph (a)(8) of this section.

(3) The institution may rebut this presumption if, no later than 30 days after the date on which the audit report that includes the attestation engagement report was submitted, the institution submits a calculation to the Secretary indicating that it satisfies the provisions of paragraph (a)(8) of this section, and the certified public accountant who could not attest to the accuracy of its previous calculation, attests to the accuracy of those calculations.

(f) Except as provided in paragraph (h) of this section, an institution shall notify the Secretary if it fails to satisfy the requirement contained in paragraph (a)(8) of this section within 90 days following the end of the fiscal year used in paragraph (d)(1) of this section.

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

(h) Special provisions for the 1994–95 award year. As of July 1, 1994:

(1) If an institution's latest complete fiscal year ended during the period of October 1, 1993 through June 30, 1994, an institution shall use that fiscal year in paragraph (d)(1) of this section to determine whether the institution satisfies the requirement contained in paragraph (a)(8) of this section.

(2) If an institution's latest complete fiscal year ended before October 1, 1993, the institution shall use as its latest fiscal year in paragraph (d)(1) of this section the fiscal year that ends between July 1, 1994 and September 30, 1994 to determine whether the institution satisfies the requirement contained in paragraph (a)(8) of this section.

(3) If an institution uses the fiscal year described in paragraph (h)(1) of this section as its latest fiscal year under paragraph (d)(1) of this section, the institution shall notify the Secretary by September 30, 1994 if it fails to satisfy the requirement contained in paragraph (a)(8) of this section.

(4) If an institution uses the fiscal year described in paragraph (h)(2) of this section as its latest fiscal year under paragraph (d)(1) of this section, the institution shall notify the Secretary if it fails to satisfy the requirement contained in paragraph (a)(8) of this section within 90 days following the end of that fiscal year.

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

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

§ 600.6 Postsecondary vocational institution.

(a) A postsecondary vocational institution is a public or private nonprofit educational institution that—

(1) Is in a State;

(2) Admits as regular students only persons who—

(i) Have a high school diploma;

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

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

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

(4) Provides an eligible program of training, as defined in 34 CFR 668.8, to prepare students for gainful employment in a recognized occupation;

(5) Is—

(i) Accredited or preaccredited; or

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

(6) Has been in existence for at least two years.

(b)(1) The Secretary considers an institution to have been in existence for two years only if—

(i) The institution has been legally authorized to provide, and has provided, a continuous education or training program to prepare students for gainful employment in a recognized occupation during the 24 months preceding the date of its eligibility application; and

(ii) The education or training program it provides on the date of its eligibility application is substantially the same in length and subject matter as the program it provided during the 24 months preceding the date of its eligibility application.

(2)(i) The Secretary considers an institution to have provided a continuous education or training program during the 24 months preceding the date of its eligibility application even if the institution did not provide that program during normal vacation periods, or periods when the institution temporarily closed due to a natural disaster that affected the institution or the institution's students.

(ii) The Secretary considers an institution to have satisfied the provisions of paragraph (b)(1)(ii) of this section if the institution substantially changed the subject matter of the educational program it provided during that 24-month period because of new technology or the requirements of other Federal agencies.

(3) In determining whether an applicant institution satisfies the requirement contained in paragraph (b)(1) of this section, the Secretary—

(i) Counts any period during which the applicant institution qualified as an eligible institution of higher education;

(ii) Counts any period during which the applicant institution was part of another eligible institution of higher education, provided that the applicant institution continues to be part of an eligible institution of higher education;

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

(iv) Except as provided in paragraph (b)(3)(iii) of this section, does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education or postsecondary vocational institution.

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

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

(Authority: 20 U.S.C. 1088 and 1094(c)(3))

§ 600.7 Conditions of institutional ineligibility.

(a) *General rule.* For purposes of title IV of the HEA, an educational institution that otherwise satisfies the requirements contained in §§ 600.4, 600.5, or 600.6 nevertheless does not qualify as an eligible institution under this part—

(1) If for its latest complete award year—

(i) More than 50 percent of the institution's courses were correspondence courses as calculated under paragraph (b) of this section;

(ii) Fifty percent or more of the institution's regular enrolled students were enrolled in correspondence courses;

(iii) Twenty-five percent or more of the institution's regular enrolled students were incarcerated;

(iv) Fifty percent or more of its regular enrolled students had neither a high school diploma nor the recognized equivalent of a high school diploma, and the institution does provide a four-year or two-year educational program for which it awards a bachelor's degree or associate degree, respectively;

(2) The institution, or an affiliate of the institution that has the power, by contract or ownership interest, to direct or cause the direction of the management or policies of the institution, files for bankruptcy; or

(3) The institution, its owner, or its chief executive officer—

(i) Has pled guilty to, has pled *nolo contendere* to, or is found guilty of, a crime involving the acquisition, use, or expenditure of title IV, HEA program funds; or

(ii) Has been judicially determined to have committed fraud involving title IV, HEA program funds.

(b) *Special provisions regarding correspondence courses and students*—

(1) *Treatment of telecommunications courses.* For purposes of paragraphs (a)(1) (i) and (ii) of this section, the Secretary considers a telecommunications course to be a correspondence course if the sum of telecommunications courses and other correspondence courses the institution provided during that award year equaled or exceeded 50 percent of the total number of courses it provided during that year.

(2) *Calculating the number of courses.* For purposes of paragraphs (a)(1) (i) and (ii) of this section—

(i) A correspondence course may be a complete educational program offered by correspondence, or one course provided by correspondence in an on-campus (residential) educational program;

(ii) A course must be considered as being offered once during an award year regardless of the number of times it is offered during that year; and

(iii) A course that is offered both on campus and by correspondence must be considered two courses for the purpose of determining the total number of courses the institution provided during an award year.

(3) *Exceptions.* (i) The provisions contained in paragraphs (a)(1) (i) and (ii) of this section do not apply to an institution that qualifies as a "technical institute or vocational school used exclusively or principally for the provision of vocational education to individuals who have completed or left high school and who are available for study in preparation for entering the labor market" under section 521(4)(C) of the Carl D. Perkins Vocational and Applied Technology Education Act.

(ii) The Secretary waives the limitation contained in paragraph (a)(1)(ii) of this section for an institution that offers a 2-year associate-degree or a 4-year bachelor's-degree program if the students enrolled in the institution's correspondence courses receive no more than 5 percent of the title IV, HEA program funds received by students at that institution.

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

(2) If the nonprofit institution that applies for a waiver consists solely of four-year or two-year educational programs for which it offers bachelor's or associate degrees, respectively, or both types of programs, the Secretary waives the prohibition contained in paragraph (a)(1)(iii) of this section for the entire institution.

(3) If the nonprofit institution that applies for a waiver does not consist solely of four-year or two-year educational programs for which it offers bachelor's or associate degrees, respectively, or both types of programs, the Secretary waives the prohibition contained in paragraph (a)(1)(iii) of this section—

(i) For the four-year and two-year programs that lead, respectively, to bachelor's and associate degrees; and

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

(d) *Special provision for a nonprofit institution if more than 50 percent of its enrollment consists of students who do not have a high school diploma or its equivalent.* (1) Subject to the provisions contained in paragraphs (d)(2) and (d)(3) of this section, the Secretary waives the limitation contained in paragraph (a)(1)(iv) of this section for a nonprofit institution if that institution demonstrates to the Secretary's satisfaction that it exceeds that limitation because it serves, through contracts with Federal, State, or local government agencies, significant numbers of students who do not have a high school diploma or its recognized equivalent.

(2) *Number of critical students.* The Secretary grants a waiver under paragraph (d)(1) of this section only if no more than 40 percent of the institution's enrollment of regular students consists of students who—

(i) Do not have a high school diploma or its equivalent; and

(ii) Are not served through contracts described in paragraph (d)(3) of this section.

(3) *Contracts with Federal, State, or local government agencies.* For purposes of granting a waiver under paragraph (d)(1) of this section, the contracts referred to must be with Federal, State, or local government agencies for the purpose of providing job training to low-income individuals who are in need of that training. An example of such a contract is a job training contract under the Job Training Partnership Act (JPTA).

(e) *Special provisions.* (1) For purposes of paragraph (a)(1)of this section, when counting regular students, the institution shall—

(i) Count each regular student without regard to the full-time or part-time nature of the student's attendance (i.e., "head count" rather than "full-time equivalent");

(ii) Count a regular student once regardless of the number of times the student enrolls during an award year; and

(iii) Determine the number of regular students who enrolled in the institution during the relevant award year by—

(A) Calculating the number of regular students who enrolled during that award year; and

(B) Excluding from the number of students in paragraph (e)(1)(iii)(A) of this section, the number of regular students who enrolled but subsequently withdrew or were expelled from the institution and were entitled to receive a 100 percent refund of their tuition and fees less any administrative fee that the institution is permitted to keep under its fair and equitable refund policy.

(2) For the purpose of calculating a completion rate under paragraph (e)(3)(ii) of this section, the institution shall—

(i) Determine the number of regular incarcerated students who enrolled in the other programs during the last completed award year;

(ii) Exclude from the number of regular incarcerated students determined in paragraph (e)(2)(i) of this section, the number of those students who enrolled but subsequently withdrew or were expelled from the institution and were entitled to receive a 100 percent refund of their tuition and fees, less any administrative fee the institution is permitted to keep under the institution's fair and equitable refund policy;

(iii) Exclude from the total obtained in paragraph (e)(2)(ii) of this section, the number of those regular incarcerated students who remained enrolled in the programs at the end of the applicable award year;

(iv) From the total obtained in paragraph (e)(2)(iii) of this section, determine the number of regular incarcerated students who received a degree, certificate, or other recognized educational credential awarded for successfully completing the program during the applicable award year; and

(v) Divide the total obtained in paragraph (e)(2)(iv) of this section by the total obtained in paragraph (e)(2)(iii) of this section and multiply by 100.

(f)(1) If the Secretary grants a waiver to an institution under this section, the waiver extends indefinitely provided that the institution satisfies the waiver requirements in each award year.

(2) If an institution fails to satisfy the waiver requirements for an award year, the institution becomes ineligible on June 30 of that award year.

(g)(1) For purposes of paragraph (a)(1) of this section, and any applicable waiver or exception under this section, the institution shall substantiate the required calculations by having the certified public accountant who prepares its audited financial statement under 34 CFR 668.15 or its title IV, HEA program compliance audit under 34 CFR 668.23 report on the accuracy of the institution's calculation based on performing an agreed-upon procedures attestation engagement in accordance with the AICPA's Statement on Standards for Attestation Engagements, and include that report as part of the audit report.

(2) If the certified public accountant cannot attest to the accuracy of the institution's calculations for purposes of

paragraph (a)(1) of this section or any applicable waiver or exception under this section, the Secretary presumes that the institution lost its eligibility as a result of those provisions.

(3) The institution may rebut this presumption if, no later than 30 days after the date on which the audit report that includes the attestation engagement report was submitted, the institution submits a calculation to the Secretary indicating that it satisfies the provisions of paragraph (a)(8) of this section, and the certified public accountant who could not attest to the accuracy of its previous calculation, attests to the accuracy of those calculations.

(h) *Notice to the Secretary.* An institution shall notify the Secretary—

(1) By July 31 following the end of an award year if it falls within one of the prohibitions contained in paragraph (a)(1)of this section, or fails to continue to satisfy a waiver or exception granted under this section; or

(2) Within 10 days if it falls within one of the prohibitions contained in paragraphs (a)(2) or (a)(3) of this section.

(i) *Regaining eligibility.* (1) If an institution loses its eligibility because of one of the prohibitions contained in paragraph (a)(1) of this section, to regain its eligibility, it must demonstrate—

(i) Compliance with all eligibility requirements;

(ii) That it did not fall within any of the prohibitions contained in paragraph (a)(1) of this section for at least one award year; and

(iii) That it changed its administrative policies and practices to ensure that it will not fall within any of the prohibitions contained in paragraph (a)(1) of this section.

(2) If an institution loses its eligibility because of one of the prohibitions contained in paragraphs (a)(2) and (a)(3) of this section, this loss is permanent. The institution's eligibility cannot be reinstated.

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

§ 600.8 Treatment of a branch campus.

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

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

§ 600.9 Written agreement between an eligible institution and another institution or organization.

(a) Without losing its eligibility under this part, an eligible institution may enter into a written agreement with another eligible institution under which the latter institution provides all or a part of the educational program of students enrolled in the former institution if the former institution gives credit to students enrolled in that contracted program on the same basis as if it provided that program itself.

(b) Without losing its eligibility under this part, an eligible institution may enter into a written agreement with an institution or organization that is not an eligible institution under which the latter institution or organization provides a part of the educational program of students enrolled in the eligible institution if—

(1) The eligible institution gives credit to students enrolled in that contracted program on the same basis as if it provided that program itself;

(2) The ineligible institution or organization—

(i) Has not been terminated from participation in the title-IV, HEA programs; or

(ii) Has not withdrawn from participation in the title IV, HEA programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution's State licensing agency, accrediting agency, guarantor, or SPRE, or by the Secretary; and

(3) The ineligible institution or organization provides—

(i) Not more than 25 percent of the educational program of a student enrolled in the eligible institution; or

(ii) More than 25 percent but not more than 50 percent of the educational program of a student enrolled in the eligible institution so long as—

(A) The eligible institution and the ineligible institution or organization are not owned or controlled by the same individual, partnership, or corporation; and

(B) The eligible institution's accrediting agency or, if the eligible institution is a public postsecondary vocational educational institution, the relevant State agency listed in the **Federal Register** in accordance with 34 CFR part 603, specifically determines that the institution's agreement meets the agency's standards for the contracting out of educational services.

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

§ 600.10 Date, extent, duration, and consequence of eligibility.

(a) *Date of eligibility.* (1) If the Secretary determines that an applicant institution satisfies all the statutory and regulatory eligibility requirements, the Secretary considers the institution to be an eligible institution as of the date—

(i) The Secretary signs the institution's program participation agreement described in 34 CFR part 668, subpart B, for purposes of participating in any title IV, HEA program; and

(ii) The Secretary receives all the information necessary to make that determination for purposes other than participating in any title IV, HEA program.

(2) For purposes of participating in a title IV, HEA program, if an eligible institution seeks eligibility for a location or educational program not previously designated eligible, and the Secretary determines that the location or educational program satisfies all the statutory and regulatory eligibility requirements, the Secretary considers the location or program to be eligible to participate in that title IV, HEA program as of the date the Secretary certifies that location or program to so participate.

(b) *Extent of eligibility.* (1) If the Secretary determines that the entire applicant institution, including all its locations and all its educational programs, satisfies the applicable requirements of this part, the Secretary extends eligibility to all educational programs and locations identified on the institution's application for eligibility.

(2) If the Secretary determines that only certain educational programs or certain locations of an applicant institution satisfy the applicable requirements of this part, the Secretary extends eligibility only to those educational programs and locations that meet those requirements and identifies the eligible educational programs and locations in the eligibility notice sent to the institution under § 600.21.

(3) Eligibility does not extend to any location that an institution establishes after it receives its eligibility designation if the institution provides at least 50 percent of an educational program at that location, unless—

(i) The institution has notified the Secretary of that location in accordance with § 600.30(a)(3); and

(ii) The Secretary does not require the institution to submit an eligibility application for that location under § 600.21(c).

(c) *Subsequent additions of educational programs.* (1) Except as provided in paragraph (c)(2) of this section, if an eligible institution adds an educational program after it has been designated as an eligible institution by the Secretary, the institution must apply to the Secretary to have that additional program designated as an eligible program of that institution.

(2) An eligible institution that adds an educational program after it has been designated as an eligible institution by the Secretary does not have to apply to the Secretary to have that additional program designated as an eligible

program of that institution if the additional program—

(i) Leads to an associate, baccalaureate, professional, or graduate degree; or

(ii)(A) Prepares students for gainful employment in the same or related recognized occupation as an educational program that has previously been designated as an eligible program at that institution by the Secretary; and

(B) Is at least 8 semester hours, 12 quarter hours, or 600 clock hours.

(3) If an institution incorrectly determines under paragraph (c)(2) of this section that an educational program satisfies the applicable statutory and regulatory eligibility provisions without applying to the Secretary for approval, the institution is liable to repay to the Secretary all HEA program funds received by the institution for that educational program, and all the title IV, HEA program funds received by or on behalf of students who were enrolled in that educational program.

(d) *Duration of eligibility.* (1) If an institution participates in the title IV, HEA programs, the Secretary's designation of the institution as an eligible institution under the title IV, HEA programs expires when the institution's program participation agreement, as described in 34 CFR part 668, subpart B, expires.

(2) If an institution participates in an HEA program other than a title IV, HEA program, the Secretary's designation of the institution as an eligible institution, for purposes of that non-title IV, HEA program, does not expire as long as the institution continues to satisfy the statutory and regulatory requirements governing its eligibility.

(e) *Consequence of eligibility.* (1) If, as a part of its institutional eligibility application, an institution indicates that it wishes to participate in a title IV, HEA program and the Secretary determines that the institution satisfies the applicable statutory and regulatory requirements governing institutional eligibility, the Secretary will determine whether the institution satisfies the standards of administrative capability and financial responsibility contained in 34 CFR part 668, subpart B.

(2) If, as part of its institutional eligibility application, an institution indicates that it does not wish to participate in any title IV, HEA program and the Secretary determines that the institution satisfies the applicable statutory and regulatory requirements governing institutional eligibility, the institution is eligible to apply to participate in any HEA program listed by the Secretary in the eligibility notice it receives under § 600.21. However, the institution is not eligible to participate in those programs, or receive funds under those programs, merely by virtue of its designation as an eligible institution under this part.

(Authority: 20 U.S.C. 1088 and 1141)

§ 600.11 Special rules regarding institutional accreditation or preaccreditation.

(a) *Change of accrediting agencies.* For purposes of §§ 600.4(a)(5)(i), 600.5(a)(6), and 600.6(a)(5)(i), the Secretary does not recognize the accreditation or preaccreditation of an otherwise eligible institution if that institution is in the process of changing its accrediting agency, unless the institution provides to the Secretary—

(1) All materials related to its prior accreditation or preaccreditation; and

(2) Materials demonstrating reasonable cause for changing its accrediting agency.

(b) *Multiple accreditation.* The Secretary does not recognize the accreditation or preaccreditation of an otherwise eligible institution if that institution is accredited or preaccredited as an institution by more than one accrediting agency, unless the institution—

(1) Provides to each such accrediting agency and the Secretary the reasons for that multiple accreditation or preaccreditation;

(2) Demonstrates to the Secretary reasonable cause for that multiple accreditation or preaccreditation; and

(3) Designates to the Secretary which agency's accreditation or preaccreditation the institution uses to establish its eligibility under this part.

(c) *Loss of accreditation or preaccreditation.* (1) An institution may not be considered eligible for 24 months after it has had its accreditation or preaccreditation withdrawn, revoked, or otherwise terminated for cause, unless the accrediting agency that took that action rescinds that action.

(2) An institution may not be considered eligible for 24 months after it has withdrawn voluntarily from its accreditation or preaccreditation status under a show-cause or suspension order issued by an accrediting agency, unless that agency rescinds its order.

(d) *Religious exception.* (1) If an otherwise eligible institution loses its accreditation or preaccreditation, the Secretary considers the institution to be accredited or preaccredited for purposes of complying with the provisions of §§ 600.4, 600.5, and 600.6 if the Secretary determines that its loss of accreditation or preaccreditation—

(i) Is related to the religious mission or affiliation of the institution; and

(ii) Is not related to its failure to satisfy the accrediting agency's standards.

(2) If the Secretary considers an unaccredited institution to be accredited or preaccredited under the provisions of paragraph (d)(1) of this section, the Secretary will consider that unaccredited institution to be accredited or preaccredited for a period sufficient to allow the institution to obtain alternative accreditation or preaccreditation, except that period may not exceed 18 months.

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

Subpart B—Procedures for Establishing Eligibility

§ 600.20 Application procedures.

(a) An institution that wishes to establish its eligibility to apply to participate in any program authorized by the HEA must first apply to the Secretary for a determination that it qualifies as an eligible institution.

(b) A previously designated eligible institution must apply to the Secretary if—

(1) The Secretary requests the institution to file an application so as to determine whether it continues to meet the requirements of this part; or

(2) The institution satisfies one of the conditions contained in paragraph (c) of this section.

(c) An institution must apply if it wishes to—

(1) Continue to be eligible beyond the scheduled expiration of its current eligibility designation;

(2) Include in its eligibility designation a branch campus that is not currently included in that designation;

(3) Include in its eligibility designation a location that is not currently included in that designation, if—

(i) The institution offers 100 percent of an educational program at that location; or

(ii) The institution offers at least 50 percent of an educational program at that location, and the Secretary requires the institution to apply for eligibility under § 600.21(c)(2);

(4) Continue to be eligible following a change in its name, location, or address;

(5) Continue to include in its eligibility designation a branch campus that has changed its name, location, or address;

(6) Continue to include in its eligibility designation another location that has changed its name, location, or address, if—

(i) That location offers 100 percent of an educational program; or

(ii) The Secretary requires the institution to apply for eligibility under § 600.21(c)(2); or

(7) Reestablish eligibility following a change in ownership that results in a change in control according to the provisions of § 600.31.

(d) An institution applying for designation as an eligible institution shall—

(1) Apply on the form prescribed by the Secretary; and

(2) Provide all the information and documentation requested by the Secretary to make a determination of its eligibility.

(Authority: 20 U.S.C. 1088 and 1141)

§ 600.21 Eligibility notification.

(a) The Secretary notifies an institution in writing—

(1) Whether the applicant institution qualifies in whole or in part as an eligible institution under the appropriate provisions in §§ 600.4, 600.5, 600.6 and 600.7;

(2) Whether the institution is certified to participate in the title IV, HEA programs if the institution applied to participate in those programs; and

(3) Of the title IV, HEA programs in which it is eligible to participate, and the title IV, HEA programs for which it is eligible to apply to participate.

(b) If only a portion of the applicant institution qualifies as an eligible institution, the Secretary specifies in the notice the locations or educational programs that qualify as the eligible institution.

(c) If the Secretary receives a notice from an institution as a result of § 600.30(a)(3), the Secretary—

(1) Notifies the institution that the location is an eligible location of that institution, identifies the HEA programs in which the institution may participate without further action, and indicates that the extension of eligibility and participation is effective on the date that the Secretary received the institution's notice; or

(2) Notifies the institution that the institution must apply for eligibility of that location under § 600.20.

(d) The Secretary makes the determination in paragraph (c) of this section by evaluating the institution's ability to provide adequately education or training at the location. In making that evaluation, the Secretary uses such factors as—

(1) The percentage of an educational program offered at the location; and

(2) The financial and administrative capability of the institution.

(Authority: 20 U.S.C. 1088, 1099c, and 1141)

Subpart C—Maintaining Eligibility

§ 600.30 Institutional notification requirements.

(a) Except as provided in paragraph (b) of this section, an eligible institution shall notify the Secretary in writing, at an address specified by the Secretary in a notice published in the **Federal Register**, no later than 10 days after the change occurs, of any change in the following information provided in the institution's eligibility application:

(1) Its name.

(2) Its address.

(3) The name, number, and address of locations other than the main campus at which it offers at least 50 percent of an educational program and the percentages of the educational programs that it provides at each location.

(4) The way it measures program length, *e.g.* clock hours or credit hours.

(5) Its ownership, if that ownership change results in a change in control of the institution.

(6) Its status as a proprietary, nonprofit, or public institution.

(7) The exercise of a person's substantial control over the institution, if the person did not previously exercise that control. The Secretary generally considers that a person exercises substantial control over an institution if the person—

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

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

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

(iv) Is a member of the board of directors, a general partner, the chief executive officer, or other executive officer of—

(A) The institution; or

(B) An entity that holds at least a 25 percent ownership interest in the institution.

(b) An eligible institution that is owned by a publicly-traded corporation shall notify the Secretary in writing, at an address specified by the Secretary in a notice published in the **Federal Register**, of any change in the information that is described in paragraphs (a) (5) through (7) of this section at the same time that the institution notifies the institution's accrediting agency, but no later than 10 days after the corporation learns of the change.

(c) The Secretary notifies the institution in writing if any reported change affects the institution's eligibility, and the effective date of that change.

(d) The institution's failure to inform the Secretary of the information described in paragraph (a) of this section within the time period stated in that paragraph may result in adverse action against it, including its loss of eligibility.

(e)(1) For the purposes of this section, an *ownership interest* is a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of the operation of, an institution or institution's parent corporation.

(2) The term *ownership interest* includes, but is not limited to—

(i) An interest as tenant in common, joint tenant, or tenant by the entireties;

(ii) A partnership; and

(iii) An interest in a trust.

(3) The term *ownership interest* does not include any share of the ownership or control of, or any right to share in the proceeds of the operation of—

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

(ii) An institutional investor; or

(iii) A profit-sharing plan, provided that all employees are covered by the plan.

(f) For the purposes of this section, the Secretary considers a member of a person's family to be a parent, sibling, spouse or child; spouse's parent or sibling; or sibling's or child's spouse.

(Authority: 20 U.S.C. 1088 and 1141)

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

(a) *General.* (1) An institution that undergoes a change of ownership that results in a change of control ceases to qualify as an eligible institution upon the change of ownership and control. A change of ownership that results in a change in control includes any change by which a person who has or thereby acquires an ownership interest in the entity that owns the institution or the parent corporation of that entity, acquires or loses the ability to control the institution.

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

(i) The institution satisfies all the applicable requirements contained in §§ 600.4, 600.5, and 600.6, except that if the institution is a proprietary institution of higher education or

postsecondary vocational institution, it need not have been in existence for two years before seeking eligibility; and

(ii) The institution qualifies to be certified to participate under 34 CFR part 668, subpart B.

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

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

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

(2) If the State of incorporation has no definition of closely-held corporation, a corporation the stock of which —

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

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

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

Ownership. Ownership or ownership interest means a legal or beneficial interest in an entity, or a right to share in the profits derived from the operation of an entity. The term does not include the interests of a mutual fund that is regularly and publicly traded, of an institutional investor, or of a profit-sharing plan in which all employees of an entity may participate.

Parent. The parent or parent corporation of a specified corporation is the corporation or partnership that controls the specified corporation directly or indirectly through one or more intermediaries.

Person. Person includes a legal person (corporation or partnership) or an individual.

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

(c) Standards for identifying changes of ownership and control—(1) *Closely-held corporation.* A change of ownership and control occurs when—

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

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

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

(2) *Publicly-traded corporation required to be registered with the Securities and Exchange Commission (SEC).* A change of ownership and control occurs when a change of control of the corporation takes place that gives rise to the obligation to file a Form 8K with the SEC notifying that agency of the change in control.

(3) *Other corporations.* A change of ownership and control of a corporation that is neither closely held nor required to be registered with the SEC occurs when—

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

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

(iii) For a membership corporation, a person who is or becomes a member acquires or loses control of 25 percent of the voting interests of the corporation and control of the corporation.

(4) *Partnership or sole proprietorship.* A change of ownership and control occurs when a person who has or acquires an ownership interest acquires or loses control of the institution.

(5) *Parent corporation.* An institution that is a wholly-owned subsidiary changes ownership and control when the parent corporation changes ownership and control as described in this section.

(6) *Nonprofit corporation or association.* An institution that is owned by a nonprofit corporation or association changes ownership and control when a change specifically described in this paragraph (c) takes place.

(7) *Public institution.* Notwithstanding paragraph (d) of this section, an institution owned and operated by a governmental entity changes ownership and control only when the ownership of the institution is transferred to a different governmental entity or to another person.

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

(1) The sale of the institution;

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

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

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

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

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

(7) A conversion of the institution from a for-profit to a nonprofit institution.

(e) *Excluded transactions.* A change of ownership and control otherwise subject to this section does not include a transfer of ownership and control upon the retirement or death of the owner, to—

(1) A member of the owner's family, as described in § 600.30(f);

(2) 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.

(f) *Transfers subject to contingency.* An institution may submit and have considered an application for a designation of eligibility and for certification under 34 CFR part 668, subpart B, only when the transfer has been completed. A transfer is complete for purposes of this section when the transfer is otherwise final but is subject to the condition subsequent that the institution obtain approval from the Secretary, the accrediting agency, or State licensing authority after the transfer. A transfer otherwise complete is not considered incomplete or contingent where the transferor retains a interest in the stock or assets of the institution or its owner solely for purposes of security.

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

§ 600.32 Eligibility of additional locations.

(a) Except as provided in paragraphs (b) and (c) of this section, to qualify as an eligible location, an additional location of an eligible institution must satisfy the applicable requirements of this section and §§ 600.4, 600.5, 600.6, 600.8, and 600.10.

(b) To qualify as an eligible location, an additional location is not required to satisfy the two-year requirement of §§ 600.5(a)(7) or 600.6(a)(6), unless—

(1) The location was a facility of another institution that has closed or ceased to provide educational programs for a reason other than a normal vacation period or a natural disaster that

directly affects the institution or the institution's students;

(2) The applicant institution acquired, either directly from the institution that closed or ceased to provide educational programs, or through an intermediary, the assets at the location; and

(3) The institution from which the applicant institution acquired the assets of the location—

(i) Owes a liability for a violation of an HEA program requirement; and

(ii) Is not making payments in accordance with an agreement to repay that liability.

(c) Notwithstanding paragraph (b) of this section, an additional location is not required to satisfy the two-year requirement of § 600.5(a)(7) or § 600.6(a)(6) if the applicant institution agrees—

(1) To be liable for all improperly expended or unspent title IV, HEA program funds received by the institution that has closed or ceased to provide educational programs;

(2) To be liable for all unpaid refunds owed to students who received title IV, HEA program funds; and

(3) To abide by the policy of the institution that has closed or ceased to provide educational programs regarding refunds of institutional charges to students in effect before the date of the acquisition of the assets of the additional location for the students who were enrolled before that date.

(d) For purposes of this section, an "additional location" is a location of an institution that was not designated as an eligible location in the eligibility notification provided to an institution under § 600.21.

(Authority: 20 U.S.C. 1088 and 1141)

Subpart D—Loss of Eligibility

§ 600.40 Loss of eligibility.

(a)(1) Except as provided in paragraphs (a) (2) and (3) of this section, an institution, or a location or educational program of an institution, loses its eligibility on the date that—

(i) The institution, location, or educational program fails to meet any of the eligibility requirements of this part;

(ii) The institution or location permanently closes;

(iii) The institution or location ceases to provide educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution, particular location, or the students of the institution or location; or

(iv) For purposes of the title IV, HEA programs—

(A) The institution's period of participation as specified under 34 CFR 668.13 expires;

(B) The institution's provisional certification is revoked under 34 CFR 668.13; or

(C) The Secretary receives a notice under 34 CFR part 667 from a SPRE of the SPRE's determination that the institution shall not be eligible to participate in a title IV, HEA program.

(2) If an institution loses its eligibility because it violated the requirements of § 600.5(a)(8), as evidenced by the determination under provisions contained in § 600.5(d), it loses its eligibility on the last day of the fiscal year used in § 600.5(d), except that if an institution's latest fiscal year was described in § 600.7(h)(1), it loses its eligibility as of June 30, 1994.

(3) If an institution loses its eligibility under the provisions of § 600.7(a)(1), it loses its eligibility on the last day of the award year being evaluated under that provision.

(b) If the Secretary undertakes to terminate the eligibility of an institution because it violated the provisions of § 600.5(a)(8) or § 600.7(a), and the institution requests a hearing, the presiding official must terminate the institution's eligibility if it violated those provisions, notwithstanding its status at the time of the hearing.

(c)(1) If the Secretary designates an institution or any of its educational programs or locations as eligible on the basis of inaccurate information or documentation, the Secretary's designation is void from the date the Secretary made the designation, and the institution or program or location, as applicable, never qualified as eligible.

(2) If an institution closes its main campus or stops providing any educational programs on its main campus, it loses its eligibility as an institution, and that loss of eligibility includes all its locations and all its programs. Its loss of eligibility is effective on the date it closes that campus or stops providing any educational program at that campus.

(d) Except as otherwise provided in this part, if an institution ceases to satisfy any of the requirements for eligibility under this part—

(1) It must notify the Secretary within 30 days of the date that it ceases to satisfy that requirement; and

(2) It becomes ineligible to continue to participate in any HEA program as of the date it ceases to satisfy any of the requirements.

(Authority: 20 U.S.C. 1088, 1099a–3, and 1141)

§ 600.41 Termination and emergency action proceedings.

(a) If the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, does not satisfy the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary may—

(1) Terminate the institution's eligibility designation in whole or as to a particular location—

(i) Under the procedural provisions applicable to terminations contained in 34 CFR 668.81, 668.83, 668.86, 668.87, 668.88, 668.89, 668.90 (a)(1), (a)(4), and (c) through (f), and 668.91; or

(ii) Under a show-cause hearing, if the institution's loss of eligibility results from—

(A) Its previously qualifying as an eligible vocational school;

(B) Its previously qualifying as an eligible institution, notwithstanding its unaccredited status, under the transfer-of-credit alternative to accreditation (as that alternative existed in 20 U.S.C. 1085, 1088, and 1141(a)(5)(B) and § 600.8 until July 23, 1992);

(C) Its loss of accreditation or preaccreditation;

(D) Its loss of legal authority to provide postsecondary education in the State in which it is physically located;

(E) Its violations of the provisions contained in § 600.5(a)(8) or § 600.7(a);

(F) Its permanently closing;

(G) Its ceasing to provide educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution, a particular location, or the students of the institution or location; or

(H) The Secretary's receipt of a notice under 34 CFR part 667 from a SPRE of the SPRE's determination that the institution shall not be eligible to participate in the title IV, HEA programs;

(2) Limit, under the provisions of 34 CFR 668.86, the authority of the institution to disburse, deliver, or cause the disbursement or delivery of funds under one or more title IV, HEA programs as otherwise provided under 34 CFR 668.26 for the benefit of students enrolled at the ineligible institution or location prior to the loss of eligibility of that institution or location; and

(3) Initiate an emergency action under the provisions contained in 34 CFR 668.83 with regard to the institution's participation in one or more title IV, HEA programs.

(b) If the Secretary believes that an educational program offered by an institution that was previously designated by the Secretary as an eligible institution under the HEA does not satisfy relevant statutory or regulatory requirements that define that educational program as part of an

eligible institution, the Secretary may in accordance with the procedural provisions described in paragraph (a) of this section—

(1) Undertake to terminate that educational program's eligibility under one or more of the title IV, HEA programs under the procedural provisions applicable to terminations described in paragraph (a) of this section;

(2) Limit the institution's authority to deliver, disburse, or cause the delivery or disbursement of funds provided under that title IV, HEA program to students enrolled in that educational program, as otherwise provided in 34 CFR 668.26; and

(3) Initiate an emergency action under the provisions contained in 34 CFR 668.83 with regard to the institution's participation in one or more title IV, HEA programs with respect to students enrolled in that educational program.

(c)(1) An action to terminate and limit the eligibility of an institution as a whole or as to any of its locations or educational programs is initiated in accordance with 34 CFR 668.86(b) and becomes final 20 days after the Secretary notifies the institution of the proposed action, unless the designated department official receives by that date a request for a hearing or written material that demonstrates that the termination and limitation should not take place.

(2) Once a termination under this section becomes final, the termination is effective with respect to any commitment, delivery, or disbursement of funds provided under an applicable title IV, HEA program by the institution—

(i) Made to students enrolled in the ineligible institution, location, or educational program; and

(ii) Made on or after the date of the act or omission that caused the loss of eligibility as to the institution, location, or educational program.

(3) Once a limitation under this section becomes final, the limitation is effective with regard to any commitment, delivery, or disbursement of funds under the applicable title IV, HEA program by the institution—

(i) Made after the date on which the limitation became final; and

(ii) Made to students enrolled in the ineligible institution, location, or educational program.

(d) After a termination under this section of the eligibility of an institution as a whole or as to a location or educational program becomes final, the institution may not certify applications for, make awards of or commitments for, deliver, or disburse funds under the applicable title IV, HEA program, except—

(1) In accordance with the requirements of 34 CFR 668.26(c) with respect to students enrolled in the ineligible institution, location, or educational program; and

(2) After satisfaction of any additional requirements, imposed pursuant to a limitation under paragraph (a)(2) of this section, which may include the following:

(i) Completion of the actions required by 34 CFR 668.26(a) and (b).

(ii) Demonstration that the institution has made satisfactory arrangements for the completion of actions required by 34 CFR 668.26(a) and (b).

(iii) Securing the confirmation of a third party selected by the Secretary that the proposed disbursements or delivery of title IV, HEA program funds meet the requirements of the applicable program.

(iv) Using institutional funds to make disbursements permitted under this paragraph and seeking reimbursement from the Secretary for those disbursements.

(e) If the Secretary undertakes to terminate the eligibility of an institution, location, or program under paragraphs (a) and (b) of this section:

(1) If the basis for the loss of eligibility is the loss of accreditation or preaccreditation, the sole issue is whether the institution, location, or program has the requisite accreditation or preaccreditation. The presiding official has no authority to consider challenges to the action of the accrediting agency.

(2) If the basis for the loss of eligibility is the loss of legal authorization, the sole issue is whether the institution, location, or program has the requisite legal authorization. The presiding official has no authority to consider challenges to the action of a State agency in removing the legal authorization.

(3) If the basis for the loss of eligibility for title IV, HEA program purposes is a notice under 34 CFR part 667 from a SPRE to the Secretary of the SPRE's determination that the institution shall not be eligible to participate in the title IV, HEA programs, the sole issue is whether the SPRE notified the Secretary of that determination. The presiding official has no authority to consider any challenge to the SPRE's determination.

(Authority: 20 U.S.C. 1088, 1091, 1094, 1099a–3, and 1141)

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April 29, 1994

Part VIII

Department of Education

34 CFR Parts 668, 682, and 690
Student Assistance General Provisions; Federal Family Education Loan Programs; Federal Pell Grant Program; Interim Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 668, 682, and 690

RIN 1840–AB85 and 1840–AB80

Student Assistance General Provisions; Federal Family Education Loan Programs; Federal Pell Grant Program

AGENCY: Department of Education.

ACTION: Interim final regulations with invitation for comment.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations, the Federal Family Education Loan (FFEL) Program regulations, and the Federal Pell Grant Program regulations to implement changes in the Higher Education Act of 1965, as amended (HEA), and to improve the monitoring and accountability of institutions and third-party servicers participating in the student financial assistance programs authorized by Title IV of the HEA (Title IV, HEA programs). These changes also establish standards of administrative and financial responsibility for third-party servicers that administer any aspect of a guaranty agency's or lender's participation in the FFEL programs.

These regulations seek to improve the efficiency of Federal student aid programs and, by so doing, to improve their capacity to enhance opportunities for postsecondary education. The Secretary invites comment on these regulations.

DATES: *Effective Date:* These regulations take effect July 1, 1994 with the exception of §§ 668.3, 668.8, 668.12, 668.13, 668.14, 668.15, 668.16, 668.17, 668.22, 668.23, 668.25, 668.26, 668.90, 668.96, 668.113, appendix A to 34 CFR part 668, 682.414, 682.416, 682.711, and 690.83. Sections 668.3, 668.8, 668.12, 668.13, 668.14, 668.15, 668.16, 668.17, 668.22, 668.23, 668.25, 668.26, 668.90, 668.96, 668.113, appendix A to 34 CFR part 668, 682.414, 682.416, 682.711, and 690.83 will become effective after the information collection requirements contained in these sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these regulations, call or write the Department of Education contact persons. A document announcing the effective date will be published in the **Federal Register**.

Comment Date: Comments on these interim final regulations must be received on or before June 20, 1994.

ADDRESSES: All comments concerning these regulations should be addressed to Greg Allen and Wendy Macias, U.S. Department of Education, 400 Maryland Avenue, SW. (Regional Office Building 3, room 4318), Washington, DC 20202–5343.

FOR FURTHER INFORMATION CONTACT: Greg Allen or Wendy Macias, U.S. Department of Education, 400 Maryland Avenue, SW. (Regional Office Building 3, room 4318), Washington, DC 20202–5343. Telephone (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 6 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Higher Education Amendments of 1992, Pub. L. 102–325, (the Amendments of 1992) and the Higher Education Technical Amendments of 1993, Pub. L. 103–208 (the Technical Amendments of 1993) amended the HEA in several areas relating to the participation of institutions in the Title IV, HEA programs. Further, the Amendments of 1992 amended the HEA to expand the Secretary's authority to regulate the activities of those individuals and organizations now called *third-party servicers*. The Student Assistance General Provisions regulations contain requirements that are common to educational institutions that participate in the Title IV, HEA programs.

On February 28, 1994, the Secretary published a Notice of Proposed Rulemaking (NPRM) for parts 668 and 690 in the **Federal Register** (59 FR 9526). The NPRM included a discussion of the major issues surrounding the proposed changes which will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the NPRM on which a discussion of those issues can be found:

The Secretary proposed to clarify the terms used in the statutory definition of *academic year* (pages 9529–9530);

The Secretary proposed a definition of an eligible program to implement statutory requirements, including requirements for "short-term" programs (at least 300 but less than 600 clock hours) that would be eligible for the FFEL programs only. The Secretary proposed methodologies for the measurement of completion and placement rates for short-term programs, as required by the statute. Also in accordance with the statute, the Secretary proposed further provisions to evaluate the quality of short-term programs (pages 9530–9531);

The Secretary proposed to add two new sections to codify procedures with regard to applications to participate initially or to continue to participate in a Title IV, HEA program and procedures by which the Secretary certifies that an institution meets the standards in subpart B of these regulations and accordingly may participate in a Title IV, HEA program. The Secretary proposed procedures to codify new statutory provisions governing provisional certification procedures for participation in a Title IV, HEA program (pages 9533–9536);

The Secretary proposed to amend the regulations governing program participation agreements to include numerous new provisions added by the Amendments of 1992 and provisions previously prescribed by the HEA but not specifically spelled out in the regulations. The Secretary also proposed provisions to amend the regulations governing program participation agreements (pages 9536–9539);

The Secretary proposed significant changes to the section governing the evaluation of an institution's financial responsibility. The Secretary proposed to strengthen the factors used to evaluate an institution's financial responsibility and to reflect statutory changes (pages 9539–9544);

The Secretary proposed to strengthen and expand the standards of administrative capability for participating institutions, addressing areas previously not regulated or for which there were only guidelines (pages 9544–9549);

The Secretary proposed to amend the provisions governing default reduction measures to reflect statutory changes made by the Amendments of 1992 and current departmental practices. The provisions in the Technical Amendments of 1993 that address institutional appeals of cohort default rates were not included in the NPRM (pages 9549–9551);

The Secretary proposed to clarify the terms used in the statutory definition of a fair and equitable refund policy (pages 9551–9556);

The Secretary proposed to implement the statutory requirement that institutions have annual compliance audits. The Secretary proposed to extend the audit requirements to foreign institutions (pages 9556–9557); and

The Secretary proposed to amend the Federal Pell Grant Program regulations to implement section 487(c)(7) of the HEA that provides that an institution may offset the amount of Title IV, HEA program disbursements against liabilities or may receive reimbursement from the Department for those amounts

if, in the course of any audit conducted after December 31, 1988, the Department discovers or is informed of any Title IV, HEA program assistance (specifically, Federal Pell Grant Program funds) that an institution has provided to its students in accordance with program requirements, but the institution has not previously received credit or reimbursement for these disbursements (page 9558).

On February 17, 1994, the Secretary published an NPRM proposing amendments to parts 668 and 682 in the **Federal Register** (59 FR 8044). The NPRM included a discussion of the major issues involved in the proposed changes. The following list summarizes those issues and identifies the pages of the preamble to the NPRM on which a discussion of those issues can be found:

The Secretary proposed a definition of *third-party servicer* as applicable to those individuals or organizations that contract with an institution to administer any aspect of the institution's participation in the Title IV, HEA programs (page 8045);

The Secretary proposed to expand the factors of financial responsibility of an institution to take into consideration substantial control over both institutions and third-party servicers (pages 8046–8047);

The Secretary proposed annual audit requirements for third-party servicers as necessary to implement statutory provisions under the Amendments of 1992 (pages 8047–8048);

The Secretary proposed notification requirements for third-party servicers against which the Secretary has assessed a liability for a violation of a Title IV, HEA program violation (pages 8048–8049);

The Secretary proposed to create a new section to codify contract requirements between institutions and third-party servicers. As one of the conditions in the contract, a third-party servicer would be required to assume joint and several liability with an institution that the servicer contracts with for any violation by the servicer of any Title IV, HEA program requirement (pages 8049–8050);

The Secretary proposed to apply against a third-party servicer the sanctions under subpart G of the Student Assistance General Provisions that currently solely apply to institutions for any violation of a Title IV, HEA program requirement (pages 8050–8051);

The Secretary proposed to apply the fiduciary standards that currently only apply to institutions to third-party servicers so that third-party servicers would be required to act at all times with the competency necessary to qualify them as a fiduciary (page 8051);

The Secretary proposed a definition of *third-party servicer* applicable to those individuals or organizations that contract with a lender or guarantee agency to administer any aspect of the lender's or guarantee agency's participation in the FFEL programs (page 8055);

The Secretary proposed to require a third-party servicer that contracts with a lender or guaranty agency to assume joint and several liability for any violation of any FFEL program requirement or applicable statutory requirement. Collection of liabilities from the violation would be collected first from the lender or guaranty agency (page 8055–8056); and

The Secretary proposed a new section to codify Federal requirements for third-party servicers that contract with lenders or guaranty agencies. A third-party servicer would be required to meet certain standards of financial responsibility and administrative capability to be considered eligible to contract with a lender or guaranty agency. In addition, this section would require a third-party servicer to have performed an annual audit of the servicer's administration of a lender's or guaranty agency's participation in the FFEL programs (page 8056);

Program Integrity Triad

In order to approve a postsecondary education institution to participate in the student financial assistance programs authorized under Title IV of the HEA (referred to as "Title IV, HEA programs") and many other Federal programs, the Secretary must determine, in part, that the institution satisfies the statutory definition of an "institution of higher education." Under the HEA and many other Federal statutes, one element of that definition requires an eligible institution of higher education to be accredited or preaccredited by an accrediting agency recognized by the Secretary as a reliable authority as to the quality of the education or training provided by the institution. Another element requires an eligible institution to be legally authorized to provide an education program beyond the secondary level in the State in which it is located. In addition, to participate in the Title IV, HEA programs, the institution must be certified by the Secretary as administratively capable and financially responsible. Thus, the HEA provides the framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the "gate" to Title IV, HEA programs is opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three "gatekeepers" sharing this responsibility have traditionally been referred to as "the triad."

While the concept of a triad of entities responsible for gatekeeping has had a long history, originating in 1952, the Higher Education Amendments of 1992, Pub. L. 102–325, significantly increased the gatekeeping responsibilities of each member of the triad. Specifically, Congress amended the HEA to provide for a new part H of Title IV entitled "Program Integrity Triad." Under the new part H, the requirements that accrediting bodies must meet if they are to be recognized by the Secretary as "gatekeepers" for Title IV or other Federal purposes are specified in detail. Part H also provides a new oversight responsibility for States: the State Postsecondary Review Program. Altogether, part H establishes a set of responsibilities for accrediting agencies, States, and the Secretary that creates a stronger and more coordinated evaluation of institutions that participate, or wish to participate, in the Title IV, HEA programs.

The Secretary recognizes that the approach to significantly increased gatekeeping activity outlined in the statute for the three members of the triad is a new one. This approach will require leadership in both implementation and evaluation if it is to achieve the effectiveness that Congress intended. The Secretary will take steps to assure that the various responsibilities of the triad members are carried out in a manner that, in fact, results in the identification of institutions that should not participate in the Title IV, HEA programs, on the basis of either the quality of education they offer or their inability to handle program funds. At the same time, the Secretary is committed to carrying out the responsibility for coordinating the activities of the triad members that are inherent in the statute in a manner that causes the least burden to institutions participating in the Title IV, HEA programs.

To these ends, the Secretary is committed to effective management of the gatekeeping function. The Secretary will review carefully the applications of accrediting bodies and the standards and operating plans proposed by State Postsecondary Review Entities (SPREs) under the State Postsecondary Review Program to insure that they meet the requirements of the statute and these regulations and will enable these triad agencies to fulfill their statutory

purposes. The Secretary will also place a priority on the completion of the "Postsecondary Education Participation System," the Department's new integrated data base, which will contain the information that the Secretary generates in the course of the Secretary's oversight of institutions participating in Title IV, HEA programs. The Secretary will use the data base to inform accrediting bodies and SPREs of actions taken by the Secretary so that they may in turn carry out their responsibilities. This expanded data base is also critical to the Secretary's effective selection of institutions for program review.

Monitoring the results of the gatekeeping process is a very important key to effective management. The Secretary will evaluate the activities of accrediting agencies, SPREs, and the Department to determine their effectiveness in improving the integrity of institutions participating in Title IV programs and will take such steps as may be indicated to improve the results. Finally, as provided in the statute, the Secretary will seek the advice and counsel of the National Advisory Committee on Institutional Quality and Integrity in evaluating the effectiveness of the triad.

The Secretary believes that the approach best suited to achieving the objectives of the statute is a complementary one, with each member of the triad focusing its evaluation on its obligations within the context of the HEA. Thus, the focus for accrediting agencies is the quality of education or training provided by the institutions or programs they accredit. States, in addition to providing the legal authority to operate within the state required for participation in the Title IV, HEA programs, will review institutions that meet certain statutory review criteria related to institutional performance in the Title IV, HEA programs. The focus of the Secretary's evaluation of institutions is on the administrative and financial capacity of those institutions to participate in the Title IV, HEA programs.

While the functions and responsibilities of each of the triad members are generally different, the statute does require, in some instances, that all members of the triad evaluate similar areas. For the most part, the principle of complementary functions will lead to the members evaluating those same areas from different perspectives for different purposes. For example, all three of the triad members are required to examine the finances of an institution. If each looks at financial strength from a perspective complementary to that of the others, accrediting agencies would focus principally on the capacity of the institution to continue to offer programs at a level of quality sufficient to meet accrediting agency standards and to fulfill the institution's mission over a 5–10 year period of accreditation. The emphasis of a review by a SPRE would be on whether or not the institution possesses the full range of resources needed to serve students currently attending the institution. The Secretary's responsibilities focus on the institution's finances in light of its ability to provide the services described in its official publications and statements, to provide the administrative resources necessary to comply with its Title IV, HEA program responsibilities, and to meet all of its financial obligations, including, but not limited to, refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary.

Despite the Secretary's efforts to encourage complementary functions for each of the triad members, it is theoretically possible that, in some instances, an institution could be subject to three different standards regulating the same area of operation. For this reason, where a Title IV standard has been promulgated at the Federal level, the Secretary expects accrediting agencies and States to take this into account in establishing their own standards to insure that varying standards do not pose an unnecessary burden on institutions. It is also important that accrediting agencies and States do not impose any standard that is weaker than comparable Title IV, HEA program standards. The Secretary believes coordination of this is a federal responsibility.

In view of the complementary approach to the functions of the triad members, the Secretary believes, for example, that institutions should not have to develop different methodologies to provide data that the three members of the triad may require. The Secretary also believes that, to the extent feasible, any other requests for data about the institution, its students, or its graduates should rely on information already in the institution's possession. To that end, the Secretary expects accrediting agencies and States either to accept student data based on the methodology that will be specified in the regulations governing "Student Right to Know," also mandated by the Higher Education Amendments of 1992, or, where the institution may have other methodologies for calculating data, such as a system designed to provide data to a State higher education commission or other State agency, to accept data in the format already being used by the institution. Similarly, the Secretary expects accrediting agencies and SPREs to use the audited financial statements institutions are now required to provide to the Secretary on an annual basis to the extent those statements are compatible with the nature of the reviews conducted under their respective standards.

The Secretary also recognizes that other Federal agencies, such as the Department of Labor and the Veterans Administration, also regulate institutions in some areas that are similar to those included in part H. The suggestion has been made that the Secretary should promulgate Federal standards in the areas of overlap so that institutions would not be subject to varying standards developed by other Federal agencies and the triad members. However, the Secretary interprets part H as permitting States and accrediting agencies to establish their own standards, as opposed to using a Federal standard, and also believes that this is the most effective approach. In addition, it is not clear how the requirements of the different agencies are compatible with the requirements of part H. The purposes of these programs administered by other agencies may be very different. As a result, the Secretary has not pursued this alternative. The Secretary does believe that it would be useful to explore how the varying requirements of other Federal agencies that are similar to those of part H might be coordinated to reduce any burden on institutions and will initiate such exploration.

The Secretary believes that, where possible, data developed at the national level should be made available to institutions, as well as to States and accrediting agencies to assist them in carrying out their responsibilities under part H. In particular, data concerning labor markets and compensation for specific fields and information concerning graduation and withdrawal rates at various types of institutions may be helpful to both triad members and institutions. The Secretary will facilitate the development of this type of information and, where possible under the auspices of the Department, will coordinate the development of data that will be helpful to institutions and the triad.

Finally, as part of the commitment to providing leadership to the triad, the Secretary will convene representatives of the triad members and institutions to exchange information about the gatekeeping process and to discuss how the triad is functioning, both in

identifying institutions whose performance is questionable and in reporting requirements that have proven to be unreasonably burdensome. The Secretary invites comments concerning the functioning of the triad, as it is implemented through these and other regulations governed by part H. The Secretary will seek improvement, where possible, within existing regulations and will propose modifications to regulations and to the statute itself if experience indicates those changes are both necessary to achieve effective gatekeeping, with minimal burden, and compatible with the need to maintain, and assure the public of, the integrity of the Title IV, HEA programs.

Substantive Changes to the NPRMs

Part 668—Student Assistance General Provisions

Subpart A—General

Section 668.2 General Definitions

Academic Year. In the February 28, 1994 NPRM, the Secretary requested comment on how to implement the technical amendment that provided that the Secretary may reduce, for good cause on a case-by-case basis, the required minimum of 30 weeks of instructional time to not less than 26 weeks of instructional time in the case of an institution of higher education that provides a 2-year or 4-year program of instruction for which it awards an associate or baccalaureate degree. The Secretary did not propose specific criteria to implement this technical amendment in the February 28, 1994 NPRM, but instead requested comments on a definition of "good cause" and requested comments on ways of implementing this provision that addressed the Secretary's concern that reductions in the award year would encourage many institutions to seek that treatment routinely. After reviewing public comments on defining good cause, and developing safeguards to discourage routine requests for reductions in the academic year, the Secretary has implemented this technical amendment in new § 668.3.

Under this section, for the purpose of awarding Title IV, HEA funds, the Secretary may reduce the length of an academic year for an institution that submits a written request to the Secretary. Section 668.3 provides for a two-year "phase-in" period for institutions that are currently participating, have an academic year of 26–29 weeks, and meet the other applicable standards of the section. The Secretary will consider all other requests for a reduction in the minimum number of weeks of instructional time to not less than 26 weeks on a case-by-case basis in accordance with the requirements of § 668.3. Section 668.3 is discussed in greater detail in the section of the *Analysis of Comments and Changes* that addressed the definition of an *academic year* (§ 668.2).

In the February 28, 1994 NPRM, the Secretary requested comment on how to address an abuse of the definition of an *academic year* whereby an institution that has programs that are measured in credit hours without terms could claim that it meets the requirements for the minimum amount of work to be performed by a full-time student over an academic year by giving a full-time student a minimal amount of instruction over a 30-week (or more) period, which the institution claims to be equivalent to 24 semester or 36 quarter hours. The Secretary requested comment on whether a minimum full-time workload for students enrolled in these educational programs should be established to address this abuse. Several commenters agreed that this abuse should be addressed. However, rather than changing the proposed definition of full-time student to require measurement of student workloads, a modification has been made to require that, for educational programs using credit hours, but not using a semester, trimester, or quarter system, a week of instructional time is any week in which at least five days of regularly scheduled instruction, examinations, or preparation for examinations occurs, as opposed to one day of regularly scheduled instruction, examinations, or preparation for examinations for all other programs. The Secretary believes it is important to ensure that full-time students are performing comparable workloads regardless of the type of institution they are attending, and that such work should be ratably allocated throughout the period of instruction. The Secretary notes that this is an area of abuse that is not fully addressed by the implementation of the "clock hour/credit hour" regulations. A corresponding change has been made to the definition of an *eligible program.*

One-third of an academic year and two-thirds of an academic year. In response to public comment, the Secretary has defined one-third of an academic year and two-thirds of an academic year in order to clarify the procedure for prorating awards under the FFEL and NDSL programs.

Undergraduate student. Because the Secretary recognizes that, at this time, there are legitimate reasons supported by statute for separate definitions of an *undergraduate student* under the various Title IV, HEA program regulations the definition of *undergraduate student* has been deleted in these final regulations.

Section 668.8 Eligible Program

Qualitative factors. Section 668.8(e)(1)(iii) requires that, for a short-term program, the length of the program may not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares students, as established by the State in which the program is offered, if the State has established such a requirement. In response to public comment, this provision has been amended to also prohibit a short-term eligible program from exceeding by 50 percent any applicable minimum number of clock hours required by a *Federal* agency for training in the recognized occupation for which the program prepares students.

In response to public comment, § 668.8(e)(2) has been revised to clarify that, since a certified public accountant cannot certify the accuracy of an institution's completion or placement-rate calculations, the institution shall substantiate these calculations by having the certified public accountant follow the procedures of an attestation engagement.

Calculation of completion rate. Section 668.8(f)(4) has been amended to require that a student must complete the educational program in which he or she is enrolled within 150 percent of the published length of the educational program in order to be counted as a completer for purposes of this calculation. This change was made to conform with the calculation of a completion rate under the Student Right-to-Know provisions. The Secretary notes that the Department will continue to evaluate the feasibility of replacing this methodology with the methodology developed relative to the Student Right-to-Know Act once that methodology has been published in final regulations.

Calculation of Placement Rate. In response to public comment, the requirement in proposed § 668.8(g)(1)(ii) that an institution exclude from the calculation of a placement rate students who are hired by the institution has been deleted from these regulations.

In response to public comment, a change has been made to the placement rate calculation to clarify that every student must be employed for at least 13 weeks in a recognized occupation for which they were trained or in a related comparable occupation before that student can be counted as placed.

The Secretary has amended § 668.8 by revising paragraph (k) to remove the provision that an institution offering an undergraduate educational program measured in credit hours and at least two academic years in length is exempt from applying the formula contained in paragraph (l) to that program if the program provides an equivalent degree as determined by the Secretary, or if each course within the program is fully acceptable for credit toward that institution's equivalent degree.

Paragraphs (k) and (l) were originally published in final regulations on July 23, 1993 (58 FR 39618). In those final regulations, the Secretary exempted from the requirements of the regulations, undergraduate educational programs that were at least two years in length and lead to an associate, bachelor's, professional, or an equivalent degree as determined by the Secretary or if each course within that program was fully acceptable for credit toward one of those degree programs at that institution. The Secretary believed that it was prudent to exempt programs that lead to an equivalent degree because there might be a type of degree being offered (not an associate, bachelor's, or professional degree) that the Secretary had not yet encountered. The Secretary wanted to be able to examine the degree to determine if that degree was in fact equivalent to an associate, bachelor's, or professional degree. If the Secretary determined that the degree was equivalent to an associate, bachelor's, or professional degree, and was at least two academic years in length, the Secretary would exempt from the regulations undergraduate educational programs that lead to the equivalent degree or if each course within the program was fully acceptable for credit toward that institution's equivalent degree.

However, since publication of the final regulations on July 23, 1993, the Secretary has yet to encounter a degree that the Secretary would consider to be an equivalent of an associate, bachelor's, or professional degree. Conversely, dozens of institutions have submitted to the Secretary arguments that their diploma programs are the equivalent of an associate degree program. The regulations were never meant to permit a determination that a nondegree program be classified as the equivalent of a degree program. The regulations only applied to a determination of whether a degree resulting from an educational program is equivalent to an associate, bachelor's, or professional degree. Because the diploma programs are not in themselves degree programs, the Secretary does not consider those programs to lead to an equivalent degree.

Because of this misconception by many institutions that "equivalent degree" means an educational program equivalent to a degree granting program, and because the Secretary has not yet found a true instance of an equivalent degree that is not an associate, bachelor's, or professional degree, the Secretary is removing the phrase "equivalent degree as determined by the Secretary" from paragraph (k).

Subpart B—Standards for Participation in the Title IV, HEA Programs

Section 668.13 Certification Procedures

Period of participation. In response to concerns of many commenters about the consequences (particularly the potential for provisional certification) to a participating institution in the event that the Secretary does not complete a review of the institution's application prior to the expiration of the institution's program participation agreement, even if the institution had filed its renewal application in a timely manner, § 668.13(b) is amended to provide that full certification will be extended on a month to month basis following the expiration of a program participation agreement where the institution's application for recertification was materially complete, and submitted at least 90 days prior to the expiration date.

Provisional certification. In response to public comment, proposed § 668.13(c)(1)(ii) that provided that the Secretary may provisionally certify an institution if the financial responsibility and administrative capability of the institution was being determined for the first time has been deleted from these regulations. Although this provision is statutory, the Secretary has decided that the other standards requiring the use of provisional certification are adequate to identify institutions that would be captured by this provision where greater monitoring and procedural restrictions are appropriate.

Section 668.13(c)(2)(i) has been amended to clarify the maximum permissible length of periods of provisional certification. Upon further consideration, the Secretary has decided to repeat the language of the statute that provides that periods of participation under provisional certification should be for "complete award years." So, for example, the regulations will permit the Secretary to provisionally certify an initial applicant for one complete award year, rather than for a period of 12 months as proposed in the February 28, 1994 NPRM. This will provide the Secretary with a complete award year of data on which to base determinations of further participation for the institution.

In response to public comment, § 668.13(d)(1) that lists the requirements for provisional certification to participate on a limited basis for institutions that are not financially responsible has been amended to make clear that the criteria of this section are not required for an institution that meets the exceptions to the general standards of financial responsibility under § 668.15(d).

In response to public comment § 668.13(d)(1)(ii) has been amended to clarify that any required submission of a letter of credit must be in an amount and in a form acceptable to the Secretary.

Proposed § 668.13(d)(1)(iii)(B) has been revised, consistent with similar changes in § 668.15(b) (3) and (4), to make clear how an institution demonstrates that it has met all of its financial obligations and is current in its debt payments. This provision is explained in greater detail in the section of the *Analysis of Comments and Changes* that addresses the factors of financial responsibility (§ 668.15).

In response to public comment, § 668.13(d)(2) has been clarified to explain that financial guarantees are only required if the institution comes within the requirements of § 668.15(c)(2), or where the institution fails to demonstrate financial responsibility under its current audit and has failed to do so at least one other time under the standards in effect during the preceding five years.

In response to public comment, a new paragraph (e) is added to § 668.13 which provides for denial of certification to initial applicants for participation in a Title IV, HEA program and to participants that have undergone a change of ownership resulting in a change of control, if the State in which those applicants or participants are located does not participate in the State Postsecondary Review Program. This addition conforms these regulations to the requirements of the State Postsecondary Review Program in 34 CFR part 667, and provides some further explanation of the consequences to an institution if the State in which the institution is located does not participate in the State Postsecondary Review Program. Under paragraph (e), the Secretary may provisionally certify a participating institution or branch campus in that State. Section 668.13(c)(2)(ii) has also been revised to provide that the provisional certification of an institution under these

circumstances expires at the end of the third complete award year following the date of the provisional certification.

In response to public comment, a change has been made to provide for notices of revocation of provisional certification to be sent by certified mail, instead of registered mail.

In response to public comment, § 668.13(f)(4)(i) has been modified to provide that the official reviewing a request for reconsideration of provisional certification must be different from, and not subject to supervision by, the official that issued the notice of revocation.

Section 668.14 Program Participation Agreement

In response to public comment, § 668.14(b)(1) has been amended to clarify that an institution must comply with all special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA. Corresponding changes have been made throughout the sections of 34 CFR part 668 and 34 CFR part 682 contained in this regulatory package.

In response to public comment, § 668.14(b)(4) has been amended to provide that an institution must provide information relating the administrative capability and financial responsibility of the information to a SPRE only if the institution was referred by the Secretary under 34 CFR 667.5.

The proposed regulations prohibited any type of incentive payments, particularly those based on "retention." In response to public comment, the Secretary has amended § 668.14(b)(22) to allow that token gifts may be given to students or alumni for referring other students for admission to the institution, as long as:

(1) The gift is not money, check or money order;

(2) No more than one such gift is given to any student or alumnus; and

(3) The value of the gift is no more than twenty-five dollars.

In response to public comment, proposed § 668.16(k) that requires that an institution: (1) Demonstrate a reasonable relationship between the length of the program and occupational entry level requirements and (2) establish the need for the training has been moved to § 668.14(b)(26). Further, the requirements of this provision have been amended to require an institution to demonstrate a reasonable relationship between the length of the program and occupational entry level requirements established by any Federal agency.

Section 668.15 Factors of Financial Responsibility

Sections 668.15(b) (1), (2), and (3) have been amended to clarify that, in order to be financially responsible, an institution must be providing the services described in its official publications and statements; providing the administrative resources necessary to comply with the requirements of subpart B; and meeting all if its financial obligations. This is a change from the proposed regulations that would have required an institution to demonstrate that it was *able* to provide and meet these requirements. The Secretary believes these changes more accurately reflect the intent of the regulations.

In response to public comment, § 668.15(b)(4) further defines the requirement that an institution be current in its debt payments. The Secretary considers an institution to be current in its long-term debt obligations if it is not in violation of existing loan agreements at the end of the institution's fiscal year. The Secretary considers an institution to not be current in all of its debt obligations whenever the institution is more than 120 days delinquent in making payments, and a legal claim has been initiated against the institution or a lien has been filed on its assets due to the non-payment of the obligation. The Secretary believes that an institution's non-payment of obligations is a serious concern because the possibility exists that legal actions brought by creditors may result in forfeiture of some or all of an institution's assets. Consistent with the determination that payment delinquencies place the institution at risk, the Secretary notes that such actions are also often precede an action by creditors to force a company into bankruptcy.

In response to public comment, § 668.15(b)(5) has been amended to require that the amount of an institution's required cash reserve shall be one-quarter of the amount the institution paid in refunds during its previous year, as shown in its audited financial statement. By using historical information specific to the individual institution, the Secretary provides for adequate reserves for all institutions, rather than establishing an across the board measure which would be inadequate for some and inappropriate for others. Also, in response to the comments, the regulations have been changed to require the cash reserve to be maintained as a cash deposit in a federally insured bank account or an investment in U.S. Treasury securities, with an original maturity of three months or less.

Proposed § 668.15(b)(6)(ii) that would have provided that an institution is financially responsible if the institution does not have a finding of unauthorized use of donor restricted net assets to meet current operating expenses, has been removed from these regulations. This change was made based upon general considerations that were presented in the public comments concerning the need to implement consistent standards for determining financial responsibility for for-profit and nonprofit institutions, and to simplify the administrative resources necessary to determine whether institutions were in compliance with the regulations.

In response to numerous public comments, § 668.15(b)(7)(i)(A) and (b)(8)(i)(B) have been amended to require that both for-profit institutions and nonprofit institutions must meet an acid test ratio of 1:1 to replace the proposed ratio requirements that differed for for-profit and nonprofit institutions. The acid test ratio is defined as the sum of cash and current accounts receivable, divided by current liabilities. The Secretary has kept the regulatory exclusions of unsecured or uncollateralized related party receivables because they represent capital outflows from an institution that do not contain provisions for repayment. The Secretary has allowed the inclusion of the institution's cash reserve requirement in the calculation of the acid test ratio.

In response to public comment concerning the proper development of standards for nonprofit and for-profit institutions, § 668.15(b)(7)(i)(B) has been amended to require that a for-profit institution may not have operating losses in one or both years exceeding ten percent of equity capital. The Secretary's intent is to determine whether a trend of continuing losses exists, or if a loss occurs in any one year that it's magnitude is such that it does not materially impact the equity of the institution. The Secretary has changed the reference year used in the calculation to be that of the beginning of the first year in the two year period rather than the most recently completed fiscal year.

In response to public comment, § 668.15(b)(7)(ii), (b)(8)(ii), and (b)(9)(v) have been added to provide that a for-profit institution, a nonprofit institution, or a public institution may demonstrate that it is financially responsible if it submits evidence of a superior bond rating as an alternative to having to meet the tests for financial responsibility. The Secretary considers

an institution to be financially responsible if the institution has currently issued an outstanding debt obligations that are, without insurance, guarantee, or credit enhancement rated at or above the second highest level of rating given by a nationally recognized statistical rating organization.

Section 668.15(b)(8)(i)(C)(*1*) has been changed from the NPRM to incorporate the existing requirement that a nonprofit institution must have a positive unrestricted current fund balance or positive unrestricted net assets. This requirement is unchanged from the former requirement in effect for more than fourteen years that a nonprofit have a positive unrestricted current fund balance.

Section 668.15(b)(8)(i)(C)(*2*) has been amended to require that a nonprofit institution may not have excess current fund expenditures in either or both of two years that results in a decrease in the current unrestricted fund or a decrease in unrestricted net assets of greater than ten percent of the institution's unrestricted current fund balance or unrestricted net assets in the beginning of the first year of the two year period. The proposed regulation would have required that a nonprofit institution not have a decrease in total net assets of such significance that if continued would result in a current ratio of less than 1:1. As in the requirement for for-profit institutions, the Secretary's intent is to determine whether a trend of continuing excess expenditures exists, or if a significant excess expenditure in any one year is so great in magnitude that it materially affects the unrestricted current fund balance or the unrestricted net assets of the institution.

In the NPRM the Secretary proposed that a public institution is financially responsible only if it has its liabilities backed by the full faith and credit of a state. In response to public comment, § 668.15(b)(9) has been revised to add three alternatives that a public institution may employ to demonstrate that it is financially responsible: for institutions reporting under the Single Audit Act, a positive unrestricted current fund balance; a positive unrestricted current fund balance in a state's Higher Education Fund, as presented in the general purpose financial statements of the state; or the submission of a statement by the State Auditor General that the institution has sufficient resources to meet all of its financial obligations.

In response to public comment, § 668.15(d)(ii) has been amended to identify the circumstances where an institution that does not otherwise demonstrate financial responsibility can continue to participate fully by showing that it meets certain conditions to demonstrate that it has sufficient resources to ensure against its precipitous closure.

In response to public comment, § 668.15(e)(3) has been added to clarify that the submission of an audit performed in accordance with the Single Audit Act satisfies the requirement for a submission of an audited financial statement under § 668.15(e)(1).

Section 668.16 Standards of Administrative Capability

In response to public comment, the Secretary has modified the proposed administrative standards significantly. The Secretary made some changes and clarified implementation of standards where commenters pointed out that the Secretary could achieve the same goal by requiring less detail or action by those institutions that have demonstrated a history of compliance with regulations governing the Title IV, HEA programs and by imposing more requirements or restrictions on institutions that either have no track record or have a record of problems administering the Title IV, HEA programs. The Secretary removed other sections of the proposed standards because there was overlap with the responsibilities of accrediting agencies or SPREs or duplication of other sections of the regulations.

In response to public comment, § 668.16(a) clarifies that an institution must administer the Title IV, HEA programs in accordance with all the statutory and regulatory provisions, and with any applicable special arrangement, agreement or limitation entered into under the authority of statutes applicable to Title IV of the HEA.

In response to public comment, § 668.16(b)(1) is amended by adding documented success in administering Title IV, HEA programs to the list of factors the Secretary may consider in determining whether an individual is capable. The Secretary intends to use the list of factors in § 668.16(b)(2) primarily to assess the adequacy of staff levels at institutions that apply for initial participation, change of ownership, or the addition of a location or branch campus; institutions that make other changes that have an impact on the administrative capability of the institution, such as ceasing to use a financial aid servicer; and institutions with documented compliance violations.

In the preamble to the February 28, 1994 NPRM, the Secretary solicited comment on the regulation of appropriate staffing levels at institutions. In response to public comment, the Secretary does not plan to specifically regulate in this area at this time. However, § 668.16 has been amended to clarify that the Secretary will look at the number and distribution of financial aid staff when determining if an institution uses an adequate number of qualified persons to administer the Title IV, HEA programs. The Secretary believes this addition is inherent to this provision and should be clearly stated. However, the Secretary does not plan to closely scrutinize the number or distribution of financial aid staff at an institution unless the Secretary finds other indications that the institution may not be administratively capable due to understaffing or a poor distribution of staff at the institution.

In response to public comment, use of third-party servicers is added to the list of factors in § 668.16(b)(2).

After consideration of public comment, the Secretary agrees that the burden to an institution of having to prepare written procedures for or written information indicating the nature and frequency of communication of pertinent information among all the offices that have an impact on the administration of the Title IV, HEA programs outweighs the benefit that this provision would provide to the Secretary. Therefore, proposed § 668.16(b)(4)(i) has been removed from these final regulations. The Secretary also agrees that, unless compliance problems relevant to the listed responsibilities are identified, institutions may satisfy the requirement in § 668.16(b)(4) that an institution have written procedures for or written information indicating the responsibilities of the various offices with respect to the approval, disbursement, and delivery of Title IV, HEA program assistance and the preparation and submission of reports to the Secretary by a general written description of the responsibilities of the various offices.

In response to public comment, § 668.16(e)(3)(B) is amended to clarify that a maximum time frame in which a student must complete his or her educational program must be no longer than 150 percent of the published length of the educational program for full-time students.

This section is also amended to clarify that the time frame must be divided into increments *of equal size*. The Secretary is making this change, as well as the

change from previous regulations that requires increments to be the lesser of an academic year or one-half of the length of the program, to make clear that no increment can coincide with the length of the maximum time frame.

Some institutions have used the previous provision as a means of avoiding determining satisfactory academic progress for a student until the student completes his or her program. Increments of the maximum time frame are expected to coincide with an institution's payment period, however. For example, in a program of one academic year that is structured on a quarter basis, the increments would be expected to be the quarters.

In response to public comment, § 668.16(f)(3) has been modified to include documentation of a student's social security number in the information normally available to an institution and for which the institution must have a system to identify and resolve discrepancies.

In response to public comment, § 668.16(g) has been amended to clarify that an institution must only refer to the Office of the Inspector General of the Department of Education *credible* information indicating fraud and abuse.

In response to public comment, the following sections have been removed from these regulations: proposed § 668.16(i) that provided that an institution that serves significant numbers of students with special needs must have and implement plans for providing students with information about how to meet their needs; proposed § 668.16(j) that would require institutions to have procedures for receiving, investigating, and resolving student complaints; proposed § 668.16(l), requiring that certain information be made available to students; proposed § 668.16(m) that required that an institution have advertising, promotion, and student recruitment practices that accurately reflect the content and objective of the educational programs offered at the institution; proposed § 668.16(o) which addressed the issue of outstanding liabilities; and proposed § 668.16(r), which proposed consideration of completion, placement and pass rate standards. The specific reasons for the removal of these provisions are discussed in the section of the *Analysis of Comments and Changes* that addresses administrative capability (§ 668.16).

In response to public comment, proposed § 668.16(k) that requires that an institution: (1) demonstrate a reasonable relationship between the length of the program and occupational entry level requirements and (2) establish the need for the training has been moved to the program participation agreement section (§ 668.14).

In response to public comment, § 668.16(j) has been amended to specify that the significant problems identified in reviews of the institution that the Secretary will take into account in determining administrative capability, relate to the administration of Title IV, HEA programs.

Proposed § 668.16(s), which would have made an annual cohort default rate of 20% in the FFEL programs and a 15% default rate in the Federal Perkins Loan Program immutable standards of administrative capability, has been modified in these final regulations in § 668.16(m) as follows. The Secretary accepted commenters' arguments that it would be more logical to use a 25% cohort default rate for the FFEL programs over a three-year period. Further, the Secretary has specified in this section of the regulations that if an institution cannot be determined administratively capable solely because the institution fails to comply with this section, the Secretary will provisionally certify the institution in accordance with § 668.13(c). An institution will have the right to appeal noncompliance with this provision by submitting an appeal in accordance with § 668.17(d). The Secretary has amended § 668.17(c)(6) to specify that this standard will not apply to tribally controlled colleges, HBCUs, and Navajo community colleges.

In response to public comment, the Secretary has amended § 668.16(l) to provide for the use of net enrollment figures, after deduction of students who were entitled to a 100 percent refund, in the calculation of withdrawal rate. In addition, the Secretary has now restricted the calculation of withdrawal rates to withdrawals of undergraduate students. The Secretary believes that the undergraduate enrollment pattern is an adequate measurement of an institution's ability to administer the Title IV, HEA programs.

Section 668.17 Default Reduction Measures

In accordance with statute, § 668.17(c)(6) has been amended to extend the exemption of historically black colleges or universities (HBCUs), tribally controlled community colleges, and Navajo community colleges from the provisions of § 668.17(c)(1) to July 1, 1998. Section 668.17(c)(1) addresses the loss of participation in the FFEL programs for institution's with cohort default rates above the specified thresholds.

Section 668.17(f) which addresses Federal SLS Program participation has been deleted since the Federal SLS Program is no longer in existence.

Section 668.22 Institutional Refunds and Repayments

Section 668.22(a)(1)(ii), (e)(1)(i), (g)((2)(iv), (i)(1)(i)(B), and (i)(2)(iii) have been revised to reflect that a student who has taken an approved leave of absence is considered to have withdrawn for purposes of Title IV, HEA program refunds and repayments. This change has been made to ensure the treatment of leaves of absence is consistent for all Title IV, HEA programs. The Federal Pell Grant Program regulations consider a student on a leave of absence to have withdrawn for purposes of receiving Federal Pell Grant Program funds. This was inconsistent with the FFEL programs regulations, which allowed an institution to consider a student on a leave of absence to still be enrolled. The FFEL programs treatment of leaves of absence remains in effect, but only for in-school deferment purposes, not for purposes of Title IV, HEA refunds and repayments. All Title IV, HEA programs will now treat a leave of absence as a withdrawal for refund and repayment purposes. Corresponding changes have been made by removing the language addressing leaves of absence in proposed § 668.22(i)(1)(ii), (i)(2), and (i)(3)(iii).

Section 668.22(a)(2) has been amended to clarify that the institution must provide refund examples to students only upon request, and must inform students of the availability of these examples in the written statement of its refund policy. The language proposed in the February 28, 1994 NPRM was unclear and implied that the required written refund statement must include the refund examples themselves.

In response to public comment, § 668.22(c)(2) and (f)(2)(ii) has been amended to include allowable late disbursements of unsubsidized Federal Stafford loans and loans made under the FDSL Program when calculating a student's unpaid charges. This language has also been changed to allow for the inclusion of late disbursements of State student financial assistance, provided the State in question has a standard written late disbursement policy which the institution follows in calculating unpaid charges and provided the student is eligible to receive the late disbursement in spite of having withdrawn. If an institution chooses to

count a late disbursement of State student aid in this manner, the institution will be liable for any amount not disbursed within 60 days after the student's withdrawal. If the late disbursement of State aid does not come in, the institution must recalculate the Title IV, HEA program refund and return any additional amounts required to the appropriate Title IV, HEA program accounts or to the lender within the applicable regulatory deadlines.

The February 28, 1994 NPRM proposed that certain fees could be subtracted from the refund due under a *pro rata* refund calculation. This treatment was consistent with previous *pro rata* guidance given under the FFEL programs. The February 28, 1994 NPRM pointed out that, as proposed, the calculation included the fees in the institutional costs, allowed the institution to retain a prorated portion of those institutional costs, and then allowed the full amount of those fees to be subtracted from the resulting refund. The resulting "double-counting" allowed the institution to retain more than the actual fees that were charged. In response to commenters that supported the elimination of such double-counting, § 668.22(c)(4) has been revised to allow an institution to exclude certain fees from the *pro rata* refund calculation so that the most an institution would be allowed to retain is 100 percent of an institutional charge.

Further, in response to comment, the reference to an application fee as an excludable fee has been deleted as it is not necessary to specifically allow for such an exclusion. The Secretary agrees with the commenters that asserted that an application fee should not be a factor in the calculation of an institutional refund for Title IV, HEA program purposes, because it is not an educational cost.

The provision allowing for the exclusion of expended board credits in excess of the attributable prorated portion (proposed § 668.22(c)(1)(iv)), based on the period attended by the student prior to withdrawal, has been removed. After further examination, the Secretary has found this provision to be excessively complicated and not entirely effective in the purpose intended. No support for this provision was received from commenters and the Secretary plans to revisit this issue in the future, after seeking further input from the financial aid community. Except for treatment under the provision in § 668.22(c)(6)(i), all room and board charges must be included in the *pro rata* refund calculation and refunded at the applicable percentage, as required by the Amendments of 1992.

The language of § 668.22(c)(5) (and corresponding language in Appendix A) has been changed to clarify the specific requirements related to "other charges assessed the student by the institution" under the *pro rata* refund calculation. "Other charges" includes, but is not limited to, charges for any equipment, books, or supplies issued by an institution to the student, provided that the enrollment agreement signed by the student specifies a separate charge for such equipment or provided that the institution refers the student to an affiliated vendor for purchase of the equipment. An institution may exclude the documented cost of such equipment from the *pro rata* refund calculation in the following instances: For unreturnable equipment, if the student actually receives and keeps the equipment; or for returnable equipment, the student does not return the equipment in good condition allowing for reasonable wear and tear, within 20 days after withdrawal. For example, an item is not considered to be in good condition and, hence, is unreturnable, if it cannot be reused because of clearly recognized health and sanitary reasons. Institutions must clearly disclose in the enrollment agreement any restrictions on the return of equipment, including identifying equipment that is unreturnable. The regulatory language has been changed to reflect that an institution must notify the student in writing, prior to enrollment, that return of such equipment will be required within 20 days of withdrawal. It is the responsibility of the institution to determine whether specific equipment is returnable or not, in accordance with State and accrediting agency guidelines. This change conforms with a similar provision from the FFEL programs regulations. The Secretary believes that it would be unreasonable to expect a student to return equipment within a certain time period without ensuring that the student has been informed of the conditions of acceptable return of equipment.

The February 28, 1994 NPRM proposed that institutions be exempted from making refunds of $25 or less, because the burden and cost of making such a refund would exceed the amount refunded. However, that proposed change will not be made. Section 668.22(f)(3)(iii) has been amended to remove the proposed minimum dollar amount below which a refund would not have to be made. After further consideration, the Secretary believes that this proposed provision is inconsistent with the amendment made to section 490 of the HEA that established criminal penalties for failure to pay refunds, specifically including refunds of less than two hundred dollars. Further, the Secretary believes that by the time the institution has determined the amount of the refund, most of the administrative effort and cost has been expended. The Secretary believes that neither the institution nor the student would benefit from the proposal to allow institutions to forego making refunds of $25 or less. Also, the Secretary believes that part of the institution's administrative costs are recouped through the administrative fee that is allowed to be excluded from the *pro rata* refund calculation.

In response to public comment, language has been added to § 668.22(i)(1)(ii) to limit an institution's determination of a student's unofficial withdrawal to no later than 30 days after the expiration of the enrollment period, the academic year, or the program, whichever is earlier.

Section 668.22(i)(2) has been amended to clarify that the refund deadline in that paragraph is applicable only to refunds made to students, and does not alter or affect the FFEL regulatory deadlines for returning a refund to a lender or the regulatory deadline for returning a refund to a Title IV, HEA program account.

In response to public comment, the Secretary has provided the following examples to aid in the implementation of the refund requirements:

Example #1

Fair and Equitable Refund: Term Institution

Institutional Profile. Term Community College (TCC) offers two- and four-year programs, measured in credit hours, and its academic year is divided into two semesters, each 15 weeks long. TCC participates in the Federal Pell Grant program, the Federal Family Education Loan (FFEL) programs, and the Federal campus-based programs. TCC charges by the semester: $1800 for tuition, $2500 for on-campus housing and meals, $25 for application, and $75 for administrative costs. Noninstitutional charges include: books and supply costs (because these items are purchased separately by the student, from the campus bookstore or an unaffiliated vendor), living expenses and meals (if the student lives in off-campus housing), transportation, and personal miscellaneous expenses. (Noninstitutional costs vary by student budget, depending in part upon the educational program in which the student enrolls.)

Applicable Refund Policies. The State in which TCC is located has a modified pro rata refund policy: students who withdraw on or before the 25 percent point of the enrollment period receive a 75 percent refund; students who withdraw after the 25 percent point but on or before the 50 percent point of the

enrollment period receive a 50 percent refund; and students who withdraw after the 50 percent point but on or before the 75 percent point of the enrollment period receive a 25 percent refund. (Students withdrawing after the 75 percent point of the enrollment period receive no refund under State guidelines.)

TCC's accrediting agency refund guidelines offer a 50 percent refund to students who withdraw in the first four weeks of the enrollment period, and a 25 percent refund to those who withdraw after four weeks but before the beginning of the ninth week. (Students withdrawing after that point receive no refund under the accrediting agency policy.)

Student Profile. Sam the Student enrolled in a two-year program at TCC, moved into on-campus housing, and began attending classes. Sam made a cash payment of $500 toward institutional charges.

Financial Aid Package and Disbursements. Sam's financial aid package for the academic year consisted of a $2200 Federal Pell Grant, a $2400 Federal Stafford Loan, a $1600 FSEOG, and $1000 in Federal Work-Study funds. Sam's first disbursement of Federal Pell Grant funds ($1100), his first disbursement of Federal Stafford Loan funds ($1116—loan and origination fees have been subtracted), and his first disbursement of FSEOG funds ($800), were credited to his institutional account. Sam received $400 of his Federal Work-Study award, paid directly to him for living expenses, before he officially withdrew at the end of the fifth week.

Step One: Figuring the Educational Costs. Only institutional costs are included in the refund calculation. TCC must use the institutional costs as charged, by the term, for a total of $4375—$1800 tuition, $2500 on-campus housing and meals (because Sam lives on-campus), and $75 for administrative costs. (The $25 application fee is not a cost of education, so it is not included.) Noninstitutional costs are treated in the repayment calculation. (See Example #3.)

Step Two: Figuring the Totals Paid to Institutional Costs. TCC's records show that Sam paid $500 in cash toward his institutional costs, and that a total of $3016 in student aid was paid toward institutional charges [$1100 Federal Pell+$1116 Federal Stafford+800 FSEOG=$3016]. (The Federal Work-Study funds are not reflected in this total, because funds earned through work-study cannot be required to be refunded or returned, and are therefore not included in the calculation of a refund.)

The total paid to institutional costs (student payments and financial aid) is $3516 [$500+$3016=$3516]. Only funds paid to institutional charges are included in the refund calculation; aid disbursed to the student for noninstitutional expenses is treated in the repayment calculation. (See Example #3.)

Step Three: Checking for Pro Rata Eligibility Under the Law. To determine whether Sam is eligible for a statutory *pro rata* refund calculation, TCC must determine if he's a first-time student and if he withdrew on or before the 60 percent point in time of the enrollment period for which he was charged. Sam is a first-time student, because he's never attended classes at TCC prior to this term. He withdrew at the end of the fifth week in the term; the term is 15 weeks long, and the 60 percent point is figured in calendar time for term institutions [15 weeks×.60=9, so any withdrawal prior to the end of the ninth week falls within the 60 percent requirement of statutory *pro rata*]. Sam withdrew at the end of the fifth week, so he is entitled to a statutory *pro rata* refund calculation.

Step Four: Calculating the Unpaid Charges. Because a student's unpaid charges impact the refund calculation, TCC must first calculate Sam's unpaid charges (as defined in § 668.22(c) and (f)) using the following formula:

Total Institutional Costs
− Total Aid Paid to Institutional Costs

=Student's Scheduled Cash Payment (SCP)
− Student's Cash Paid to Institutional Costs

=Unpaid Charges

To calculate Sam's unpaid charges, TCC subtracts the $3016 in total aid paid to institutional costs (from Step Two, above) from the Total institutional costs of $4375 (from Step One, above). The resulting scheduled cash payment is $1359 [$4375 − $3016=$1359]. From that total, TCC subtracts Sam's cash payment of $500 (from Step Two, above) and Sam's unpaid charges equal $859 [$1359 − $500=$859]. This amount ($859) will be used in all three refund calculations.

Step Five: Calculating a Fair and Equitable Refund. Under the Amendments of 1992, TCC must calculate Sam's refund under State and accrediting agency guidelines, and under statutory *pro rata* requirements. TCC must then use whichever calculation provides the largest refund.

In accordance with the June 8, 1993 Student Assistance General Provisions regulations, for all refunds other than statutory *pro rata* refunds, the student's unpaid charges must be subtracted from the amount the institution may otherwise retain. Therefore, in calculating Sam's refund under State and accrediting agency guidelines, $859 (from Step Four, above) must be subtracted from the amount TCC could otherwise retain.

The State refund guidelines allow Sam a 50 percent refund (he withdrew after the 25 percent point but before the 50 percent point), which means TCC is allowed to retain 50 percent of the institutional charges. Total institutional costs (from Step One, above) are $4375. Assessed at 50 percent, this allows TCC to retain $2188 [$4375×.50=$2187.5]. (Figures are rounded to the nearest dollar.) However, in accordance with the June 8, 1993 regulations, TCC must subtract Sam's unpaid charges of $859 (from Step Four, above) from this amount. Therefore, TCC is actually allowed to retain $1329 [$2188 − $859=$1329]. Sam's refund under the State policy is $2187, figured by subtracting the amount TCC can retain from the total paid to institutional costs (from Step Two, above) [$3516 − $1329=$2187].

The accrediting agency refund guidelines allow Sam a 25 percent refund (he withdrew after four weeks but before the beginning of the ninth week), which means TCC is allowed to retain 75 percent of the institutional charges. Total institutional costs (from Step One, above) are $4375. Assessed at 75 percent, this allows TCC to retain $3281 [$4375×.75=$3281.25]. (Figures are rounded to the nearest dollar.) However, in accordance with the June 8, 1993 regulations, TCC must subtract Sam's unpaid charges of $859 (from Step Four, above) from this amount. Therefore, TCC is actually allowed to retain $2422 [$3281 − $859=$2422]. Sam's refund under the accrediting agency policy is $1094, figured by subtracting the amount TCC can retain from the total paid to institutional costs (from Step Two, above) [$3516 − $2422=$1094].

To figure Sam's refund under the statutory *pro rata* refund calculation, TCC must first calculate the portion of the enrollment period that remains (in accordance with § 668.22(c)) by using the following formula for credit-hour programs:

Weeks Remaining in Period
÷Total Weeks in Period

=Portion of Enrollment Period That Remains

Sam withdrew at the end of the fifth week of a fifteen-week semester, so 10 weeks remain in the term. TCC calculates that for Sam, 60 percent of the enrollment period remains [10÷15=.666, rounded down to the nearest tenth]. The statutory *pro rata* calculation allows Sam a refund proportionate to the portion of the enrollment period that remains: 60 percent. Total institutional costs (from Step One, above) are $4375. However, under the statutory *pro rata* refund calculation, TCC is allowed to exclude from this amount an administrative charge, not to exceed the lesser of $100 or 5 percent of the institutional charges (provided that the fee is a real and documented charge). Therefore, the $75 administrative fee charged to all TCC students can be excluded, making the total institutional costs for statutory *pro rata* purposes equal $4300 [$4375 − $75=$4300]. (Had the administrative fee exceeded $100 or 5 percent of TCC's total institutional charges, TCC could only have excluded the allowable portion of the fee.) Total institutional costs are assessed at 60 percent, making Sam's initial refund equal $2580 [$4300×.60=$2580]. However, in accordance with the law, TCC must subtract Sam's unpaid charges of $859 (from Step Four, above) from his initial refund amount. Therefore, Sam's actual refund under the statutory *pro rata* refund calculation is $1721 [$2580 − $859=$1721].

After calculating all of Sam's possible refunds, TCC must use the calculation which provides for the largest refund. In this case, the largest refund is provided by the State refund calculation: $2187. This refund amount must be returned, in Sam's behalf, first to the Title IV, HEA programs and then to Sam, in accordance with the allocation priorities in § 668.22(g); no portion of the refund due can be used to pay Sam's unpaid charges to TCC.

Example #2

Fair and Equitable Refund: Nonterm Institution.

Institutional Profile. Nonterm Technical Institute (NTI) offers 900-hour and 1200-hour programs, measured in clock hours, and its academic year is 30 weeks long. NTI participates in the Federal Pell Grant program and the Federal Family Education Loan (FFEL) programs. NTI charges by the program and requires payment up-front. The institutional costs of the 900-hour program are: $3000 for tuition; $520 for equipment, books, and supplies; and a $100 administrative fee. Institutional costs for the 1200-hour program are: $4000 for tuition; $740 for equipment, books, and supplies; and a $150 administrative fee. Noninstitutional charges include: living expenses and meals (NTI has no on-campus housing or food service), transportation, and personal miscellaneous expenses. (Noninstitutional costs vary by student budget, depending in part upon the educational program in which the student enrolls.)

Applicable Refund Policies. The State in which NTI is located provides a 90 percent refund to students who withdraw before completing 10 percent of the program; students who withdraw after the 10 percent point but before completing 25 percent of the program receive a 70 percent refund; students who withdraw after the 25 percent point but before completing 50 percent of the program receive a 45 percent refund; and students who withdraw after the 50 percent point but before completing 75 percent of the program receive a 20 percent refund. (Students withdrawing after completing 75 percent of the program receive no refund under State guidelines.)

NTI's accrediting agency gives an 80 percent refund to students who withdraw before completing 15 percent of the program; students who withdraw after the 15 percent point but before completing 45 percent of the program receive a 50 percent refund; and students who withdraw after the 45 percent point but before completing 60 percent of the program receive a 25 percent refund. (Students withdrawing after completing 60 percent of the program receive no refund under the accrediting agency policy.)

Student Profile. Susan the Student, who lives in an off-campus apartment, enrolled in a 900-hour program at NTI and began attending classes. Susan made a cash payment of $800 toward institutional charges.

Financial Aid Package and Disbursements. Susan's financial aid package for the program consisted of a $2000 Federal Pell Grant and a $2325 Federal Stafford Loan. Susan's first Federal Pell Grant disbursement ($1000) and the first disbursement of her Federal Stafford Loan ($1081—loan and origination fees have been subtracted) were credited to her institutional account. At the end of the academic year, NTI determined that Susan had unofficially withdrawn. The last record of Susan's attendance was a midterm exam she'd taken after completing 450 hours of the program.

Step One: Figuring the Educational Costs. Only institutional costs are included in the refund calculation. NTI must use the institutional costs as charged, by the term, for a total of $3620—$3000 tuition, $520 for equipment, books, and supplies, and $100 for administrative costs. Noninstitutional costs are treated in the repayment calculation. (See Example #3.)

Step Two: Figuring the Totals Paid to Institutional Costs. NTI's records show that Susan paid $800 in cash toward her institutional costs, and that a total of $2081 in student aid was paid toward institutional charges [$1000 Federal Pell+$1081 Federal Stafford=$2081].

The total paid to institutional costs (student payments and financial aid) is $2881 [$800+$2081=$2881]. Only funds paid to institutional charges are included in the refund calculation; aid disbursed to the student for noninstitutional expenses are treated in the repayment calculation. (See Example #3.)

Step Three: Checking for Pro Rata Eligibility Under the Law. To determine whether Susan is eligible for a statutory pro rata refund calculation, NTI must determine if she's a first-time student and if she withdrew on or before the point in time when she had completed 60 percent of the clock hours scheduled for the period of enrollment for which she was charged. Susan enrolled last year in the same program at NTI, but she never began attending classes and so was entitled to a 100 percent refund. Therefore, in accordance with the regulatory definition in § 668.22(c), Susan is a first-time student. Susan's last recorded date of attendance was at the point of having completed 450 clock hours; 900 clock hours are scheduled for the program, and 60 percent of the scheduled hours would be 540 clock hours [900 hours×.60=540]. Because Susan is a first-time student and she withdrew before completing 60 percent of the hours scheduled, she is entitled to a statutory pro rata refund calculation.

Step Four: Calculating the Unpaid Charges. Because a student's unpaid charges impact the refund calculation, NTI must first calculate Susan's unpaid charges (as defined in § 668.22(c) and (f)) using the following formula:

Total Institutional Costs
−Total Aid Paid to Institutional Costs

=Student's Scheduled Cash Payment (SCP)
−Student's Cash Paid to Institutional Costs

=Unpaid Charges

To calculate Susan's unpaid charges, NTI subtracts the $2081 in total aid paid to institutional costs (from Step Two, above) from the total institutional costs of $3620 (from Step One, above). The resulting scheduled cash payment is $1539 [$3620 − $2081=$1539]. From that total, NTI subtracts Susan's cash payment of $800 (from Step Two, above) and Susan's unpaid charges equal $739 [$1539 − $800=$739]. This amount ($739) will be used in all three refund calculations.

Step Five: Calculating a Fair and Equitable Refund. Under the Amendments of 1992, NTI must calculate Susan's refund under State and accrediting agency guidelines, and under statutory *pro rata* requirements. NTI must then use whichever calculation provides the largest refund.

In accordance with the June 8, 1993 Student Assistance General Provisions regulations, for all refunds other than statutory *pro rata* refunds, the student's unpaid charges must be subtracted from the amount the institution may otherwise retain. Therefore, in calculating Susan's refund under State and accrediting agency guidelines, $739 (from Step Four, above) must be subtracted from the amount NTI could otherwise retain.

The State refund guidelines allow Susan a 20 percent refund (she withdrew after the 50 percent point but before completing 75 percent of the program), which means NTI is allowed to retain 80 percent of the institutional charges. Total institutional costs (from Step One, above) are $3620. Assessed at 80 percent, this allows NTI to retain $2896 [$3620×.80=$2896]. However, in accordance with the June 8, 1993 regulations, NTI must subtract Susan's unpaid charges of $739 (from Step Four, above) from this amount. Therefore, NTI is actually allowed to retain $2157 [$2896 − $739=$2157]. Susan's refund under the State policy is $724, figured by subtracting the amount NTI can retain from the total paid to institutional costs (from Step Two, above) [$2881 − $2157=$724].

The accrediting agency refund guidelines allow Susan a 25 percent refund (she withdrew after the 45 percent point but before completing 60 percent of the program), which means NTI is allowed to retain 75 percent of the institutional charges. Total institutional costs (from Step One, above) are $3620. Assessed at 75 percent, this allows NTI to retain $2715 [$3620×.75=$2715]. However, in accordance with the June 8, 1993 regulations, NTI must subtract Susan's unpaid charges of $739 (from Step Four, above) from this amount. Therefore, NTI is actually allowed to retain $1976 [$2715 − $739=$1976]. Susan's refund under the accrediting agency policy is $905, figured by subtracting the amount NTI can retain from the total paid to institutional costs (from Step Two, above) [$2881 − $1976=$905].

To figure Susan's refund under the statutory *pro rata* refund calculation, NTI must first calculate the portion of the enrollment period that remains (in accordance with § 668.22(c)) by using the following formula for clock-hour programs:

Hours Remaining in Period
÷*Total Hours in Period*
=Portion of Enrollment Period That Remains

Susan's last recorded date of attendance was at the point of having completed 450 clock hours, so 450 hours remain in the program. NTI calculates that for Susan, 50 percent of the enrollment period remains [450÷900=.50]. The statutory *pro rata* calculation allows Susan a refund proportionate to the portion of the enrollment period that remains: 50 percent. Total institutional costs (from Step One, above) are $3620. However, under the statutory *pro rata* refund calculation, NTI is allowed to exclude from this amount an

administrative charge, not to exceed the lesser of $100 or 5 percent of the institutional charges (provided that the fee is a real and documented charge). Therefore, the $100 administrative fee charged to all NTI students can be excluded, making the total institutional costs for statutory *pro rata* purposes equal $3520 [$3620 − $100=$3520]. (Had the administrative fee exceeded $100 or 5 percent of NTI's total institutional charges, NTI could only have excluded the allowable portion of the fee.) NTI could also exclude (from the total institutional costs) the documented cost of any returnable equipment that Susan failed to return in accordance with § 668.22(c), and the documented cost of any unreturnable equipment that was actually issued to Susan (and kept by Susan) in accordance with 668.22(c). Total institutional costs are assessed at 50 percent, making Susan's initial refund equal $1760 [$3520×.50=$1760]. However, in accordance with the law, NTI must subtract Susan's unpaid charges of $739 (from Step Four, above) from her initial refund amount. Therefore, Susan's actual refund under the statutory *pro rata* refund calculation is $1021 [$1760 − $739=$1021].

After calculating all of Susan's possible refunds, NTI must use the calculation which provides for the largest refund. In this case, the largest refund is provided by the statutory *pro rata* refund calculation: $1021. This refund amount must be returned, in Susan's behalf, first to the Title IV, HEA programs and then to Susan, in accordance with the allocation priorities in § 668.22(g); NTI cannot bill Susan for any unpaid charges, because under the statutory *pro rata* refund calculation, those charges have been paid by Title IV, HEA program funds.

Example #3

Repayment Calculation

Institutional Profile. United States Academy (USA) offers one- and two-year programs on a semester system; its academic year is 30 weeks long and divided into two equal semesters, each 15 weeks in length. USA participates in the Federal Pell Grant program and the Federal Family Education Loan (FFEL) programs. USA charges $800 tuition per semester. Noninstitutional costs are assessed by the semester at the following average rates: $3000 for living expenses and meals (USA has no on-campus housing or food service), $250 for books and supplies (not purchased through the institution), $600 for transportation, and $300 for personal miscellaneous expenses. (Noninstitutional cost assessments are amended as necessary based on individual student needs and circumstances.)

Institutional Repayment Policy. In keeping with the local bookstore's refund policy, 50 percent of the books and supplies allowance is incurred at the time of purchase. All other noninstitutional (living) expenses are prorated based on the percentage of the semester completed.

Student Profile. Sarah the Student, who lives in an off-campus apartment, enrolled for the winter semester at USA and began attending classes. She made a $400 cash payment toward her tuition costs. Her noninstitutional costs are adequately reflected in the institution's average student budget.

Financial Aid Package and Disbursements. Sarah's financial aid package for the program consisted of a $1800 Federal Pell Grant and a $2000 Federal Stafford Loan. Sarah's first Federal Pell Grant disbursement ($900) was applied first to her tuition balance ($400) and the remaining $500 was then disbursed to her in cash. The first disbursement of her Federal Stafford Loan ($930—loan and origination fees have been subtracted) was also disbursed directly to her. Sarah officially withdrew after attending 4 weeks.

Step One: Figuring Expenses Actually Incurred. Only noninstitutional costs are included in a repayment calculation. Institutional costs are treated in the refund calculation. (See Examples #1 and #2.) According to USA's repayment policy, 50 percent of Sarah's $250 books and supplies allowance was incurred at the time of purchase [$250×.50=$125]. The rest of her semester expenses, for living expenses and meals, transportation, and personal miscellaneous expenses, are prorated based on the percentage of the term completed. Total noninstitutional costs equal $3900 [$3000+$600+$300=$3900]. Because Sarah completed 4 of 15 weeks, these costs should be prorated at 27 percent [4÷15=.266, rounded to the nearest tenth]. Therefore, Sarah's noninstitutional costs incurred equal $1053 [$3900×.27=$1053].

Step Two: Figuring the Total Federal Student Financial Aid (SFA) Disbursed as Cash. Sarah received $500 of her Federal Pell Grant in cash, and all of her first Stafford Loan disbursements, $930, in cash. However, in accordance with § 668.22(e), the repayment calculation does not include any Title IV, HEA program loan amounts disbursed as cash, because those loan funds will have to be repaid by the student anyway. Therefore, a total of $500 cash disbursed is considered for repayment purposes. (As with the refund calculation, the repayment calculation does not include any Federal Work-Study funds disbursed as cash, because repayment of work earnings cannot be required. Notice that students Sam and Susan, from Examples #1 and #2 respectively, would not have owed repayments because they received no cash disbursements other than FFELP loan funds or Federal Work-Study funds.)

Step Three: Calculating the Repayment Owed. To calculate Sarah's owed repayment, USA must subtract the total costs incurred ($1053, from Step One above) from the total cash disbursed ($500, from Step Two above). In Sarah's case, this calculation results in a negative number [$500 − $1053=0], which means she owes no repayment. If her cash disbursement had exceeded her costs incurred, however, she would have been required to repay the balance back to the Title IV, HEA program funds (the Federal Pell Grant program, in this case), in accordance with the allocation priorities in § 668.22(g); if Sarah had owed unpaid charges to USA, no portion of the repayment owed could be used to pay those charges.

Section 668.23 Audits, Records, and Examinations

The Secretary has amended § 668.23 by requiring an institution or a third-party servicer with which the institution contracts to cooperate with the institution's nationally recognized accrediting agency in the conduct of audits, investigations, or program reviews authorized by law, in addition to the other authorized entities that were stipulated in the NPRMs.

In addition, the Secretary has amended this section to require an institution to have performed, without exception, on an annual basis, a compliance audit of an institution's administration of its Title IV, HEA programs or a third-party servicer to have performed, without exception, on an annual basis, a compliance audit of a third-party's administration of an aspect of an institution's participation in a Title IV, HEA program.

The Secretary is removing the audit exceptions proposed in the NPRMs that would have exempted certain institutions and third-party servicers from some or all of the audit requirements of this section because upon further review, the Secretary has determined that the proposed exemptions were inconsistent with the requirement in section 487(c) of the HEA that annual compliance audits be provided for in these regulations. However, changes are planned for the *Student Financial Assistance Programs Audit Guide* to reduce administrative costs by allowing institutions meeting certain performance-based or funding criteria to submit compliance audits under a reviewed or compiled basis rather than a full compliance audit.

Paragraph (c)(3) is revised to specify that an institution's or third-party servicer's audit report must be submitted to the Department of Education's Office of Inspector General within 120 days after the end of the institution's or servicer's fiscal year. An institution or third-party servicer that submits an audit conducted in accordance with the Single Audit Act (Chapter 75 of Title 31, United States Code) is required to submit that audit report in accordance with the deadlines established in that act.

Finally, paragraph (c)(4) is revised to include the Secretary of Veterans Affairs in the list of entities that the Secretary may require an institution or a third-party servicer to provide, upon request, the results of any audit conducted under this section.

Subpart G—Fine, Limitation, Suspension and Termination Proceedings

Section 668.82 Standard of Conduct

The Secretary has revised paragraph (d)(1)(D) to clarify that a third-party servicer violates its fiduciary duty and that of any institution with which the servicer contracts if the servicer uses or contracts in a capacity that involves any aspect of the administration of the Title IV, HEA programs any person, agency, or organization that has been or whose officers or employees are guilty of a crime or judicially or administratively determined to have committed fraud or other material violation of law with respect to government funds.

Section 668.92 Fines

The Secretary has revised this section to take into account additional criteria when determining the amount of a fine against a third-party servicer. Paragraph (a)(5) is revised so that a repeated mechanical systemic unintentional error is not counted as a single violation if the third-party servicer, against whom the fine is assessed, had already been cited for a similar violation and had not taken the appropriate steps to correct the problem. The Secretary will also take into consideration in determining the amount of the fine, the amount of Title IV, HEA program funds that were wasted as a result of the repeated mechanical systemic unintentional error. The Secretary also makes a conforming change in § 682.413 to parallel the changes described in this section.

Part 682—Federal Family Education Loan Programs

Subpart D—Guaranty Agency Programs

Section 682.413 Remedial Actions

The Secretary has revised the provisions of this section governing the means of collecting a liability that results from a third-party servicer's violation of applicable Title IV, HEA program requirements in administering a lender's or guaranty agency's FFEL programs. A third-party servicer is required to repay any outstanding liabilities because of its violation only if the lender or guaranty agency has not paid the full amount of the liability or has not made satisfactory arrangements to pay the amount of the liability within 30 days from the date that the lender or guaranty agency receives the notice from the Secretary of the liability. If the 30-day period elapses and the lender or guaranty agency has not paid the full amount of the liability within that time frame or has not set up a payment plan acceptable to the Secretary to repay that liability, the Secretary will attempt to collect any remaining amount owed by offsetting the lender's or guaranty agency's first bill to the Secretary for interest benefits or special allowance. After that, if the liability has not been completely paid, the Secretary will seek payment for the remainder of the liability from the third-party servicer.

Section 682.416 Requirements for Third-Party Servicers and Lenders Contracting With Third-Party Servicers

The Secretary has revised paragraph (b) to specify that the Secretary will apply the provisions of 34 CFR 668.15(b) (1)–(4) and (6)–(9) to determine that a third-party servicer is financially responsible under this part. Any references to an institution under those provisions shall be understood to mean the third-party servicer, for this purpose.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRMs, 84 parties submitted comments on the NPRM published on February 17, 1994 and 421 parties submitted comments on the NPRM published on February 28, 1994. An analysis of the comments and of the changes in the regulations since publication of the NPRMs follows.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority are not addressed.

General comments that refer to broad issues rather than a specific section or sections of the proposed regulations are discussed first, followed by a discussion of other issues in the order in which they appeared in the NPRMs.

It should be noted that not all comments are addressed in these final regulations. There are several reasons for this. First, many of the concerns expressed by commenters were directed to the statute, not the proposed regulations. In some instances, those comments are mentioned in the discussion that follows because of the importance of the issues that were raised. In most instances, however, they are not mentioned because the Secretary is not legally authorized to make the changes suggested by commenters. Second, many commenters made excellent suggestions for editorial and technical changes, as well as other minor changes, that, in the Secretary's opinion, strengthened the regulations; the Secretary has merely incorporated these suggestions without comment. Third, some comments appeared to be based on misunderstandings of what was actually in the NPRMs. For example, a few commenters expressed concern about the absence of a particular provision that was, in fact, included in the NPRMs. In general, these types of comments are not discussed.

General Comments

The Secretary received numerous comments about the overall impact of the proposed regulations. In general, commenters opposed to the proposed regulations believed that the February 28, 1994 NPRM did not achieve the coordinated balance of responsibilities among the triad members that it sought to achieve, and that it provided for extensive and duplicative data collection and reporting requirements that created a costly and unnecessary burden on the higher education community. Further, they believed that the regulations did not regulate "narrowly to the law," as they purported to do. In general, these commenters suggested that the Secretary should review each requirement in the proposed regulations to determine if it was required by the statute and should further ensure that all requirements that meet this test and are included in the final regulations are implemented in the most reasonable and cost effective manner. This, they believed, would ensure the Department's compliance with Executive Order 12866.

The more specific concerns of commenters opposed to the proposed regulations may be summarized as follows:

(1) The proposed regulations are overly prescriptive and excessive in detail and either exceed the statutory authority of the Secretary or significantly expand the statute beyond Congressional intent.

(2) The proposed regulations will force institutions and third-party servicers to engage in excessive and duplicative information gathering and reporting, at considerable cost, with no net increase in the quantity or quality of information available to the public, and will result in the diversion of institutions' and third-party servicers' already scarce resources away from their primary mission of providing a quality education.

(3) The proposed regulations threaten the diversity of American higher education and fail to focus oversight properly on vocational institutions.

In addition to receiving comments in opposition to the proposed regulations, the Secretary received comments supportive of the NPRM. For example,

these commenters favored the increased protections for students in the changes to the refund provisions, and approved of the strengthening of the administrative capability and financial responsibility standards.

Finally, the Secretary received suggestions from several commenters that the Department should strongly encourage all triad members to work together and adopt the same or similar language for the various standards, should collect the necessary data through a common source such as readily available public information or IPEDS, and should use common methodologies for various calculations such as completion or withdrawal rates.

Discussion: As suggested by several commenters, the Secretary has carefully reviewed each requirement in the proposed regulations in light of statutory intent. The Secretary has also carefully considered both the burden of the proposed regulations on institutions and third-party servicers, in terms of cost, duplication of effort, and the added recordkeeping and reporting requirements. Similarly, the Secretary has considered the benefits of the proposed regulations, not just to institutions and third-party servicers but to students and the general public as well. A particular concern of the Secretary has been how to ensure that the regulations hold the three members of the triad accountable for the manner in which they fulfill their responsibilities under the HEA yet still provide each member of the triad the flexibility to determine the appropriate means to carry out those responsibilities.

In general, the Secretary has responded to the concerns of commenters by eliminating much of what was perceived as excessive detail in the February 28, 1994 NPRM, thus providing institutions more flexibility to meet a particular requirement in the manner that best suits their needs. The final regulations make it quite clear that the Secretary continues to bear the primary responsibility for enforcing standards and requirements to ensure that institutions and third-party servicers administer Title IV, HEA program funds properly.

The Secretary does not believe that the Department's role overshadows those of the accrediting agencies or the States. These regulations not only speak to the responsibilities of each member of the triad, but also establish the Federal requirements for institutions and third-party servicers under the HEA. Therefore, the Federal role in these regulations may appear larger than that envisioned for the States and accrediting bodies, but this appearance is due to the inclusion of the implementing regulations for these responsibilities. Without question, the States and accrediting bodies will exercise their responsibilities by promulgating and implementing standards for HEA program participants, and the Secretary anticipates that any overview of all such requirements by the triad would show that the Federal role has been appropriately established. The Secretary notes that some of the commenters specific concerns are addressed in the *Analysis of Comments and Changes* section of these regulations.

Finally, with regard to the issue of whether the regulations properly focus on vocational institutions, the Secretary wishes to note that Congress found abuses in all sectors of higher education, not just the vocational sector. For this reason, the regulations apply to all institutions.

Changes: The specific changes to the regulations are discussed below.

Part 668—Student Assistance General Provisions

Subpart A—General

Section 668.2 General Definitions.

Academic Year. Comments: Many commenters argued that the proposed definition of a week in determining the length of an academic year should not be based on the number of days of instructional time for institutions that use clock hours to measure program length. These commenters suggested that a week of instructional time should be based on the number of clock hours completed by a student. Some of these commenters suggested that a week of instructional time should be defined as 24 clock hours; another commenter suggested 30 clock hours. A number of these commenters suggested that this approach was more consistent with the regulatory requirements for calculating pro-rata refunds, which relies on the number of clock hours completed by students.

Discussion: Section 481(d)(1) of the HEA requires that an academic year must be a minimum of 30 weeks of instructional time in which a full-time student is expected to complete at least 900 clock hours at an institution that measures program length in clock hours. Thus, the statute requires a minimum of 30 weeks and a minimum of 900 clock hours; both standards must be met.

Changes: None.

Comments: Many commenters recommended that the Secretary implement the provision in the Technical Amendments of 1993 that provides that the Secretary may reduce, for good cause, the 30-week minimum to not less than 26 weeks of instructional time.

Many of these commenters suggested that "good cause" should be based on educational outcomes, such as placement rates or completion rates. Some commenters suggested the same standard that was proposed for short-term programs in § 668.8—a 70 percent completion rate and a 70 percent placement rate. Other commenters suggested that approval by an institution's nationally recognized accrediting agency or State postsecondary review entity (SPRE) would demonstrate good cause. Some commenters suggested that good cause should be based on whether an educational program has historically provided instruction for less than 30 weeks in previous academic years. Other factors suggested for defining good cause included fiscal stability of an institution, scheduling adjustments due to natural disasters, ethnic composition of an institution's student population, an accelerated or concentrated educational program, and educational programs that offer advanced placement.

Some commenters recommended that no reductions in the 30-week minimum should be permitted or that reductions should be approved on an extremely limited basis in order to avoid inequitable treatment of institutions and students.

Discussion: The Secretary did not propose specific criteria to implement this technical amendment in the February 28, 1994 NPRM, but instead requested comments on a definition of "good cause" and requested comments on ways of implementing this provision that addressed the Secretary's concern that reductions in the award year would encourage many institutions to seek that treatment routinely. After reviewing public comments on defining good cause, and developing safeguards to discourage routine requests for reductions in the academic year, the Secretary has implemented this technical amendment through regulation.

In an effort to discourage routine requests, the Secretary will grant a reduction for institutions that can demonstrate a commitment to changing to a 30-week academic year, but will not permit the period of reduction to exceed two years. For institutions that do not demonstrate a commitment to changing to a 30-week academic year, the Secretary may grant a reduction for a limited period, on a case-by-case basis.

The Secretary agrees with the commenters that suggested approval by an institution's nationally recognized accrediting agency or State body that authorizes the institution to provide postsecondary programs should be considered as factors in determining good cause on a case-by-case basis, but such approval may not be a sufficient reason for granting an institution's request. Other factors that should be taken into account include the number of hours of attendance and other coursework that a full-time student is required to complete in the academic year, and any unique circumstances that justify granting the institution's request.

The Secretary does not believe that placement rates, completion rates or other educational outcomes that may measure the quality of an educational program are relevant in determining whether the instruction offered in less than thirty weeks is sufficient to justify a reduction in the minimum standard. Other factors suggested by commenters may qualify as unique circumstances that justify granting the institution's request, depending upon the context in which these factors are presented in a particular case.

Every institution that requests a reduction must also demonstrate that it has provided Title IV, HEA program funds to its students based on the academic-year requirements in section 481(d) of the HEA since July 23, 1992, as the requirements became applicable to the various Title IV, HEA programs. The Secretary believes institutions must have made a good faith effort to comply with the requirements of the statute. Institutions that did not comply with the law should not now expect to receive a temporary waiver.

Changes: A new § 668.3 is established, under which, for the purpose of awarding Title IV, HEA funds, the Secretary may reduce the length of an academic year for an institution that submits a written request to the Secretary. The request must identify each educational program for which a reduced academic year is requested and specify the requested length, which may not be less than 26 weeks of instructional time. The Secretary considers requests for reducing an academic year only for educational programs at institutions that provide 2-year and 4-year programs leading to associate degrees or baccalaureate degrees, respectively. In addition, an institution must demonstrate that it has provided Title IV, HEA program funds to its students based on the academic-year requirements in section 481(d) of the HEA since July 23, 1992.

In addition, for an institution that currently has an academic year of less than 30 weeks and demonstrates that it is in the process of changing to a 30-week academic year, the Secretary will grant a reduction for a period not to exceed two years.

For an institution that meets all of the above requirements other than demonstrating a commitment to changing to a 30-week academic year, the Secretary may grant a reduction for a limited period, on a case-by-case basis. The Secretary considers such factors as approval of the academic year for each educational program by the institution's accrediting agency or State body that legally authorizes the institution to provide postsecondary education, the number of hours of attendance and other coursework that a full-time student is required to complete in the academic year, and any unique circumstances that justify granting the institution's request.

Comments: Some commenters supported the proposed definition of a week as a seven-day period of instructional time in which one day of regularly scheduled instruction, examination, or preparation for examination occurs. Some commenters argued that the standard of one day a week was too lax and susceptible to abuse. One commenter suggested that the minimum standard for one week of instructional time should be revised to require one instructional hour per week. Another commenter suggested that the definition of an academic year should be based on the total number of days of scheduled instruction.

Discussion: The Secretary agrees with those commenters who were concerned that the proposed definition of a week of instructional time was susceptible to abuse. Based on these comments and on information the Secretary has received regarding abuses in this area, the Secretary believes that the standard of one regularly scheduled instructional day per week needs to be increased to five days of regularly scheduled time per week for educational programs using credit hours and not using a semester, trimester, or quarter system. Under the proposed definition published in the February 28, 1994 NPRM, institutions could structure programs that do not use clock hours or standard academic terms to provide one class a week and permit those classes to be "made up" later in the program, in order to maximize the amount of Title IV, HEA program funds received by the institution.

Changes: A change has been made. For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instructional time to be any week in which at least five days of regularly scheduled instruction, examinations, or preparation for examinations occurs. A corresponding change has been made to the definition of an *eligible program*.

Comments: A number of commenters suggested that instructional time should include internships. Some commenters suggested including other activities, such as periods of orientation, cooperative education, independent study, special studies, and research.

Discussion: The Secretary agrees that internships, cooperative education programs, independent study, and other forms of regularly scheduled instruction can be considered as part of an institution's academic year. In most cases, research is not considered to be regularly scheduled instruction. Orientation programs do not provide educational instruction related to class preparation or examination and must not be included in determining the length of an academic year.

Changes: None.

Comments: Several commenters argued that the proposed academic year definition would make it difficult for institutions to develop creative programs that allow students to accelerate their educational programs. One commenter believed that, if the Secretary does not account for these types of programs, a student will no longer have an incentive to accelerate his or her educational program, and the Department will expend more Title IV, HEA program funds on longer periods of study.

Discussion: Because the cost of a student's education includes living expenses in addition to the cost of tuition and fees, the Secretary believes that students who have an incentive to reduce their costs by accelerating their educational programs will still have a strong incentive to pursue a more concentrated or intensive course load. In addition, the Secretary will consider unique circumstance in determining whether to reduce the academic year for programs that are eligible for such consideration.

Changes: None.

Comments: A commenter suggested that the Secretary define two-thirds of an academic year as a minimum of 15 weeks of instructional time and one-third of an academic year as 10 weeks of instructional time in order to clarify the procedure for prorating the awards for students attending programs that are less than an academic year.

Discussion: The Secretary agrees that the procedure for prorating the awards

for students attending programs that are less than an academic year needs to be clarified. However, the Secretary does not believe that 15 weeks of instructional time is an adequate minimum standard for two-thirds of an academic year. If the minimum standard for a full academic year is 30 weeks, the minimum standard for two-thirds of an academic year should be two-thirds of 30 weeks (20 weeks).

Changes: A change has been made. In § 668.2, the Secretary defines two-thirds of an academic year as a period that is at least two-thirds of an academic year as determined by an institution. At a minimum, two-thirds of an academic year must be a period that begins on the first day of classes and ends on the last day of classes or examinations and is a minimum of 20 weeks of instructional time during which, for an undergraduate course of study, a full-time student is expected to complete at least 16 semester or trimester hours or 24 quarter hours in an educational program whose length is measured in credit hours or 600 clock hours in an educational program whose length is measured in clock hours. For an institution whose academic year has been reduced under § 668.3, one-third of an academic year is the pro-rated equivalent, as measured in weeks and credit or clock hours, of at least two-thirds of the institution's academic year.

In § 668.2, the Secretary also defines one-third of an academic year as a period that is at least one-third of an academic year as determined by an institution. At a minimum, one-third of an academic year must be a period that begins on the first day of classes and ends on the last day of classes or examinations and is a minimum of 10 weeks of instructional time during which, for an undergraduate course of study, a full-time student is expected to complete at least 8 semester or trimester hours or 12 quarter hours in an educational program whose length is measured in credit hours or 300 clock hours in an educational program whose length is measured in clock hours. For an institution whose academic year has been reduced under § 668.3, one-third of an academic year is the pro-rated equivalent, as measured in weeks and credit or clock hours, of at least one-third of the institution's academic year.

Comments: Several commenters suggested that the definition of an academic year in § 668.2 should be amended to reflect the provision in the Technical Amendments of 1993 specifying that the definition of academic year in section 481 of the HEA applies only to an undergraduate course of study.

Discussion: The Secretary agrees that a limitation in the definition of academic year needs to be included in § 668.2. However, the Secretary notes that the requirement that an academic year require a minimum of 30 weeks of instructional time applies to both undergraduate and graduate courses of study.

Changes: A change has been made to clarify that the amount of instruction that a full-time student is required to complete during an academic year applies only to an undergraduate course of study.

Full-time student. Comments: Several commenters believed that the Secretary should address the potential for abuse under the definition of *academic year* for educational programs that are measured in credit hours. One commenter suggested that the Secretary establish a weekly minimum full-time workload for full-time students in these programs by tying quarter hours to actual quarters to prevent an institution from claiming to offer a full academic year's worth of work over a thirty-week period by giving a full-time student a small amount of instruction, which the institution claims to be equivalent to 24 semester or 36 quarter hours. The commenter also suggested that the Secretary eliminate the use of quarter or semester hours for institutions that do not have quarters or semesters and instead require those institutions to measure their programs in clock hours.

Two commenters urged the Secretary to reject any mechanism where the institution would be responsible for self-measuring the quantity of work required because it would be too easy for unscrupulous institutions to evade. Instead, the commenters recommended that only bona fide courses, related work, research, or special studies would count toward whether a student would be full-time, and that each institution's quantification would have to be approved during the certification process set forth in § 668.13. One commenter also suggested that the Secretary change the procedures and not permit institutions to measure workloads for term or semester based schools in clock hours, because the clock hour schedules permitted institutions to compress the course offerings into too short a time period.

A few commenters advised that the clock hour/credit hour regulation would provide the protection necessary for the weekly schedules of students enrolled at institutions offering credit hours without terms, and recommended that no further action be taken in changing the proposed definition of full-time student. Several other commenters stated that they believed the proposed definition was sufficient to prevent abuse without further additions to establish a minimum full-time course workload. One commenter suggested that no stricter definition be adopted for full-time students enrolled at institutions offering credit hours without terms because this area is currently addressed by accrediting agencies, which are in a better position to evaluate the variety of delivery systems used by postsecondary institutions. One commenter also questioned whether it was fair to adopt a more stringent criterion for credit hour programs without academic terms rather than adopting uniform criteria and standards for full-time students for all sectors of postsecondary education.

One commenter suggested that the proposed definition was unfair because it requires the same number of credit hours for a student regardless of whether the courses are measured in semester hours or quarter hours, resulting in students having to perform a greater quantity of work during a quarter calendar if they were taking semester hours. Several other commenters suggested that the proposed definition was unfair because it would prohibit students from taking cooperative employment for periods that were less than eighteen weeks. These commenters suggested that shorter periods of cooperative education should be accepted in conjunction with a smaller number of credits so long as the workload was pro-rated to match the academic workload of a full-time student. For example, a student taking cooperative education for one-fourth of the credits necessary to be a full-time student would have to complete the cooperative training in one-fourth of the time allotted to a full-time student in an eighteen week program. Two other commenters stated that the proposed definition would establish workloads that could not readily be satisfied by part-time students or students that were taking evening or weekend classes. These commenters believed that students in these circumstances were often making many more sacrifices to pursue their education than full-time day students, and that it was unfair to reduce or eliminate aid that these students currently receive because they do not carry enough credits to qualify for comparable aid under the proposed regulations.

One commenter suggested that the in-class attendance should be the only component of the student workload considered for this provision, and that under that standard the definition for full-time student would require at least

12 hours of attendance per week to correspond to the 12 credit hour workload.

A few other commenters suggested that the proposed definition be clarified to show that only students taking classes "entirely" by correspondence would not be required to meet the workload requirements set out in the proposed definition. Others suggested that the language for credit hour workloads be amended to show that trimester hours would require the equivalent workload for semester hours for academic terms and academic years.

Discussion: As stated in the February 28, 1994 NPRM, this definition of *full-time student* is based primarily on the longstanding definition found in the Federal Pell Grant and the campus-based program regulations. The Secretary believes this definition of *full-time student* has proved to be appropriate and effective and does not believe any substantive changes are necessary. The Secretary notes that this definition is now applicable for purposes of all Title IV, HEA programs. The individual Title IV, HEA program regulations will be amended at a later date to remove the definition of *full-time student.*

The Secretary believes that additional changes are appropriate in the regulations to prevent institutions from establishing elongated instructional schedules that do not require an appropriate workload throughout that period for a full-time student. Institutions offering credit hour programs without terms have more flexibility in shifting the workload requirements for their programs over an indefinite period, and the Secretary believes that it is appropriate to establish some minimum instructional periods that must be used for full-time students attending these institutions. No corresponding changes need to be made where students are already required to receive a minimum amount of clock hours of training per week to be full-time students, or where the institution has fixed terms.

The Secretary also believes it is important to ensure through regulations that full-time students are performing comparable workloads regardless of the type of institution they are attending, and that such work should be ratably allocated throughout the period of instruction. The Secretary notes that this is an area of abuse that is not fully addressed by the implementation of the "clock hour/credit hour" regulations.

Rather than changing the proposed definition of full-time student to require measurement of student workloads, a modification is being made to require a minimum number of days of instruction per week for institutions that offer credit hour programs without terms. A discussion of the specific change is included in the section of the *Analysis of Comments and Changes* that addresses the definition academic year (§ 668.2).

Changes: None.

Undergraduate student. Comments: Several commenters objected to defining an *undergraduate student* as a student who has not earned a baccalaureate or first professional degree. The commenters noted that this would prevent students who were pursuing further undergraduate studies from receiving any Title IV, HEA program assistance. The commenters noted that this was a departure from current departmental practice that permits such a student to receive assistance under the Title IV, HEA loan programs.

Discussion: The Secretary recognizes that there are legitimate reasons supported by statute for separate definitions of an *undergraduate student* based upon the different statutory requirements for the various Title IV, HEA program regulations. The Secretary believes it is not appropriate at this time to include a general definition of an *undergraduate student* in the Student Assistance General Provisions regulations.

Changes: The definition of *undergraduate student* has been removed from these final regulations.

Third-party servicer. Comments: Many commenters asked the Secretary not to include computer services or software in the examples of activities that constitute administration of a Title IV, HEA program, on the grounds that this type of service encompasses activities in a broad spectrum, from computer software distributors of popular commercial spreadsheet programs to computer on-line Federal news services. Several commenters stated that computer services are simply technological means utilized in administering the programs; computer servicers who actually perform administrative functions would be covered, therefore there is no need to separately include such providers in the definition. Other commenters argued for the inclusion of computer services or software in the examples of a Title IV-related activity. These commenters argued that it was necessary to include providers of computer services and software in the definition of third-party servicer because many distributors of software certify that their computer programs—represented to satisfy Title IV, HEA program requirements—comply with all applicable Title IV, HEA program requirements. As a result, institutions contracting with a provider for the software take for granted that the software is in compliance with all Title IV, HEA program requirements. If a violation of a Title IV, HEA program requirement occurs because of the software, the provider of that software should be held responsible. Several commenters argued that those software providers could be subject to potential liabilities for Title IV, HEA program violations, even though the computer programs of the provider could be modified by the user.

Discussion: The Secretary agrees with those commenters who either objected to the inclusion of computer services or software providers in the examples of Title IV-related activities, or who saw no need to separately include such providers. In adopting the definition of third-party servicer, the Secretary is not including providers of those services or software because the Secretary believes that this type of service is simply a technological means to assist in carrying out certain administrative functions that are already included in the proposed definition of a third-party servicer.

Changes: None.

Comments: Two commenters were concerned that a third-party servicer could avoid the requirements of these regulations by simply not entering into a written contract with an eligible institution to administer any aspect of that institution's participation in the Title IV, HEA programs. The commenters recommended that the regulations stipulate that the acceptance of fees by the servicer from the institution for administration of any aspect of the institution's participation in a Title IV, HEA program would constitute a contract with the institution for purposes of the definition of third-party servicer under these regulations.

Discussion: The Secretary disagrees with the commenters that a third-party servicer that contracts with an eligible institution could be exempt from these regulations simply by not executing a written contract with that institution. A third-party servicer is defined as anyone who contracts with an institution, and is not limited to only those entering a written contractual agreement. Oral contracts, payment of fees for services rendered and other arrangements also constitute enforceable contracts. The Secretary recognizes these types of contracts and will consider an individual or organization employing such a method to contract with an institution to administer any aspect of the institution's participation in the Title IV, HEA programs to be a third-party servicer and therefore subject to

these regulations. The Secretary cautions institutions and third-party servicers that verbal contracts or other non-written contracts do not exempt institutions from documenting in writing the contractual obligations of both parties, including the requirements in § 668.25, and submitting a copy to the Secretary, if so instructed by the Secretary.

Changes: None.

Comments: One commenter felt that the activities of Multiple Data Entry (MDE) Processors and the Central Processor should be included in the examples of what constitutes administration of participation in a Title IV, HEA program because the data generated by MDEs or the Central Processor is the foundation for determining a student's eligibility for Title IV, HEA program assistance.

Discussion: The Secretary disagrees with the commenter. The Secretary has previously explained in the NPRM published on February 17, 1994, that MDEs serve under contract with the Department and are already bound by that contract and other Department of Education requirements. Therefore, the Secretary does not believe it necessary to separately regulate MDE activities as part of these regulations.

Changes: None.

Comments: One commenter was of the opinion that the activities of administering or scoring ability-to-benefit tests should be included in the examples of what the Secretary considers to be a third-party servicer activity because these activities constitute the determination of student eligibility.

Discussion: The Secretary agrees with the commenter that these activities could be considered to be an aspect of the administration of Title IV, HEA programs and therefore should be regulated. However, the Secretary believes that any abuses in these types of activities will be protected against in the regulations governing the administration of ability-to-benefit tests. The Secretary plans to issue an NPRM on this subject shortly. Therefore, the Secretary does not believe it necessary to regulate administering or scoring ability-to-benefit test activities as part of these regulations.

Changes: None.

Comments: A few commenters requested that attorneys litigating on behalf of institutions to collect loan funds or interpreting statutory or regulatory requirements be excluded from the definition of third-party servicer.

Discussion: The Secretary generally considers attorneys not to be covered by the definition of a third-party servicer under these regulations. The Secretary, in promulgating the definition of third-party servicer, applied the definition to a set of activities relating to the administration of the Title IV, HEA programs, and thus is not regulating distinct entities by their identity but rather the activities that individuals or organizations perform in contracting with institutions. Provision of legal advice is not one of these activities. However, it is conceivable that an attorney would be considered a third-party servicer under these regulations if the activity of the attorney, performed on behalf of an institution, constitutes administration of the Title IV, HEA programs. It would not be appropriate to state that attorneys are never considered third-party servicers as that would permit services to escape oversight simply by being provided under attorney signature or by non-attorneys working for attorneys or their law firms.

Changes: None.

Section 668.8 Eligible Program

Definitions. Comments: Some commenters believed that the definition of "equivalent of an associate degree" would be difficult to administer because colleges do not have consistent standards for accepting two-year programs for full credit toward a bachelor's degree and for qualifying a student for admission into the third year of a bachelor's degree program. Some of these commenters suggested that any person who completes the equivalent number of credit hours necessary to receive an associate degree should be included in this definition as long as the person earned those credits from an institution that was accredited by a nationally recognized accrediting agency. Other commenters suggested that any program that leads to an occupational objective that requires licensing or certification and equals at least the length of a typical associate degree program, should be added to the proposed definition. Another commenter expressed support for the provision as written in the February 28, 1994 NPRM.

Discussion: As stated in the February 28, 1994 NPRM, this definition is modeled after section 1201(a)(3) of the HEA, and is designed to measure the educational backgrounds of students admitted to programs offered by a proprietary institution of higher education and postsecondary vocational institutions. The Secretary believes that a student does not have the equivalent of an associate degree unless he or she has completed an educational program that includes two critical characteristics: the student successfully completed at least a two-year program that is acceptable for full credit toward a bachelor's degree and the student qualifies for admission into the third year of a bachelor's degree program. The alternatives suggested by commenters lack these characteristics.

In response to comments about the absence of consistent standards, the Secretary notes that inconsistent standards apply to students with associate degrees as well. The two-year programs completed by students with an associate degree may be fully transferable to some institutions offering bachelor's degree, but not to other institutions. Institutions that have programs leading to a bachelor's degree also have different standards for determining a transfer student's standing.

Changes: None.

Qualitative Factors. Comments: Some commenters argued that short-term programs (programs of less than 600 clock hours) should not be required to be in existence for a year before establishing eligibility because the rate of technological change in the workplace dictates rapid responses by institutions in offering educational programs to meet those changes. Some of these commenters also believed that factors related to quality should be determined by accrediting agencies. Another commenter suggested that initial eligibility for these programs should be based on an institution's track record of success rather than the existence of the program for one year.

Discussion: The Secretary believes that a good track record of success is whether an institution can maintain a new program for one year. The Secretary agrees that the quality of these programs should continue to be monitored by accrediting agencies, but the history of abuse in these programs necessitates Federal regulatory standards as well. Institutions are not prevented from responding rapidly to the demands of the economy by offering new short-term programs, but institutions must be able to demonstrate that these new programs can meet the minimum placement and completion rate standards before Title IV, HEA funds are provided to students enrolled in these programs. Obviously, this data cannot be provided unless the program has been in existence for a period of time.

Changes: None.

Comments: A number of commenters objected to limiting the length of a program to no more than 150 percent of the minimum number of clock hours required for training in the recognized occupation for which the program

prepares students, as established by the State in which the program is offered, if the State has established such a requirement. Some of these commenters observed that the requirement would create inconsistent standards because States have different requirements and that maximum program lengths should be determined by accrediting agencies. Another commenter argued that differing State standards would make it difficult to train students from neighboring States if those States have higher standards.

Some commenters believed that "course stretching" was a frequent source of abuse. They cited examples of institutions' combining short programs into one accredited course that does not specifically lead to licensure, purely for the purpose of exceeding the statutory 600 clock hour minimum. These commenters recommended that the standard in the February 28, 1994 NPRM was too lenient and that the program length should not exceed the minimum State standard. Some commenters suggested that the minimum licensing standards of the Federal government should also be taken into account in limiting the length of a program. Another commenter suggested that exceptions should be made to the general standard if the education provided by a particular program was better than average.

Discussion: The Secretary believes that 150 percent of the State minimum allows enough latitude for institutions to provide quality programs and furnishes a sufficient safeguard against the abuses of course stretching. Because States have different licensing standards, the Secretary does not believe that a single standard for a maximum program length is appropriate. The argument made by one commenter about training students from neighboring States with higher standards only serves to illustrate the importance of recognizing each State's requirements. Training students who will not be able to meet the licensing requirements of the States in which they intend to work is a terrible disservice to those students. The Secretary agrees that these regulations ought to recognize any minimum standards established by various Federal agencies for applicable short-term programs.

Changes: This provision is revised to prohibit a short-term eligible program from exceeding by 50 percent any applicable minimum number of clock hours required by a Federal agency for training in the recognized occupation for which the program prepares students.

Comments: Some commenters argued that programs with a small number of graduates would not provide a statistically valid measure for completion or placement rates.

Discussion: The Secretary believes these rates are statistically valid unless fewer than thirty students complete a program in an award year. The percentage of educational programs this size participating in the Title IV, HEA programs is so small, that the issue of statistical validity does not need to be addressed in the regulations.

Changes: None.

Award Year. Comments: Many commenters suggested that the period of time for calculating the placement rate should be based on the most recent calendar year or on the award year ending twelve months earlier (i.e., for 1995–96, the placement rate would apply to students who graduated in 1993–94) instead of the immediately preceding award year, to account fully for the 180-day period permitted to demonstrate that a graduate has been placed and the 13-week period required to count an employed student as placed. The ability to count individuals as placements under these circumstances becomes increasingly difficult as graduation dates approach the end of an award year. Some of these commenters believed that this approach would be consistent with the reporting procedures of many States and accrediting agencies.

Other commenters suggested that the burden on institutions would be reduced significantly if the formula for calculating placement and completion rates were the same as the Department's Student-Right-to-Know provisions, and if the same formulas were used by accrediting agencies and State licensing agencies.

Discussion: As noted in the earlier discussion, one reason that the Secretary has adopted the requirement for a short-term program to be in existence for at least one year is to allow for a track record of completion and placement rates. If the calculation of these rates were to be based on an earlier award or calendar year than the one specified in these regulations, the Secretary would need to require that newly established short-term programs remain ineligible for an even longer period so that track record could be established. The Secretary does not wish to discourage the creation of legitimate, high quality short-term programs by requiring too great a period of ineligibility for those programs. The Secretary notes, of course, that once these regulations have been in effect for at least a year, data for currently eligible programs, based on earlier years, will be available for review.

The Secretary agrees that a standard rate is desirable, to the extent that a standard rate will provide the information the Department and other entities seek to obtain. Some rates may have to differ in order to achieve the purpose for which they are mandated. For example, a rate that is designed purely for consumer information purposes may require different data or time periods, than a rate that must coincide with student aid program calendars or a rate that is used for long-term academic studies. The Secretary cannot control the design of placement rates required by State agencies or accrediting agencies, but a standard rate or rates that can be calculated from the same data sources would help to reduce the burden on institutions. The Secretary encourages States and accrediting agencies to foster the development of uniform standards the Secretary could adopt, or adopt the standards in these regulations.

The Student-Right-to-Know regulations are currently being drafted with the intention of developing a completion rate that will be useful for all Title IV, HEA programs when the statute so permits; but the Student-Right-to-Know regulations will not require a placement rate calculation.

Changes: None.

Calculation of Completion Rate. Comments: Some commenters suggested that the definition of "enrolled" for purposes of calculating completion rates should be amended to reflect only students who begin attending classes.

Another commenter noted that some institutions do not charge new students for any institutional costs during the first month that the students attended classes, because administrators at these institutions believe that if these students withdrew before tuition and fees were assessed, the students could be excluded from the calculation of a completion rate.

Discussion: As stated in the February 28, 1994 NPRM, when calculating the completion rate, an institution would subtract from the number of regular students who were enrolled in the program those students who withdrew, dropped out of, or were expelled from the program and were entitled to and actually received in a timely manner in accordance with the refund requirements of these regulations, a refund of 100 percent of their tuition and fees (less any permitted administrative fee) under the institution's refund policy. The Secretary believes that this provision addresses the commenters concerns.

Changes: None.

Comments: Some commenters suggested that students who transfer to another program or who withdraw because they have found a new job, should be excluded from the completion-rate formula.

Discussion: The Secretary believes that transfer students and students who withdraw for the purpose of starting new jobs or withdraw for other reasons are accounted for by allowing up to 30 percent of the enrolled students to withdraw from the program.

Changes: None.

Calculation of Placement Rate.

Comments: Many commenters objected to the requirement that a student must be employed for at least 13 weeks following graduation from an institution to be included in that institution's placement-rate calculation. These commenters believed that this requirement is overly burdensome because the institution would have to track those students for long periods. They believed that an institution should not be held accountable for factors that are beyond the institution's control, such as layoffs, plant closings, illnesses, forced relocations, or the motivation of students. Some commenters suggested that instead of tracking students (who tend to be very mobile) for 13 weeks, evidence of the initial hiring by an employer should suffice. A commenter suggested that the period of employment should be reduced to 30 days.

Discussion: As discussed in the February 28, 1994 NPRM, the Secretary believes that an employment requirement of 13 weeks will help stem abuses by institutions that may arrange to have students hired for short-term jobs in order to boost placement rates. In addition, a period of time beyond the initial hiring by an employer should be used to determine that the student received adequate training from the institution. The Secretary believes that extraneous factors affecting a student's employment are accounted for by using a placement rate that excludes up to 30 percent of the institution's graduates. The 13-week period is consistent with the period of time a student must be employed to be counted in the institution's placement rate under the procedures delineated in § 668.17(d) for the appeal of an institution's loss of participation due to an unacceptable cohort default rate

Changes: None.

Comments: A commenter suggested that students who are placed in jobs that are not related to their training should be counted, or at least excluded from the placement-rate formula. Another commenter suggested that placements should be limited to graduates who obtained a job in the recognized occupation for which they were trained in order to prevent program abuse.

Discussion: Students who are placed in jobs not related to their training should be treated in the formula in the same manner as students who are not employed. The placement rate is designed to measure the effectiveness of the training provided by the institution, and employment in an unrelated job does not demonstrate that the training was effective. The Secretary believes that graduates who are employed in occupations that are comparable and related to the occupation for which they have been trained should be included in the numerator of the placement rate formula. In these circumstances, the training provided by the school is likely to have been a contributing factor in obtaining employment. However, the Department may revise this provision in the future if there are numerous incidents of abuse in this area.

Changes: None.

Comments: A number of commenters contended that it would be too burdensome for institutions to document the placement rates of students because students and employers would have little incentive to provide written verification of employment. Some commenters believed the substantiation requirement would discourage employers from hiring students from institutions that solicited documentation. Some commenters recommended that the institution should be required to record information, such as the name, address, and telephone number of the employer, the job title, and the starting date of employment, instead of obtaining the documentation proposed in the February 28, 1994 NPRM. A State agency, or the Department's reviewers, or an auditor could then use this information to verify the placement. Other commenters suggested that a written statement from the student that his or her employment was a result of the institution's training would be sufficient verification; or that an institution should merely be required to document its attempt to obtain written verification from employers or graduates.

Many commenters also were concerned about the cost of the Secretary's proposed requirement that an institution's auditor should review the documentation of placement rates for each student in the placement-rate calculation. Some of these commenters suggested that the auditor be permitted to verify the placement rates by selecting a random sample. Some commenters suggested that the Department should administer and pay for its own placement substantiation procedures.

Discussion: As stated in the preamble to the February 28, 1994 NPRM, the Secretary believes that requiring institutions to document this data and requiring an auditor to review this data will help curb abuse by institutions that may overstate their placement rates to achieve and maintain eligibility for short-term programs. In order to address this concern, the Secretary believes that documentation of employment must be made by a reliable source and that written statements by the student or the institution are not sufficient. The failure of an employer or student to respond to requests for documentation is accounted for by using a placement rate that excludes up to 30 percent of the institution's graduates.

The Secretary disagrees with comments that the requirement of auditing each placement rate is unnecessary or prohibitively expensive. The audit will be conducted as part of the institution's annual compliance review and specific guidance provided in the Department of Education's audit guide should be drafted in a manner sufficient to detect abuse and avoid unnecessary costs.

Changes: None.

Comments: Some commenters suggested that based on auditing literature, certified public accountants cannot certify the accuracy of an institution's placement-rate calculations, but must instead follow the procedures of an attestation engagement.

Discussion: The Secretary agrees with the commenters that a clarification is necessary.

Changes: This section has been amended to require that an institution shall substantiate the calculation of its completion and placement rates by having the certified public accountant who prepares its audit report required under § 668.23 report on the institution's calculations based on performing an attestation engagement in accordance with the Standards for Attestation Engagements of the American Institute of Independent Certified Public Accountants (AICPA). Section 668.24 has also been amended to reflect the same type of change discussed here.

Comments: Some commenters argued that students who are hired by an institution either before or after they receive a degree or certificate from that institution, should not be excluded from the placement rate calculation. The

commenters suggested that institutions would be penalized for hiring the most qualified candidate and that any abuse in this area could be easily detected. Other commenters suggested that graduates who are employed by separate businesses that are operated by, or financially linked to, an institution's owner(s) should be excluded from the placement-rate calculation. Some commenters suggested that graduates who were student employees should not be subtracted from the number of students who have degrees or certificates if they find a position with another employer.

Discussion: Upon further consideration, the Secretary agrees that including students who are hired by an institution would have a negligible effect on the institution's placement rate, particularly if the hiring is based on a legitimate employment selection process.

The Secretary does not agree with the suggestion to exclude graduates from an institution's placement-rate formula if they are hired by separate businesses that have some financial connection to the institution. In many of these cases, the potential for abuse is not as great because the economic interests of the parties that control the separate businesses do not necessarily coincide with the financial interests of the institutions.

The Secretary agrees that student employees who are no longer employed by the institution upon graduation and who are hired by another employer after graduation, should not be excluded from the placement rate calculation.

Changes: The requirement that an institution exclude from the calculation of a placement rate students who are hired by the institution has been deleted from these regulations.

Comments: Some commenters believed that the placement rate calculation may be misinterpreted by some institutions because the proposed placement rate calculation requires the school to include students in the numerator who, "on the date of this calculation *are employed*, or have been employed for at least 13 weeks following receipt of the credential by the institution." These commenters suggested that the phrase "are employed" will be interpreted to mean that any student employed at the time the calculation is made, regardless of whether they have met the 13-week standard, can be included in the numerator.

Discussion: Every student must be employed for at least 13 weeks in a recognized occupation for which they were trained or in a related comparable occupation before that student can be counted as placed. The Secretary agrees to clarify this provision.

Changes: A change has been made to clarify that every student must be employed for at least 13 weeks in a recognized occupation for which they were trained or in a related comparable occupation before that student can be counted as placed by inserting a comma after the words "have been employed."

English as a Second Language. Comments: Some commenters argued that the purpose of the testing requirement for students who completed a program in English as a Second Language (ESL) was unclear, and that testing the proficiency of these students was an intrusion on an institution's internal academic affairs and a violation of the Department of Education Organization Act. Another commenter recommended testing students before they enrolled in an ESL program to determine whether they needed to improve their proficiency skills, as well as testing students who completed the program. A commenter suggested that the ESL testing provisions should also apply to vocational programs that include ESL education within the curriculum. Another commenter expressed support for the provision as written in the February 28, 1994 NPRM.

Discussion: As discussed in the February 28, 1994 NPRM, the purpose of this requirement, which is based on a California law, is to curb abuses by institutions. Some institutions have received significant amounts of Federal Pell Grant funds for students who have not attained an adequate proficiency in written and spoken English to use already existing knowledge, training and skills. Because this testing requirement is limited to ESL programs that are ancillary to an institution's academic programs, the Secretary does not believe it is an intrusion on an institution's internal academic affairs.

The suggestions to add a pre-test requirement or to extend the testing requirement to vocational programs that include ESL courses were not adopted at this time. However, the Secretary intends to monitor reports of abuse in these areas to see if regulation is necessary. Institutions are encouraged to test all students before and after they enroll in ESL courses to determine whether the students need to improve their proficiency skills and to determine whether the students have attained the desired proficiency skills after completing the courses.

Changes: None.

Subpart B—Standards for Participation in the Title IV, HEA Programs

Section 668.11 Scope

Comments: A few commenters opposed subjecting a third-party servicer to proceedings under subpart G of this part, which governs emergency actions, fines, and limitation, suspension, or termination of participation in the Title IV, HEA programs. The commenters felt that since the Secretary has noted that institutions are ultimately responsible for any liabilities incurred that the institutions should be responsible for monitoring the activities of the organization with which they contract.

Discussion: The Secretary disagrees with the commenters who argued that third-party servicers should not be subject to proceedings under subpart G of this part. The statute specifically requires the Secretary to apply subpart G proceedings to third-party servicers. The Secretary agrees with commenters that institutions have a duty to monitor the actions of their third-party servicers, and that an institution is always ultimately liable for any violations caused by those servicers, but, the Secretary believes that Congress clearly intended for the Secretary to directly hold third-party servicers accountable for any program violations through the use of all sanctions that the Secretary is able to impose. The sanctions under subpart G of this part are an appropriate recourse to use to correct program violations because a third-party servicer, as an agent of an institution, contracts with institutions to provide services that parallel an institution's responsibilities under the institution's program participation agreement.

Changes: None.

Section 668.12 Application Procedures

Applications for continued participation. Comments: This section of the regulations generated many comments. Some commenters were concerned about the circumstances under which their institutions might be required to file an application in order to continue to participate in a Title IV, HEA program. The majority of the comments concerned the need for institutions to be notified enough in advance of the expiration of their program participation agreements so they could file an application for reapproval and the corresponding need for the Secretary to act on an institution's renewal application prior to the expiration of the institution's program participation agreement.

A number of commenters were concerned that the provision requiring

institutions to apply for recertification upon the request of the Secretary allowed the Secretary too much discretionary authority and would mean that the Secretary would act in an arbitrary and capricious manner. Many of these commenters believed that the regulations should identify the specific circumstances or significant events that would trigger a request from the Secretary and should require the Secretary to explain the reasons for the request. Two commenters recommended further that the regulations make clear that the Secretary will initiate action only if there is reliable evidence affecting an institution's financial responsibility or administrative capability. This commenter also said that it should be made clear that such an application would not be considered an initial application and that if the Secretary were to determine, on the basis of the application, that the institution should no longer participate in a Title IV, HEA program, the institution would have recourse to the appeal procedures specified in subpart G of this part.

Over seventy commenters were very concerned about the recertification process. Their understanding of the process was that even were an institution to file an application for reapproval in a timely manner, if the Secretary did not approve the institution prior to the expiration date of its program participation agreement, the institution either would lose approval altogether or would be provisionally certified. Because provisional certification connotes lesser status to these commenters and confers fewer appeal rights than full certification, the commenters viewed provisional certification under these circumstances to be unfair and unacceptable.

Many commenters provided concrete, constructive recommendations for addressing their concerns. The majority of these commenters asked that the Secretary notify institutions in advance of the scheduled expiration dates of the program participation agreements and supply the necessary application forms. One group of commenters suggested that the Secretary establish time frames for the submission and the processing of applications. The time frames proposed by the commenters varied greatly, with one commenter urging that the Secretary be required to send applications to institutions 18 months in advance of the expiration dates of the program participation agreements and another stating that six months would be sufficient. Other commenters would have the regulations require that the Secretary act on an application within 45 or 60 days of receipt. The approach taken by another group of commenters was to recommend that if an institution submitted an application for renewal within a specific time frame, such as a certain number of days prior to the expiration date of the program participation agreement, the Secretary should extend the certification of the institution, as necessary, until the Secretary's review is complete.

Discussion: The Secretary finds it necessary to reserve the right to require a participating institution to submit an application for certification if the Secretary has reason to believe the financial responsibility or administrative capability of the institution is in question. The Secretary refers those concerned to a discussion of the Secretary's position on page 9533 of the preamble to the NPRM published on February 28, 1994. The Secretary reiterates that the Secretary expects to exercise this authority rarely and to advise the affected institution of the reason for the request. An application submitted under these provisions is not considered an initial application, because the institution is a participating institution. The institution continues to be governed by the program participation agreement in effect at the time the institution submits its application until that program participation expires, the institution signs a new program participation agreement, or the Secretary limits or terminates the institution's program participation agreement under the procedures in subpart G of this part.

The Secretary understands the concerns expressed regarding the processing of renewal applications and agrees that an institution should not be penalized if it files an application in a timely manner but the Secretary is unable to complete a review of the institution prior to the expiration date of the institution's program participation agreement. For a full discussion of this issue, see the section of the *Analysis of Comments and Changes* that addresses certification procedures (§ 668.13).

Changes: None.

Notification and application requirements for additional locations.

Comments: There were a number of comments on this section, and they conveyed a wide range of concerns. Many of the commenters were concerned that institutions would be required to notify the Secretary of each new location, regardless of the percentage of the educational program offered at the location. Many of these commenters asserted that the provision would prohibit community colleges from responding to community needs, because community colleges are constantly offering training and education at new locations.

Other commenters could discern no reason why the addition of a branch campus or other location at which 100 percent of an eligible program is offered should trigger a certification review of an entire institution. These commenters suggested that because accrediting agencies and State licensing bodies review additional locations, there is no need for the Secretary also to conduct a review. One commenter went so far as to recommend that § 668.12(b)(2) be removed, to guarantee that if the Secretary were to decide to certify a branch campus or other location, the decision could not trigger a recertification review of the entire institution.

Commenters were concerned about the effect of these regulations on the ability of institutions to continue to offer internships on sites apart from their main campuses. Commenters complained about the effect of these provisions on an institution that contracts with a company to provide training for the company's employees on the site of the company's facilities.

A few commenters supported the Secretary's need to monitor the financial responsibility and administrative capability of institutions that establish locations that offer at least 50 percent of an educational program. Two commenters recommended that the regulations be expanded to require that a location that offers less than 50 percent of an educational program be reported to the Secretary if the volume of activity at the location exceeded a certain threshold.

Discussion: The comments reflect a good deal of confusion about the current requirements for reporting the addition of locations, current application procedures, and the proposed regulations.

The current Institutional Eligibility regulations, published on April 5, 1988, specify in § 600.30(a)(3) that institutions are to notify the Secretary of any changes in the name or number of locations since the institution's last eligibility application. As a practical matter, the Secretary has required institutions to report only changes to those locations at which the institution offered a complete educational program. This policy has been reflected for several years in the application and instructions. Thus, the notification requirement in these regulations, and the corresponding requirement in the new Institutional Eligibility regulations at § 600.30, are actually less onerous than the requirements in earlier

regulations. Under these final regulations, community colleges and other institutions that frequently establish outreach locations at which they offer one or two courses need not report these locations. And, unless the internship portion of a student's program constitutes at least 50 percent of that program, there would be no need to report the location at which an internship is performed. Similarly, there is no need to report locations that offer only continuing education classes and do not have students who are eligible to receive Title IV, HEA program funds.

The Secretary has determined through experience that the addition of a branch campus or other location that offers a complete educational program can have a major impact on the financial status of the whole institution and the ability of the whole institution to administer the Title IV, HEA programs. For many years, the Secretary has required institutions that seek to add a location at which a complete educational program is offered to undergo a certification review so that the Secretary could ascertain whether the institution has the financial resources and sufficient administrative capability to support another location. In addition, section 498(b) of the HEA requires the Secretary to have a form on which the institution describes the relationship between a main campus of an institution and all of its branch campuses. It follows then that the Secretary cannot scrutinize a branch campus in a vacuum. Thus, this provision is a codification of the Secretary's longstanding policy and application procedures and new statutory requirements.

Commenters that discussed employer-sponsored training programs seemed not to understand that if institutions contract with employers to provide training programs at the work-site or some other off-campus location that employer is paying for the cost of training and no Title IV, HEA program funds are involved, there is no need for the institution to notify the Secretary.

The Secretary has established a requirement that an institution must notify the Secretary of a location that offers at least 50 percent of an educational program if the institution wishes to have the location included in the institution's participation in a Title IV, HEA program. The Secretary puts institutions on notice that they may be required to file a complete recertification application in such situations, but the Secretary expects to make requests for complete recertification applications only rarely.

Changes: None.

Notification and application requirements for changes in name, location, or address. Comments: Two commenters stated that the Secretary should not require an institution to undergo a recertification review if the institution changed only its name, address, or location.

Discussion: This section requires only that institutions notify the Secretary of such changes.

Changes: None.

Required forms and information. Comments: A few commenters asserted that the proposed requirement of § 668.12(e)(2) for an institution to provide to the Secretary upon request all information that the Secretary needs to certify an institution was too broad. Their perception was that the requirement would give the Secretary unlimited access to institutional information under the guise of a certification review. They recommended that the provision be revised to state that the Secretary would request only the information and documentation specified on the application form.

Discussion: This provision refers only to information and documentation needed to certify that the institution meets the standards in this subpart, particularly the factors of financial responsibility and standards of administrative capability. The application form clearly specifies the information and documents that institutions must submit with their application. However, the Secretary must retain the flexibility to request additional information or documentation to clarify or support an institution's response on the application, should that be necessary. The Secretary notes that this provision would not require an institution to provide information such as tenure information contained in faculty records.

Changes: None.

Section 668.13 Certification Procedures

Requirements for certification. Comments: A few commenters objected to the proposal that an institution could be refused full certification that the institution meets the standards of subpart B and may participate in the Title IV, HEA programs because of a problem identified at one of its branch campuses. These commenters suggested that it was not fair to restrict the certification for an institution based upon a problem that was identified at its branch location.

Discussion: The commenters misunderstood the purpose of this provision. Section 498(j) of the HEA requires a branch campus, as defined by the Secretary, to be certified under the requirements of this subpart to be included in an institution's participation in a Title IV, HEA program. Thus, a *branch campus* must separately demonstrate to the Secretary's satisfaction that it meets, for example, the factors of financial responsibility and standards of administrative capability. The commenters should note that the Secretary has defined *branch campus* narrowly, in part for this reason, in the Institutional Eligibility regulations. A more complete discussion of the implications of meeting that definition is found in those regulations.

Changes: None.

Comments: Several comments were received recommending that an institution's financial aid officer be included in the list of personnel that are required to have precertification training.

Discussion: Pursuant to the administrative capability standards set out in § 668.16, every institution is required to designate a capable individual that is responsible for administering the Title IV, HEA programs at the institution. This designated individual, who is usually a financial aid administrator, is required to have precertification training.

Changes: None.

Period of participation. Comments: A few commenters suggested that the Secretary provide greater detail in the regulations concerning when an institution would receive full certification for a period of less than four years.

Discussion: As noted in the discussion for the proposed regulations, the full four year certification period will generally be used for institutions. There may be a limited number of times when an institution would receive a shorter period of full certification, based upon the specific circumstances presented. One instance where a shorter period of full certification would be used is where an institution has submitted a materially complete application for renewal in a timely manner, but no decision is issued before the institution's certification expires. In that instance, as explained in the discussion concerning provisional certification below, the institution's full certification would be extended on a month to month basis until a decision on its application was issued. Other situations will arise where a certification of less than four years will be appropriate, but it is not feasible to try and identify such infrequent actions

by referencing them specifically in the regulations.

Changes: None.

Provisional certification. Comments: Several commenters were concerned that the proposed implementation of provisional certification in the regulations was very broad, and would impose hardships on a number of institutions. The commenters suggested that the Secretary treat the administrative capability and financial responsibility requirements as indicators of instances where provisional certification could be used, but would not necessarily be required if the institution could demonstrate that it should be permitted to participate under full certification. Numerous commenters suggested that it was inappropriate to use provisional certification for institutions whose cohort default rates exceeded the thresholds set out in the proposed regulations at § 668.16. Other commenters recommended that the regulations be amended to clarify that provisional certification could be renewed.

Some commenters suggested that the regulations be amended to provide for the provisional certification of all institutions in a State where no SPRE has been established. These commenters believed that this use of provisional certification was consistent with the intent of the HEA for the Secretary to monitor institutions more closely in this situation.

Discussion: The Secretary believes it is appropriate to use the administrative capability and financial responsibility thresholds as events that will require provisional certification, rather than as indicators that might or might not result in provisional certification being required. Provisional certification will be used to permit these institutions to continue participating in the Title IV, HEA programs while correcting over time the items that were identified that caused the institution to be placed under provisional certification. The categories and thresholds set out in the regulations provide sufficient notice to institutions of the standards to which they will be held accountable. The proposed mechanism for provisional certification also provides administrative efficiency in reviewing applications for certification, and encourages institutional improvements over time to meet and maintain these standards.

The Secretary has responded to concerns about the cohort default rate measures by adjusting the administrative capability thresholds in § 668.16 that would trigger a requirement that an institution would receive provisional certification based upon its reported cohort default rates. See the section of the *Analysis of Comments and Changes* that addresses administrative capability (§ 668.16). The Secretary intends that institutions that have participated successfully under provisional certification, but who still do not satisfy certain requirements for full certification, will be permitted to renew their provisional certification. No specific changes are needed to reflect this procedure in the regulations, because such decisions will be made in response to the applications for certification that institutions will submit in response to the expirations of their current certifications.

The Secretary agrees that technical changes are needed to make these regulations conform to the requirements of the State Postsecondary Review Program in 34 CFR part 667, and has decided to provide some further explanation here of the consequences to an institution if the State in which the institution is located does not participate in the State Postsecondary Review Program.

Section 494(a) of the HEA prohibits the Secretary from designating as eligible to participate in a Title IV, HEA program any institution seeking initial participation in that Title IV, HEA program, or any participating institution that has undergone a change of ownership resulting in a change of control, as determined under 34 CFR 600.31, if the institution is in a State that does not participate in the State Postsecondary Review Program. The Secretary also is prohibited from designating for initial inclusion in any institution's eligibility for participation a Title IV, HEA programs branch campus located in a State that does not participate in the State Postsecondary Review Program, even if the institution itself is in a State that participates in the State Postsecondary Review Program.

Further, the Secretary may grant no more than provisional certification for participation in a Title IV, HEA program to any participating institution or branch campus in a State that does not participate in the State Postsecondary Review Program.

Currently, all States participate in the State Postsecondary Review Program. The Secretary does not anticipate that any State will fail to comply with the requirements of the State Postsecondary Review Program to the extent that the State will cease to participate in the program. Nevertheless, the regulations need to incorporate these statutory provisions so that institutions may be aware of the potential consequences of a State's failure to participate in the program.

Changes: A new paragraph (e) is added to provide for denial of certification to initial applicants for participation in a Title IV, HEA program and to participants that have undergone a change of ownership resulting in a change of control, if the State in which those applicants or participants are located does not participate in the State Postsecondary Review Program. Under paragraph (e), the Secretary may provisionally certify a participating institution or branch campus in that State. Section 668.13(c)(2)(ii) has also been revised to provide that the provisional certification of an institution under these circumstances expires at the end of the third complete award year following the date of the provisional certification.

Comments: Several commenters voiced concern over the proposed language in the regulations that would subject institutions to provisional certification where the financial responsibility and administrative capability was being determined for the first time. Suggestions were made that schools be exempted from this provision if they had been in operation for a number of years without problems being identified concerning their financial condition or administrative capability.

Discussion: The Secretary believes that the other standards requiring the use of provisional certification are adequate to identify institutions where greater monitoring and procedural restrictions are appropriate. The Secretary agrees that longstanding institutions with no previous problems identified in their administrative capability or financial condition will not require the use of provisional certification where the current audits and application submitted by the institution satisfies the financial and administrative requirements under the regulations. Furthermore, since provisional certification is required for initial applicants and for existing institutions whose financial condition or administrative capability cannot be shown to meet the required standards, there does not appear to be a corresponding need to require provisional certification if a participating institution satisfies the proposed standards when the Department reviews its application for the first time.

Changes: The provision that provided that the Secretary may provisionally certify an institutions if the financial responsibility and administrative capability of the institution was being

determined for the first time has been deleted from these regulations.

Comments: A number of commenters objected to the proposal that provisional certification be used for all occasions where the institution undergoes a change in ownership that results in a change of control. Instead, the commenters suggested that there were numerous instances where a transfer of an institution to a new owner should be viewed as a positive step that should be encouraged by using full certification, especially where the transfer was to an owner that had already established a good track record with the Department. Some comments also recommended that transfers to family members or to employees that had experience operating the institution should not require provisional certification.

Discussion: The Secretary agrees that some transfers to family members or to personnel that own stock in an institution who have also worked for the institution should be treated differently from other changes of ownership that result in a change of control. These transfers to family members or to certain other owners have been exempted from treatment as a change of ownership resulting in a change of control in the regulations codified at 34 CFR part 600. In all other situations where there is a change of ownership resulting in a change of control, the Secretary believes it is appropriate to use provisional certification in order to provide more protection to the Federal interests while the new owner demonstrates the ability to operate that institution successfully. Such concern is especially warranted where a financially troubled institution has been acquired for little or no capital investment by the new owner, because the risk of loss is minimized if the institution fails as a business investment. Even though it may be a positive step for an institution to be bought by a new owner who can provide greater resources and experience in its operations, it is also reasonable to provide for the greater oversight and protection to Title IV, HEA program funds that are available under provisional certification. Also, the period of provisional certification may be established for a shorter period where the particular facts so warrant.

Changes: None.

Comments: A number of commenters were concerned that an institution that had applied for recertification in a timely manner would be placed on provisional certification if the Department had not processed the application before the institution's participation agreement expired. These commenters objected to changing an institution from full certification to provisional certification where the delays were attributable to the Department's review process rather than to a tardy application for renewal from the institution. Some remarks were also submitted by these commenters suggesting that formal notice be required from the Secretary of the expiration date for an institution's period of participation before any such ending date could become effective.

Discussion: The Secretary agrees that delays in processing applications by the Department should not be the cause for transferring an institution from full certification to provisional certification. In such a circumstance where a complete application for renewal was timely submitted, it is appropriate to provide for a mechanism that will continue the institution's full certification on an interim basis. The Secretary has decided to establish a target date for institutions to submit certification renewal applications at least 90 days before the ending date for the institution's current program participation agreement. Provided that the application is materially complete when submitted, the institution's full certification will continue beyond its expiration date on a month-to-month basis until the Department issues its decision on the application. If the institution's application is not approved for full certification, the program participation agreement will expire on the last business day of the month in which the decision is sent to the institution. If the application for full certification is not made at least 90 days before the ending date for the institution's program participation agreement, the institution will only be permitted to participate under provisional certification while an application for recertification is pending. When an institution is notified that its application for recertification was not materially complete when submitted, the Department will exercise reasonable discretion in determining whether to deny the application as submitted or to request additional information, and to determine whether the institution may continue to participate under provisional certification while the application is reviewed.

The Secretary continues to believe that it is appropriate for the institution to monitor the expiration date for its participation rather than relying upon the Secretary to tell it when it must reapply. Although the Secretary may provide routine notices to institutions concerning upcoming expiration dates, the institution will be held responsible for submitting an application for recertification in a timely manner in accordance with the expiration date on its program participation agreement, regardless of whether the institution receives a notice of expiration from the Secretary.

Changes: Section 668.13(b) is amended to provide that full certification will be extended on a month to month basis following the expiration of a program participation agreement where the institution's application for recertification was materially complete, and submitted at least 90 days prior to the expiration date.

Requirements for provisional certification to participate on a limited basis for institutions that are not financially responsible. Comments: A number of commenters stated that an institution should not be placed under provisional certification if the institution satisfied the criteria for provisional certification to participate on a limited basis for institutions that are not financially responsible. These commenters believed sufficient protection of Title IV, HEA program funds was obtained from the required posting of a reduced surety in conjunction with using a funding arrangement other than the advance payment system without the additional requirement of only granting provisional certification to the institution. Several of the commenters also argued that any institution meeting these criteria should be considered to be financially responsible, and therefore not placed under the provisional certification that would trigger heightened monitoring by the Department and by the other members of the triad. The commenters also observed that institutions that were in financial difficulties would probably experience further hardship by being required to post a surety and receive Title IV, HEA program funding through an alternate mechanism.

A few commenters noted that this provision appeared to require provisional certification if an institution did not demonstrate financial responsibility under the general standards of financial responsibility set out in § 668.15(b), and that such a construction of the regulation would mean that institutions demonstrating financial responsibility under the exceptions to the general standards of financial responsibility set out in § 668.15(d) could still be required to use provisional certification.

Some commenters also suggested that the reference to a letter of credit be modified to explain that it would be an irrevocable letter of credit rather than

some other type that the institution could revoke without notice to the Department. These commenters also suggested that institutions could withhold information about the amount of Title IV, HEA program funds disbursed through the institution that would otherwise increase the amount of the letter of credit that would be set based upon the information available to the Department for the institution's prior award years.

Some commenters suggested that the requirement that an institution show that it has met all of its financial obligations during the preceding two award years be expanded to acknowledge that normal business practices would permit institutions to refinance debts to change payment terms or obtain lower interest rates.

Several commenters also stated that the proposed regulation was unfair because it would require provisional certification for any institution that had not demonstrated financial responsibility during the preceding five years, regardless of whether the institution currently demonstrated financial responsibility under its most recent audit. These commenters believed that such a procedure would be unfair because it could penalize an institution that met current financial responsibility standards based upon its prior financial condition. Other commenters suggested that the Secretary should exercise discretion in determining when financial guarantees would be required rather than making them mandatory whenever an institution triggered these provisions.

Discussion: The Secretary disagrees that the standards for provisional certification to participate on a limited basis for institutions that are not financially responsible should be deemed to constitute a sufficient demonstration of financial responsibility that would warrant granting full certification to such institutions. Institutions that are not able to meet the general standards of financial responsibility in § 668.15(b) or the exceptions to the general standards of financial responsibility in § 668.15(d) are in a financial situation that is demonstrably different from their counterparts that do satisfy the requirements under these sections. Institutions that only meet the standards for provisional certification to participate on a limited basis for institutions that are not financially responsible warrant the additional monitoring and protection to Title IV, HEA program funds that provisional certification provides. Even though such funding restrictions and surety postings may be difficult for some institutions that are already experiencing financial restraints, such protections and the heightened ability to act quickly to protect Title IV, HEA program funds are essential for improving the Department's oversight and gatekeeping responsibilities. Provisional certification will permit some institutions to improve their financial operations over time without compromising their administration of the Title IV, HEA programs.

The Secretary would like to clarify that any letter of credit that an institution is required to submit to the Secretary must be in a form and amount acceptable to the Secretary.

The Secretary agrees with the commenters on the provision requiring an institution to have met all its financial obligations during the preceding two award years. The Secretary has decided to clarify this provision in the manner in which a similar provision has been clarified in § 668.15 (see the discussion in § 668.15 on this issue).

The Secretary would also like to clarify when third party financial guarantees or assumptions of liabilities by owners are required. Institutions that demonstrate financial responsibility under the requirements of § 668.15(b) and § 668.15(d) and are in compliance with all other requirements of this subpart generally are entitled to full certification. An institution that, despite meeting the requirements of § 668.15(b) and (d), falls within one of the categories in § 668.15(c)(2) is not considered financially responsible and therefore cannot be fully certified. These categories include a limitation, suspension, or termination by the Secretary or a guaranty agency of the institution's participation at any time within the previous five years or a settlement to resolve such an action. Also included are audit or program review findings during the two most recent audits or program reviews amounting to more than five percent of the institution's Title IV, HEA program funds for a given award year, a citation for failure to submit acceptable audit reports in a timely fashion during any of the previous five years, and a failure to address satisfactorily any compliance problems still identified in program reviews or audits after the institution has exhausted its appeals of those findings. The Secretary considers any of these characteristics sufficiently detrimental to the integrity of the Title IV, HEA programs to provide that an institution meeting them is not financially responsible.

Further, to emphasize the seriousness with which the Secretary views these institutional failings, to protect Federal funds, and to deter institutions from acting in a manner that could cause them to fall within one of these categories, the Secretary will refuse even to provisionally certify such an institution, unless the appropriate additional financial guarantees and assumptions of liability are furnished. In the February 28, 1994 NPRM, the Secretary had also proposed to apply this treatment regarding provisional certification to any institution failing the financial responsibility standards of § 668.15 during the previous five years. The Secretary believes that a modification of this last provision is in order. The Secretary therefore wishes to clarify that any institution that fails to demonstrate financial responsibility under its current audit, and that has failed to do so at least once under the standards in effect during the preceding five years (other than for a reason described in § 668.15(c)(2)) is also required to post financial guarantees and furnish assumptions of liability in accordance with § 668.13(d)(2). This additional safeguard is warranted where an institution does not meet the current standard for demonstrating financial responsibility and has failed to do so at least once during the preceding five years.

The Secretary believes that it is appropriate to put in place a procedure where such financial guarantees and assumptions of liability will be required from institutions that come within the provisions in § 668.13(d)(2). Rather than exercising discretion in whether to require such guarantees at all, the Department will examine the specific circumstances presented by each such institution and set the required amount and terms of the financial guarantees and assumptions of liability in accordance with the regulation.

Changes: The requirements for provisional certification to participate on a limited basis for institutions that are not financially responsible have been amended to make clear that the criteria of this section are not required for an institution that meets the exceptions to the general standards of financial responsibility under § 668.15(d). The regulations have been amended to clarify that any required submission of a letter of credit must be in an amount and in a form acceptable to the Secretary. Section 668.13(d)(2) has been clarified to explain that financial guarantees are only required if the institution comes within the requirements of § 668.15(c)(2), or where the institution fails to demonstrate

financial responsibility under its current audit and has failed to do so at least one other time under the standards in effect during the preceding five years.

Revocation of provisional certification. Comments: A number of commenters complained that the lack of a formal appeal process for revocation of provisional certification was unfair to the institution because it provided much less due process than is available to other institutions under the appeal procedures in subpart G of the regulations. Some of these commenters also indicated that they believed it would be more appropriate to offer provisionally certified institutions the full appeal rights under subpart G of the regulations, and several commenters believed that more extensive appeal procedures were required to revoke provisional certification than were described in the regulations.

Some commenters also suggested that a revocation notice should not be made effective upon the date of the mailing, but either upon receipt by the institution or until a specified number of days after the mailing. A few commenters also recommended that first class mail be used because it is an accepted means of filing legal documents in the court system, or that certified mail be used as an alternative to registered mail.

Many commenters also requested that the provision that provides that an institution may request reconsideration of a revocation of provisional certification be modified to provide that any request for reconsideration of a revocation of provisional certification be decided by someone other than the person issuing the revocation. These comments stated that it was important that such requests for reconsideration be made to a different official because it would be more meaningful than having the request be presented to the person that had already made a decision adverse to the institution.

Discussion: The Secretary disagrees with the commenters that revocations of provisional certification should receive the same appeal procedures given to fully certified institutions under subpart G of the regulations. Institutions receiving provisional certification are being given the opportunity to participate under limiting conditions because a heightened risk to Title IV, HEA program funds has been identified, either by the institution's current financial condition or through prior problems in the administration of the Title IV, HEA programs by the institution or its owners. Furthermore, section 498(h) of the HEA provides that provisionally certified institutions may be terminated if the Secretary determines that an institution is unable to meet its responsibilities under its program participation agreement. This language is significantly different from the requirement in section 487(c)(1)(F) of the HEA that provides that an adverse action against a fully participating institution be determined after reasonable notice and opportunity for hearing. The regulations require that the notice revoking the provisional certification contain the basis for the action, explain to the institution the consequences of such revocation, and detail the procedures required to request reconsideration of the action. The notice and opportunity to request reconsideration of the decision to revoke the institution's provisional certification provide adequate protection to the institution that it will have the opportunity to respond directly to the stated basis for the action, and establish a reasonable mechanism to resolve the dispute in a fair manner. The Secretary believes that such procedure provides an institution with a fair opportunity to be heard, and the final agency decision will be subject to Federal court review to ensure that the action was not arbitrary and capricious.

The Secretary does not agree that a notice of revocation of an institution's provisional certification should be effective on a date other than the date that the letter is sent to the institution. An institution that participates under provisional certification does so with the understanding that it is subject to greater scrutiny with fewer procedural rights when problems are identified. A notice advising the institution that its provisional certification is revoked will identify the reasons for such action and give the institution an opportunity to request reconsideration of that decision. The effective date of the revocation is the date that the notice is mailed; this provides greater protection of Title IV, HEA program funds while still giving the institution an opportunity to have that decision subsequently set aside.

The Secretary agrees that it would be more appropriate to provide that notices of revocation decisions will be sent by certified mail, return receipt requested, rather than by registered mail. The Secretary notes that certified mail is already used to initiate adverse actions against fully participating institutions under subpart G of the regulations, and therefore believes that it is appropriate to standardize this notice requirement for revocations of provisional certification. The regulation also provides that, where practical, more expeditious notice may be provided through facsimile or overnight mail.

The Secretary agrees that the designated department official making the decision concerning an institution's request for reconsideration of a revocation should be different from, and not subject to supervision by, the official who initiated the revocation of the institution's provisional certification. This separation of function will ensure that the official making the final decision for the Department is independent from the supervision of the official issuing the initial decision, and this procedural protection strengthens the integrity of the review procedures for revocation of provisional certification.

Changes: A change has been made to provide for notices of revocation of provisional certification to be sent by certified mail. The regulations have been modified to require that the official reviewing a request for reconsideration of provisional certification must be different from, and not subject to supervision by, the official that issued the notice of revocation.

Section 668.14 Program participation agreement.

Comments: Five commenters suggested that an institution's program participation agreement should only cover those branches or locations which are specifically listed in the institution's notice of eligibility. One commenter indicated that this provision makes clear that the program participation agreement applies to each branch campus or location of the institution.

Discussion: The provision emphasizes that the program participation agreement applies only to those branch campuses and locations that meet the applicable requirements of this part; therefore, additional clarification is unnecessary.

Changes: None.

Comments: Four commenters asserted that the regulations should specify that the terminology "special arrangement, agreement, or limitation" applies only to the Title IV, HEA programs, and not any other programs in which the institution participates. Two commenters suggested that the proposed regulations marked a radical departure from existing regulations, and that a "phase- in" period was in order.

Discussion: The Secretary would like to clarify that any "special arrangements, agreements, or limitations" included in an institution's program participation agreement by the Secretary should apply only to those special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA. Considering that the

language for this section of the regulations is for the most part statutory, institutions have had access to this information since July 1992 when the Amendments of 1992 were enacted. The Secretary believes that institutions have had adequate time to set in place any policies or procedures to comply with this section. A "phase-in" period is unnecessary.

Changes: Section 668.14(b)(1) has been amended to clarify that an institution must comply with all special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA. Corresponding changes have been made throughout the sections of 34 CFR 668 and 34 CFR 682 contained in this regulatory package.

Comments: One commenter agreed that a mechanism was needed to ensure that an institution's fund requests meet only its immediate Title IV, HEA program needs, but suggested that such a mechanism should accommodate institutions where funds must first pass through a State agency, adding to the time frame for expenditure. Four commenters indicated that the proposed regulations may necessitate changes in institutions' methods of accounting, programming, banking, fund monitoring, etc. and recommended that institutions should be allowed a reasonable "phase-in" period for the requirements, during which the Secretary should provide significant guidance regarding implementation.

Discussion: The Department's requirements regarding immediate cash needs have not changed with these proposed regulations. They have simply been restated as a criterion of the program participation agreement. These long established rules are explained in many Department publications, and are included in annual Department training sessions. A "phase-in" period for these requirements is unnecessary. As for institutions that must wait for funds to pass through a State agency, these institutions should have already addressed this issue in an effort to comply with existing Title IV, HEA program guidance.

Changes: None.

Comments: A large group of commenters was concerned that the information provided to the Secretary, SPRE, guaranty agency, accrediting agency or State licensing agency relative to an institution's administrative capability and financial responsibility may be disclosed to the public, and recommended that the Secretary provide a guarantee that such information must be kept confidential by the above-listed parties. Three commenters suggested that the Secretary develop a specific format for the reporting of data and that the data be sent directly to the Secretary for dissemination to any of the above organizations that might need it.

Discussion: The Secretary does not have the authority to create or supersede laws that may relate to disclosure of potentially sensitive information. Such laws vary from State to State and from agency to agency; it would be inappropriate for the Secretary to address such an issue. As for data provided directly to the Secretary, if that data were discloseable under a freedom of information request, the Secretary would have no choice but to release the information if it were requested.

It is important to note that the provision only requires institutions that have been selected for review under the State Postsecondary Review Program process to provide the above-referenced information to SPREs. By the nature of the selection procedures and because of the limited number of institutions which the Secretary anticipates will meet review-triggering criteria, the Secretary believes most institutions will not be requested to provide this information and therefore will not need to worry about potential public disclosure.

The Secretary believes a specific format for reporting and a centralized location for collection of data are unnecessary at this time. As the information must only be provided upon request, each organization can specify exactly what information is needed from an institution and in what time frame. A format specified by the Secretary might cause some institutions to be burdened with providing information that is not needed.

Changes: Section 668.14(b)(4) has been amended to provide that an institution must provide information relating the administrative capability and financial responsibility of the information to a SPRE if the institution was referred by the Secretary under 34 CFR 667.5.

Comments: Four commenters recommended that SPREs and guaranty agencies be added as parties to whom institutions must submit reports of information required by the Secretary. Four commenters also suggested including Federal consolidation loans in the list of loan programs described in this section.

Discussion: Other provisions in the regulations require reports to be provided to SPREs and guaranty agencies. To restate those requirements here would be redundant.

Federal consolidation loans are not a Title IV, HEA program in which an institution must be certified for participation and consequently should not be included in this section.

Changes: None.

Comments: Three commenters indicated that the proposed regulations placed responsibility on institutions for knowing how much money students may have borrowed while attending other institutions.

Discussion: The commenters are correct. Institutions do have a responsibility to determine the amounts of Title IV, HEA program funds students have received attending other institutions by obtaining financial aid transcripts from those schools. Past abuses with this system, caused chiefly by institutions which did not recognize the importance of financial aid transcripts, have created the need to tie this requirement to an institution's continuing participation in the Title IV, HEA programs. While the Secretary does not anticipate that an institution would be penalized for information of which it was not aware, it must be stressed that an institution must do everything in its power to ensure that no loan is certified for an amount in excess of a student's allowable limits.

Changes: None.

Comments: Two commenters recommended that applicable institutions not only be required to make graduation and placement statistics available to prospective students, but also to publish the information in their catalogs. One commenter suggested that an institution only be required to provide to prospective students the job licensing requirements for its programs relative to the State in which the school is located.

Discussion: The Secretary believes the regulations go far enough in requiring the institutions to make graduation and placement rates available to prospective students. While some institutions may elect to publish this information in their catalogs for convenience, such a measure is not required. Concerning the comment on State licensing requirements for jobs, neither the statute nor the proposed regulations indicate that an institution must provide the criteria for any State other than that in which the school is located.

Changes: None.

Comments: Three commenters are concerned that early deadlines for applications for State grants may affect an institution's ability to inform eligible student loan borrowers about the availability and eligibility of those borrowers for State grant assistance in the State in which the institution is

located. Two commenters are concerned that in having to inform students from other locations of State grant information pursuant to their States, institutions will be required to be aware of State grant information for a large number of States.

Discussion: If an institution is aware that a student has enrolled or applied for financial assistance after the application date has passed to receive State grant assistance that year in that State, it must simply inform the student that he or she is not eligible for those funds, and may apply the following year prior to the deadline. Accordingly, the institution will then process the student's aid package with no consideration of State grant funds for that award year. The Secretary does not understand how this requirement could have any adverse affect on an institution. In fact, it is the Secretary's understanding that many institutions already publish State grant application information in their catalogs or disseminate the information through their financial aid offices. Regarding students from other States, institutions are indeed required to inform them of State grant assistance available to them from their own State; however, the institutions are not expected to be experts on this information, but rather to be sources of general information from which students may learn who to contact in their State to apply for assistance. The Secretary does not believe this requirement is unduly burdensome on institutions.

Changes: None.

Comments: A large group of commenters was concerned that requiring newly participating institutions or institutions that have changed ownership to implement a default management plan equal to Appendix D, for two years, was overly restrictive. Most suggested that institutions be allowed to submit an alternate plan to the Secretary for approval. Many of the commenters recommended that in the case of ownership changes, institutions with default rates under a certain percentage (10% or 20%) should be exempt from the requirement.

Discussion: The Secretary's proposal that newly participating institutions and institutions that have changed ownership use Appendix D as a default management plan was made only after careful review by the Department showed that Appendix D is effective in helping reduce student defaults. Moreover, Appendix D is simply a basic default management plan. There is nothing in the statute or regulations that would preclude an institution from adding elements. In fact, the Secretary applauds such creative efforts and believes they may help to further reduce student defaults. The Secretary believes institutions with low default rates should not be exempted because there is no reason to believe under different ownership the rates would remain as low.

Changes: None.

Comments: Four commenters want to expand the regulations to include Social Security Administration, Immigration and Naturalization Service, Law Enforcement Agencies and Direct Lending Contractors as parties that are authorized to share information pertaining to an institution's Title IV, HEA eligibility or participation, or pertaining to fraud and abuse.

Discussion: The Secretary does not have authority to include these organizations in the regulations as they do not appear in the statute.

Changes: None.

Comments: Many commenters argued that the provisions in this section governing an institution's ability to employ or contract with individuals or organizations to administer any aspect of the Title IV, HEA programs or the receipt of funds under those programs go far beyond the scope of section 487(a)(16) of the HEA. These commenters pointed out that the statute referred only to individuals or organizations that have been convicted, have pled *nolo contendere* or guilty to a crime, or that have been judicially determined to have committed fraud involving Title IV, HEA program funds and not to administrative determinations, other material violations of law, or misuse of State, local, or Federal government funds (other than Title IV, HEA program funds) with respect to an institution's ability to employ an individual or organization. One commenter supported the Secretary's proposed restrictions. Five commenters were concerned that an institution may be penalized for hiring or contracting with a party convicted of fraud involving government funds or a party that has been terminated from participation under the HEA for an infraction involving government funds, even if they were unaware of the conviction or termination. One commenter was concerned that the institution may be penalized if it hired or contracted with such a party, even if that person's job was to cut grass or collect garbage.

Discussion: The Secretary disagrees with those commenters who argued that the provisions in this section restricting an institution's ability to employ or contract with certain individuals or organizations go beyond the authority of the HEA. Section 487(a)(4) expressly requires an institution to agree in its program participation agreement to comply with financial and fiscal responsibility requirements established by the Secretary. These requirements are part of the financial responsibility provisions found in § 668.15(c). In proposing the additional restrictions in the NPRM, the Secretary provided justification that these additional safeguards were necessary to protect the Title IV, HEA programs and institutions participating in those programs. The Secretary still believes those justifications to be valid. The regulations state in regard to a participating institution's responsibility, it will not "knowingly" employ or contract with an individual, agency, organization, etc. which has violated any laws involving any government funds. The Secretary believes the regulations are clear that an institution will not be penalized for information of which it is not aware. Furthermore, in safeguarding Federal funds, the Secretary is concerned with *any* parties that may have previously violated a law involving government funds, even if these parties now perform janitorial or maintenance duties. By the provision, an employment or contract relationship with such a party is not appropriate, and by "knowingly" entering into such a relationship an institution may well jeopardize its continued participation in the Title IV, HEA programs. The Secretary believes the regulations make this clear as well.

Changes: None.

Comments: Three commenters recommended that the regulations be amended to prohibit contracts with institutions or third-party servicers that have been terminated for any reason, not just for a reason involving government funds.

Discussion: The purpose of this provision is to safeguard Federal funds, not to punish institutions or servicers that may have been terminated. For that reason, the Secretary believes the provision is adequate in its present form to satisfy the intent of the statute.

Changes: None.

Comments: Five commenters advised that requiring institutions to complete surveys conducted as part of the Integrated Postsecondary Education System (IPEDS) in a timely manner and to the satisfaction of the Secretary could be burdensome to institutions, especially if the school did not have a large staff or computer systems capable of collecting information. Three of the five commenters recommended that the Secretary design forms or specify

formats to make data collection easier. One of the five commenters suggested that the Secretary accommodate institutions not yet computerized with more time to complete the surveys.

Discussion: The language for this provision is statutory and may not be changed by the Secretary. In addition, the Secretary believes that any survey conducted as part of IPEDS is necessary and will provide valuable information to the Department. Those offices that collect IPEDS information work diligently to create consistent, easy-to-use forms and formats, not just because this makes data collection easier for the institutions, but also because it makes tabulating and sorting of the information easier. The Secretary does not believe this requirement is unduly burdensome to institutions.

Changes: None.

Comments: One commenter suggested that by not allowing institutions to impose penalties on students unable to meet their financial obligations due to disbursement delays for loan proceeds, this provision would force institutions to "carry" unpaid students indefinitely, creating a financial burden. One commenter suggested it was not the intent of the statute for an institution to allow an unpaid student to remain enrolled if the delay in disbursement of loan proceeds was caused by the student's failure to comply with a program requirement. One commenter recommended that the regulations stipulate that institutions would not be prohibited from withholding academic transcripts and other graduate services from students as the result of delayed disbursement of Title IV, HEA program funds.

Discussion: The language of this requirement is for the most part statutory, and very clear in its intent. The Secretary does not believe this requirement will cause a financial burden to institutions as this situation should not frequently occur if an institution is complying with all applicable regulations.

It is not probable that a student would deliberately cause the delay of his or her loan disbursement by not complying with the instructions of the institution or lender; nevertheless, if such a situation occurred, the institution would not be prohibited from imposing penalties on the student.

The withholding of a student's academic transcript or other graduate services is considered a penalty by the Secretary.

Changes: None.

Comments: A very large number of commenters suggested that the proposed regulations went beyond the scope of the statute by prohibiting any type of incentive payments, particularly those based on "retention." Most of those same commenters, plus another large group, felt that token gifts to students and alumni should be excluded from this requirement.

Discussion: The Secretary believes that even in incentive payment structures based on retention there is room for abuse and, in fact, has seen evidence of such abuse. Since July of 1992 when the Amendments of 1992 were enacted, many institutions have opted to change to retention-based pay for admissions personnel. In that time, the Secretary has seen evidence of lowered satisfactory progress standards and in extreme cases, falsified attendance and leave of absence requests, all in an effort to keep students enrolled. In many cases, these practices were designed by admissions personnel who were duly paid after the student passed a retention mark. After that mark, the students were dropped. Furthermore, the Secretary has evidence that some of these students were admitted using falsified ability-to-benefit tests, which further ties the issue of retention to enrollment. The Secretary believes that reputable and conscientious institutions can develop other creative ways to reward their employees that will have no direct or indirect relationship to success in securing enrollments. Regarding token gifts for students and alumni who refer other students, the Secretary, after reviewing the comments, has decided that such practices are widespread and will cause no harm if the tokens are not monetary, and limits are placed both on their value and frequency of distribution.

Changes: The Secretary has amended § 668.14(b)(22) to allow that token gifts may be given to students or alumni for referring other students for admission to the institution, as long as:

(1) the gift is not money, check or money order;

(2) no more than one such gift is given to any student or alumnus; and

(3) the value of the gift is no more than twenty-five dollars.

Comments: Seven commenters asserted that most institutions that offer athletically related student aid are currently audited by the National Collegiate Athletic Association (NCAA) and the Office of Management and Budget (OMB), and that the regulations should be amended to state that compilations and audits which together satisfy NCAA and OMB also satisfy the requirements of paragraphs (d) and (e) of the regulation. One commenter indicated that the proposed regulations paralleled NCAA audit requirements and compliance should not pose a problem for member institutions. One commenter pointed out that a "compilation" is a term defined under Statements on Standards for Accounting and Review Services No.1 and only provides a representation without any assurances on the statements. The commenter suggested that the Secretary require preparation of a schedule, and have that schedule audited.

Discussion: The Secretary believes that the requirements of the statute and regulations stand on their own. It is up to each institution to determine if a particular audit or compilation prepared for a different organization satisfies the conditions specified in paragraphs (d) and (e) of the regulation. The Secretary believes it is unwise to give blanket approval to audits and compilations which, although at present may satisfy the regulation, may not at a later date. Furthermore, the language of this provision, as written, covers all institutions, even those which are not NCAA members.

Changes: None.

Comments: Seven commenters indicated that by making the effective date for participation in the Title IV, HEA programs the date that the Secretary signs an institution's program participation agreement, there may well be a lapse of time from the expiration of the prior program participation agreement during which the institution may be ineligible. The commenters felt this may create financial problems for both institutions and students, and some recommended that program participation be made retroactive to the date of application. Some other commenters felt program participation should be made retroactive to the date of the certification review.

Discussion: The language for this provision is statutory. The Secretary has no reason to believe that Congress had any other intent when the law was drafted. However, the Secretary understands the concern of commenters that an institution's program participation agreement might expire after an institution has submitted a renewal application but before the Secretary signs a new program participation agreement. The Secretary has modified § 668.13 to address that concern. See the section of the *Analysis of Comments and Changes* that addresses certification procedures (§ 668.13).

Changes: None.

Section 668.15 Factors of Financial Responsibility

General. Comments: A few commenters supported all of the Secretary's proposed regulations in § 668.15. One of the commenters recommended the inclusion of a debt to net worth ratio in considering an institution's financial responsibility. One commenter, who disagreed with the Secretary's rationale for increasing the current ratio requirement from 1:1 to 1.25:1, suggested that the Secretary consider other types of financial analysis such as a "Z Score" in evaluating an institution's financial resources. Another commenter, who also disagreed with the Secretary, believed that tangible net worth was not an appropriate indicator of financial responsibility and recommended that the Secretary consider cash flow statements in his evaluation.

Discussion: The Secretary considered a number of alternative ratio tests that could be used to evaluate an institution's financial condition. While the Secretary does consider minimum capitalization an important factor in determining an institution's financial responsibility, he has elected not to put such a standard into regulation at this time. Based upon the limited information presented by in the commenters, the Secretary is not convinced that a "Z Score" would be an appropriate measure of financial responsibility for an institution. However, the Secretary will monitor the financial information gathered in accordance with these regulations to determine whether it would be appropriate to require either additional, or alternative cash flow statement criteria as a factor in determining financial responsibility.

Changes: None.

Comments: Many commenters responded to the Secretary's request for comments regarding the acceptability of a "bond rating" as sufficient indicia of a nonprofit institution's financial responsibility. The majority of the commenters expressed support of the use of a bond rating as a means of evaluating financial responsibility. One commenter suggested that the Secretary consider an institution to be financially responsible if it is able to demonstrate that it has a debt financing arrangement that is acceptable to the College Construction Loan Authority (Connie Lee). Another commenter believed that the Secretary should broaden the definition of acceptable bonds to include other than general obligation bonds because certain types of revenue bonds issued by pubic nonprofit institutions also have ratings by nationally recognized rating agencies. One commenter believed that the Secretary should expand the provision to exempt for-profit institutions with an acceptable bond rating.

Discussion: The Secretary believes that a superior bond rating may serve as an effective proxy for demonstrating an institution's financial responsibility. An institution that has the capacity to issue a top rated debt security is, in general, considered to have the financial resources necessary to meet all of its financial obligations. The Secretary believes that the debt paying ability of an institution, as determined by a comprehensive credit review conducted by a nationally recognized statistical rating organization, is representative of the institution's financial health. For an institution's bond rating to serve as an acceptable proxy, the institution must have the financial resources required to obtain a rating at or above the second highest level used by the rating organization. Furthermore, the Secretary requires that an institution provide evidence that the issue has been rated without consideration of any insurance, guarantee, or credit enhancement that may have been used to lower the institution's cost of capital. The Secretary requires that an institution provide an actual rating from a nationally recognized statistical rating organization. Since Connie Lee is not a rating organization, financing arrangements that are acceptable to Connie Lee are only eligible for consideration to the extent that they are separately rated by a nationally recognized rating organization that is acceptable to the Secretary. The Secretary agrees with commenters that the substitution of a bond rating for an institution's having to demonstrate financial responsibility should be expanded to include other forms of rated debt such as revenue bonds. The Secretary also agrees that this provision should be applied to both nonprofit and for-profit institutions.

Changes: Sections 668.15(b)(7)(ii), (b)(8)(ii) and (b)(9)(v) have been added to provide that the Secretary shall consider an institution to be financially responsible if the institution is able to demonstrate to the satisfaction of the Secretary that it has an outstanding debt obligation which has been rated by a nationally recognized statistical rating organization at or above the second highest level rated by that organization. To be acceptable to the Secretary, an institution's debt must have been rated without consideration of any insurance, guarantee, or credit enhancement employed by the institution to lower its cost of capital.

General standards of financial responsibility. Comments: A few commenters expressed concern that the Secretary's requirement that an institution submit an audited financial statement without qualification or disclaimer was particularly burdensome because the commenters believed an institution is likely to be faced with a "qualified" statement as a result of adopting new accounting standards mandated under FAS 117.

Discussion: The Secretary believes that the reliability of any financial statement is dependent upon the ability of the institution's independent auditor to determine and report that the information contained within the financial statements is a fair representation of the institution's financial resources. The auditor will issue a qualified statement if the auditor is unable to determine that the information is a fair representation because of any uncertainty. It is the institution's responsibility to identify the cause of the uncertainty and make every reasonable effort to correct it.

Changes: None.

Comments: Many commenters believed that the requirement for an institution to be current on any debt service should be clarified to take into consideration legitimate disputes that may arise in the normal course of business. Several commenters believed that a single instance or even a few instances of late payments would not necessarily be indicative of financial problems. Many commenters believed that an institution should be considered current, despite not having made scheduled payments, if the institution is currently involved in negotiations with creditors to restructure or reschedule outstanding debt. A number of commenters suggested that a pattern of late payments on the part of an institution would be a more reliable indicator of financial difficulty than would a single instance of failure to pay. Many of the commenters suggested that the Secretary rely on the judgement of the institution's independent auditor in determining whether or not such a pattern of late payment exists.

Discussion: In general, the Secretary believes that an institution's ability to meet its financial obligations when due is indicative of financial health. However, the Secretary recognizes that over the normal course of a business cycle an institution may occasionally delay payment to certain trade creditors as a result of contractual disputes. Alternatively, the Secretary recognizes that an institution that is experiencing

cash flow problems will typically delay payment to creditors in an effort to conserve cash. Clearly, if the cause of an institution's delay in making payment is contractual in nature, than the Secretary expects that this would occur infrequently. If the cause is related to insufficient cash flow, then the Secretary would expect to observe a recurring pattern of late payments to creditors. The Secretary believes that payments related to long term liabilities such as term loans from financial institutions, bonds, debentures, or notes payable which become due beyond one year are of significant importance because the institution's assets are typically pledged, encumbered, or assigned to collateralize such obligations. The Secretary agrees with the commenters that an institution is current, despite having failed to make scheduled payments, if the institution has reached an acceptable agreement with creditors to substantially reschedule or restructure the outstanding debt. However, the Secretary believes that a failure, on the part of the institution, to reach an agreement with creditors after a reasonable period of time exposes the institution to potential financial and legal problems that may adversely affect the quality of the institution's educational program. Information about the institution's outstanding debt is already provided by the institution in its audited financial statement. Furthermore, the institution's independent auditor has a responsibility to disclose any failure, on the part of the institution, to be in compliance with loan agreements in existence on the date the institution's balance sheet was prepared.

Changes: Section 668.15(b)(4) is amended to provide that an institution is not considered to be financially responsible if the institution is not in compliance with all loan agreements in existence on the date the institution's financial statements are prepared. However, the Secretary considers an institution to be current in its debt service if the institution can provide evidence that it has reached a mutually acceptable agreement to restructure or reschedule its obligations. If an institution is unable to reach a mutually acceptable agreement with creditors after 120 days and the institution's failure to pay its obligations has resulted in a creditor taking legal action to attach the institution's assets or obtain a judgment, then the institution shall not be considered to be financially responsible.

Comments: Many commenters felt the requirement that an institution maintain a cash reserve was excessive. A few commenters supported the requirement of the cash reserve and provided suggestions for alternative methods of calculating the amount of the reserve requirement. A majority of the commenters who expressed a concern believed that the establishment of a separate reserve account would significantly reduce available working capital funds that might be better applied to meet other operating expenditures. Many commenters believed that nonprofit institutions should be allowed to include amounts held in the cash reserve in the calculation of the ratio of current assets to current liabilities. Some commenters supported the Secretary's position that the cash reserve account should be excluded from the calculation of the ratio for nonprofit institutions. A number of the commenters thought that a more appropriate requirement would be a cash reserve that is based on the institution's actual refund experience. A few commenters suggested that the cash reserve requirement be based on the residual of total unearned tuition liability less accounts receivable, with an adjustment for refunds made under the *pro rata* refund policy. Many commenters suggested that the calculation of the reserve requirement on the basis of deferred tuition revenue seemed arbitrary and indicated that it would vary greatly among institutions depending on the timing of enrollments and the preparation of year end financial statements. Other commenters recommended that the Secretary consider an annual financial statement along with cash flow projections for the next three enrollment periods as an alternative to the cash reserve. A few commenters believed that the definition of acceptable forms of the cash reserve should be expanded to include money market instruments, that are highly liquid and trade in an active secondary market. Overall, the majority of the commenters believed that the provision should be removed.

Discussion: Section 498(c)(5) of the HEA requires the Secretary to establish requirements for an institution to maintain sufficient cash reserves to ensure repayment of any required refunds. The Secretary proposed that a cash reserve based on the institution's deferred tuition revenue would be appropriate because the balance of the deferred tuition account generally reflects amounts collected by, or contractually obligated to be received by, the institution in advance of providing educational services. The Secretary believed an institution could reasonably expect that some students would withdraw prior to the completion of their educational program and be entitled to a refund of amounts paid for services not yet rendered.

The Secretary believes that the commenters are correct in observing that the balance of deferred tuition revenue would vary among institutions depending on factors that have little to do with actual refund payments by the institution, such as enrollment periods and fiscal year ends. The Secretary believes that it would be more consistent with the intent of the HEA for this provision to match the reserve requirement more closely with an institution's historical refund experience. The Secretary believes that a cash reserve balance equal to one quarter of the institution's previous year's total refund expenditure would be sufficient to satisfy the institutions cash reserve requirement because that amount represents approximately three months potential refund expenditure.

In order to establish the appropriate amount for the cash reserve, the institution will have to disclose, in a note to its audited financial statements, the dollar amount of total refunds paid in both the current fiscal year and prior year. The Secretary does not consider internally generated cash flow projections as reliable indicators of an institution's ability to meet the cash reserve requirement. The Secretary does not consider liquid investments, such as money market funds, to be equivalent to cash because such investments do not generally have a maturity date and are therefore more characteristic of equity investments.

While the Secretary acknowledges the criticism from the commenters that the establishment of a cash reserve reduces available working capital, the Secretary points out that the establishment of a reserve account requires the accumulation of cash on a one-time basis. Contributions to the reserve account would be required only to the extent that enrollment levels and refund experiences vary. On a continuing basis, the resulting net outflow of working capital would be the same despite the establishment of a cash reserve.

The Secretary agrees with the commenters that nonprofit institutions should be treated consistently with for-profit institutions, and allowed to include the cash reserve in the calculation of the liquidity ratios. The reserve account is intended to provide an immediately available source of cash that must be available to make refunds at any time. It is reasonable to expect that if an institution were to close at other than the end of an academic

period that the cash reserve funds would be used to pay the institution's refund liability. Since unpaid refunds are generally recognized as a current liability it is appropriate to recognize, in the institution's ratio calculation, those assets which would actually be used to offset the liability in the event of liquidation.

The regulation will restrict the type of account in which the cash reserve must be kept because it must be maintained at a certain minimum level at all times. Accordingly, an institution may not hold reserve funds in any type of investment that is subject to significant price variation. The Secretary believes only cash held in the form of a demand deposit in a federally insured bank account, or short term investments secured by the full faith and credit of the United States meet this criteria.

Changes: The Secretary amends the cash reserve requirement in § 668.15(b)(5) to require an institution to maintain at all times, a cash reserve equal to one-quarter of the total dollar amount of refunds paid by the institution in the previous fiscal year. Such reserves shall be maintained in a cash deposit in a federally insured bank account or, in U.S. Treasury securities, backed by the full faith and credit of the United States having an original maturity of three months or less.

Comments: Many commenters believed that the requirement that for-profit institutions maintain a ratio of current assets to current liabilities of 1.25:1 was burdensome and exceeded the scope of the statute. One commenter supported the ratio requirement and suggested that a current ratio of 1.6:1 up to 2:1 might be a more appropriate standard of financial responsibility. The majority of commenters who expressed concern regarding the ratio requirement indicated that they believed the Secretary's justification for applying a higher standard to for-profit institutions was unsupported and discriminatory. Many commenters believed that the Secretary should not attempt to distinguish between for-profit and nonprofit institutions. Among the commenters who expressed a concern, most believed that the establishment of separate ratio tests for each type of institution was not required by the HEA. Some of the commenters believed that the exclusion of uncollateralized related party receivables from the calculation of current assets was inconsistent with generally accepted accounting principles. A number of commenters suggested that a phase-in period ranging from twelve months to more than five years should be granted to allow institutions time to build up working capital reserves in order to comply with this standard.

Discussion: Many commenters believed that in applying this standard the Secretary was effectively mandating that for-profit institutions divert available funds away from capital assets such as facilities, supplies, and equipment and into lower yielding short term investments. While the Secretary recognizes the possibility that a higher current ratio requirement could theoretically lead to greater inefficiencies in the use of funds, the Secretary believes that higher levels of working capital afford greater financial flexibility to institutions and thus provide greater protection against the possibility of unexpected closure. The Secretary believes that Congress intended to ensure through regulation that students are afforded every reasonable protection with regard to their attendance at an institution through which they are receiving HEA funds. The Secretary also believes that the numerous fundamental differences in accounting and funding methods for nonprofit and for-profit institutions provide sufficient justification for the application of different standards to them.

However, the Secretary believes that a change in the current ratio requirement is appropriate to take into consideration differing financial and operating structures while employing similar standards for both for-profit and nonprofit institutions. In order to implement a uniform standard that may be used for different types of institutions, the Secretary believes that it is appropriate to exclude certain assets and liabilities from the calculation of the analytical ratios. As discussed in more detail below, the Secretary believes institutions that are currently in compliance with the existing standards of financial responsibility will not require a grace period to meet the new standards.

Changes: In §§ 668.15(b)(7)(i)(A) and (b)(8)(i)(B), the Secretary has replaced the current ratio requirement of 1.25:1 with an acid test ratio of 1:1, representing the ratio of the sum of cash and cash equivalents, and current accounts receivable divided by current liabilities. In applying this standard, the Secretary excludes from the ratio calculation all unsecured or uncollateralized related party receivables as well as all other assets not specifically identified in the above ratio calculation.

Comments: Several commenters were concerned that the Secretary is involved in attempting to set accounting standards by requiring classified statements of financial position for nonprofit institutions reporting under Financial Accounting Standards Board Statement 117 (FASB 117), Financial Statements for Not-for-Profit Organizations.

Discussion: The Secretary is aware that presenting the statement of financial position of a nonprofit institution as a classified statement of financial position is a matter of management decision. However, during the negotiated rule making process, the need for comparable financial responsibility and accounting standards became evident. This need must be reconciled in some manner, despite the varying accounting standards between for-profit and nonprofit entities. The Secretary does not permit this information to be presented in a supplementary schedule because supplementary schedules are not subject to audit tests, as are notes to the financial statements. The information concerning current assets and current liabilities does not have to be included as part of the audit but may be included in the notes to the financial statements. Preparation of a classified statement of financial position is included as an option under FASB 117. The Secretary is therefore not setting standards but merely requiring that presentation be made in accordance with one of those options in particular.

Changes: None.

Comments: Many commenters believed that implementation of the proposed regulations should be delayed for at least a year, with most commenters expressed stating that the increased current ratio requirement and cash reserve requirement would require institutions to accumulate additional cash or other liquid assets.

Discussion: The Secretary believes institutions that are in compliance with the current standards for financial responsibility will not require a significant period of time to implement the proposed changes. For many institutions, the acid test ratio proposed by the Secretary will measure exactly the same elements as the former current ratio did. The establishment of a separate cash reserve should not impact the calculation to a great extent because the cash reserve balance will be included in the ratio calculation. Because the acid test ratio is a more stringent measure of liquidity, the Secretary only requires that an institution demonstrate parity between its most liquid assets and its current obligations. The accumulation of significant liquid assets would generally not be required by an institution. The Secretary believes that it is reasonable to

expect that an institution has at least as much cash on hand and current receivables as it does current obligations.

Changes: None.

Past performance of an institution or persons affiliated with an institution. Comments: Two commenters were concerned about the proposal to expand the requirements whereby an institution is not considered to be financially responsible if an individual, who exercises substantial control over any other existing institutions or defunct institution or third-party servicer, owes a liability for a violation of a Title IV requirement, and is not making payments according to an agreement established with the Secretary to repay the liability. Several commenters wanted all references to a member or members of a person's family deleted from the regulations citing that people should not be held financially or legally responsible for the actions of members of their family who have reached their majority. Another commenter was concerned about the inclusion of a member of the person's family without regard to whether there is any partnership between the individuals and felt that this requirement unnecessarily broadens the scope of the requirement. Several commenters suggested that the percentage of ownership interest used to establish substantial control over an institution or third-party servicer be set at 50 percent rather than 25 percent stating that a 25 percent ownership interest does not mean that the person has control of the business.

Discussion: Section 498(e)(4)(B) refers to audit findings of more than 5 percent of an institution's Title IV, HEA program funds for any award year. The Secretary considers this statutory provision to be designed to require the consideration of the loss of that amount of Title IV, HEA program funds, regardless of whether that loss was identified from an audit or as the result of a program review.

The Secretary considers the criteria in the provisions of § 668.15(c)(2) to be indicative of serious problems with financial responsibility. An institution in one of these categories has already failed to comply properly with the Title IV, HEA program requirements and has had the opportunity, during its appeal process or other negotiations with the Department's officials, to demonstrate any mitigating circumstances that might have justified reducing or eliminating the sanction or finding. The Secretary agrees with the commenters who suggested that one of the categories of past performance problems should be revised to reflect a failure of an institution to resolve satisfactorily any significant compliance problem.

The Secretary is satisfied that citing an institution for a failure to submit acceptable required audit reports in a timely fashion is a better standard of past performance problems than a final determination. A final determination is issued only after an acceptable audit report has been submitted and the findings have been formally issued to the institution. An institution can be cited for failure to submit an audit report in a timely fashion, and an institution can have its audit report returned because the report is unacceptable. These actions do not imply that the institution has committed any other violations of Title IV, HEA program requirements, but it is essential for the Secretary to have acceptable audit reports on time so that the Secretary can evaluate whether the institution is appropriately administering its participation in the Title IV, HEA programs.

Changes: The criterion in paragraph (c)(2)(iv) of this section has been revised to provide that the failure to resolve satisfactorily any significant problem identified in a program review or audit report causes an institution not to be considered financially responsible.

Exceptions to the general standards of financial responsibility. Comments: Three commenters suggested that performance bonds should be accepted to meet the standard for surety amounting to at least 50 percent of total Title IV HEA program funding under the statute. The commenters contended that performance bonds may provide equal, if not better, protection to the Secretary than letters of credit because it is often possible to collect on performance bonds even after the expiration date.

Discussion: The Secretary has determined that the level of protection afforded by performance bonds is not sufficient due to the relative difficulty in collecting against such instruments compared to recoveries under a letter of credit. In some instances involving school closures where a performance bond was in place, the Secretary might be required to submit and document claims on a student-by-student basis before a third party before collecting the full amount of institutional liabilities. Collection under an irrevocable letter of credit has proven to be reliable and effective in protecting the federal interests.

Changes: None.

Comments: A number of commenters responded to the Secretary's request in the February 28, 1994 NPRM for specific standards that might be employed to measure the acceptability of a State's tuition recovery fund. Several commenters recommended that the Department only require states to certify that the fund can pay all required refunds on behalf of schools that close precipitously. Some of the commenters recommended that the Secretary take into consideration the success of various teach-out measures which exist in the various states. One commenter recommended removal of the exemption because many charges associated with attending an institution that are properly included in refunds are not considered part of tuition, and would not be recoverable by the student in the event an institution closes. The commenter went on to recommend that the Secretary require an actuarial analysis and certification of full funding before considering a fund acceptable. Some of the commenters believed that a State's tuition recovery fund should be acceptable if the State has taxing authority to require schools to contribute to the fund. One commenter provided the Department with a number of suggestions including: assessing the extent of refund obligation that the fund would cover, the current funding level, maximum fund balance, amounts of annual assessments, amount of annual claims, the authority of the fund's administrator and the historical experience of the fund. One commenter believed that the Department would not effectively be able to evaluate the State's tuition recovery fund. Another commenter suggested that the acceptability of the state's tuition recovery fund should be determined by comparing a State fund's established maximum payout to an individual institution's annual loan volume.

Discussion: In general, the Secretary believes that a State's tuition recovery fund will be found to be acceptable where it has the backing of the full faith and credit of the State and agrees to administer such refund payments in accordance with the requirements of the HEA programs. Based upon historical experience, State tuition recovery funds have been poorly capitalized and fund administrators have little authority to levy assessments. Many of the funds will pay refunds only for students currently enrolled, and not to students that were owed refunds when the institution closed. Other State tuition recovery funds have only provided protection to in-state residents and, in general, have capped payments at a predetermined maximum level without regard to the refund owed under the HEA programs. Some problems have also arisen where refunds were being

made directly to students on a first-come, first-served basis that exhausted the available funds without apportioning them ratably to the funding sources that should have received the refunds for the benefit of those students.

Given these concerns regarding the acceptability of State tuition recovery funds, the Secretary does not believe it is appropriate to address these criteria through regulation at this time. The Secretary will continue to review this issue to determine what standards, if any, may be set out through regulation.

Changes: None.

Comments: One commenter supported the requirement that an institution maintain a minimum cash reserve equal to 10 percent of deferred tuition revenue but believed that an institution's contributions to a State's tuition recovery fund should be included in calculating the reserve requirement. One commenter noted that the North Carolina General Statute 115D–90 requires an institution to maintain a guaranty bond in an amount equivalent to an institution's deferred tuition revenue at peak enrollment. The commenter believed that students were already afforded reasonable protection under the bond requirement and suggested that the cash reserve be required when no other form of protection exists. Another commenter believed that the Secretary should fully exempt institutions which retain deferred tuition amounts through independently administered escrow arrangements.

Discussion: Section 498(c)(5) of the HEA requires that all institutions maintain a minimum cash reserve. The requirement for an institution to maintain a cash reserve does not apply to institutions which reside in a State that has a tuition recovery fund if that state's tuition recovery fund is acceptable to the Secretary. As discussed above, under certain situations an institution may be able to demonstrate that the State tuition recovery fund to which it contributes will supplant the institution's requirement to maintain a separate cash reserve. In such an instance, the institution will not be able to treat its contributions to the State tuition recovery fund as a portion of its current assets.

Changes: None

Comments: One commenter believed that the requirement for an institution to demonstrate a positive tangible net worth would discourage employee ownership of institutions because amounts invested in employee stock ownership plans (ESOP's) are treated as intangibles and would be excluded from the calculation of net worth. Furthermore, the commenter believed that this particular provision was retroactive because intangibles that may have been acquired several years ago would still appear on an institution's balance sheet. The same commenter believed that the expense item representing amortization of intangibles should be excluded from the calculation of operating loss in view of the Secretary's exclusion of intangible assets from the calculation of tangible net worth. Another commenter requested that the Secretary consider the market value of assets purchased years ago and carried at depreciated book value on the institution's financial statement. One commenter believed that intangibles should be excluded only if the Secretary has reason to believe that the value of these assets does not reflect an arm's length valuation.

Discussion: In general, an intangible asset has no physical existence and depends on some expected future benefit to derive its value. While the Secretary believes that the presence of an intangible on an institution's balance sheet can, and often does, imply some future economic benefit to the institution, the Secretary does not believe that such an asset should be included in the institution's net worth calculation to determine whether the institution demonstrates financial responsibility for HEA program purposes. The Secretary does not believe that it would be necessary to exclude the expense item in the calculation of operating losses. Generally accepted accounting principles require that an institution show asset values at historical cost less accumulated depreciation. In the ordinary course of business, it would not be possible for the Secretary to make a determination regarding the current market value of any asset unless that asset was actually sold in an arm's length transaction or an actuarial valuation was obtained in a manner acceptable to the Secretary. Administrative efficiency and a preference for certainty as documented through the audited financial statements warrant the exclusion of such items.

Changes: None.

Documentation of financial responsibility. Comments: Two commenters felt that audited financial statements should be submitted only once every four years, when most institutions are recertified. The commenters believed that the statute allows for this limited reporting. A few commenters believed that the submission of an audited financial statement should be accepted by the Secretary as sufficient evidence to establish an institution's financial responsibility without regard to the content of the statements.

Discussion: The statute is clear in making annual audited financial statements a requirement. Further, the Secretary believes that the Department has a responsibility to verify on an annual basis that institutions have sufficient financial strength to provide the educational services for which its students are contracting. The Secretary has prescribed an acid test ratio in accordance with § 498(c)(2) of the HEA. The calculation of the acid test ratio is based on information contained in an institution's audited financial statement as prescribed in § 498(4). The Secretary believes that the acid test ratio provides reliable information about the financial condition of an institution.

Changes: None.

Comments: One commenter believed that the requirement that an institution submit a financial statement for its two most recently complete fiscal years should be clarified by the Secretary to require two years of financial information in only the first year following the implementation of the regulation because annual financial statements would be required thereafter.

Discussion: The Secretary requires the submission of two years of financial data on an annual basis. To be considered financially responsible, an institution must demonstrate that it has not experienced operating losses in either or both of its two most recently completed fiscal years that in sum total more than ten percent of the institution's total net worth at the beginning of the first year in the two year period. The Secretary shall make this determination on the basis of financial information submitted by the institution in the form of an audited comparative financial statement representing each of the institution's two most recently completed fiscal years or by comparing information provided by the institution in the form of two individual audited financial statements, each representing one of the institution's two most recently completed fiscal years.

Changes: None.

Comments: Many commenters believed that the requirement for an institution to submit an audited financial statement within four months of the institution's fiscal year end was burdensome because institutions were also required to perform compliance audits during the year at points that did not necessarily coincide with the institution's fiscal year end. As a result

the institution would be required to incur additional audit costs that would be unnecessary if both audits could be performed simultaneously. To accomplish this, the commenters requested that the Secretary extend the period in which audits are due from four months to within six months of the institution's fiscal year end. Two commenters believed that the requirement for an institution to submit an audited financial statement within four months of the fiscal year end contradicted the objectives of the Single Audit Act, and OMB circular A–128 and A–133, because timing differences related to the availability of information would result in an institution being required perform both a financial audit and a compliance audit. Another commenter noted that audits prepared in accordance with the Single Audit Act were acceptable under 34 CFR 668.23(f), and suggested that an audit prepared in accordance with the Single Audit Act ought to be acceptable to the Secretary in other sections of the same regulation.

Discussion: The Secretary believes that a four month period provides ample opportunity for an institution to accomplish the preparation and audit of fiscal year end financial statements. The reliability of any financial statement, as a fair representation of the institution's true financial condition, is largely dependent on the timeliness of the financial report. The Secretary believes that four months is reasonable and notes that many thousands of publicly traded corporations make timely submissions under the 3 month time frame set by the Securities and Exchange Commission for the submission of annual audited financial statements. The Secretary may, however, grant an extension on an individual basis where the institution demonstrates a sufficient basis for the extension. An institution that is required to report in accordance with OMB circular A–128 or A–133 under the Single Audit Act will continue to be governed by the reporting requirements specified under that act.

Changes: The Secretary has added § 668.15(e)(3) to show that audits submitted in accordance with the Single Audit Act meet the reporting requirements under this section.

Section 668.16 Standards of Administrative Capability

Comments: Proposed changes to this section generated many comments. Some commenters asserted that many of the proposed standards go far beyond the issue of administrative capability. Some argued that the Secretary would exceed the authority of the HEA if the proposed revisions were retained in final regulations. Some commenters argued that some of the issues addressed in this section were subject to review by accrediting agencies or SPREs and inclusion in these standards would result in duplication of effort on the part of the Triad agencies and institutions. Some commenters believed the proposed standards to be needlessly detailed and complex. Some commenters stated that the proposed standards were too broad. Some commenters strongly opposed the clarification that institutions would be expected to comply with all the standards in order to be fully certified. Some commenters noted that there was no effort to weigh the relative importance of the various proposed elements of administrative capability and recommended that the section be revised to prioritize the various standards. Some commenters recommend that the elements of administrative capability in § 668.16 be considered indicators, not absolutes. Some commenters requested that the Secretary provide more specificity in the regulations so that institutions would know precisely what was requested of them and when.

Discussion: The Secretary appreciates the many thoughtful comments on the various aspects of regulating in the area of administrative capability. The Secretary found many of the constructive recommendations made by commenters to be useful in modifying some standards, crafting more precise language for other standards, and understanding why some proposed standards are unnecessary or should not be imposed at this time.

Based on the comments, the Secretary has modified the proposed administrative standards significantly. While specific changes are discussed in detail in connection with the applicable section, the Secretary believes it may be useful to note some of the principles and rationale which guided the refinement of the administrative standards. The Secretary made many changes in sections where commenters pointed out that the same goal could be reached by requiring less detail or action by those institutions that demonstrated a history of compliance with regulations governing the Title IV, HEA programs and imposing more on requirements or restrictions on institutions that have either no track record or have a record of problems administering the Title IV, HEA programs. The Secretary also made adjustments in those proposed standards where there was overlap with the responsibilities of accrediting agencies or SPREs.

The Secretary did not find persuasive the comments of those who urged that the elements be considered as indicators of administrative capability instead of absolutes, or that the standards be prioritized to indicate relative importance. Requiring that institutions meet each and every standard is critical to successful enforcement by the Secretary. If institutions were not required to do so, institutions could argue that they had substantially complied with the administrative capability standards and it would be difficult for the Department to enforce compliance. The Secretary has determined that only way to become a more effective gatekeeper is to select critical standards, put institutions on notice that they are responsible for adhering to them—by requiring that each standard of administrative capability be met—and taking action when they are not.

Changes: None.

Comments: The majority of commenters believed the Secretary should clarify that an institution must administer the Title IV, HEA programs in accordance with *all* statutory provisions, regulatory provisions, or applicable special arrangement, agreement or limitation. Two commenters believed the paragraph to be overly broad and unnecessary.

Discussion: The Secretary appreciates the support of those commenters who understand the importance of making it clear that an institution is expected to comply with all applicable statutes, regulations, and any special agreement or arrangement into which the institution has entered with the Secretary. The Secretary agrees to clarify that special agreements, limitations, or arrangements are those entered into under statutes applicable to Title IV of the HEA.

Changes: Section 668.16(a) is amended to clarify that an institution must administer the Title IV, HEA programs in accordance with all statutory provisions, regulatory provisions, or applicable special arrangements, agreements or limitations entered into under the authority of statutes applicable to Title IV of the HEA. A conforming change has been made to § 668.14(b)(1).

Comments: Many commenters supported the idea that the Department recognize quality training provided by State, regional, or national financial aid administrators or guaranty agencies as a factor in the determination of a designated individual's ability to administer the Title IV, HEA programs at an institution. One commenter noted that while attendance at training

workshops may be beneficial, the workshops have no means of assessing whether attendees have achieved a given level of knowledge. While a few commenters acknowledged that the caliber of training varies and suggested a system that recognizes a variety of training options, no one responded to the Secretary's request for criteria to consider in approving non-Federal training.

A majority of the commenters recommended that to be deemed a "capable individual" an aid administrator should be required to satisfy a training or certification requirement. Many commenters noted that a continuing education requirement might be appropriate, also. Some of the commenters who advocated a continuing education requirement recommended that such training be required to be reported to the Secretary or be attested to by the institution's auditor.

Of those commenters who advocated a certification requirement, most opposed national certification because they felt it would be costly and might duplicate State certification efforts. However, two commenters did advocate national certification or credentials. A few commenters opposed certification and noted that one State had discarded certification several years ago; one commenter noted that the Secretary has not shown any evidence that State-certified training leads to or correlates with improved administration of the Title IV, HEA programs. One commenter who recommended that experience, training, or certification be required specified that the requirement should apply to "at least" the individual operationally in charge of the financial aid office.

Several commenters provided additional suggestions for factors to use in determining whether an individual is capable: An individual's record of timeliness and accuracy in administration of Title IV, HEA programs; an individual's years of experience administering Title IV, HEA programs; an individual's on-going attendance at workshops and seminars during each award year; and an individual's record of compliance with Title IV, HEA program regulations.

Discussion: The Secretary appreciates the comments from those individuals and organizations that supported making some kind of training, certification, or continuing education a requirement. The Secretary continues to believe that State certification, as well as participation in and completion of quality workshops and training programs, are good indicators of a "capable individual" and intends to consider these factors in evaluating capability. However, the Secretary does not see the need at this time to make training or certification a requirement.

Despite the lack of response to the solicitation of suggestions on training elements the Secretary might use to evaluate and approve nondepartmental training, the Secretary believes that quality training programs exist outside the Department that would be beneficial in determining an individual's capability and will continue to solicit advice as to how such programs might be identified and approved. To encourage suggestions on appropriate approval of training programs and to facilitate the use of any training programs approved in the future to evaluate capability, the Secretary retains, without change, the provision in the final regulations that would accommodate training approved by the Secretary.

The Secretary agrees that previous experience and documented success in properly administering Title IV, HEA programs are germane to the evaluation of an individual's capability.

Changes: Previous experience and documented success in properly administering Title IV, HEA programs are added to the list of factors in § 668.16(b)(1) that the Secretary may consider in determining whether an individual is capable.

Comments: The vast majority of commenters opposed strongly the use of any prescriptive staffing standards to evaluate the adequacy of staffing levels at institutions. Many commenters were concerned that there are too many variables—number and type of professional programs offered by an institution, level of staff experience, degree of centralized processing, use of third-party servicers, and diversity of the student body, in addition to the factors listed in § 668.16(b)(2)—to permit an accurate assessment of the adequacy of staff levels. A number of commenters expressed the concern that small institutions would be penalized if staff levels were stipulated in regulations. Many commenters stated that adequate staffing should not be an issue unless an institution demonstrates problems administering the Title IV, HEA programs, as reflected in audits, program reviews, or student complaints. One commenter noted that during the negotiated rulemaking sessions, non-Federal negotiators explained and stressed the potential negative impact on current aid office staffing levels that could result from creating an artificial ratio of aid applicants or recipients to financial aid administrators.

A few commenters provided suggestions on how to evaluate the adequacy of staffing levels at institutions or recommended that the Secretary analyze workload issues and develop appropriate formulae. Other commenters recommended to the Secretary a recent staffing survey conducted for the National Association of Student Financial Aid Administrators (NASFAA) as an appropriate model to use in developing more precise measures of staff adequacy. A few commenters believed that currently participating institutions should be judged on the basis of their track record, but thought that use of ratios of aid applicants or recipients to financial aid administrators might be helpful in the assessment of the administrative capability of institutions applying for participation in the Title IV, HEA programs for the first time.

Discussion: The Secretary believes that, in general, a currently participating institution's compliance with the other standards of administrative capability can serve as a reliable indicator that a financial aid office is staffed adequately. However, if an institution adds a branch campus or other location, starts using or stops using a third-party servicer, or makes other changes that would have an impact on the administrative capability of the institution, the Secretary believes it may be necessary to look more closely at the institution's staffing pattern. Further, an institution that undergoes a change of ownership that results in a change of control may experience a change in its enrollment level and financial aid office personnel and should be subject to review of its staffing level.

In general, the Secretary intends to use the list of factors in this section especially to assess the adequacy of staffing at institutions that make these changes, at institutions that are applying for initial participation, and at institutions with documented compliance violations. However, the Secretary expects all institutions to be able to demonstrate that they have an adequate number of qualified persons to administer the Title IV, HEA programs properly.

In addition to those factors identified in the proposed regulations, the Secretary agrees with those commenters that the use of third-party servicers could have a significant impact on the institution's ability to administer the Title IV, HEA programs.

Given the lack of information available currently about establishing meaningful ratios of staff to student applicants or recipients, the Secretary is not adding a ratio to the factors used to

evaluate even new institutions at this time.

Changes: The Secretary has amended § 668.16(b)(2) by adding the use of third-party servicers to the list of factors to be considered in assessing adequacy of staff levels.

Comments: A few commenters argued that requiring communication of information from any institutional office that receives information that has a bearing on student eligibility for Title IV, HEA program assistance to the person designated to be responsible for administering Title IV, HEA programs was very labor intensive and should be removed. One commenter stated that the specifications for interoffice communications bear no relationship to an expected outcome.

Discussion: The Secretary notes that this requirement has existed for some time. The Secretary continues to believe that it is an appropriate administrative standard inasmuch as proper communication among offices is essential to ensuring that students are eligible for the amounts of Title IV, HEA program assistance they receive and that the status of borrowers is updated, when appropriate.

Changes: None.

Comments: A dozen commenters objected to the proposed requirement that institutions have written procedures or information regarding several key aspects of the administration of the Title IV, HEA programs. Most of these commenters stated that the proposed requirement was burdensome and would create a lot of paperwork with no discernible benefit. One commenter noted that communications processes and structures are dynamic by nature and thus subject to frequent changes. Another commenter expressed concern that the Secretary was trying to dictate the pattern and frequency of communications among college offices. This commenter added that while development of written procedures such as those proposed would be good management practice, the Secretary should not regulate such practices. Some of the commenters recommended that this proposed requirement be removed entirely. Other commenters recommended that the requirement be imposed only on institutions that did not have a record of administering the Title IV, HEA programs successfully or only on larger institutions.

Several commenters suggested that institutions be able to show compliance through their computer systems. One commenter, concerned that the time required to provide detailed documentation would take valuable time away from the smoothly running delivery of aid, recommended that general delineation of responsibilities be considered sufficient. Another commenter recommended that institutions be permitted to work out the method and frequency of communication. One commenter asked that the Secretary clarify how this provision relates to multi-campus institutions if the proposal were retained in final regulations.

Discussion: The Secretary is not persuaded that mandating written procedures or information covering certain aspects of Title IV, HEA administration is an inappropriate or unnecessary administrative standard. However, the Secretary appreciates the concern of commenters who perceived certain areas of the proposal to be unduly burdensome. The Secretary agrees that the burden to an institution of having to prepare written procedures for or written information indicating the nature and frequency of communication of pertinent information among all the offices that have an impact on the administration of the Title IV, HEA programs outweighs the benefit that this provision would provide to the Secretary. The Secretary also agrees that, unless compliance problems relevant to the listed responsibilities are identified, institutions may satisfy the requirement that an institution have written procedures for or written information indicating the responsibilities of the various offices with respect to the approval, disbursement, and delivery of Title IV, HEA program assistance and the preparation and submission of reports to the Secretary by a general written description of the responsibilities of the various offices.

Changes: The requirement that an institution has to prepare written procedures for or written information indicating the nature and frequency of communication of pertinent information among all the offices that have an impact on the administration of the Title IV, HEA programs has been removed from these regulations.

Comments: A number of commenters discussed the issue of appropriate separation of awarding and disbursing functions. Many of these commenters said the prohibition on having family members perform the two functions would be onerous, particularly in a small, family-run institution. In a similar vein, some commenters noted that in a small institution the owner works and has responsibility over all facets of the institution. At small institutions, it is very difficult to provide for organizational independence. Many commenters suggested deleting the new language that references family members and individuals that have control over both functions and relying on the annual audit process to test for adequate internal controls.

Discussion: This standard was strengthened to provide additional deterrence to collusion, which is a big problem at institutions that engage in fraud and at many institutions that fail to make refunds. The strengthened language also gives the Secretary added, needed authority to terminate institutions that engage in collusion.

While the Secretary understands the concern of small family-run institutions that arranging for someone outside the family to perform one or both tasks will be burdensome, the suggestion that the Secretary delete the new language and rely on the required financial and compliance audit is not realistic. At very small institutions, the auditor would probably conclude that there are no internal controls because there are only two or three employees—often the owners.

Changes: None.

Comments: The Secretary received in excess of sixty comments on the provisions that address satisfactory academic progress. The vast majority of commenters were opposed to the proposed addition of § 668.16(e)(3)(ii)(B), which stipulates that undergraduate students would be expected to complete their educational programs within 150% of the published length of the programs as a standard for measuring a student's satisfactory academic progress. They recommended that the proposed new provision be removed. A few commenters argued that implementation of the provision would be an infringement of the academic freedom of institutions. Many others asserted that requiring this level of detail in an institution's satisfactory academic progress standards is unwarranted, because it interferes with institutions' academic procedures, and argued that the proposed new requirement bears no discernible relationship to administrative capability standards. A few commenters opposed the inclusion of any satisfactory academic progress requirements in the standards for determining administrative capability.

Many commenters were opposed to the proposed new criterion governing the maximum time frame because they believed that it does not take into consideration the academic career patterns of nontraditional students who work and have varying hours, attend part-time, or need remedial academic help, often interspersing developmental

courses with courses taken for credit. One commenter contended that this provision would discriminate against students who change majors or eligible programs. Some commenters argued that implementation of the proposed provision would result in the cut-off of Title IV, HEA program funds to students in these categories even though the students may be serious and highly motivated. Thus, students who would otherwise be able to complete an eligible program would be denied that opportunity because they could continue with their education only if they received Title IV, HEA program assistance.

Two commenters recommended that students be permitted to appeal this provision on a case-by-case basis. One commenter concurred with the provision as written and stated the standard is part of the current policy of the commenter's institution. One commenter stated that the required increments of time for the establishment of a maximum time frame in which the student must complete his or her educational program do not work for a program such as court reporting, where the time it takes students to complete a given amount of work may vary from 3 to 12 months.

Discussion: Because students are required by Title IV of the HEA to maintain satisfactory progress to receive Title IV, HEA program assistance, it is only logical that an institution's ability to administer Title IV, HEA programs must be judged, in part, on the existence and implementation of an adequate satisfactory progress policy. The proposed addition is a codification of longstanding policy and is consistent with the requirements of the Student-Right-to-Know Act.

As stated in the February 28, 1994 NPRM, the establishment of a maximum time frame would take into account a student's enrollment status. Institutions are currently required to monitor enrollment status of students receiving Title IV, HEA program funds and 150% of published program length can and should be viewed only in the context of an individual student's enrollment status. Thus, if a nontraditional student who is enrolled in a baccalaureate program that a full-time student is expected to complete in four years and a half-time student is expected to complete in eight years, vacillates between full-time and half-time enrollment, that student would have a computed maximum enrollment period somewhere between six and 12 years. Further, because the requirement is designed to set an upper limit on the period of time for which a student may receive Title IV, HEA program assistance, periods of nonenrollment, during which the student is not receiving Title IV, HEA program funds, would not be counted against the length of time the student is pursuing a degree or certificate. Thus, a student who enrolls and receives Title IV, HEA program funds sporadically would be treated differently from a full-time student who pursues a degree or certificate without interruption.

Paragraph (e)(1)(vii) of this section requires an institution to have procedures under which a student may appeal a determination that the student is not making satisfactory progress. With regard to eligible programs of an academic year or less, these regulations make even clearer the longstanding requirement that the maximum time frame must be divided into increments. Satisfactory academic progress policies are expected to measure whether students are progressing satisfactorily toward their educational goals and should serve also as a device for counseling students about their need to improve their progress, if applicable. If maximum time frames are not divided into increments, these policies are not serving their purpose. This principle applies to programs shorter than an academic year no less than to longer programs.

Changes: Section 668.16(e)(3)(B) is amended to clarify that a maximum time frame in which a student must complete his or her educational program must be no longer than 150 percent of the published length of the educational program for full-time students.

Comments: Two commenters recommended expanding the requirement that an institution must develop and apply an adequate system to identify and resolve discrepancies in the information that the institution receives to include documentation of a student's social security number. They reasoned that resolution of social security number discrepancies is an important part of controlling fraud and abuse in the Title IV, HEA programs and the ability of an institution to obtain appropriate documentation to resolve such discrepancies should be considered in determining administrative capability.

Discussion: The Secretary concurs with the commenters that resolution of social security number discrepancies is essential and should be expressly stated in this section.

Changes: Section 668.16(f)(3) is amended to include documentation of a student's social security number in the information normally available to an institution and for which the institution must have a system to identify and resolve discrepancies.

Comments: About half the commenters expressed concern, to varying degrees, that the proposed reporting requirement is too vague and broad and would result in overreporting that would overwhelm the Office of Inspector General. Some of these commenters recommended that the word "evidence" replace "information." Other commenters suggested that there be some kind of internal review or discussion. Several commenters recommended that institutions continue to make referrals to local law enforcement officials or at least consult with them. Two commenters wanted assurance that the institution would be protected in the event that it made a referral.

Discussion: The Secretary cannot accept the substitution of "evidence" for "information" because that the word "evidence" has legal ramifications. Evidence is normally determined in a court of law when the judge determines what permissible evidence is. Institutions may contact the Office of Investigations within the Office of Inspector General for advice before making a formal referral. The Secretary also cannot accept the suggestion that institutions establish an internal review mechanism prior to referral as such a mechanism may work to block appropriate referrals. However, the Secretary believes that an institution should only be required to refer to the Office of the Inspector General of the Department of Education *credible* information indicating fraud and abuse.

The Secretary sees no problem with institutions making concurrent referrals to local law enforcement authorities, but cannot support the referral to local authorities as an alternative to making referrals to the Office of Inspector General. Concurrent referrals can be made with the regulation as written; no change is necessary. The Secretary cannot guaranty protection to institutions or individuals that make referrals.

Changes: Section 668.16(g) has been amended to clarify that an institution must only refer to the Office of the Inspector General of the Department of Education *credible* information indicating fraud and abuse.

Comments: Almost two-thirds of the commenters supported the concept of requiring institutions that serve significant numbers of students with special needs to have and implement plans for providing students with information about how to meet their needs, but half of these commenters recommended that the requirement be

imposed only on institutions with high withdrawal rates. Two commenters recommended that institutions be required actually to provide the necessary support services.

Several commenters suggested that students with language barriers be considered to have special needs. One commenter suggested that students from low socio-economic background, as determined by using the Expected Family Contribution (EFC) figures under the Federal Need Analysis formula, be determined to have special needs. Those commenters who responded to the Secretary's request for how to define significant number suggested either that 66 percent of total enrollment be used, as that would be consistent with the mitigating circumstances threshold for appealing determinations of excessive cohort default rates, or that percentages of enrollment, for example five percent, 10 percent, or 20 percent, be used as thresholds, depending on the number of students.

Of the commenters who opposed the proposed requirement, almost half argued that there is no connection between the proposed regulation and administrative capability and the Secretary therefore should not regulate in this area. A half dozen commenters believed that students were aware of their own special needs and it was their responsibility to ensure that these needs were met. Several other commenters believed the proposed requirement was unnecessary because either institutions that had students with special needs were already attending to those needs, or such students would already be getting help from appropriate social service agencies. One commenter who objected strongly to the proposal noted, among other concerns, that students need to learn to become self reliant and that employers with whom the commenter's institution deal say the institution is already coddling its students too much.

Discussion: The Secretary is persuaded that regulation in this area is unnecessary at this time.

Changes: The provision that provides that an institution that serves significant numbers of students with special needs must have and implement plans for providing students with information about how to meet their needs has been removed from these regulations.

Comments: Two commenters supported the provision that would require institutions to have procedures for receiving, investigating, and resolving student complaints but requested that the Secretary clarify the proposed language. One of these commenters asked that the Secretary make it clear that institutions would be expected to handle only those complaints related to the educational programs and support services offered by the institution. The other commenter thought that institutions should be required to publicize their system for handling complaints and maintain a log of student complaints.

Discussion: The Secretary appreciates the commenters' support; it is good administrative practice to have a mechanism to resolve student complaints. However, the Secretary has decided the proposed requirement is not an essential administrative standard as there will be other means of addressing student complaints about an institution. Each SPRE will be setting up a student complaint system to process student complaints about the postsecondary institutions in its State. Further, SPREs will be reviewing the handling of student complaints at institutions they review. Accrediting agencies will also be required to assess student complaints about institutions they consider.

Changes: Proposed § 668.16(j) has been removed from these final regulations.

Comments: The Secretary received many comments on the proposals aimed at institutions with educational programs with the stated objective of preparing a student for gainful employment in a recognized occupation. Many of the commenters opposed the proposed requirements that the institution: (1) demonstrate a reasonable relationship between the length of the program and occupational entry level requirements and (2) establish the need for the training. The commenters believe the responsibility for evaluation of program length and the need for training rests with the other members of the Triad, principally the accrediting agencies. Some of these commenters argued that if the Secretary were to regulate in this area, the Secretary would exceed his statutory authority and be intervening inappropriately in academic affairs. Other commenters asserted that need for or length of training programs has nothing to do with ability of institutions to administer Title IV, HEA programs. These commenters recommended the elimination of this proposed standard.

While some commenters were concerned that the standard, as proposed, is unreasonably vague, other commenters charged that the Secretary would be micromanaging if it were implemented. A number of these commenters noted that, for several reasons, it would be difficult to determine whether program length really is appropriate. Many commenters noted that their students are prepared and hired for positions that are above entry level.

Many commenters saw the proposed standard as harmful or unworkable because of the use of minimum State standards as a measure of appropriate length. One commenter noted that there is no provision for evaluation of the method by which a State determines the minimum hours. Another commenter said State-mandated hours are too low. Other commenters questioned what would happen if the State sets an inappropriate length. One commenter represented an institution that trains students from many States, each with different minimum requirements, and argued that it would be entirely inappropriate to limit the length of that institution's programs based on the minimum standard of the State in which the institution is located. Many commenters believed that the proposed regulation is unnecessary. One commenter suggested that disclosures to prospective students are mandated under the Student Right-to-Know Act and that SPRE standards will be addressing the abuses of the type described in the preamble to the February 28, 1994 NPRM and this provision would thus be duplicative.

Discussion: The Secretary proposed this provision to curb existing abuses in these areas. The Secretary questions the motives of any institution that claims it is necessary to greatly exceed the minimum number of clock hours required by the State in which the institution is located for adequate training for a particular occupation. The Secretary is also concerned with any institution that provides training for occupations for which no training is necessary, or for which on-the-job training is adequate. Although an institution's SPRE and accrediting agency may regulate in these general areas, the Secretary believes it is necessary to *specifically* target areas of past abuse. Further, the Secretary believes it is consistent to require an institution to demonstrate a reasonable relationship between the length of the program and occupational entry level requirements established by any Federal agency. See the discussion in the *Analysis of Comments and Changes* section that addresses the definition of an eligible program (§ 668.8).

However, the Secretary was persuaded by the commenters who asserted that need for or length of training programs is not directly linked to the ability of institutions to administer the Title IV, HEA programs. The Secretary believes that this provision is more appropriate as a

requirement for participation in the Title IV, HEA programs under an institution's program participation agreement.

Changes: This provision has been moved to § 668.14(b)(26). Further, the requirements of this provision have been amended to require an institution to demonstrate a reasonable relationship between the length of the program and occupational entry level requirements established by any Federal agency.

Comments: Almost half the commenters supported the proposals for requiring that information on job availability and the relevance of courses to any specific State licensing standards be made available to students. All of these commenters suggested new ideas to clarify and expand the proposed requirements. Most of the other commenters asserted that the proposed requirements did not pertain to the proper administration of the Title IV, HEA programs and noted that accrediting agency and SPRE standards will address these areas. These commenters recommended that these proposed requirements be removed.

Discussion: The Secretary continues to believe that providing adequate and accurate information to students and prospective students, so they can make informed decisions, is a function of proper administration of the Title IV, HEA programs. However, this requirement is covered in the section on the Program Participation Agreement, § 668.14, and therefore is being removed from the administrative capability standards section.

Changes: Proposed paragraph 668.16(l) is removed from these final regulations.

Comments: Some commenters stated that the proposed requirement on advertising and recruitment practices was an extremely important one and recommended that it be strengthened by adding reference to oral as well as written statements. The majority of commenters asserted that the proposed requirements did not pertain to the proper administration of the Title IV, HEA programs and noted that accrediting agency and SPRE standards will address these areas. These commenters recommended that these proposed requirements be removed.

Discussion: While the Secretary continues to believe that advertising, promotion and recruitment practices that reflect the content and objectives of educational programs accurately is a critical aspect of the proper administration of the Title IV, HEA programs, the Secretary also recognizes that accrediting agencies and SPREs will address these practices and agrees with those commenters that recommended that these proposed requirements not be included in the final regulations.

Changes: Proposed paragraph 668.16(m) is removed from these final regulations.

Comments: One commenter suggested that there might be a timing problem for an institution that is in the process of responding to an audit report in which liabilities have been identified. The commenter recommended that the Secretary expand the proposed language that would require that an institution have no outstanding liabilities, unless it has made satisfactory arrangements to repay them, to allow for liabilities the institution is currently in the process of making provisions to repay. Another commenter stated that this provision duplicates the financial responsibility requirements proposed in § 668.15(b) (3) and (4) and recommended that it be removed from the administrative capability requirements.

Discussion: The one commenter apparently believes that liabilities are established at the time an audit report is issued. Contrary to the commenter's perception, institutions are provided with the opportunity to respond to an issued audit report before liabilities are established. However, once the audit report and institutional response have been reviewed and a final program determination letter establishing liabilities has been issued, an institution must either repay the liabilities or make satisfactory arrangements to repay. Responding to audit reports, making any necessary corrections to institutional procedures, and making satisfactory arrangements for the repayment of any liabilities established are all fundamental responsibilities of participating institutions. However, the Secretary agrees that these responsibilities are adequately enumerated in the general standards of financial responsibility in § 668.15(b).

Changes: Proposed § 668.16(o) is removed from these regulations.

Comments: The majority of commenters asserted that the proposed requirement that an institution show no evidence of significant problems identified in reviews of the institution was overly broad and imprecise, giving the Secretary unlimited authority to deny certification because of evidence of problems in a wide variety of areas. They recommended that the proposed regulation be rewritten to limit the scope. Many of these commenters were concerned that institutions would be penalized even if there were a problem unrelated to Title IV, HEA programs matters. One example given was that of a university hospital that was found in violation of Medicare reimbursement rules. Some commenters were concerned that the Secretary would deny certification based on an audit finding or other citation that had not yet been reviewed and upheld in a final audit determination or similar action. They urged that only serious findings upheld in final audit or program review determinations or legal proceedings be considered.

Many commenters expressed concern that the Secretary would deny certification to an institution on the basis of a SPRE review, even if the SPRE itself thought the institution should still receive student aid. Two commenters argued that the regulation, as proposed, would affect the institutions involved in the Department of Justice investigation of the Overlap Group, though they have signed a consent decree. One commenter recommended that the provision be removed.

Discussion: The proposed regulation was intended to allow the Secretary to consider evidence of problems in administering Title IV, HEA programs, as documented not only in reports and determinations issued by the Secretary but by other agencies, identified in proposed § 668.16(p)(1), in determining of administrative capability. The Secretary understands the commenters' concern that this was not clearly stated in the proposed regulation and agrees to clarify that the Secretary intends to take into account evidence of significant problems that have a bearing on the administration of the Title IV, HEA programs.

As stated in the February 28, 1994 NPRM, the Secretary plans to use problems identified in final reports and determinations in evaluating an institution's administrative capability. However, the Secretary cannot accede to commenters' urging that only findings for which institutions have exhausted all appeal procedures be considered. If, for example, the Office of Inspector General, a guarantee agency, and an institution's accrediting agency all issued final reports identifying major Title IV, HEA compliance problems, including failure to make appropriate refunds, and a $1 million liability, it would be unconscionable for the Secretary to fully certify the institution because the institution had not had time to exhaust the appeal opportunities of the various oversight agencies.

Changes: Section 668.16(j) has been amended to specify that the significant problems identified must relate to problems that affect, as determined by the Secretary, the institution's ability to administer a Title IV, HEA program.

Comments: Some commenters supported the proposed requirement that an institution comply with any standards established by the State in which the institution is located or, if no such standards exist, standards developed by the Secretary regarding completion rates, placements rates and pass rates on required State examinations. Many other commenters requested that the Secretary either clarify in final regulations that institutions would be expected to comply with SPRE standards or explain what other State standards should be adhered to. Most of these commenters also asked the Secretary to clarify what Federal standards institutions would be expected to comply with if there were no State standards.

The majority of commenters were opposed to the proposed regulation and recommended that it be removed from the final regulations. Most of these commenters argued that assessment of completion, placement, and licensure pass rates is within the purview of accrediting agencies and States. Some of these commenters stated that review of such rates, as proposed, has no bearing on the capability of an institution to administer Title IV, HEA programs. Many commenters asserted that if the Secretary were to promulgate this regulation, the Secretary would violate the Department of Education Organization Act as implementation of the regulation would involve the Secretary in assessing the effectiveness of an institution's academic programs.

Discussion: The Secretary notes that in commenting on other sections, such as proposed § 668.16(s), which deals with default rates, commenters urged the Secretary to pay more attention to results indicators, such as completion rates, placement rates, and the pass rate on State licensure examinations, and give relatively less credence to input indicators. Further, both the HEA and the Student Right-to-Know Act prescribe the development and use of completion and placement rates under certain circumstances. Nevertheless, the Secretary believes that at this juncture, it is important for the SPREs to develop standards in these areas without reference to the establishment of standards by the Secretary.

Changes: Proposed § 668.16(r) has been removed from these final regulations.

Comments: Many commenters argued that the proposal to use a one-year Federal Stafford Loan and Federal SLS programs default rate of 20 percent as a criterion of administrative capability went beyond the statute and Congressional intent. Other commenters asserted that use of a single year's default rate would be unfair to institutions with small numbers of students, and institutions with graduates who default in unusually high numbers in any given year, and recommended use of two or three consecutive year figures to obtain a more accurate picture of an institution's loan program experience. Another group of commenters was concerned that use of 20 percent, rather than 25 percent, as a criterion was inconsistent not only with the statute, but at variance with other provisions for addressing defaults under the Federal Stafford Loan and Federal SLS programs. Of those individuals and organizations that expressed concern with the use of a one-year, 20 percent figure, many recommended using 25 percent and three years of default rate data instead.

A large number of commenters stated that an institution's default rates are not indicative of an institution's administrative capability. A majority of these commenters expressed their belief that default rates are more reflective of the characteristics of the student body served by the institution than of the institution's administrative capability and recommended that, at the least, the final regulations provide an exemption for institutions that serve a large number of low-income students. Other commenters argued that default rates are influenced by many factors beyond the control of institutions, including: erroneous data, errors in calculating rates, collection practices of lenders, inadequate servicing, regional differences, and borrowers' failure to accept responsibility. Some commenters recommended that the ratio of borrowers to total student enrollment be taken into consideration. A few others expressed concern that there are delays in resolution of challenges to default rates and wanted to have it clear that only final default rates would be used.

A few commenters acknowledged that default rates may be one indication of lack of administrative capability, but argued that many other factors can and do affect administrative capability.

Some suggested that it would be more appropriate for the Secretary to rely on information such as an institution's withdrawal, completion or placement rates and pass rates on external testing and certification, in combination with the default rate, rather than to rely on the default rate alone. Another commenter recommended assessing an institution's default management activities in conjunction with its default rate.

A number of commenters expressed concern that many poor students would be discriminated against if default rates were used as an administrative capability criterion. Some commenters noted the default rate exceptions for tribally controlled community colleges, historically black colleges and universities (HBCUs), and Navajo community colleges and questioned why institutions other than these that serve just as many poor students should be considered poorly operated institutions as a result of a high default rate.

Discussion: The Secretary would like to point out that the use of default rates as a determining factor in the evaluation of an institution's administrative capability is not new. Although some commenters perceived the proposed use of a 20 percent default rate to be at variance with current default practices, it should be noted that the Secretary proposed use of a 20 percent rate because that rate is currently considered as an indicator of impaired administrative capability. Furthermore, institutions with default rates of 20 percent or more are currently required to submit default management plans. However the Secretary also sees merit in using 25 percent as the criterion for addressing defaults under the FFEL programs, as an institution that has a 25 percent rate for three consecutive years is subject to termination from the FFEL programs and it is therefore consistent for the Secretary to thus provisionally certify or otherwise limit such an institution's participation in the Title IV, HEA programs. Acceptance of a three-year time period would also address the concern of commenters that a one-year rate may not be an accurate indicator of an institution's administrative capability.

Although the Secretary does not agree with those commenters who assert that default rates are not indicative of administrative capability, as stated in the February 28, 1994 NPRM, the Secretary does agree that approval of an institution to participate, or to continue participation in, Title IV, HEA programs should not rest solely on the institution's having a default rate below 25 percent. Therefore, if the Secretary identifies no other serious administrative capability problems that would warrant denying participation approval to an institution with a default rate of 25 percent or more, the Secretary intends to provisionally certify the institution. As discussed above, the limitations on full certification will include, at minimum, the prohibition on participation in the FFEL programs.

The Secretary acknowledges that tribally controlled colleges, HBCUs, and Navajo community colleges have been

treated differently, but notes that exceptions to default provisions for these institutions were mandated by Congress. The Secretary notes that the exception for these institutions will be extended to apply to this provision.

Changes: The Secretary accepts commenters views that it is more logical to use a 25 percent default rate over a three year period and has amended § 668.16(m) of these final regulations accordingly. The Secretary has amended § 668.17(c)(6) to specify that this standard will not apply to tribally controlled colleges HBCUs, and Navajo community colleges.

Comments: Several commenters contended that the cohort default rate used to determine an institution's administrative capability should be the same for the Federal Perkins Loan Program as it is for the Federal Stafford Loan and Federal SLS programs. Two commenters contended that the cohort default rate should be set at 30 percent for the Federal Perkins Loan Program to be consistent with implementation of the new cohort default rate calculation for the Federal Perkins Loan Program. One commenter suggested that there be a "phase-in" of this requirement to allow institutions the opportunity to meet the lower default rate. Two commenters recommended that the Secretary provide for an appeal procedure for Federal Perkins Loan default rates.

Discussion: Different cohort default rates apply to determining administrative capability with respect to the Federal Perkins Loan Program than apply to the Federal Stafford Loan and Federal SLS programs to conform to different standards for participation in those programs and different sanctions applied for exceeding the rates in those programs.

Changes: None.

Comments: In response to the Secretary's request for comment on the development of an appropriate default rate for the FDSL Program, one commenter contended that the rate should be no lower than the cohort default rate for the Federal Stafford Loan and Federal SLS programs. The commenter believed that if a student does not meet his or her repayment arrangements, the student should be placed in default. A few commenters believed that a student who is using income contingent repayment should not be considered in default and should not be removed from the cohort used to determine an institution's default rate.

Discussion: The Secretary is exploring the use of an appropriate default rate for the FDSL Program through the negotiated rulemaking process. A default rate for the FDSL Program will not be used for the evaluation of an institution's administrative capability at this time.

Changes: None.

Comments: The Secretary received over eighty comments on the use and computation of withdrawal rates in the determination of administrative capability. The majority of commenters had concerns about the calculation of withdrawal rates and the effect of this standard on institutions serving high-risk populations.

The principal concern with the calculation was that a student who merely completed registration procedures but never showed up for classes would be treated as a withdrawal. The commenters believed that this would result in artificially high withdrawal rates. One commenter stated that it is not unusual to have 20 percent of the enrolled students never start classes. These commenters recommended that only students who actually begin classes be counted. Several other commenters urged that the calculation of withdrawal rate take into consideration the institution's refund policy. One of these commenters said that the State of California requires a complete refund of the registration fee up to one week after classes begin, allowing for a "no obligation" look. Another commenter stated that, at another institution, students are allowed a three week "look-see" period during which to make sure the students are satisfied with the training they are receiving and to allow institution personnel to make sure the student is motivated and capable of benefiting from the training.

Many commenters expressed concern that withdrawal rates may be more indicative of the type of students being served rather than of an institution's administrative capability. Some of these commenters asserted that use of a 33 percent withdrawal rate as an absolute standard would result in discrimination against high-risk minority students, reducing opportunities available to them. Commenters also asserted that this standard would adversely affect community colleges that enroll a significantly large number of adult, nontraditional students, many of whom exit and return to the institution several times during their academic careers, or transfer to other institutions. Another commenter noted that institutions located near military bases, where transfers of personnel are routine, could experience high withdrawals of students. One commenter noted that some institutions serve vocational rehabilitation and JTPA students who are impaired to some degree, and as a result, often drop out of the programs in which they were enrolled. Most of these commenters recommended that there be some appeal provision or mitigating circumstances exemption.

One commenter said that in addition to the student population served, withdrawal rates were a function of overall institutional performance and the support services that are provided to students. Two commenters asked how institutions should determine which students will succeed and which will fail.

Some commenters recommended that a rate other than 33 percent be used as an administrative standard. Many commenters noted that the proposed 33 percent rate was a stricter standard than that used by JTPA or any State, but made no mention of what rates States are using. One commenter suggested that if there were any withdrawal rate standard, it should be set at 40 percent, not 33 percent, as that rate would be consistent with JTPA standards. Other commenters said withdrawal rates would be fair only if they were based on national averages, comparing similar programs in like-type institutions or a study of some sort. Yet another commenter said there should be State-established withdrawal rates.

Some commenters argued that withdrawal rates are an academic matter and should not be subject to Federal regulation. Other commenters questioned the basis for the standard. Some stated their belief that an institution's withdrawal rate has nothing to do with the administration of the Title IV, HEA programs. A few commenters said review of withdrawal rates fell within the purview of accrediting agencies; others asserted it was no longer necessary for the Secretary to review withdrawal rates as the SPREs and accrediting agencies will have specific criteria relating to completion and placement rates. Others simply said they could see no basis for using 33 percent as a standard.

Quite a few commenters supported the use of withdrawal rates in assessing administrative capability, albeit as an indicator rather than an absolute. One of the commenters believed the language in current regulations was sufficient to allow the Secretary to make administrative capability determinations. One commenter supported the proposed regulation, as written. Others had no problem with the use of a 33 percent rate as an absolute, provided that students who register, but never show up, are not included in the calculation. One other commenter said the proposed rate was too high.

Discussion: For many years, the administrative capability regulations have provided for the use of withdrawal rates in excess of 33 percent as an indicator of impaired administrative capability. The Secretary notes, therefore, that the use of withdrawal rates as a determining factor in the evaluation of an institution's administrative capability is not new.

The Secretary does not accept the argument of some commenters that withdrawal rates are not an appropriate measure of administrative capability. On the contrary, the Secretary finds that withdrawal rates are a clear measure of administrative capability as they are a function of overall institutional performance and the information and support services that an institution provides to its students and prospective students.

The Secretary expects that an institution that has good admissions procedures and administers the ability-to-benefit provisions properly will have a lower withdrawal rate than one which admits students who cannot benefit from the program either because they lack the academic ability or do not receive adequate support services. An institution that provides proper disclosures, such as the institutional and financial assistance information required to be provided to students and prospective students under subpart D of these regulations, and in the case of an institution that advertises job placement rates as a means of attracting students, data concerning graduation and employment, and applicable State licensing requirements, as required in the program participation agreement in § 668.14(b)(10), will be providing information necessary for prospective students to make informed decisions. The Secretary believes that if prospective students receive adequate and accurate information, they will not drop out of an institution in great numbers. Further, if an institution provides the financial aid counseling required in § 668.16(h), the Secretary expects that students are not likely to withdraw because of a lack of understanding about the financial resources available to them.

In sum, an institution that provides students with comprehensive, accurate information on the institution and its programs, thereby enabling prospective students to make informed decisions about applying to the institution, screens students adequately from the outset to determine that the student can benefit from the program selected, and provides adequate counseling to students who apply for Title IV, HEA program assistance is expected to have a withdrawal rate below 33 percent.

The Secretary notes further that students who withdraw may be eligible for a refund, especially now that more stringent refund policies have been set forth in these regulations at § 668.22. Were an institution to have a high withdrawal rate, it follows that an institution might experience difficulty complying with the refund requirement. By questioning the administrative capability of an institution with a high withdrawal rate, the Secretary can monitor compliance with the refund requirement. The Secretary also believes withdrawal rates are related to default rates in the FFEL and Federal Perkins loan programs in that students who withdraw are more likely to default. By dealing with institutions that have high withdrawal rates, the Secretary hopes to reduce dollars lost due to default in the future.

The Secretary agrees that the withdrawal rate calculation should not include students that complete registration procedures but never begin classes. Similarly, the Secretary agrees that a student who receives a 100 percent refund (less any allowable administrative fee) should not be counted for the purposes of this calculation.

The Secretary agrees with the commenter who wrote that withdrawal rates are a function of overall institutional performance and the support services that are provided to students. The Secretary believes that transfer students, high- risk students, and students who withdraw for other reasons are accounted for by allowing up to 33 percent of the students to withdraw from the institution.

Changes: This provision is amended in § 668.16(l) to provide for use of net enrollment figures, after deduction of students who were entitled to a 100 percent refund.

Comments: Several commenters objected to this proposed requirement that an institution must not otherwise appear to lack the ability to administer the Title IV, HEA programs competently on the grounds that it is redundant and too open-ended. They recommended that it be removed.

Discussion: This paragraph contains language that is in current regulations. Obviously, should the Secretary find it necessary to invoke this paragraph in support of an action, the Secretary would provide the affected institution with detailed information that supports the determination that the institution lacks the ability to administer the Title IV, HEA programs competently.

Changes: None.

Section 668.17 Default Reduction Measures

Default rates. Comments: A number of commenters suggested that any institution with a cohort default rate above 20 percent should be allowed to appeal its cohort default rate because that is the minimum standard for punitive action against an institution.

Discussion: There are varying types of appeals offered to institutions depending on their cohort default rates. An institution which has default rates above the thresholds for participation in the FFEL programs may appeal on the grounds that: (1) The calculation of the rate was erroneous; (2) it satisfies the criteria for exceptional mitigating circumstances; or (3) the calculation included loans which due to improper servicing or collection resulted in an inaccurate or incomplete calculation of the cohort default rate. Institutions with cohort defaults above 20 percent for the most recent year may challenge the calculation of the rate based on allegations of improper loan servicing. In addition, an institution which receives provisional certification based on a default rate above 25 percent over a three year period also can show that it meets the criteria for exceptional mitigating circumstances and should receive full certification under the appropriate regulatory standards. For further information on this provision, see the section of the *Analysis of Comments and Changes* that addresses standards of administrative capability (§ 668.16). Thus, institutions with rates above 20 percent have a significant opportunity to challenge their cohort default rate.

Changes: None.

Default management plan. Comments: Some commenters asked the Secretary to reconsider the requirement that all institutions with cohort default rates greater than 20 percent implement a default management plan that includes the default reduction measures listed in appendix D to the regulations. The commenters asked the Secretary to allow institutions to request approval for alternative plans.

Discussion: The commenters misread the regulations. Section 668.17(b)(1) requires institutions with cohort default rates over 20 percent but less than or equal to 40 percent to submit and implement a default management plan that implements the measures described in appendix D, but allows the institution to submit an alternative plan for the Secretary's consideration. Institutions with cohort default rates above 40 percent must implement the measures listed in appendix D. The

Secretary believes that these latter institutions obviously have failed to otherwise reduce their default rates and that their future efforts need to meet certain standards.

Changes: None.

End of participation. Comments: One commenter asked the Secretary to shorten the guaranty agencies time frame for responding to institutional requests for confirmation of default rate information.

Discussion: The Secretary believes that the regulations must allow the guaranty agencies' sufficient time to check their records in response to questions raised by schools. The Secretary does not agree that it would be appropriate to shorten the time frame.

Changes: None.

Comments: A number of commenters objected to the Secretary's proposal to change the effective date of the institution's loss of participation under § 668.17(c)(3) to the date the institution receives notice of the Secretary's determination that its default rates exceed the statutory levels.

Discussion: Previous regulations allow an institution with excessive cohort default rates to continue to participate until eight calendar days after the institution receives the Secretary's notification. The Secretary has determined that it is inappropriate to allow an institution that has high default rates above the statutory limits eight additional days to entice students to enroll and receive loans under the FFEL programs. An institution which files a timely appeal remains eligible to participate during the appeal process. However, there is no reason to allow an institution that does not appeal additional time to participate in the program.

Changes: None.

Comments: Some commenters asked the Secretary to clarify the status of FFEL programs loan proceeds which are disbursed after the institution learns that it is no longer eligible to participate in the FFEL programs under § 668.17, but before the lenders or guaranty agencies learn of the loss of participation. These commenters also urged the Secretary to provide simultaneous notice of the loss of participation to guaranty agencies, lenders and other agencies.

Discussion: The rules governing the disbursement of funds after an institution's loss of participation are set forth in detail in § 668.26 of the regulations. The Secretary already provides notice of actions against high default rate institutions to guaranty agencies simultaneously with or very soon after notification is sent to the institution. The Secretary will also provide appropriate notification to other interested parties.

Changes: None.

Comments: One commenter suggested that if the Secretary initiates a limitation, suspension or termination action based on an institution's default rate, the Secretary should notify the appropriate SPRE and the institution's accrediting agency.

Discussion: Section 494C(h)(2) of the HEA requires the Secretary to notify a SPRE of any limitation, suspension, termination, emergency action, or other action that the Department takes against an institution. In the regulations governing the designation of nationally recognized accrediting agencies, the Secretary is including a similar provision.

Changes: None.

Appeal procedures. Comments: Some commenters asked how the Secretary planned to implement the amendments to sections 435(a) and 435(m) of the HEA, which allow certain institutions with high cohort default rates to review certain loan servicing records and appeal the calculation of that rate based on allegations of improper loan servicing.

Discussion: As noted by the commenters, sections 435(a)(3) and 435(m)(1)(B) of the HEA were changed by the Technical Amendments of 1993. Under the amended law, institutions that are subject to the loss of eligibility under the FFEL programs under section 435(a)(2)(A) of the HEA, subject to loss of eligibility for the Federal SLS Program under section 428A(a)(2), or whose cohort default rate for the most recent year for which rates have been calculated equals or exceeds 20 percent may include in their appeal of such rate a defense based on allegations of improper loan servicing. The Technical Amendments of 1993 also provide that these institutions will have an opportunity to review certain loan servicing and collection records maintained by the guaranty agencies. The Secretary published a Request for Comments in the **Federal Register** on March 22, 1994 (59 FR 13606) and is reviewing the comments issued in response to that notice. The Secretary intends to issue separate regulations to implement these provisions shortly.

Changes: None.

Comments: Some commenters complained that the time deadlines for cohort default rate appeals are too restrictive and do not provide enough time to prepare an appeal.

Discussion: The Secretary believes that the regulations provide adequate time for an institution to prepare and submit an appeal of the calculation of the cohort default rate. The Secretary notes that Congress has enacted strict time limits on the institution's appeal of its cohort default rates under section 435(a) of the HEA and the Secretary's regulations reflect these requirements.

Changes: None.

Comments: Many commenters argued that the standards for an appeal of the loss of participation in the FFEL programs based on exceptional mitigating circumstances in § 668.17(d) are too tough. The commenters suggested that the completion and placement rate requirements should be reduced or that the standards should consider the population or community served by the institution.

Discussion: The Secretary notes that section 435(a)(2)(ii) of the HEA allows an institution to avoid the loss of participation in the FFEL programs if it shows that exceptional mitigating circumstances exist. The current regulations are tough but are also consistent with this statutory requirement. The HEA clearly establishes a presumption that an institution with excessive cohort default rates above the statutory levels is not serving its students and that its continued participation in the FFEL programs is not in the public interest. It is appropriate that an institution must meet tough standards to overcome this presumption. The Secretary notes that most of the commenters did not provide any basis for changing the standard or adopting other standards. Therefore, the Secretary will not make any changes to those requirements. The Secretary will, however, continue to evaluate the exceptional mitigating circumstances standards in the regulations and determine whether future changes are appropriate.

Changes: None.

Comments: Some commenters asked the Secretary to change the proposal that would limit the evidence institutions could use to show that they serve students with a disadvantaged economic background. The Secretary had proposed to limit institutions to showing that the students' qualified for an expected family contribution of zero.

Discussion: The Secretary has found that an excepted family contribution of zero is an appropriate standard for showing that an institution serves students with a disadvantaged economic background. Therefore, no change will be made.

Changes: None.

Comments: One commenter suggested that institutions which ask guaranty agencies to verify data should be required to list the guaranty date and

type of loan as well as the information required by § 668.17(d)(7). Another commenter suggested that the institution should request the information from the Secretary rather than from the guaranty agencies.

Discussion: The Secretary believes that the guaranty agency will be able to identify the loans in question with the name and social security of the borrowers involved and that it is unnecessary to provide the guaranty date and loan type. The Secretary notes that only Federal Stafford and Federal SLS loans are currently included in the calculation of the cohort default rate. The Secretary also believes that it is appropriate for requests for confirmation of errors to be sent to the guaranty agency rather than the Secretary. The guaranty agencies have the data which the institution is challenging.

Changes: None.

Comments: One commenter argued that the Secretary should have a time deadline for issuing decisions on appeals of cohort default rates filed by institutions and that the institution should win the appeal if the decision is not issued on time. Another commenter suggested that the institution should not be subject to a sanction if a new reduced cohort default rate is issued for the institution during the appeal process.

Discussion: The Secretary is committed to issuing decisions on appeals from institutions within a reasonable time. Many of the changes made to these regulations will contribute to this effort. However, the Secretary does not believe that it is appropriate to allow an institution to avoid responsibility for its default rate because a decision is not issued within a specified time. The Secretary also does not believe that an institution should automatically be able to escape responsibility for its high default rate one year by delaying the completion of its appeal until the next year's lower rate is released.

Changes: None.

Comments: One commenter asked the Secretary to allow institutions to submit cohort default rate appeals by facsimile rather than by mail.

Discussion: The Secretary has found that cohort default rate appeals frequently involve numerous documents involving detailed listings of information. Facsimile transmission may well result in blurred documents. In these circumstances, the Secretary will continue to require appeals to be submitted by mail.

Changes: None.

Definitions. Comments: Some commenters noted that the Secretary proposed to eliminate the provision of the regulations that required that, in calculating the cohort default rates, the Secretary would exclude any loans which, due to improper servicing or collection would result in an inaccurate calculation of the cohort default rate. The commenters objected to this change on the grounds that they believe that this change is contrary to Congressional intent in enacting the new law.

Discussion: The Secretary believes that it is clear that Congress intended to limit the issue of allegations of improper loan servicing in regard to cohort default rates to appeals from the calculation of such rates. The Secretary notes that the Technical Amendments of 1993 changed the language of sections 435(a) and 435(m)(1)(B) of the HEA to limit consideration of improper loan servicing allegations to appeals. Prior to the amendments, the HEA stated that improper servicing would be considered in calculating the cohort default rate. The Technical Amendments of 1993 eliminated this language and added a new subsection 435(a)(3) to specifically allow certain schools with high default rates to appeal those rates based on allegations of improper loan servicing. There is no support for the commenters claim that Congress intended the Secretary to consider allegations of improper loan servicing before rates are calculated and during the appeal process.

Changes: None.

Comments: Some commenters urged the Secretary to require guaranty agencies to allow institutions to review the default rate data prior to submittal of the data to the Secretary and to work with the institutions to ensure correction of the data before the Secretary publishes the list of institutional cohort default rates. Some commenters argued that publication of rates without such a process violated due process.

Discussion: The Secretary notes that a recent decision of the United States District Court for the District of Columbia, *Career College Association* v. *U.S. Department of Education*, C.A. No. 92–1345–LFO (March 22, 1994) rejected the claim that pre-publication review of cohort default rate information was required. However, the Technical Amendments of 1993 amended the HEA to provide institutions an opportunity to review and correct errors in the information provided by the guaranty agency to the Secretary for calculating cohort default rates. This amendment is not effective until October 1, 1994 and the Department intends to issue regulations to provide this opportunity shortly.

Changes: None.

Comments: Some commenters argued that a whole new structure for cohort default rates should be developed. According to these commenters, there are significant errors in the cohort default rate information and the courts have found that the Secretary's calculation of such rates is improper. Some commenters said that the Secretary should make every effort to ensure that default rate information is accurate.

Discussion: The Secretary has taken and will continue to take appropriate actions to ensure that guaranty agencies provide correct information for use in calculating cohort default rates. The Secretary has found that, during the appeal process, institutions have not generally proven significant errors in the calculation of their cohort default rates. Thus, the Secretary rejects the commenters' claim that the cohort default rate information is inaccurate. Moreover, the Secretary does not agree that the courts have reached this conclusion. The commenters are referring to certain preliminary decisions reached by courts relying on the allegations raised by individual schools. The Secretary strongly objects to the suggestion that the cohort default rate information is inaccurate. The Secretary also does not believe that the commenters have shown any facts that support creation of a new appeal structure. However, the Secretary believes that the changes made by the Technical Amendments of 1993 may resolve some of the commenters' concerns.

Changes: None.

Comments: One commenter asked why a loan is still counted as in default for purposes of the cohort default rate if the institution pays off the loan.

Discussion: The Secretary does not believe that an institution should be allowed to buy its way out of the sanctions related to high defaults by its students. The law holds institutions responsible for high default rates and wealthy institutions should not be able to avoid their responsibility for these high rates by paying off loans.

Changes: None.

Comments: One commenter suggested that Federal PLUS loans should be included in the calculation of the cohort default rate.

Discussion: The definition of "cohort default rate" is in section 435(m) of the HEA and includes only Federal Stafford Loans (both subsidized and unsubsidized), Federal SLS loans and Federal Consolidation Loans which are used to repay Federal Stafford and SLS loans.

Changes: None.

Section 668.22 Institutional Refunds and Repayments.

General. Comments: Three commenters believed the specific *pro rata* refund requirements should not be limited solely to first-time students who received Title IV, HEA program assistance.

Discussion: The Secretary does not intend to extend this requirement beyond the scope of the statute; however, an institution would not be prohibited from extending the *pro rata* refund requirements to other students.

Changes: None.

Comments: A few commenters contended that cost substantiation is unduly burdensome. The commenters maintained that costs differ greatly between programs, that indirect expenses such as storage, maintenance, packaging, and shipping would be difficult to justify, and that cost per student would be difficult to calculate if supplies were bought in bulk. The commenters argued that for large schools with many programs, the costs would change too frequently to accurately report and many costs are determined by student choice. The commenters stated that only estimates of costs are possible. These commenters believed that this provision should apply only to institutions with compliance problems. Two commenters contended that the free market will determine what costs are reasonable and this provision is beyond the Secretary's authority. Two commenters believed that this provision should be moved to § 668.44 (student consumer information). Two commenters fully supported the Secretary's proposal, citing firsthand experience with institutions that attempt to circumvent refund policies by inflating supply costs. One commenter recommended that the Secretary limit this provision to the substantiation of only books and supplies that are required and that are institutional charges. One commenter recommended that the provision be limited to requiring institutions to substantiate only the cost of items that the institution supplies, not of those provided by a third-party organization. One commenter asserted that accrediting agencies should monitor these costs.

Discussion: The Secretary believes that cost substantiation is appropriate if the institution wishes to exclude such costs from the refund calculation. As noted by some commenters, the free market has not worked to contain costs charged to students for supplies because the students have little, if any, discretion on the supplies that they are required to purchase for most programs. Furthermore, based upon the Department's experience, some institutions have historically inflated charges for supplies that students were required to purchase. This predatory pricing for supplies has, in turn, inflated costs borne by the Title IV, HEA programs and reduced or eliminated refunds that would otherwise have been owed to the Title IV, HEA programs for students who withdrew. The treatment of supply charges under these regulations will help curb this abuse without significantly changing the supply charges that can be excluded from the refund calculation by institutions that fairly price supplies to their students.

As a result of limiting the required cost substantiation to student charges for supplies sold by the institution or by an affiliated or related entity, the institution is responsible for documenting the costs where a business relationship exists between the seller and the institution. Furthermore, even if an institution purchases supplies in bulk and takes advantage of purchasing discounts that cause the costs for such supplies to fluctuate over time, the Secretary does not believe that it is unduly burdensome to require the institution to document its per-unit cost for the supplies before it may exclude that amount from the refund calculation. Furthermore, the Secretary does not believe it is appropriate for the institution to increase the documented supply costs by allocating any portion of the institution's fixed charges to such calculation. Any such cost recovery for institutional overhead would make the calculation overly complex, difficult to monitor, and more subject to abuse by some institutions. The procedures under the regulations permit the institution to recover the actual cost of such supplies, but are not intended to recapture any additional charges allocable to such items.

The Secretary also believes that the Department is the primary member of the triad that is responsible for monitoring an institution's ability to comply with the requirements for prompt and accurate refund payments. Although an institution's accrediting body or cognizant SPRE will have concerns about certain aspects of an institution's adoption and implementation of its refund policy, HEA has given the Department the primary responsibility for establishing the requirements for the timing, calculation and procedures for paying refunds to the Title IV, HEA programs.

Changes: None.

Comments: Six commenters supported the requirement for fair and equitable refunds, but suggested that to be truly equitable, the requirement should be in force for all students, not just those who receive Title IV, HEA program assistance. Two commenters supported the Secretary's proposal to limit these refund requirements to affect only recipients of Title IV, HEA program assistance. Two commenters suggested refund requirements should differ among students based on the reason for the student's withdrawal. The commenters believed students who officially withdraw for "legitimate" reasons, such as medical leave or a family emergency, deserve the benefit of a liberal refund policy. The commenters believed, however, that students who withdraw without notification or whose reasons for withdrawal are "irresponsible or immature" should be subject to a more stringent, less beneficial refund policy.

Discussion: As discussed in the preamble of the February 28, 1994 NPRM, several negotiators asserted that applying the refund requirements to all students would be too costly for institutions. The Secretary acknowledges that having different refund policies for students who received Title IV, HEA program assistance could be perceived as inequitable. However, no institution is prohibited from adopting these refund requirements for all its students. The Secretary believes Congress clearly intended to treat groups of students in a like manner with regard to refunds, regardless of an individual student's reason for withdrawal. The Secretary believes a refund policy requiring the assessment of a student's valid cause for withdrawal would be difficult to regulate and implement, and would require extensive professional judgment on the part of the institution, thereby excessively increasing the institution's burden.

Changes: None.

Comments: Six commenters stated that the requirement that an institution provide examples of an institution's refund policy to prospective students is burdensome and unnecessary. The commenters asserted that most students would not understand such examples and that the examples would inevitably be misleading because the many variables that might apply to a real student's withdrawal situation would not be represented. Three commenters shared the Secretary's view that prospective and current students should receive a written statement containing an institution's refund policy, but one commenter believed providing such a

statement would be burdensome and costly for institutions.

Discussion: The Secretary believes that current and prospective students have the right to be informed in writing of an institution's refund policies and practices, and that the costs of providing such information are part of the normal costs of doing business. A particular student's ability to completely comprehend such information does not impact that student's right to receive the information. Further, the Secretary would expect that, in accordance with 34 CFR 668.45(a), an institution would have designated an employee or group of employees who must be available on a full-time basis to assist students or prospective students with any questions they might have in this area. The Secretary wishes to clarify that, as discussed in the February 28, 1994 NPRM, the requirement to provide examples would be met if the institution informs students in the written refund policy that examples are available and the institution makes the examples readily available to current and prospective students on request. The Secretary does not believe refund examples must include all possible variables to be useful to students. An institution is expected to provide reasonable examples of common refund situations applicable to its average student population.

Changes: Section 668.22(a)(2) has been amended to clarify that the institution must make available to students, upon request, examples of the application of the refund policy and inform students of the availability of these examples in the written statement.

Fair and equitable refund policy. Comments: Many commenters believed the requirement for a fair and equitable refund, as interpreted in the February 28, 1994 NPRM, is needlessly complex, is intrusive upon the rights of institutions to determine policy, and extends beyond the intent of the law. The commenters believed institutions should not be forced to calculate up to three separate refund amounts for each withdrawing student, as this would be burdensome and confusing both to institution employees and to students, resulting in withdrawing students inevitably receiving incorrect information. The commenters asserted that an institution should be allowed to determine which calculation generally provides the most beneficial refund to its average student body population and use that calculation consistently for Title IV, HEA program refunds. Four commenters believed the Secretary should provide certified refund calculation software for institutional use, rather than unfairly expecting institutions to create or purchase from a private source software that is potentially erroneous. Two commenters requested the Secretary commit to providing clear notice of revisions and changes to the refund requirements, to avoid the inevitable widespread confusion and noncompliance that will otherwise result if the February 28, 1994 NPRM is published as a final rule. One commenter believed it is inappropriate and inefficient to require institutions to implement a policy which affects such a small number of individuals, and that institutions are capable of developing workable refund policies that are fair and reasonable. One commenter supported the Secretary's interpretation of the statute and believed withdrawing students deserve the benefit of the largest refund possible.

Discussion: The Amendments of 1992 define a fair and equitable refund policy as one that provides for at least the largest of the amounts provided under applicable State law, nationally recognized accrediting agency requirements approved by the Secretary, or the *pro rata* refund calculation for qualifying students, as described in the statute. The Secretary asserts that the individual calculation of all possible refunds for each withdrawing student is the only possible means by which an institution can determine which refund calculation provides the largest amount, as required by the statute. The Secretary is exploring the development by the Department of software for institutional use. The Secretary believes the equity to the student provided by the law and the proposed rule override the commenters' concerns of burden and potential confusion, and will continue to provide ample direction and guidance on refunds to institutions in the form of examples, Dear Colleague Letters, and the *Federal Student Financial Aid Handbook*.

Changes: None.

Comments: Four commenters believed the requirements of Appendix A are too cumbersome and should be replaced with a more reasonable policy. Three commenters believed the Appendix A requirements are intrusive and extend beyond the scope of the statute, resulting in excessive burden and cost for institutions. The commenters suggested Appendix A should be a guideline for problem-free institutions, required only of institutions with demonstrated compliance problems. Two commenters suggested all institutions should be required to follow the guidelines of Appendix A, thereby eliminating all the other detailed and stringent refund requirements proposed in the February 28, 1994 NPRM. Four commenters asserted that institutions have already adopted procedures in line with the Appendix A guidance and that further intrusion on the part of the Secretary is unnecessary and unjustifiable. The commenters believed institutions have the ethical means to decide these issues among themselves and should be allowed to do so.

Discussion: The Secretary believes the Amendments of 1992 clearly give every student who receives Title IV, HEA program assistance—not just those students who attend institutions with compliance problems—the right to a fair and equitable refund as defined in the statute. The Secretary is concerned, as discussed in the February 28, 1994 NPRM, with instances wherein an institution's State and accrediting agency do not have specific refund policies and a particular student is not entitled to a *pro rata* refund. In such a case, a loophole exists and the law offers no alternative standard by which to ensure the student receives a fair and equitable refund. Consistent with existing FFEL programs regulations, the Secretary intends to provide Appendix A as an acceptable refund standard in the absence of all other standards.

Changes: None.

Pro rata Refund. Comments: Many commenters believed the 60 percent point in time (for the purposes of the *pro rata* refund requirement), when measured in clock hours, should be calculated using the hours scheduled instead of the proposed use of hours completed by the student. Two commenters specifically referred to the statute's concept of elapsed time, stating that the treatment proposed in the February 28, 1994 NPRM is in conflict with the Secretary's earlier guidance and the intent of the law. All of these commenters believed the costs of providing education are fixed for each day a class is offered, regardless of an individual student's attendance. The commenters further suggested the Secretary is openly discriminating against clock-hour institutions by allowing credit-hour institutions to figure the 60 percent point in time using weeks, while insisting that clock-hour institutions consider individual students' rates of progress. Two commenters suggested the Secretary allow clock-hour institutions to include excused absences and repeated hours in the total hours completed by a student. One commenter noted that the determination of the 60 percent point in time conflicts with the determination of the portion of the enrollment period that remains for the purposes of calculating a refund after an institution has

determined that a *pro rata* refund must be calculated. This commenter believed these two determinations should be simple and consistent with one another.

Discussion: In the case of a program measured in clock hours, the Secretary believes it is most reasonable to use the number of hours completed by the student in determining what percentage of the enrollment period has elapsed. To determine the 60 percent point by using scheduled hours could unjustifiably punish a student whose progress is slower than the average student, and could cause a first-time student whose progress is above average to be entitled to a *pro rata* refund past the point of 60 percent completion. The Secretary acknowledges that this and other provisions of the Title IV, HEA program rules differentiate between institutions based on whether programs are measured in clock or credit hours, and based on whether the institutions use standard terms. The Secretary believes this differentiation is justifiable and necessary, and is due to the Department's extensive efforts to take into account the many variables and circumstances found in the postsecondary educational community. In accordance with past guidance issued by the Department, excused absences may be counted when determining hours completed by the student if the institution has a written excused absence policy allowing for a reasonable number of absences which do not need to be made up to complete the program, and if it is documented that the hours were actually scheduled and missed by the student prior to the student's withdrawal. The Secretary acknowledges that, as discussed in the February 28, 1994 NPRM, the determination of the 60 percent point in time is intentionally different from the determination of the portion of the enrollment period that remains. The Secretary does not believe consistency between these two determinations is necessary or beneficial.

Changes: None.

Comments: Four commenters found the proposed definition of unpaid charges for *pro rata* purposes to be in conflict with the statutory definition. Two commenters believed the statute adequately defines unpaid charges and it is unnecessary for the Secretary to propose a different or expanded definition. One commenter supported the Secretary's proposal to define unpaid charges for *pro rata* purposes as it was defined for general refund purposes in the June 8, 1993 final regulations. One commenter suggested that the treatment of unpaid charges should be the same in all refund situations, instead of the current proposal which differentiates between statutory *pro rata* refund calculations and all other calculations. This commenter believed this discriminates against certain groups of students and thus fails to treat all students equitably.

Discussion: The Secretary does not believe the proposed definition of unpaid charges is in conflict with the more general statutory definition. The Secretary believes it is appropriate to make the definition consistent with the regulatory definition already in place. The treatment of unpaid charges for the purposes of the statutory *pro rata* calculation is prescribed in the Amendments of 1992. The Secretary has in the past sufficiently justified the treatment of unpaid charges for refund calculations other than statutory *pro rata* refund calculations. The commenter has submitted no evidence of discrimination.

Changes: None.

Comments: Three commenters support the Secretary's proposal to avoid double-counting certain charges (i.e., administrative fees) by excluding them from the *pro rata* refund calculation instead of subtracting them. Three commenters disagreed with the required proration of all educational costs, given that some costs incurred by the institution are fixed (i.e., teacher salaries, dormitory charges, and physical plant costs) and do not decrease when a student withdraws. The commenters asserted that institutions required to issue *pro rata* refunds will lose money, and that the students who remain will experience cost increases as a result. Four commenters believed an application fee should not be subtracted from a *pro rata* refund, because it is not really an education cost and because a portion of administrative costs are already recouped through the *pro rata* refund calculation. Two commenters asserted there is no statutory support for the Secretary's proposal that an administrative fee must be a real and documented charge. One commenter suggested the Secretary allow all administrative fees to be subtracted from the *pro rata* refund calculation. Three commenters believed it is intrusive and inappropriate for the Secretary to regulate details such as irregularly expended meal credits, passed-through room charges, and group health insurance fees. The commenters stated that such details should be handled in guidelines, not requirements, and should ultimately be left to the discretion of individual institutions. One commenter suggested that the costs of services voluntarily provided by an institution as a courtesy to its students should be excluded from the *pro rata* refund calculation. Two commenters suggested that the Secretary's proposed treatment of group health insurance costs should be extended to include other insurance, such as the liability and medical malpractice insurance required for medical students or group health insurance that is not required by the institution. One commenter stated that the exclusion allowed for group health insurance fees should be extended to all refund calculations, not just statutory *pro rata* refund calculations.

Discussion: The Secretary agrees that it is more reasonable to completely exclude certain costs from the *pro rata* refund calculation, in effect allowing the institution to fully retain the money paid for those charges, rather than include the costs and assess them at a prorated percentage, only to then completely subtract them from the refund, thereby double-counting them. The Secretary wishes to clarify that the proration of educational costs under the *pro rata* refund calculation is required by the Amendments of 1992 and it is not the purpose or authority of these regulations to rescind that requirement. The Secretary agrees that an application fee is not an educational cost for Title IV, HEA program purposes and that it is therefore not relevant in the calculation of a refund. The Secretary does not believe that Congress intended to allow institutions to retain from a *pro rata* refund amount administrative charges that do not actually exist. The *pro rata* refund calculation determines what portion of institutional charges paid can be retained by the institution; the Secretary believes it is unreasonable to allow the retention of a fee that was not in fact charged or paid. The statutory *pro rata* calculation provides for the maximum amount of administrative costs that may be retained by the institution. The Secretary believes certain costs (i.e., passed-through room charges, and group health insurance fees) warrant treatment other than standard proration and has therefore specifically named such costs and proposed they be excluded from the calculation. The Secretary believes the specific regulation of the treatment of these costs will avoid institutional abuse of these allowances and ensure greater equity in the payment of refunds. After further consideration, the Secretary has found the provision treating irregularly expended meal credits to be unnecessarily complex and not entirely effective in its intended purpose. No commenters offered

support for this provision or any alternative suggestions. This issue will be reexamined in the future and further input from the financial aid community will be sought. The Secretary recognizes that some institutions may elect to provide certain services, such as voluntary group health insurance, as a courtesy to students. The Secretary believes it is necessary to exclude from the *pro rata* refund calculation mandatory charges for group health insurance to prevent students from an unavoidable loss of insurance upon withdrawal. This situation could be avoided if the student had the option of purchasing health insurance from a source other than the institution. The Secretary does not believe the cost of specialized insurance coverage such as medical malpractice coverage warrants the same treatment as group health insurance costs, primarily because such specialized insurance is no longer needed by the student after withdrawal. The statute provides that all refunds other than *pro rata* refunds are to be made in accordance with State or accrediting agency standards. To extend the allowable exclusion for group health insurance fees to all refund calculations would necessitate an amendment to the law.

Changes: Section 668.22(c)(4) has been amended to reflect that certain fees, listed as allowable subtractions in the February 28, 1994 NPRM, are to be excluded entirely from the *pro rata* refund calculation. This section has also been amended to delete from that list of fees the reference to an application fee.

Comments: Several commenters believed the cost of equipment, books and supplies should not be prorated, because possession of an item cannot be "split" between the institution and the student. The commenters believed the proposed treatment of books and supply costs will unjustifiably enable students to keep supplies they had not fully paid for, and will force institutions to either function as "pawn shops" for the return of such items or bear the costs of supplies they do not own. The commenters believed such a policy will force institutions to raise book and supply costs for students who remain or to stop providing supplies altogether, to the obvious detriment of continuing students. Two commenters believed institutions will be forced to instruct students to obtain supplies from independent vendors, resulting in great consumer risks for the student. One commenter suggested that the refund amount for equipment, book, and supply costs should be determined by the manufacturer of the individual products and passed on from the institution to the student accordingly. Several commenters asserted that equipment, books, and supplies become the sole property of the student when issued, and suggested the institution be allowed to withhold delivery and billing of such items until they are needed. The commenters also suggested the Secretary allow institutions to retain the full cost of unreturnable items issued and of returnable items issued that are not returned, and require institutions to refund in full the cost of any issued items that are returned and of any items that were not issued but for which the student was charged. Several commenters stated that the return of certain supplies, books, or equipment is unrealistic and burdensome, regardless of the condition in which it is returned, and that the regulations should therefore not require institutions to accept returned items. One commenter supported the Secretary's proposed treatment of charges for returned equipment.

Discussion: The Amendments of 1992 require all institutions participating in the Title IV, HEA programs to refund unearned tuition, fees, room and board, *and other charges* to a student who received Title IV, HEA program assistance and failed to complete the period of enrollment for which the student was charged. The Secretary does not believe Congress intended to exclude the unearned cost of books, supplies, and equipment from the refund amount. However, the Secretary agrees that institutions should not be expected to refund to the student a portion of the cost of unreturnable items that were actually issued to the student and kept by the student. The Secretary wishes to clarify that the proposed requirements governing books, supplies, and equipment will not force an institution to accept returned merchandise; rather, the proposed provision allows an institution to state that an item is returnable and to then retain in full the cost of that item if it is not returned, provided the institution clearly disclosed in the enrollment agreement any restrictions on the return of equipment, including equipment that is unreturnable and deadlines for returns.

Changes: Section 668.22(c)(5) has been amended to allow an institution to exclude from the *pro rata* refund calculation the documented cost of any unreturnable equipment, books, and supplies issued to the student, if the student was informed in the enrollment agreement that the item is unreturnable and may keep the item, or under what conditions normally returnable equipment is considered to be unreturnable. A corresponding change has been made to appendix A.

Comments: Several commenters asserted that the definition of a first-time student should be limited to a student attending any postsecondary institution for the first time. Three commenters disagreed with the Secretary's proposal to include in the first-time student definition any student who previously enrolled at the institution but received a 100 percent refund of tuition and fees. One commenter asked the Secretary to amend the first-time student definition to include students who previously enrolled only in continuing education courses that do not lead to a degree. One commenter requested the Secretary to issue one consistent definition of a first-time student, instead of expecting institutions to use different definitions for different Department requirements, such as IPEDS, refund calculations, FFEL programs counseling, and student consumerism.

Discussion: The Secretary believes it is the intent of Congress to extend the benefit of a *pro rata* refund calculation to all students attending a particular institution for the first time, not just to those students who are attending any postsecondary institution for the first time. The Secretary also believes that a student who enrolled at an institution but received a full 100 percent refund has not had sufficient educational experience at the institution to be considered anything other than a first-time student. The Secretary does not believe the issue of continuing education coursework poses a serious problem with the definition of a first-time student for the purposes of the *pro rata* refund calculation. The Secretary recognizes that the definition of first-time student is different for certain purposes in the administration of the Title IV, HEA programs, and will explore the possibility of creating a single, consistent definition in the future.

Changes: None.

Comments: Three commenters believed the proposed definition of "the portion of the enrollment period for which the student was charged that remains" is not consistent with the statutory definition of an academic year. The commenters asked the Secretary to include in the proposed definition an explanation of the term "week" and describe the appropriate handling of a student who attends only a portion of a week.

Discussion: The Secretary does not believe consistency with the statutory definition of an academic year is relevant. The Secretary does not believe

further explanation is necessary, and intends to entrust institutions with the responsibility for fairly and consistently handling uncertain situations such as a partial week of attendance.

Changes: None.

Period of Enrollment for Which the Student Has Been Charged. Comments: Several commenters suggested alternatives to the Secretary's definition of "period of enrollment for which the student was charged." Three commenters suggested using only the length of the program, for institutions charging by the program, or the length of the term, for institutions charging by the term. One commenter suggested the Secretary require all institutions to use the academic year as the enrollment period. Another commenter suggested the Secretary require all institutions to use the lesser of a payment period, the program length, or the academic year. Three commenters believed the proposed definition does not address programs longer than an academic year. Several commenters believed the Secretary's proposed definition is unfair to institutions charging by the program, forcing them to use the cost of the entire program in the refund calculation, while only a portion of the financial aid awarded for the entire program can be counted when calculating the unpaid charges. Such a formula results in excessively high unpaid charges, which must be subtracted from the amount the institution could otherwise retain. The commenters believed this treatment is discriminatory against institutions that charge by the program and suggested the Secretary retain the concept of payment periods, both for assessing charges and considering aid disbursed, and limit those payment periods to one-third an academic year (as in a quarterly term system), or one-half an academic year (as in a semester term system). Two commenters believed the determination of the enrollment period for refund purposes should be left to the discretion of the institution. Two commenters asked that clock-hour institutions using standard terms be treated the same as credit-hour institutions using standard terms.

Discussion: The Secretary believes the proposed definition of "period of enrollment for which the student was charged" is adequate and applicable to the needs and circumstances of the various types of institutions participating in the Title IV, HEA programs. The Secretary wishes to clarify that the proposed definition establishes a minimum period of enrollment (to prohibit institutions from creating artificially short periods of enrollment simply for the purposes of reducing a student's unpaid charges or eligibility for a *pro rata* refund calculation) and does not impose a maximum limit to the period of enrollment. The Secretary recognizes that institutions charging by the program may have to pay *pro rata* refunds to a greater number of students than institutions that charge by the term and may consistently find their students have high amounts of unpaid charges under the proposed refund calculation, resulting in a reduction in the amount the institution can retain for non *pro rata* refund calculations. The Secretary would like to point out, however, that such a situation exists precisely because the institution charges the student for the entire cost of the program up-front. It is true the same student could attend an institution which charges by the term and would, under the proposed refund calculation, owe a smaller amount of unpaid charges. The term institution, however, does not contract with the student for any amount in excess of the costs of the term. The adverse affects of the Secretary's proposal, therefore, as claimed by some of the commenters, are the result of an institution's own decision to contract with the student for the costs of the entire program up-front, instead of contracting for the costs of a smaller period of study, such as an academic term; this is an institutional decision over which the Secretary has no control. The Secretary believes the discontinuation of the use of payment periods and the practice of attribution will greatly simplify the refund requirements, and that this benefit overrides the commenters' concerns. The Secretary believes it is necessary to define and limit the definition of enrollment period to ensure equitable refunds to Title IV, HEA program recipients. The Secretary wishes to clarify that, under the proposed definition, all clock hour institutions are treated the same, regardless of whether they use standard terms or not, because it has been the experience of the Secretary that these institutions all charge by the program.

Changes: None.

Repayments to Title IV, HEA Programs of Institutional Refunds and Repayments. Comments: Three commenters believed the treatment of unpaid charges for non*pro rata* refunds, as prescribed in the June 8, 1993 final regulations, should be rescinded in compliance with the statutory treatment for *pro rata* refund purposes. Two commenters believed the requirement penalizes institutions by reducing the amount of institutional charges they can retain. Three commenters asserted that the requirement unfairly leaves students owing large balances to the institution which would otherwise have been paid by Title IV, HEA program assistance, and this result obviously is not fair and equitable under the statute. Three commenters requested the Secretary include late disbursements of State, private, and institutional aid as amounts that can be used to reduce a student's unpaid charges, if these aid sources have published late disbursement policies under which a withdrawing student can be paid. Two commenters suggested the Secretary include late disbursements of unsubsidized Stafford Loan program funds and all Direct Loan program funds as amounts that can be used to reduce a student's unpaid charges. Two commenters believed the consideration of late disbursements when determining unpaid charges is inappropriate and should not be allowed under the refund requirements. One commenter suggested that, because the requirement to subtract unpaid charges from the amount the institution can retain does not apply to statutory *pro rata* refund calculations, the requirement should also not apply to voluntarily *pro rata* refund calculations that are not required by the Amendments of 1992.

Discussion: The public was previously invited to comment on requirement to subtract unpaid charges from the amount the institution can retain in response to the December 23, 1991 NPRM. The comments and responses on this issue, including the decisions and rationale of the Secretary, are included in the June 8, 1993 final regulations which included the requirement. The required treatment of unpaid charges for the purposes of this section, except for the calculation of a *pro rata* refund under the statute, reaffirms the basic principle of student financial aid: the family (or student) makes its contribution first before financial aid is expended. Although some students may have to pay more toward institutional charges than they originally expected, due to the fact that they withdrew and became ineligible for a portion of the aid they expected to receive, this is more equitable to those students who have responsibly fulfilled their financial obligations to the institution. The Secretary does not believe this issue warrants reconsideration in the context of the February 28, 1994 NPRM. The administration of private and institutional student aid funds is not within the control of the Secretary. Therefore, the Secretary cannot guarantee the availability or delivery of these funds and cannot allow

institutions to use late disbursements of these funds to reduce a student's unpaid charges. The Secretary agrees, however, that institutions should be allowed to use late disbursements of State student aid to reduce a student's unpaid charges, provided the State in question has a standard written late disbursement policy which the institution follows in calculating unpaid charges and provided the student is eligible to receive the late disbursement in spite of having withdrawn. The Secretary wishes to clarify that an institution which chooses to count a late disbursement of State student aid in this manner will be liable for that amount if it is not disbursed to the student within 60 days after the student's date of withdrawal, as defined in § 668.22(i)(1), and will be required to recalculate the Title IV, HEA program refund and return any additional amounts required to the appropriate Title IV, HEA program accounts or to the lender within the deadlines specified in § 688.22(g). The Secretary agrees that institutions should be allowed to use allowable late disbursement amounts from unsubsidized Federal Stafford loans and Direct Student loans to reduce a student's unpaid charges. The Secretary does not believe the treatment of unpaid charges for the purpose of statutory *pro rata* refund calculations should be extended to voluntary *pro rata* refund calculations.

Changes: Section 668.22(f)(2)(ii) has been amended to include allowable late disbursements of State student financial assistance, unsubsidized Federal Stafford loans and loans made under the Federal Direct Student Loan Program. A corresponding change has been made to § 668.22(c)(2).

Comments: Many commenters disagreed with the Secretary's proposal to remove the fraction that is currently used to determine what portion of the refund must be returned to the Title IV, HEA programs. These commenters believed this change is grossly unfair and negates the concept of equal partnership between the Federal government, the States, and the institution in providing student financial assistance. Six commenters believed the proposed treatment will cause all parties who contribute to a Title IV, HEA program recipient's educational costs—States, institutions, private sources of aid—to lose their contributed funds to the Title IV, HEA programs in the event of a withdrawal. These commenters believed these other parties will therefore be reluctant to pay any of their funds to recipients of Title IV, HEA program assistance. These commenters asserted that such a policy would unfairly penalize State, institutional, and private sources of aid, and Title IV, HEA program recipients. One commenter reported that State programs are already deciding to avoid the Title IV, HEA program refund calculation by withholding their monies until after the refund period has passed; such a practice will be detrimental to Title IV, HEA program recipients who withdraw and owe large balances that would have been paid by State assistance, had it been disbursed on time. This commenter urged the Secretary to prevent the negative effects of this policy by amending the definition of "financial aid" (for the purposes of calculating the student's unpaid charges) to include State and private assistance that can reasonably be expected to be awarded, even if it has not actually been received at the time of withdrawal. One commenter supported the Secretary's rationale for removing the fraction in relation to refunds, but did not support extending that interpretation to repayments.

Discussion: The Secretary wishes to further clarify that the Amendments of 1992 specify in section 485 that refunds must be returned to the Title IV, HEA programs first. Further, the Technical Amendments of 1993 changed section 485 of the HEA to specify that refunds may be returned to other sources of student assistance only after the refund is returned to the Title IV, HEA program funds in the specified order of allocation. The Secretary has no authority to alter this requirement. The Secretary recognizes that some States, institutions, or private sources of aid may deliberately withhold funds from otherwise eligible students who have received Title IV, HEA program assistance. This is a decision over which the Secretary has no control. The Secretary does not believe the definition of "financial aid" can be amended in the manner suggested by one commenter, as such a change would be difficult to regulate. The Secretary feels it is appropriate, for consistency with the spirit of the law and to reduce administrative burden, to extend the interpretation of the law to repayments as well as refunds.

Changes: None.

Comments: Two commenters support the Secretary's proposal to set a minimum dollar amount below which a refund or repayment does not have to be made. One commenter suggested the Secretary set the same minimum amount for both refunds and repayments.

Discussion: After further consideration, the Secretary believes that this proposed provision is inconsistent with the amendment made to section 490 of the HEA that established criminal penalties for failure to pay refunds, specifically including refunds of less than two hundred dollars. Further, the Secretary believes that by the time the institution has determined the amount of the refund, most of the administrative effort and cost has been expended. The Secretary believes that neither the institution nor the student would benefit from the proposal to allow institutions to forgo making refunds of $25 or less. Also, the Secretary believes that part of the institution's administrative costs are recouped through the administrative fee that is allowed to be excluded from the *pro rata* refund calculation.

Changes: Section 668.22(f)(3)(iii) has been amended to remove the proposed minimum dollar amount below which a refund would not have to be made.

Allocation of Refunds and Overpayments. Comments: Three commenters support the Secretary's proposal to mandate the order of return of FFEL programs refund amounts. One commenter supported the proposed allocation of FFEL programs refunds and believed it will reduce student indebtedness. Three commenters believed including PLUS and unsubsidized Stafford loans in the refund allocation negates the basic principle of financial aid, that the family (or student) makes its contribution first before financial aid is expended. One commenter believed PLUS and unsubsidized Stafford loans should be excluded from the refund allocation, because grant money should not be used to pay back student loans, especially loans that are not need-based.

Discussion: The Secretary wishes to clarify that section 485 of the Amendments of 1992 specifies the order of return of refunds to the various sources of aid and to the student. The statute does not exclude the PLUS or unsubsidized Stafford loan programs from this order of return. For consistency and reduced administrative burden, the Secretary has proposed the same order of return for repayments as is mandated in the law for refunds. The Secretary believes the return order to be logical and appropriate.

Changes: None.

Comments: Three commenters disagreed with the Secretary's assertion in the preamble of the February 28, 1994 NPRM that refunds should not be used to eliminate outstanding balances on loans made for prior years. These commenters believed it is in the best interest of the student to allow a refund to be applied to outstanding loans.

Discussion: The Title IV, HEA programs award financial assistance based on the costs of attendance and the student's need assessment for a specific period of enrollment in a specific award year. The Secretary believes it is inappropriate to use funds awarded for the current enrollment period to cover costs from a prior enrollment period.

Changes: None.

Refund Dates. Comments: Four commenters believed the Secretary should be more flexible in terms of how an institution determines and documents a student's last day of attendance in the case of unofficial withdrawal. These commenters asserted that it is unreasonable to expect all institutions to maintain attendance records. Two commenters suggested institutions be required to determine that a student has unofficially withdrawn within a certain time frame, to avoid a student's unofficial withdrawal going unnoticed for an unreasonably long period of time. One commenter believed the proposed provisions should address cases of institution-initiated retroactive withdrawals.

Discussion: The Secretary wishes to clarify that the concept of using the student's last recorded date of attendance for refund purposes is not "new," but has been included in § 668.22 of the Student Assistance General Provisions regulations since 1988. All institutions participating in the Title IV, HEA programs have long been expected to have in place a system by which student attendance can be documented for the purposes of determining the withdrawal date in cases of unofficial withdrawal. The Secretary agrees that unofficial withdrawals should be determined within a reasonable time frame, in connection with the proposed definition of "withdrawal date." The Secretary believes cases of institution-initiated retroactive withdrawals are uncommon and as such do not warrant regulatory inclusion.

Changes: Section 668.22(i)(1)(ii) has been amended to limit an institution's determination of a student's unofficial withdrawal to no later than 30 days after the expiration of the enrollment period, the academic year, or the program, whichever is earlier.

Comments: One commenter believed the Secretary should not impose a deadline for refunds and repayments. Several commenters simply stated the proposed 30-day deadline would be too difficult to meet, especially for refunds made to lenders, and requested it be extended to 45 or 60 days. Many commenters stated that the proposal to require refunds be made within 30 days was unreasonable, in light of the proposed 20-day return period for equipment, books, or supplies. These commenters believed it is unfair to allow a student a leisurely 20-day period in which to return equipment, only to force the institution to rush the calculation and processing of a refund. Seven commenters stated that the proposed 30-day refund deadline does not take into account the unavoidable delay in determining unofficial withdrawals. These commenters believed most unofficial withdrawals are not discovered until the end of the subsequent enrollment periods add-drop period, and that several institutions will therefore consistently be unable to meet the 30-day requirement. Three commenters requested that all refund deadlines—for refunds to the program accounts, to lenders, and to students—be modified to be consistent, suggesting 60 days as a reasonable length of time for a refund to be made.

Discussion: The Secretary wishes to reiterate that, as discussed in the preamble of the February 28, 1994 NPRM, the refund deadline given in § 668.22(i)(3) applies *only* to refunds made directly to the student. The Secretary believes refund deadlines are appropriate and necessary. The Secretary would like to clarify that the deadlines for the return of refunds to the Title IV, HEA programs are not "new." These deadlines are not included in the current Student Assistance General Provisions regulations, but in the FFEL programs regulations. The Secretary wishes to clarify that § 668.22(g)(2)(iv) clearly states the 30-day refund requirement given in that paragraph applies to all Title IV, HEA programs other than the Federal Work-Study and FFEL programs. The deadline for refunds to lenders under the FFEL programs is set forth not in this section of the student aid regulations, but in 34 CFR 682.607. The Secretary believes that a 30-day refund deadline, in spite of the 20-day return period for equipment, is reasonable and sound. The Secretary would like to clarify that § 668.22(g)(2)(iv) clearly states the refund deadline is determined according to either the date the student officially withdraws *or* the date the institution determines the student has unofficially withdrawn. The Secretary believes this treatment sufficiently allows for the time needed to determine unofficial withdrawals. The Secretary believes the refund deadline for the purposes of the FFEL programs is appropriately longer than the refund deadlines discussed in this section of the student aid regulations and that this is necessary to account for the added procedures of returning funds to the lender.

Changes: Section 668.22(i)(2) has been amended to clarify that the deadline in that paragraph is applicable only to refunds made to students.

Appendix A

Comments: A few commenters requested the Secretary more specifically define several different terms used in appendix A.

Discussion: The Secretary believes the terms used in Appendix A are standard terms of the educational community, having been in common use for several years, and as such, necessitate no further definition.

Changes: None.

Comments: Three commenters believed that appendix A was originally intended to address proprietary institutions and fails to recognize or treat the specific circumstances of nonproprietary, term-based institutions. Specifically, these commenters stated that mandatory proration of all institutional costs disregards the fact that some institutional costs (such as instructor salary and physical plant costs) are fixed and unaffected by the withdrawal of a small number of students. These commenters requested the Secretary drop appendix A and replace it with requirements that more adequately apply to both proprietary and nonproprietary institutions.

Discussion: The proration of educational costs is required for *pro rata* refund calculations under the Amendments of 1992. The Secretary feels it is reasonable to extend this concept to the Appendix A requirements, in keeping with Congress' intent to provide a fair and equitable refund to Title IV, HEA program recipients. The Secretary notes that, in the past, the guidelines of appendix A were applicable to *any* institution, not just proprietary institutions, if neither an institution's accrediting agency nor its State had refund standards and the institution did not choose to follow refund policies set by another association of institutions and approved by the Secretary. Appendix A is intended to provide a general and stringent refund standard; the Secretary encourages institutions and accrediting agencies to work together in developing accrediting agency refund standards which can be used instead of appendix A standards and which can be better suited to the particular needs and circumstances of individual institutions.

Changes: None.

Comments: A few commenters suggested various changes to the percent of tuition charges that must be refunded for withdrawals which occur during certain portions of the academic period.

Discussion: The Secretary believes the refund percentages provided in appendix A are reasonable and appropriate. The commenters have not given evidence or justification as to why these refund levels should be altered.

Changes: None.

Comments: One commenter suggested that institutions should be allowed to deduct a students unpaid charges from a refund due under appendix A.

Discussion: The June 8, 1993 final regulations require that, for all refund calculations other than a statutory *pro rata* refund calculation, a students unpaid charges be subtracted from the amount an institution could otherwise retain. The Secretary finds no justification for exempting refund calculations under appendix A from this requirement.

Changes: None.

Comments: One commenter believed board charges are adequately treated under part VI of appendix A, and should not be discussed separately in part VII.

Discussion: The Secretary believes housing charges are separate and distinct costs from board charges, even though some institutions voluntarily choose to link these two costs together. A housing contract prescribes charges for a dormitory or housing space that presumably cannot be refilled past a certain point; therefore, such charges are expended at the point the space cannot be refilled. Part VI provides for the refund and retention of such charges accordingly. Board charges, however, are incrementally expended over the length of the period for which the student has been charged; the cost of food the student has not yet consumed cannot fairly be retained by the institution. The contract concept applied to housing charges, therefore, is inappropriate when determining the fair refund of board costs. Part VII, therefore, provides separate and distinct guidance for the refund of board charges. For the purposes of calculating a refund under appendix A, institutions must treat these two charges separately, in accordance with the appropriate guidelines.

Changes: None.

Comments: One commenter suggested adding specific language to Section VIII A to clarify that an administrative fee (of the lesser of $100 or 5 percent of tuition) cannot be retained in the case of a student whose aid package consisted only of FFEL programs funds, because FFEL programs funds must be returned in full to the lender if the student withdraws before attending one class.

Discussion: The commenter is correct regarding the requirement that FFEL programs funds be returned in full in the circumstance noted. However, the Secretary does not believe this or other such requirements should be reiterated in appendix A. The first paragraph of appendix A clearly states that these requirements do not affect an institution's obligation to comply with other Department of Education regulations.

Changes: None.

Comments: Five commenters requested the Secretary clarify the treatment of unofficial withdrawals under appendix A. Specifically, two of these commenters believed the language of Section X clearly implies that a students failure to give withdrawal notice in writing would be just cause to deny the student's refund.

Discussion: The Secretary considers an institution to have met the fair and equitable refund requirement if it uses a policy that meets the *minimum* requirements of appendix A. Although appendix A does not recognize unofficial withdrawals and recommends against the institution's acceptance of oral withdrawal notification, an institution is not prohibited from adapting a more liberal interpretation of this subject into its implementation of appendix A requirements.

Changes: None.

Section 668.23 Audits, Records, and Examinations

Comments: Two commenters suggested including the nationally recognized accrediting agencies among the list of agencies with which institutions participating in the Title IV, HEA programs must cooperate in the conduct of audits, investigations, and program reviews authorized by law. A few commenters also suggested including the nationally recognized accrediting agencies among the list of agencies with which a third-party servicer must cooperate in the conduct of audits, investigations, and program reviews authorized by law.

Discussion: The Secretary agrees with the commenters. Accrediting agencies assist the Secretary in determining institutional participation in the Title IV, HEA programs and should therefore be included in the list of entities that an institution must cooperate with. A third-party servicer, acting as an agent of the institution, should be required to cooperate with any accrediting agency that accredits an institution with which the servicer contracts to administer any aspect of the institution's participation in the Title IV, HEA programs.

Changes: This section is revised to include nationally recognized accrediting agencies in the list of entities that an institution and a third-party servicer must cooperate with in the conduct of audits, investigations, or program reviews authorized by law.

Comments: One commenter was concerned that the requirement for a third-party servicer to cooperate with a guaranty agency and other entities in the conduct of audits, investigations, and program reviews, would give the guaranty agency access to proprietary information of that servicer. The commenter noted that guaranty agencies directly compete for the services provided by other third-party servicers. The commenter suggested limiting cooperation to only include information that a holder of loans would be required to make available.

Discussion: The Secretary disagrees with the commenter. These regulations only require access to a third-party servicer's records to the extent necessary to monitor compliance with applicable statutes, regulations, special arrangements, agreements, and limitation.

Changes: None.

Comments: Another commenter felt that a third-party servicer should not be required to cooperate with these entities to the extent that that cooperation includes the copying of computer programs that are the sole property of the servicer. The commenter felt that any copying would violate copyright laws included in the licensing agreement to the software; the commenter recommended deleting this provision.

Discussion: These regulations require access to a third-party servicer's records to the extent necessary to monitor compliance with applicable statutes, regulations, special arrangements, agreements, and limitations. These regulations do not require, nor does the Secretary expect, a third-party servicer to violate any copyright laws governing computer programs. Nevertheless, a third-party servicer, like an institution, is expected to make available for examination and copying all relevant information, including the computer program.

Changes: None.

Comments: Several commenters suggested amending the provisions of § 668.23(b)(3) governing reasonable access to an institution's personnel to allow an institution the basic right to protect its interest during a compliance review by having an attorney, a management representative, or a tape

recorder present when the Department of Education conducts an interview with a person employed by the institution. A few commenters suggested that these provisions violate an employee's constitutional rights to counsel. One commenter stated that as a minimum, an institution should have the opportunity to build its own record and rebut inaccurate charges by having tape recordings of interviews between its employees and the Department of Education's representatives. Several commenters were against the provisions in this section that require a third-party servicer, in the conduct of audits, investigations, or program reviews, to allow its individual employees—those employees connected with the servicer's administration of the Title IV, HEA programs—to be questioned in private, without management being present or without the questioning being tape recorded. Many of these commenters contended that this requirement violated an individual's right to due process. One commenter felt that the Secretary was overstepping his statutory authority in this matter.

Discussion: The Secretary has already responded to similar comments in the preamble to final regulations for parts 600 and 668 that was published in the **Federal Register** on July 31, 1991 (56 FR 36682). The Secretary continues to disagree with these views and in the three years since these regulations have been in effect has received no evidence that the claims of the commenters are justified. With respect to third-party servicers, these provisions simply add requirements for third-party servicers that parallel current requirements for institutions participating in the Title IV, HEA programs.

Changes: None.

Comments: Many commenters recommended that an institution should be able to use a third-party servicer's annual compliance audit report to satisfy the portion of an institution's audit requirement for those areas that the servicer has contracted to administer on behalf of the institution. These commenters noted that this idea would eliminate duplication of effort by independent auditors auditing a third-party servicer's activities.

Discussion: The Secretary generally agrees with commenters that an institution may use a third-party servicer's audit report to cover those areas of an institution's participation in the Title IV, HEA programs that the institution has contracted with the servicer to administer. However, if an institution is required to have audited additional areas of its administration or is required to use different procedures in having the audit performed than the servicer then the institution may not be able to use fully the results of the servicer's audit. An institution is always responsible for ensuring that a compliance audit of the institution's participation in the Title IV, HEA programs includes all aspects of the institution's participation.

Changes: None.

Comments: Forty-three commenters suggested that an institution ought to be permitted to remain under the biennial audit requirement if that institution did not have deficiencies in the prior audit report of more than five percent of the institution's total Title IV, HEA program funds. Many of these commenters pointed out that this modification would parallel a similar provision in the proposed § 668.15 governing financial responsibility. At a minimum, the commenters recommended that these provisions be modified to reflect that an institution that had no deficiencies that required a monetary adjustment be permitted to remain under the biennial audit requirement. Several commenters asked the Secretary to clarify what are considered to be no deficiencies and material exceptions. One commenter suggested specifying certain amounts in the use of those terms. Three commenters supported the Secretary's proposal to provide exceptions to the annual audit requirement for third-party servicers that administer small amounts of Title IV, HEA program funds. One commenter argued that third-party servicers administering less than $250,000 in Title IV, HEA program funds should not be excluded from having an annual audit performed. One commenter recommended that instead of requiring third-party servicers to have performed a compliance audit at least every two years if the servicer administers less than $1,000,000 in Title IV, HEA program funds, that that threshold should be increased to $5,000,000. Three commenters urged the Secretary to require all third-party servicers to have an annual audit performed. One commenter suggested defining what is meant by a material exception.

Discussion: The Secretary has reevaluated his proposal in the February 17 and 28, 1994, NPRMs and upon a further examination of section 487(c) of the HEA and information surrounding the intent of the statute, has determined that the proposals were inconsistent with the requirement for an institution to have performed, without exception, on an annual basis, a compliance audit of the institution's administration of its Title IV, HEA programs or a third-party servicer to have performed, without exceptions, on an annual basis, a compliance audit of the servicer's administration of any aspect of its administration of an institution's participation in a Title IV, HEA program. The Secretary appreciates the comments and suggestions provided with respect to the basis for exempting institutions and third-party servicers from the annual audit requirement. While the Secretary cannot adopt these in the regulations, the Secretary is considering them in the development of changes to the Department of Education's audit guides. These changes are being designed to reduce administrative costs by allowing institutions that meet certain performance-based or funding criteria to have performed compliance audits under a reviewed or compiled basis rather than fully audited.

Changes: The provisions that provided for exceptions to the annual audit requirements for institutions and third-party servicers have been deleted in these final regulations. The proposed audit exceptions in this section have been removed. This section has been revised to require that all institutions have performed an annual compliance audit of the institution's administration of its Title IV, HEA programs; and to require that all third-party servicers have an annual compliance audit performed of every aspect of the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer has a contract.

Comments: Many commenters suggested amending § 668.23(c)(8) to establish deadlines for the submission of audit reports, rather than allowing the Inspector General to specify these deadlines in the audit guides. Several commenters questioned whether the Inspector General has the authority to establish this requirement without regulations. Another commenter suggested that the regulations contain a provision that would require institutions to meet the deadlines specified in the audit guide, but stipulate that under no circumstances would the institution be required to submit its audit report earlier than four months following the expiration of the audit period.

Discussion: Upon review of the commenters' concerns, the Secretary agrees that because these regulations require that an audit report must be submitted in a timely manner, the regulations should provide institutions and third-party servicers with the specific dates for submission of audit reports. The Secretary believes that a period of 120 days from the end of the

institution's or servicer's fiscal year provides an institution or servicer with a sufficient period of time to have an audit performed and to submit the audit report to the Department.

Changes: The regulations have been revised to state that an institution or third-party servicer must submit its audit within 120 days of the end of its fiscal year. An institution or third-party servicer that has an audit performed under the Single Audit Act must submit the audit report in accordance with the deadlines specified in that act.

Comments: Many commenters were opposed to the provision that the Secretary could require a third-party servicer to release the results of an audit to cognizant guaranty agencies, eligible lenders under the FFEL programs, State agencies, nationally recognized accrediting agencies, and State Postsecondary Review Entities on the grounds that these entities are not affected by the servicer's actions and release of information in the audit report could unnecessarily damage a third-party servicer's reputation.

Discussion: The Secretary disagrees with the commenters that the referenced entities are not affected by a third-party servicer's actions. The Secretary believes that by providing information-sharing among the appropriate authorized entities that the Secretary relies on to help provide oversight of Title IV, HEA program participants, that the Secretary is responding to Congressional intent. A third-party servicer acts as an agent of the institution and is responsible for administering a portion of an institution's participation. As such, the various entities involved in program oversight will have a genuine need for access to records of, or information about, the servicer. The Secretary therefore considers that the audit results of third-party servicers must be included in the information available to the appropriate oversight bodies monitoring institutional compliance with Title IV, HEA requirements.

Changes: The Secretary is revising paragraph (c)(4) of this section to include the Secretary of Veteran Affairs in the list of entities that the Secretary may require an institution or third-party servicer to provide the results of an audit to.

Comments: One commenter felt that an audit guide specifically developed for third-party servicers was necessary to comply with the requirements of this section. Another commenter was of the opinion that the period covered by a third-party servicer's first audit should not start until after audit guidance is available from the Department of Education.

Discussion: The Department of Education's Office of Inspector General is working on developing audit guides applicable for compliance audits performed of institutions and third-party servicers. The Secretary expects that these guides will be available before the initial audit period covered by an audit performed of a third-party servicer begins.

Changes: None.

Comments: Regarding the requirement for an institution to maintain records on a student's placement if the institution has a placement service used by the student, four commenters were concerned that application of this requirement to all institutions for all types of student employment placement might be overreaching and could result in institutions electing to terminate their student employment service rather than comply with burdensome recordkeeping requirements. Commenters pointed out that at some large institutions, student employment centers often act as clearinghouses for posting jobs and professional career opportunities, but frequently lacked the resources to track actual placement. Most often, employment information is made available to students and that information is simply removed from posting once the employer indicates the position has been filled. Commenters maintained that a formal follow-up process on student employment is not generally systematic and obtaining appropriate documentation would discourage institutions from continuing to provide this service to students. Two commenters recommended removing this requirement from the regulations. Three other commenters suggested that the Department of Education revise this provision of the regulations so that it would apply only to institutions that are otherwise required to track student employment as a condition of Title IV, HEA program eligibility or pertains only to those students for which the institution must otherwise maintain employment records.

Discussion: The Secretary does not intend for this requirement to be burdensome to institutions. This provision merely requires an institution with a placement service to document that the institution does what it claims to do—namely, place students in jobs.

Changes: None.

Comments: Two commenters objected to the requirement that an institution establish and maintain records that support the educational qualifications of each regular student admitted to the institution whether or not that student receives Title IV, HEA program assistance, that are relevant to the institution's admission standards. Both commenters believed that institutions should only be required to establish and maintain summary or aggregate information on the educational qualifications of students admitted to the institution. This aggregate data would be available to the Secretary only if the Secretary could demonstrate a compelling need to review the information.

Discussion: The Secretary believes this provision is necessary to establish whether an institution is in compliance with the statutory admission requirements of sections 1201(a) and 481(b) and (c) of the HEA for purposes of institutional eligibility and participation in the Title IV, HEA programs.

Changes: None.

Comments: Two commenters urged the Secretary to include a requirement that institutions retain records documenting whether and when a student completes his or her educational program. This information is needed to verify completion rates.

Discussion: The Secretary has taken these comments under consideration, but concluded that other regulatory provisions governing the completion rate calculations contain requirements to retain documentation to support the computations.

Changes: None.

Section 668.24 Audit Exceptions and Repayments

Comments: Two commenters supported the Secretary's proposed requirement for a third-party servicer to notify all institutions for which the servicer provides the same service, in addition to those institutions under whose contract the servicer incurred a liability for a Title IV, HEA program violation. Other commenters felt that this requirement was excessively broad. Several of these commenters argued that this requirement would unnecessarily damage a third-party servicer's reputation. Several commenters noted that the Secretary's proposed notification requirements were not all that different from full notification of all institutions with which the servicer contracts. One commenter suggested that third-party servicers should be required to notify institutions receiving the same service for which the servicer owes a liability only if that liability is material. One commenter recommended that a third-party servicer that is assessed a liability should have a reasonable amount of time to provide the notification to the servicer's clients.

Another commenter was of the opinion that the Secretary notify all of the institutions with which the servicer contracts of the Secretary's determination at the same time that the servicer is notified.

Discussion: The Secretary disagrees with the commenters that objected to the notification requirements. If a third-party servicer is assessed liability for a violation of a Title IV, HEA program requirement, any institution for which the servicer provides the same service in which the violation was found is potentially at risk as a result of the servicer's actions. Obviously, each institution under whose contract the servicer committed a violation should be notified because the Secretary holds that institution responsible for the full amount of the liability. In addition, each institution that contracts with the servicer for the same service in which the violation was found should also be informed of the servicer's violation. The Secretary believes that an institution that receives the same service should be informed of the servicer's violation of any Title IV, HEA program requirement because the servicer may commit a similar violation at that institution and the institution could be held liable for that violation. This notice will also allow an institution to take corrective action without waiting for formal action by the Secretary.

With respect to the commenter who was concerned that third-party servicers should have a reasonable amount of time in which to notify affected institutions of the Secretary's determination to assess a liability against the servicer, the Secretary does not believe that that time frame needs to be quantified. Servicers are expected promptly to notify affected institutions of the Secretary's determination because those institutions are also responsible for violations committed by their servicers. Servicers that fail to notify institutions may jeopardize an institution's ability to provide information to show that questioned expenditures were proper or take corrective action to mitigate violations caused by a third-party servicer. In reviewing a third-party servicer's appeal of the Secretary's determination, the Secretary will take into consideration whether or not the servicer notified affected institutions promptly of the Secretary's determination.

The Secretary does not agree that it is necessary for the Department of Education to provide notice to all of the institutions with which a third-party servicer contracts if that servicer is assessed a liability. A third-party servicer, as a responsible agent of an institution, has an obligation to keep that institution informed of any developments that might possibility jeopardize the institution's participation in the Title IV, HEA programs. If the Secretary seeks to assess liability against an institution for a third-party servicer's conduct, he will provide the appropriate notice to the affected institution.

Changes: None.

Comments: Four commenters opposed the provision in this section that required an institution to be responsible for payment of any liability owed by the institution's third-party servicer for a violation of the institution's participation until the amount is paid in full. One of these commenters argued that the third-party servicer should be held entirely accountable for payment of any liabilities incurred for the servicer's violation of Title IV, HEA program requirements.

Discussion: In the NPRM published on February 17, 1994, the Secretary repeatedly stated that an institution is always responsible for the actions of any of its third-party servicers. This responsibility includes assuming payment of any liability incurred by the servicer as a result of a violation of a Title IV, HEA program requirement by the servicer while administering aspects of the institution's participation in the Title IV, HEA programs. See § 668.25(c)(3). No institution will be required to answer for servicer violations without the opportunity to have such determinations reviewed under the procedures established in these regulations.

Changes: None.

Comments: Two commenters were concerned with the provision in this section governing the ability of the Secretary to perform an administrative offset to collect funds owed under the procedures of this section. One of these commenters suggested that the Secretary only use administrative offset to collect funds if a third-party servicer has not entered into an agreement with the Secretary to repay those funds. The other commenter thought that this provision amounted to the equivalent of an emergency action without having to afford an institution or third-party servicer a show-cause hearing. Several commenters were opposed to the provision in this section governing the ability of the Secretary to collect on a surety or third-party guarantee before the conclusion of appeal proceedings. These commenters contended that this provision assumes that the party is guilty before it is proven. Two of the commenters were also opposed to this provision on the grounds that audit findings of the Department of Education are sometimes insupportable or in error and that to collect on a surety or guarantee before those findings can be proven wrong is simply improper.

Discussion: The provisions in this section governing additional steps that the Secretary may take to collect funds owed under the procedures of this section are necessary to allow the Secretary to act quickly to protect Federal funds and insure that funds are available for collection. Institutions have a distinct financial incentive to cause delay and prolong any appeal of audit determinations. Some institutions use delays to either hide assets or drain assets so that none remain for collection; others may attempt to draw increased amounts of Title IV, HEA program funds prior to any final determination. The commenters are incorrect in stating that administrative offset denies procedural protection. Under the Department's offset regulations in 34 CFR part 30, the Department provides written notice and an opportunity to inspect records and receive an oral hearing. The Department may offset prior to completing the procedural requirements where failure to offset may substantially prejudice its ability to collect. In such cases, the Secretary completes the procedural requirements promptly thereafter and returns any funds later found not to be owing.

With respect to comments about the Secretary's ability to collect a surety or guarantee before final determinations are concluded or all appeal procedures are exhausted, the Secretary does not agree with the commenters. Financial surety is provided to the Department as a condition of participation to insure that funds are available to satisfy liabilities. The Secretary would only attempt recourse in cases where there is a need to provide relief to students or borrowers affected by the actions of the institution or third-party servicer, or where the terms of the surety do not guarantee that funds will be available after appeals are completed. For example, in the case of an institution that has failed to pay refunds owed to students that attended that institution, the Secretary believes that the need to collect in advance to pay those refunds outweighs deferring collection to final determinations or until the exhaustion of all appeal procedures are completed.

Changes: The reference to 34 CFR 30.28 is revised to refer to 34 CFR part 30 to clarify that the procedural protections in that part related to administrative offset apply.

Section 668.25 Contracts Between an Institution and a Third-Party Servicer

Comments: Many commenters supported fully the Secretary's proposal in this section that requires a third-party servicer to assume joint and several liability with an institution for any violation by the servicer of any statutory or regulatory provision relating to Title IV of the HEA. One of these commenters noted that only the assumption of full liability by a third-party servicer could ensure the protection of public funds.

In addition, many commenters supported the application of some type of liability on a third-party servicer for the servicer's violation of a Title IV, HEA program requirement, although most of these commenters recommended that the Secretary cap liability at the fees and compensation received by the servicer from the institution. A few commenters supported the Secretary's compromise to limit the liability of a third-party servicer to the fees and compensation received from the institution if the servicer was not an affiliate of the institution and to assess full joint and several liability against the servicer if the servicer was an affiliate of the institution. Other commenters believed in the concept of joint and several liability for third-party servicers only to the extent that it could be unequivocally proven that the servicer is the one at fault, or that the violation of a Title IV, HEA program requirement was more serious than simple human error.

Many commenters opposed requiring a third-party servicer to assume joint and several liability with an institution for a violation by the servicer of a Title IV, HEA program requirement. These commenters argued that to impose joint and several liability on a third-party servicer would (1) lead to increased servicing fees to compensate for increased risk assumed by the servicer; (2) force out servicers not willing to assume a level of risk in excess of the servicer's fees and compensation; and (3) interfere in contractual matters that should be left to the parties involved. These commenters recommended that instead of imposing liability on a third-party servicer, to increase accountability of the administration of the Title IV, HEA programs, the Secretary should instead focus on an institution's administrative capability and financial responsibility to achieve greater accountability.

Several commenters questioned what happens to existing contracts with institutions that were negotiated under a different assumption of liability. A few of these commenters asked the Secretary not to impose retroactive liability for contracts that did not incorporate or price for such an event.

Discussion: The Secretary appreciates the support from the commenters who agreed that third-party servicers should be jointly and severally liable with an institution with which the servicer contracts for any violation by the servicer of a Title IV, HEA program requirement. The Secretary agrees with these commenters that third-party servicer liability is necessary to insure compliance with Title IV, HEA program requirements. Servicers who must stand behind their work financially are more likely to use the high standard of care expected of Title IV, HEA program participants.

The Secretary has reexamined his position with regard to adopting the compromise in the NPRM to limit joint and several liability to the fees and compensation that a third-party servicer has received from the institution if the servicer was not an affiliate of the institution. The Secretary does not believe that anything less than the full assumption of liability can fully protect the interest of Federal tax dollars in the form of Title IV, HEA program assistance. Otherwise, servicers have no financial incentive to insure complete program compliance. With respect to the comment that a third-party servicer should not be assessed liability unless it can be proven that the servicer is at fault, the Secretary does not consider a third-party servicer to be jointly and severally liable with an institution unless the servicer is the one that has violated a Title IV, HEA program requirement. The Secretary believes that if a third-party servicer violates a Title IV, HEA program requirement that the servicer should be held liable, along with the institution with which the servicer contracts, because a violation, even an error, impacts on the integrity of the Federal student financial assistance programs, and should be redressed.

The Secretary disagrees with the comments that requiring servicer liability will necessarily increase fees so as to deny access to servicing. Some of these commenters noted that some servicers may price their service at a low-level to reflect the fact that they assume no liability. The Secretary does not believe that institutions or federal taxpayers are well served by servicers who are unwilling to stand behind the quality of their work. As agents of institutions participating in the Title IV, HEA programs, servicers are also subject to an institution's fiduciary responsibility to use the highest standard of care and diligence. By rejecting any responsibility for the quality of its work, the Secretary believes any such servicer cannot be expected to perform with the required concern for the proper expenditure of federal funds. The Secretary notes that he received favorable comments from organizations that are third-party servicers, or institutions who utilize third-party servicers, who did not raise any issue of adverse impact on fees. The Secretary has no doubt that these and similar servicers will continue to compete effectively for institutional clients at competitive prices. The Secretary notes that the higher education servicing industry is highly competitive which should restrain any excessive fee increases; in fact, by requiring all servicers to assume liability, the Secretary believes that this requirement should level the playing field by eliminating underbidding by those servicers who assume no responsibility for the quality of their work.

The Secretary notes that servicers are not being asked to serve as guarantors for their client-institutions, but merely being required to answer for the consequences of their own conduct. In this regard, if the services they provide have no adverse financial impact, there is no financial exposure for such a third-party servicer, or reason to increase fees charged.

With respect to those commenters who contended that the liability provision interfered in contractual matters that should be left up to the parties involved, the Secretary disagrees. The Secretary strongly believes that it is necessary to include this provision in the regulations because a third-party servicer administers aspects of the Title IV, HEA programs that are funded with Federal tax dollars. Therefore, it is entirely appropriate to establish requirements to safeguard such funds. Simply leaving this area to the parties, leaves open that possibility that no minimal care will be exercised by the servicer. An institution is free, however, under these regulations to agree to indemnify a third-party servicer in the event a third-party servicer must make any payment to the Secretary. The Secretary notes that these regulations will have the salutary effect of requiring institutions and servicers to exercise greater care in the selection of their contractual partners.

The Secretary would like to make clear that a third-party servicer and an institution are only jointly and severally liable for any violations of any statutory or regulatory provision applicable to Title IV of the HEA and not for other types of violations. The Secretary is

imposing requirements in contracts between third-party servicers and institutions only to the extent that a third-party servicer or institution administers any aspect of the Title IV, HEA programs.

With respect to the commenters who asked about the impact on existing contracts, the Secretary states that third-party servicers will have no joint and several liability for periods prior to the effective date of these regulations. The Secretary expects that once these regulations become effective, all contracts between third-party servicers and institutions will have to include the requirements provided in § 668.25(c), including the requirement that a third-party servicer is jointly and severally liable with the institution for any violation by the servicer of any statutory provision of or applicable to Title IV of the HEA, any regulatory prescribed under that statutory authority, and any applicable special arrangements, agreements, and limitations entered into under the authority of statutes pertaining to Title IV of the HEA. This may require modification of existing contracts.

Changes: None.

Comments: Some of the commenters questioned the provisions of this section governing a third-party servicer's responsibility to report all suspected instances of fraud to the Department of Education's Office of Inspector General. Two of these commenters recommended that in order to meet this requirement that third-party servicers be given an unqualified privilege exempting the servicer from any liability in connection with the referral of an institution to the Department of Education's Office of the Inspector General. In addition, one of the commenter questioned the Secretary's requirement to refer suspected instances of fraud or other criminal misconduct in connection with the Title IV, HEA programs. The commenter was concerned that if the servicer was wrong that the servicer's reputation would be irrevocably damaged. One commenter suggested that a third-party servicer should only be required to report information indicating fraud only where there is proof to substantiate the belief that an institution may have engaged in fraud.

Discussion: The Secretary recognizes that third-party servicers will not always be privy to sufficient information to identify possible fraud or criminal misconduct on the part of an institution. However, if there are identifiable circumstances in which a reasonable person would believe that an institution has deliberately misreported information, recklessly reported information without regard for its accuracy, or altered official documents, then a third-party servicer should report such information to the Office of Inspector General. The servicer is not required to reach a firm conclusion as to the impropriety of the institution's actions or provide evidence to substantiate possible criminal charges, but is required to simply refer the matter to the Department of Education's Office of Inspector General for appropriate action. Since this referral requirement is a required part of any contract between a third-party servicer and an institution, an institution has no basis to object to any referral made pursuant to this requirement. The Secretary thus believes that it is unnecessary to provide an unqualified privilege as suggested by some commenters; moreover, such a privilege would allow referrals even where there is no reasonable basis to believe misconduct has occurred. The Secretary assures third-party servicers that a third-party servicer will not be held responsible for any violations that the servicer has not itself perpetrated or aided and abetted. However, the Secretary will regard failure to take appropriate action when there is reasonable cause to believe that fraud or criminal misconduct has occurred to be a serious violation of these regulations and of a participant's fiduciary obligations.

Changes: None.

Comments: One commenter supported the concept of the provision in this section governing the requirement that an institution must notify the Secretary within 10 days of the date that a contract between an institution or third-party servicer is modified or terminated or within 10 days of the date that a third-party servicer, under contract with that institution, goes out of business, stops providing services, or files a petition for bankruptcy. However, the commenter believed that the burden of notifying the Secretary of any changes to the contract should rest with the servicer. Many commenters opposed this provision and argued that this requirement constituted needless paperwork on the part of the institution. These commenters contended that any changes to a contract between a third-party servicer would be examined in the course of having performed an annual audit.

One commenter recommended that the notification time frame be changed from 10 days to 30 days. Another commenter recommended that the time frame either be revised to state that the institution must notify the Secretary promptly of any changes or, barring that, within 90 days.

Discussion: Section 498(b)(3) of the HEA requires an institution to submit to the Secretary with its application for participation a copy of any contract between the institution and a third-party servicer and a description of that servicer; section 487(a)(3) requires an institution to submit information related to its administrative capability and financial responsibility. The Secretary interprets these statutory provisions to require institutions to keep the Secretary apprised of any contracts between themselves and third-party servicers, including, any significant modifications to those contracts, or any terminations of those contracts. The Secretary need contract information provided by institutions to monitor the responsibilities of third-party servicers. For example, if a program review uncovers a Title IV, HEA program violation at an institution in an area that a third-party servicer has recently contracted to administer, the Secretary must have current information to identify other institutions where the same servicer may have committed the same violation. The Secretary believes that 10 days constitutes a reasonable time period in which an institution must inform the Secretary of any changes or terminations of a contract while at the same time providing the Secretary with current information on those contracts. This time frame is consistent with the other reporting requirements concerning institutional eligibility under 34 CFR 600.30, thereby facilitating reporting as an institution will not have to track different reporting deadlines.

Changes: None.

Comments: One commenter objected to the requirement that a third-party servicer return all applicable records to the institution if the contract between the servicer and institution is terminated, or if the servicer stops providing services, or if the servicer files a petition for bankruptcy. The commenter believed that these records were the servicer's sole guarantee that the institution would pay the servicer any fees or compensation still owed to the servicer by the institution. The servicer also argued that the absence of these records would adversely affect the ability of an independent auditor in the event the servicer had a compliance audit performed of its administration of the institution's participation in the Title IV, HEA programs.

Discussion: If a third-party servicer must return records to an institution, these regulations do not prohibit a third-party servicer from retaining copies of the original records in order to facilitate a compliance audit. The Secretary notes

that the expense of copying should be unnecessary as an institution must provide a third-party servicer's independent auditor with access to records pursuant to 34 CFR 668.23(b).

With respect to the comment specifying that record retention was a third-party servicer's sole guarantee that an institution owing that servicer unpaid fees or compensation would pay, the Secretary strongly objects to any use of Title IV, HEA program records as bargaining chips in a pay dispute. Access to those records is required for uninterrupted administration of those programs. No servicer should hold these records hostage.

Changes: None.

Comments: Several commenters were concerned with the provisions in this section that limited a third-party servicer's ability to enter into a written contract with an eligible institution if the servicer had been limited, suspended, or terminated by the Secretary within the past five years.

Discussion: The Secretary understands the commenters' concerns but does not believe that those concerns are justified. As the Secretary explained in the NPRM, if a third-party servicer is found to exhibit indicators of a questionable past performance, the servicer would be prohibited from entering into a written contract with an institution to administer any aspect of the institution's participation in the Title IV, HEA programs. However, notwithstanding this prohibition, the Secretary would consider the servicer still eligible to contract with an institution if persons or entities with substantial control over the servicer agree to be responsible for any potential liability arising from the servicer's administration of the Title IV, HEA programs.

Changes: None.

Section 668.26 End of an Institution's Participation

Comments: Several commenters believed that if an institution's participation ends, it would be less disruptive to currently enrolled students who are receiving Title IV, HEA program assistance to allow the students to continue to be enrolled and receive Title IV, HEA program assistance until they complete their educational program. The commenters suggested that immediate termination of all funds under the Title IV, HEA programs would likely cause closure of the institution and costs to the government resulting from forgiveness of the students' loans. A few commenters argued that if an institution's participation has ended, it would be unrealistic to require the institution to inform immediately the State in which the institution is located of its loss of participation in the NEISP or SSIG Program, because there would be no one to make the notification. The commenters suggested that it would be more appropriate for the Secretary to make the notification in this case.

Discussion: Commenters misunderstood that immediate termination of Title IV, HEA program funds occurs for students at an institution whose participation ends but that does not close. The availability of those funds continues through the end of the payment period or period of enrollment in which the participation ends for enrolled students who have received a commitment for those funds. To provide funds beyond that point, however, would oblige the Secretary in effect to continue an institution's participation after the institution no longer qualifies for that participation. With regard to the commenters' objections to notifying a State upon the loss of an institution's participation in the NEISP or SSIG Program, it is no more unreasonable to expect an institution to notify the State than to expect the institution to notify the Secretary of the loss of participation in any other program. Institutions have been complying with this requirement for 20 years.

Changes: None.

Comments: Many commenters contended that if the Secretary receives a notice from a SPRE that the institution's participation should be withdrawn, the institution's participation should not end until the institution has had the opportunity to appeal to the Secretary or appropriate authority. Many commenters believed that an institution's participation should not end if the institution's program participation agreement expires due to the Secretary's failure to approve the application for a renewal of participation in a timely manner. One commenter suggested that, if an institution's participation is terminated as a result of misuse of funds under the Title IV, HEA programs, the Secretary prohibit the institution from crediting to a student's account or delivering to the student the proceeds of a second or subsequent disbursement of a Federal Stafford or Federal SLS loan after the institution's participation in the Title IV, HEA programs ends. The commenter believes it would be inappropriate to allow an institution that had previously misused funds under the Title IV, HEA program to disburse additional funds.

One commenter disagreed with the requirement that, if an institution's participation in a Title IV, HEA program ends, the institution must submit a letter of engagement for an audit of all funds received under that program within 45 days. The commenter stated that engagement letters are not required under generally accepted auditing standards or Government auditing standards.

Discussion: Under the State Postsecondary Review Program, a SPRE does not inform the Secretary that an institution's participation should be terminated until the SPRE has afforded the institution its full appeal rights. A further discussion of this process is found in the preamble to the regulations for the State Postsecondary Review Program. The Secretary agrees with those commenters who were concerned about the expiration of an institution's participation if the review of a properly completed application, submitted in a timely manner, has not been completed before the expiration of participation. An explanation of the changes made to accommodate this circumstance is found in the section of the *Analysis of Comments and Changes* that addresses certification procedures (§ 668.13).

The Secretary appreciates the concern of the commenter that an institution terminated for misuse of Title IV, HEA program funds ought not be permitted to continue to handle those funds, even for a limited period. The Secretary, however, considers that the honoring of commitments made to students is equally important and, provided that the institution continues to offer education, insists that those commitments be honored. The Secretary can also take additional steps to safeguard these remaining funds when appropriate. The institution remains liable for the proper handling of Title IV, HEA program funds even after its participation is terminated. Naturally, should the institution reapply for participation in a Title IV, HEA program or should a person with substantial control over the institution also have substantial control over another institution, the way that the terminated institution complied with the requirements of this section will be a factor in determining the institution's readmission into the programs or the person's continued role in the administration of the programs.

The Secretary needs assurance that if an institution's participation in a Title IV, HEA program ends, the institution will make arrangements for a final audit of the institution's administration of the program. A letter of engagement provides the Secretary authoritative

notification that the institution is carrying out its responsibility to end its participation in a way that will allow the Secretary to determine whether any further liabilities or corrective action is required. Generally accepted auditing standards and the GAO's *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions* do not prohibit this requirement.

Changes: None.

Comments: Two commenters recommended that the Secretary expand the exception for institutions that close as a result of a natural disaster. They suggested that the exemption apply to an institution that closes as a result of fire, a weather emergency, or other causes beyond the control of the institution. One commenter suggested that an institution that is closed or stops providing educational programs for fewer than seven instructional days should remain a participating institution.

Discussion: The Secretary adopts the exception for closures as a result of a natural disaster because this event is readily verifiable. The Secretary acknowledges that other circumstances may require an institution to close on a temporary basis, but does not consider these other circumstances sufficient to establish additional exceptions to the requirements of this section, because the period of closure will be too short. In most such instances, the institution has recourse to other remedies, such as the arrangement for the use of other facilities. Indeed, the definition of *academic year* for most purposes actually recognizes that a week of instructional time can include a number of days in which instruction does not occur.

Changes: None.

Subpart G—Fine, Limitation, Suspension, and Termination Proceedings

Section 668.81 Scope and Special Definitions

Comments: Several commenters believed that the appeal procedures of this section should apply to institutions that were provisionally certified if the Secretary revokes the institution's provisional certification. Many commenters believed that the appeal procedures of this section should apply to institutions if the institution's period of participation has expired. Several commenters suggested that the Secretary limit, suspend, or terminate the eligibility of a third-party servicer to contract with an institution only to those services and Title IV, HEA programs for which the servicer has been found to be in violation and only to those institutions on whose behalf the servicer committed the violation. The commenters claimed that the servicer's activities and the Secretary's sanctions might sometimes concern violations would have no material relationship to the servicer's ability to provide other servicing functions to institutions which it serves and to other institutions unaffected by the original violations.

Discussion: See discussions under the section of the *Analysis of Comments and Changes* that address certification procedures (§ 668.13). The Secretary does not agree with the commenters' suggestion that the Secretary should limit, suspend, or terminate the eligibility of a third-party servicer to contract with an institution only to those services and Title IV, HEA programs for which the servicer has been found to be in violation and only to those institutions on whose behalf the servicer committed the violation. The Secretary imposes a sanction against a third-party servicer for a violation of a Title IV, HEA program requirement for a specific reason, to protect the integrity of the Title IV, HEA program. The Secretary, if necessary, must reserve the right to limit, suspend, or terminate a third-party servicer's eligibility to administer any aspect of the Title IV, HEA programs for any institution to ensure that further harm does not occur to one or all of those programs. However, where appropriate, any limitation, suspension or termination action may be limited in scope as suggested.

Changes: None.

Section 668.82 Standard of Conduct

Comments: One commenter believed that individual employees should not be responsible for actions beyond their control; instead, they should be held responsible for actions that are reasonable. For example, to be held responsible for accounting errors of other departments may be going beyond what is reasonable. Two commenters argued that the servicer is merely under contract to provide particular services, and is in no position to monitor the institution's compliance with other fiduciary matters. They also claimed that establishing a fiduciary standard also would establish enormous liability for areas beyond the servicer's control. These commenters recommended that clarification is needed in the regulations to ensure that a third-party servicer could only be held to a fiduciary standard for funds under that servicer's direct control.

Discussion: The Secretary holds a third-party servicer to a fiduciary standard of care and diligence only in the exercise of the servicer's Title IV, HEA program responsibilities that the servicer has contracted with the institution to perform. The Secretary does not expect a third-party servicer to be responsible for aspects of administration of the Title IV, HEA programs or funds attributed to those programs that the servicer has not contracted with an institution to administer. With respect to the comment on the responsibility of individual employees, the Secretary notes that these regulations apply a standard of conduct only to the third-party servicer itself; individual employees are not held accountable under this provision. However, the Secretary expects a third-party servicer to train its employees to perform their duties consistent with the servicer's fiduciary obligations.

Changes: None.

Comments: One commenter was concerned that the provisions governing a third-party servicer's fiduciary duty would limit the servicer's ability to acquire its servicing fees from funds administered by the servicer.

Discussion: A third-party servicer entrusted with Title IV, HEA program funds may not use those funds to compensate itself for fees owed to the servicer by an institution. As provided in § 668.18, federal funds may only be used for Title IV, HEA program purposes, and may not be hypothecated or used for collateral. The only exception would be where an institution has agreed to pay to the servicer all or part of the administrative cost allowance payable to an institution under the Title IV, HEA program regulations. Otherwise, the Secretary will regard any effort to take servicing fees directly from federal funds as a grave violation of a third-party servicer's fiduciary obligation, for which its eligibility to contract with any institution should be terminated.

Changes: None.

Comments: Several commenters believed that it is unreasonable to expect a third-party servicer to be held to the same fiduciary standards as the institution.

Many commenters stated that the proposed language could be read to mean that if any employee of a third-party servicer (e.g., janitor or painter) has been convicted of or has pled *nolo contendere* to any crime involving government funds (not specifically Federal student aid), the servicer is subject to termination. Four of these commenters voiced concern about the issue of due process, because the ability to screen all applicants is very limited

due to laws regarding privacy and nondiscrimination in hiring. One of the commenters stated that such removal may be prevented by State or Federal laws and perhaps expose the servicer to liability. One commenter believed that the provisions should be effective only for new contracts, because many servicers currently have contracts with subcontractors that do not contain the restriction regarding removal of an affiliation, and the servicer could be liable for breach of contract.

Discussion: The Secretary does not agree with the comment that a third-party servicer should not be held to the same fiduciary standard as an institution. As an agent of an institution, a third-party servicer administers aspects of the institution's participation in the Title IV, HEA programs. Therefore, it is necessary to hold a third-party servicer to the same level of fiduciary responsibility as the institution in handling or influencing the use of Title IV, HEA program funds.

The Secretary agrees with those commenters who argued that a third-party servicer should not be considered to have violated its fiduciary duty with regard to the conduct of any person, entity, or officer or employee of an entity with which the servicer contracts, if that person or entity does not have Title IV-related responsibilities. For example, the Secretary would not hold the conduct of a custodian employed by a third-party servicer as an element in determining that the third-party servicer has violated its fiduciary duty, if that custodian had no responsibility for administering a Title IV, HEA program.

With respect to those commenters who were concerned that the removal of an agent of a third-party may violate due process or may be prohibited by Federal or State law or may be a breach of contract, the Secretary does not believe that those prohibitions exist. However, the Secretary recommends that third-party servicers modify their contract terms to specify that the servicer is prohibited from engaging any entity to administer any aspect of the Title IV, HEA programs that meets the criteria in paragraph (d)(1)(i)(D) of this section.

The Secretary expects a third-party servicer to apply these provisions to existing contracts as well as to any new contracts that the servicer may enter. These provisions supersede provisions of existing contracts that the servicer may have with outside entities.

Changes: Paragraph (d)(1)(i)(D) of this section is revised so that a third-party servicer violates its fiduciary duty in instances where the servicer uses or contracts with, in a capacity that involves the administration of any aspect of the Title IV, HEA programs, any other person, agency, or organization that has been or whose officers or employees have been convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or other material violation of law with respect to those funds.

Comments: One commenter suggested that paragraph (d)(1)(i)(B) of this section should be amended to exclude those instances in which the funds that were fraudulently or criminally obtained or spent were repaid. The same commenter believed that this provision is too broad in scope, and should be restricted only to crime and fraud involving funds covered by the contract between the institution and the servicer.

Discussion: The Secretary disagrees with the commenter. A person that has been convicted of, pled guilty to, or has been determined to have engaged in criminal misconduct or fraud with respect to government funds poses a danger to the Title IV, HEA programs and the funds appropriated for use by those programs. Such a person has violated the public trust by misusing public funds. The Secretary does not believe that payment of restitution by that person is sufficient to guarantee that the person will not repeat the offense.

Changes: None.

Comments: Several commenters thought that the requirements in paragraph (d)(2) of this section were unreasonable by specifying that an institution or third-party servicer would violate its fiduciary responsibility if the servicer or a principal or affiliate of the servicer violated any Title IV, HEA program requirement. The commenters thought that the cure—to sever all ties with that servicer, or a principle or affiliate of that servicer, or to remove all responsibilities of administration of the Title IV, HEA programs—was too punitive in its scope.

Discussion: The Secretary agrees with those commenters. An institution or third-party servicer should not be considered to have automatically violated its fiduciary responsibility if the servicer or a principal or affiliate of that servicer violates a Title IV, HEA program requirement. The Secretary has recourse to apply the appropriate sanctions in this subpart against an institution or third-party servicer if the servicer or a principal or affiliate of the servicer commits a violation of any Title IV, HEA program requirement.

Changes: The Secretary removes the provisions of paragraph (d)(2) of this section.

Section 668.83 Emergency Action

Comments: Three commenters stated that no emergency action should be taken until the servicer has been given the opportunity to defend its actions. One of these commenters remarked that the Secretary could be subject to lawsuit if the servicer were proved innocent. Two commenters voiced concern that emergency actions could have a severe impact on an institution or servicer without a promulgation of evidence. One of these commenters suggested that the language be revised to read, "Receives verifiable information, determined by the official to be reliable * * *." Four commenters felt that emergency action should only be taken when the errors are intentional or the servicer or institution refuses to take corrective action. One commenter felt that due process mandates that the burden of proof be on the Secretary to show cause why an emergency action is necessary, and that the burden should shift only after the Secretary has made a prima facie case. Several commenters stated that an emergency action against a third-party servicer should not, as a matter of law, prohibit the servicer from engaging in the administration of any aspect of an institution's participation in the Title IV, HEA programs, but should only be limited to that aspect where emergency action is absolutely necessitated. The commenters felt this was necessary to provide a smooth turnover of servicing responsibilities rather than a sudden halt which could cause chaos, confusion and loss throughout the industry, including the Department of Education, the institution, and the borrower.

Discussion: The HEA specifies that the Secretary shall take an emergency action against a third-party servicer if the Secretary receives information, determined by the Secretary to be reliable, that a third-party servicer under contract with an eligible institution is violating any statutory or regulatory provision applicable to Title IV of the HEA, or any applicable special arrangement, agreement, or limitation and the Secretary determines that immediate action is necessary to prevent the misuse of Federal funds and the likelihood of loss outweighs the importance of waiting for the final outcome of a limitation, suspension, or termination action against the servicer. An emergency action is effective on the date that a notice and statement of the basis of the emergency action is mailed to the third-party servicer. If a third-

party servicer does not think that such action is warranted, the servicer may request a prompt show-cause hearing. As to the concerns expressed over possible disruption, the Secretary will tailor emergency actions as he determines necessary to protect federal interests. The Secretary also refers the reader to the discussions of emergency actions with respect to institutions in the regulations published on March 10, 1993 (58 FR 13336).

Changes: None.

Sections 668.84 Fine Proceedings, 668.85 Suspension Proceedings, and 668.86 Limitation or Termination Proceedings

Comments: A few commenters felt that proposed §§ 668.84 (governing fine proceedings), 668.85 (governing suspension proceedings), and 668.86 (governing limitation and termination proceedings) violate due process and privacy rights by requiring that a third-party servicer apprise all clients of proposed actions. The commenters thought that notification at that time is at a minimum premature if not inappropriate and would serve to create adversarial relations between parties that should have a cooperative working relationship. Several commenters felt that fines should be imposed only if the violation was "willful" or "knowing." Another commenter felt that notification of a fine proceeding against a third-party servicer should not be sent until the appeal process is completed because it could damage a third-party servicer's reputation among unaffected parties and could unnecessarily alarm the servicer's client base. One commenter recommended that the notice be limited to affected clients and suggested that if the Secretary does not want to eliminate the notice at the beginning of a fine proceeding, the Secretary should be required to send a notice when the decision to fine has been reversed.

Discussion: Quite the contrary to the commenters' views that notification to a third-party servicer's clients at the initiation of a fine or other proceeding against the servicer violates due process, this provision protects those rights. The potential consequences to an institution if the institution's agent violates a Title IV, HEA requirement can be severe, covering the full range of sanctions under this subpart. Thus, notice to an institution allows the institution the opportunity to participate in the process on behalf of its agent and in its own defense.

In addition, a sanction imposed against the servicer could have an adverse effect on the participation of an institution that contracts with the servicer, including the severing or limiting of the contractual relationship. Early notice to affected institutions permits them to judge the potential effect of the action on their participation and to prepare accordingly. As the Secretary noted in the NPRM, early notice also allows an institution to take corrective action before the conclusion of a proceeding under this subpart. The Secretary also corrects here two misunderstandings of these commenters: it is the designated department official, not the third-party servicer, who provides notice under this subpart; and the designated department official notifies only those institutions affected by the servicer's violations, not all institutions that contract with the servicer.

The Secretary is sensitive to those who were concerned about how notification in the initiation of a fine proceeding could affect a third-party servicer's reputation, but notes that information about actions the Secretary takes with regard to violations of Title IV, HEA program requirements is publicly available and is required by section 494C of the HEA to be shared at least with SPREs and by 34 CFR part 603 with accrediting agencies. The Secretary has provided, in § 668.90, for notification to all affected institutions that contract with a third-party servicer of the Secretary's final decision with regard to appeals under this subpart.

In determining whether to impose a fine, the amount of a fine, or whether to impose any other sanction for a violation of a Title IV, HEA program requirement, the Secretary always considers the extent to which the violation was deliberate. The Secretary does not consider it necessary to specify that consideration in these regulations.

Changes: None.

Comments: Several commenters suggested that in the case of a proceeding against an institution, the Secretary should notify the third-party servicers that contract with that institution, because the functions performed by certain third-party servicers could continue to be performed inadvertently when, in fact, the Secretary has limited, suspended, or terminated those activities. The commenters further recommended that in the case of a suspension, limitation, or termination against an institution the Secretary inform each third-party servicer that contracts with the institution of the consequences of the action to the servicer. The commenters also request parallel notification provisions concerning hearings and the submission of written material in the absence of a hearing.

Discussion: The Secretary expects an institution to provide immediate notice as necessary to its employees, agents and third-party servicers to comply with the terms of any action taken by the Department. The Secretary notes that he does not hold a third-party servicer responsible for violations of Title IV, HEA program requirements committed solely by an institution. Therefore, the Secretary does not consider it necessary to establish provisions for the notification separately to third-party servicers in every case.

Changes: None.

Comments: Two commenters strongly objected to the proposal to include, as a specific basis for any of these proceedings against an institution or a third-party servicer, a substantial misrepresentation of the institution's educational program, financial charges, or employability of the institution's graduates by an institution or servicer under contract with an institution, as applicable. The commenters felt that this proposal would require a third-party servicer to monitor a client institution's marketing of its educational program, its admissions process and the appropriateness of the financial charges as well as the statements made, verbal or written, regarding the employability of the institution's graduates. One commenter suggested that the application of this provision be limited to third-party servicers that provide services such as marketing for institutions. One commenter suggested that misrepresentation of eligibility of a location be added to the violations subject to the imposition of a fine.

Discussion: These provisions, with respect to third-party servicers, are aimed at just such servicers as those mentioned by one of the commenters—those that provide marketing or other services designed to represent an institution to prospective students and the public. However, the provisions can apply equally to any other third-party servicer that, in the conduct of its activities under a contract with an institution, deliberately misrepresents the nature of the institution's educational program or other relevant information. These provisions do not require a third-party servicer to take any special steps to monitor an institution's activities. The servicer being an agent of the institution is expected simply to avoid misrepresenting the institution. Subpart F of this part describes what constitutes misrepresentation. Misrepresentation of the eligibility of an institution's educational program clearly falls within the meaning of the term under subpart F and further may constitute fraud under the provisions of

§ 668.83, providing a potential basis for an emergency action. In the February 17, 1994, NPRM, the Secretary emphasized the seriousness with which he regards misrepresentation and the potential danger that misrepresentation poses to the Title IV, HEA programs. Commenters have not persuaded the Secretary to modify that view.

Changes: None.

Comments: One commenter felt that the Secretary should not pursue action against a contracting institution until the matter with the third-party servicer is resolved and also requested that the Secretary not fine both the servicer and the institution for the same occurrence. The commenter recommended that the proposed effective date of the suspension, limitation, or termination, which is at least 20 days after the mailing of the notice of intent, be revised to either 30 calendar days or 20 business days to allow sufficient time for preparation of a response. A commenter suggested that a fine be imposed only for material violations of Title IV, HEA program requirements.

Discussion: The Secretary reserves the right to initiate an action against an institution at any point at which the Secretary determines that the action is necessary. The protection of the Title IV, HEA programs requires this flexibility. Whether to impose fines on both an institution and a third-party servicer, and the amount of those fines, for the same occurrence depends on the degree to which each party caused or is otherwise responsible for the violation.

The Secretary considers 20 days generally to be sufficient time for the notified party to prepare a response. The Secretary notes, however, that this provision establishes a minimum time frame. The Secretary may allow additional time if the Secretary determines that the circumstances of the proceeding require more.

The Secretary does not consider it advisable to restrict the imposition of fines to material violations of Title IV, HEA program requirements. However, § 668.92 describes generally the factors that the Secretary may consider in determining the amount of a fine.

Changes: None.

Sections 668.87 Prehearing Conference, 668.88 Hearing, 668.89 Authority and Responsibilities of the Hearing Official, 668.90 Initial and Final Decisions—Appeals, and 668.91 Filing of Requests for Hearings and Appeals; Confirmation of Mailing and Receipt Dates

Comments: Several commenters questioned the absence of criteria in the regulations for the qualification of the hearing officer. The commenters also suggested that procedures should be established to allow for the participants to inform the hearing officer of details of the issues given the generally complex issues involved in most cases. The commenters recommended that the Secretary be required to provide a copy of the transcript described in § 668.88(d) to all parties within ten days of the hearing. Several commenters felt that any decision should be governed by a "reasonableness" standard to limit the liabilities of parties participating or providing servicing of the Title IV, HEA programs in good faith. The commenters thought that the process should allow for extenuating circumstances and that the hearing official should have the authority to interpret regulations and to rule them inapplicable. Another commenter believed that the hearing official should be bound by not only all applicable statutes and regulations but also other guidance deemed to be in effect by the Secretary to ensure that "Dear Colleague" letters and other written guidance from the Department of Education be included. One commenter believed that any prehearing conference with a third-party servicer should include any institution that has a contract with that servicer and who could potentially be affected by the Secretary's action. One commenter suggested that § 668.89 be modified to require that the hearing official be bound not only by "all applicable statutes and regulations" but also by all applicable judicial precedent, the Constitution, Federal statutes of general applicability, including the United States Bankruptcy Code.

One commenter questioned the statement that if the hearing officer finds that a termination is warranted, the Secretary affirms that decision asking if the Secretary intends to automatically affirm the hearing official's decision. A few commenters suggested that an institution or third-party servicer should be able to introduce new evidence on appeal noting that the Secretary should have the opportunity to have complete information that may not have been presented at the original fact-finding sessions. These commenters thought that the emphasis in resolving the issue should be on arriving at the most fair and most logical conclusion as opposed to conforming to a stringent pattern or process. One commenter felt that the Secretary should not have a special process for fraud investigations and there should not be limitations placed on a hearing official's ability to act. The commenter believed that the proposed procedures would unfairly limit the due process procedures available to participants in the system and that the current procedures do not require further modification.

Discussion: The Secretary has considered the suggestions from the commenters that some minimum standards be set out in the regulations to establish qualifications for the hearing officer, but does not believe that any such actions are appropriate. The hearing official is charged with the responsibility of resolving the issues requested in the appeal, and the parties bear the responsibility of presenting the issues in controversy. The hearing official meets requirements for experience and capability in accordance with internal Department procedures, and no additional requirements are needed in these regulations. Additionally, the hearing official's decisions involving limitations, suspensions, terminations and fines may be appealed to the Secretary under this subpart. This appeal to the Secretary provides an additional procedural safeguard that the issue will be resolved fairly in a manner that is consistent with other decisions issued by the Secretary.

The Secretary does not agree with the suggestion that additional regulations are necessary to permit the participants to inform the hearing officer of details of the issues due to the generally complex issues involved in some cases. Under the regulations, any party may request a prehearing conference that would address how the parties could present the relevant issues to the hearing official. In addition, the parties have the opportunity to make their position known in the pleadings required by the hearing official.

The Secretary agrees with the commenters that an institution or third-party servicer who is the respondent in an administrative hearing should be provided with a copy of a transcript when one is prepared by the Department of Education. Under current procedures, a transcription is routinely made of any adverse action initiated under this subpart, and a copy of the transcript is provided to the respondent.

The Secretary disagrees with the suggestion that the regulations establish a "reasonableness" standard to limit the liabilities of parties participating or providing servicing of the Title IV, HEA programs in good faith. Institutions and third-party servicers are fiduciaries that are entrusted with properly administering the Title IV, HEA programs. Establishing a lesser negligence is inappropriate, particularly given the advance system of Title IV,

HEA funding used by the overwhelming majority of participating institutions. As fiduciaries, these parties are held to one of the highest standards of accountability, and it is inappropriate to excuse or reduce a liability that is caused by a subjective good faith belief purportedly held by the institution or third-party servicer. Business decisions that concern the degree of care and oversight required by institutions and third-party servicers must take into consideration their responsibility for adhering to the applicable program requirements.

The Secretary also rejects any suggestion that the hearing official be given discretion to refuse to apply applicable regulations to a dispute. The regulations constitute final determinations by the Secretary concerning the requirements that must be followed by institutions and third-party servicers to participate in the HEA programs. The hearing official must apply the regulations as written. This process provides certainty to all parties, and enables the development and enforcement of a consistent body of administrative rulings.

The Secretary appreciates the suggestion of commenters who urged that guidance issued by the Department in the form of manuals, handbooks, other publications or Dear Colleague letters should be binding the hearing official in the same manner as regulations. However, such guidance does not have the same legal force as regulations issued pursuant to formal rulemaking. The Secretary believes that such guidance does provide a foundation against which the reasonableness of the institution's or third-party servicer's conduct may be judged. In the context of resolving whether the institution or third-party servicer violated a regulation or statute, or breached its fiduciary duties, the hearing official should evaluate the institution's or third-party servicer's actions based upon whether it made a good faith effort to apply and follow the guidance issued by the Department. The Secretary believes that actions taken contrary to such guidance would be presumptively improper and should be viewed as such by a hearing official. The Secretary further believes it will be a rare instance where a party can demonstrate that it fulfilled its fiduciary obligation and complied with statutory or regulatory requirements while failing to heed or apply guidance issued by the Department of Education as to the proper application of statutory or regulatory provisions.

The Secretary does not agree that it is necessary to list all possible authority binding on the hearing official. The parties are free to cite any authority they feel may govern a particular case or issue. Section 668.89(d) is included to preclude hearing official from ignoring or refusing to apply departmental statutes and regulations. If a hearing otherwise fails to apply applicable authority, a party may appeal to the Secretary.

The Secretary does not agree that an adverse action initiated against a third-party servicer must necessarily include any institution that has a contract with that servicer who could potentially be affected by the Secretary's action. The particular facts in each case will determine the party or parties against whom an adverse action is taken, and in some instances it may be appropriate for an institution and its servicer to both be named as respondents. In some cases, a third-party servicer against whom an adverse action is initiated may ask the Department to expand the administrative action to encompass the institutions that are relevant to the administrative action. Again, the Secretary believes that the particular facts of each case will have to be considered to determine the appropriate actions, rather than expanding the scope of the regulations to require such participation by other parties in every case.

The commenter also suggested that such participation by a third-party servicer's customers should be considered because an adverse ruling would have an impact on every other client for that servicer, especially where a termination or debarment action were sought. However, the resulting impact of a termination or a debarment of a third-party servicer on the servicer's customers is not a sufficient basis for these parties to be given a right to be represented in any prehearing conference. To invite all potentially affected parties to the hearing would complicate the proceedings. The proper focus of the administrative proceeding is determining whether the limitation, termination, or suspension should be imposed based upon the cited program violations.

The Secretary has modified the proposed regulation to provide that any initial decision by a hearing official that is appealed to the Secretary may be affirmed, reversed, remanded to the hearing official, or modified. The Secretary also notes that the regulations require a hearing official to uphold certain adverse actions when specific findings are made as set out in § 668.90. Although the Secretary reserves the discretion to review such rulings on appeal, these administrative decisions already reflect the Secretary's judgment that such action is appropriate under those facts, and modification of any such ruling will be rare.

The Secretary disagrees with the suggestion that an institution or third-party servicer should be able to introduce new evidence on appeal. The administrative process requires that the relevant information necessary for the decision will be presented to the hearing official within the time limits set out in the regulations. Any appeal to the Secretary must be based solely upon that information already in the administrative record and upon items which may be judicially noticed. Any subsequent opportunity to introduce new evidence on appeal would deprive the hearing official of the opportunity to have issued a decision based upon a complete record, and could discourage a respondent from placing its complete case before the hearing official at the appropriate time. This system of resolution is fairer and more efficient because it provides each party with an opportunity to have their complete case heard by a hearing official and then, where appropriate, have the initial decision reviewed by the Secretary on appeal.

The Secretary believes that it is appropriate to include fraud as a finding in § 668.90 for which an adverse action must be upheld where the hearing official makes a determination that the underlying activity has occurred. This addition to the regulation reelects the Secretary's determination that any fraud committed by an institution or third-party servicer is serious enough to warrant the imposition of the adverse action sought. In such instances, and consistent with the other items that have been placed into this category in the past such as missed audit submissions, it is appropriate to limit the discretion of the hearing official in accordance with the Secretary's determination that this category of finding warrants the adverse action initiated by the designated Department official. Furthermore, the regulation provides certainty to all parties concerning the gravity of the underlying violation, while providing an institution or third-party servicer an opportunity to request an administrative appeal to a hearing official concerning whether the respondent committed fraud.

Changes: The regulations have been changed to provide that the Secretary may affirm, reverse, remand to the hearing official, or modify any initial decision that is appealed to the Secretary. Section 668.88 has also been amended to specify that no charge is made to provide one copy of the

transcript to the hearing to an institution or a third-party servicer.

Section 668.92 Fines

Comments: A number of commenters responded to the Secretary's request for comment and agreed that repeated mechanical systemic unintentional errors should be treated as a single violation for purposes of assessing a fine against a third-party servicer. However, one commenter argued that total compensation for the value of the error should be expected. Another commenter suggested that the Secretary should address cases in which the third-party servicer deliberately failed to implement a regulation or failed to institute programming corrections relating to previously cited findings identified by an auditor, client, or the Secretary. The commenter believes that in these situations the fines should be significant based upon the risk of loss due to the servicer's negligence.

Several commenters felt that it would be inappropriate to adjust the amount of a fine simply based upon the size of the institution or servicer, claiming that a small organization should not benefit and a large organization should not be penalized solely on their size. One commenter suggested that the purpose of considering the size of the servicer's business was to take into consideration the dollar value of the violation in comparison to the overall value of the contracts being serviced by the servicer and suggested that language be added concerning the assessment of materiality of the violation. A few commenters supported a position that the determination of the size of any fine take into account the extensiveness and gravity of the violation and should be assessed in direct correlation to any loss of funds. The commenters also felt that the fines should only be assessed against the party who was directly responsible for the violation and supported the provision that the servicer may provide evidence that the institution contributed to the violation.

One commenter felt that any references to special arrangements should be deleted and noted that performing any statutory and regulatory requirement should cover all applicable situations.

Discussion: The Secretary agrees with the commenter who suggested that, in determining the amount of the fine to be assessed against a third-party servicer for a violation of a Title IV, HEA program requirement, a repeated mechanical systemic unintentional error need not be counted as a single violation if the servicer had been previously cited for this type of error and had failed to implement corrections. With respect to the commenter who suggested that in determining the amount of a fine with respect to a repeated mechanical systemic unintentional error, that the amount of the fine should at least be equal to the total value caused by the error, the Secretary does not agree with that comment. However, the Secretary does agree that the determination of the amount of the fine should take into consideration the amount of Title IV, HEA program funds that were lost due to the error.

With respect to the concerns expressed about the relationship of the amount of a fine to the size of an institution or of a third-party servicer's business, the Secretary points out that the size of an institution or business has a bearing on whether the institution or servicer has overextended its capability of properly administering the Title IV, HEA programs and the extent to which harm has been done to the programs.

With respect to the commenter who thought that the phrase special arrangement should be deleted from this section, the Secretary does not agree with that commenter. Special arrangements are based on individual circumstance and therefore should be taken into consideration. However, as noted elsewhere in the comments and discussion section, the Secretary clarifies special arrangements to refer to those special arrangements entered into under the authority of statutes applicable to Title IV of the HEA.

Changes: Paragraph (a)(5) is revised to specify that as one of the criteria in determining the extent to which violations are caused by a repeated mechanical systemic unintentional error, the total number of violations is considered to be a single violation, provided the third-party servicer has not previously been cited for this type of error and had failed to make the appropriate corrections to the system where the violation originated. In determining the amount of a fine, the Secretary also takes into consideration, as applicable, the financial loss to the Title IV, HEA programs that was attributable to the repeated mechanical systemic unintentional error.

Section 668.94 Termination

Comments: One commenter recommended that the regulations be amended to terminate the eligibility to perform some but not all of the services provided by the third-party servicer, claiming that some functions provided by the servicer may continue to meet the applicable requirements of the program. This change would recognize that a third-party servicer may provide multiple and unrelated functions under the Title IV, HEA programs. Many commenters expressed concern about the provision in § 668.94(c) requiring the servicer to return to each institution that contracts with the servicer all records pertaining to the servicer's administration of that program on behalf of that institution. One commenter suggested that since the institution may contract with another servicing entity, the records should be passed to the new servicer as specified by the institution. Many commenters pointed out that the records maintained by the third-party servicer appear on microfiche, imaging disc, microfilm, or in paper form and the servicer will be able to provide copies of such records but not the original records. One commenter suggested an expansion to require the servicer to return servicer notes, related documents, records or copies of such notes, related documents and records that pertain to the servicer's administration of the program on behalf of the institution. The commenter further suggested that the servicer certify copies as exact copies whenever required by law. The commenter also suggested that a sentence be added to protect the proprietary rights of the servicer to data base media, servicing procedures, computer programs, software packages, servicer forms, and other proprietary information, procedures and materials. Another commenter noted that copies of records for a single institution's loans may be commingled with records pertaining to other institutions and suggested that servicers should be permitted to provide records upon request rather than all at once.

Discussion: The Secretary agrees with the commenters that it may be appropriate to terminate the eligibility of a third-party servicer to perform some but not all of the activities under certain circumstances. In other situations, however, a violation may be so egregious that complete termination from being able to administer any aspect of the institution's participation is appropriate. The Secretary believes that the regulations provide the needed flexibility to determine the correct action to be taken.

Records relating to a third-party servicer's administration of any aspect of an institution's participation in the Title IV, HEA programs are the institution's property. A third-party servicer may make copies of the original records that it provides to an institution if the contract between the servicer and institution is terminated. See the discussion in § 668.25 on records.

The Secretary does not agree that the regulations need to be expanded to cover servicer notes, related documents, records, or copies of such notes; that is a matter between the institution and the servicer. The Secretary does not believe that it is necessary to add regulatory language to protect the proprietary rights of the servicer since adequate protection already exists through copyright laws to serve this purpose.

Changes: None.

Section 668.95 Reimbursements, Refunds, and Offsets

Comments: Several commenters recommended that the reference to third-party servicer in § 668.95(c) be removed because the servicer generally makes no claims for benefits on its own behalf therefore funds would not be available to be offset. Another commenter noted that if the Secretary is transmitting funds directly to a third-party servicer on behalf of institutions, the funds are for multiple institutions and to offset an unaffected institution's funds would not be reasonable or fair. One commenter requested that the provision in paragraph (b)(1)(ii) of this section that would have the servicer or institution repay any discounts, premiums, or excess interest paid under 34 CFR part 682 be eliminated stating that the payment of premiums and discounts are contract issues between two lenders in the FFEL programs and should not be assessed to other parties or repaid to the Secretary.

Discussion: The Secretary disagrees with those commenters who recommended removing reference to a third-party servicer from the provision governing the ability of the Secretary to offset any benefits or claims due to an institution or third-party servicer against any payment that an institution or third-party servicer may owe to the Secretary. A situation may arise where a third-party servicer makes a claim against the Department of Education for funds owed to the servicer and the Secretary wants to offset that claim because the servicer has not repaid a liability owed the Department of Education for a violation of the Title IV, HEA program requirement.

The Secretary also does not accept the comment that paragraph (b)(1)(ii) of this section should be removed. This provision is particularly relevant to an institution's participation in the FFEL programs.

Changes: None.

Subpart H—Appeal procedures for Audit Determinations and Program Review Determinations

Section 668.114 Notification of Hearing

Comments: Several commenters suggested that with respect to a third-party servicer's request for review, the hearing official only notify the institutions to whom the findings were originally disclosed since a third-party servicer may have added new clients during the period between the publication of the findings and the announcement of the hearing and the new clients would not be aware of the findings and could be confused by the notice of the hearing. Another commenter felt only institutions that contract with the servicer of the affected functions should be notified.

Discussion: The Secretary agrees that subsequent notices from the hearing official should be sent only to the actual parties to the proceeding. In the cases of institutions receiving similar services to those at issue in the proceeding, they need not be notified. As discussed above, the need for notice to other affected institutions is satisfied with notice of the final determination. Therefore, there is no need to impose the burden on the hearing official of providing notice to every institution with which a third-party servicer contracts.

Changes: Section 668.114(b) is revised to require notice only to the actual parties to the proceeding.

Section 668.116 Hearing

Comments: Several commenters recommended that an institution or third-party servicer also have the burden of proving that the findings are not substantial in nature. The commenters felt that some findings or alleged violations may be irrefutable, but their effect may be strictly limited, posing immaterial impact on the integrity of the servicer's or lender's portfolio. One commenter felt that a third-party servicer should only have the burden of proving that the "expenditures questioned or disallowed were proper" to the extent that the servicer contracts with the institution for cash management of Title IV, HEA program funds and that the Secretary should not question servicing fee income since it is not considered Title, IV HEA program funds. A few commenters suggested deleting references to the time frames within which an institution must have provided documentation previously stating that any legitimate documentation regarding the subject at issue should be admissible and the time frames within which it was previously submitted are irrelevant to their authenticity or material relationship to the case. Several commenters felt that the transcribed records of the proceeding should only be made available to the hearing participants and not to any institution that contracts with the servicer.

Discussion: With respect to the suggestion that an institution or third-party servicer need only prove that findings are "not substantial," the Secretary disagrees that the standard for accountability for Federal funds should be relaxed. An institution, or its third-party servicer, is a fiduciary and duty bound to use the highest standard of care and diligence at all times in the administration of the Title IV HEA programs. The suggested language would weaken this standard. If, as suggested by the commenters, a violation truly has an immaterial impact, then there will no significant liabilities assessed.

The commenter who felt that a third-party servicer should not have to justify expenditure of its fee income is correct. Section 668.116(d) only requires proof that Title IV HEA program funds were properly expended.

With respect to the comments on altering the time periods for submission of documentation by institutions, the Secretary notes that the purpose of this rulemaking it to make existing regulations applicable to third-party servicers and not to extensively modify the hearing procedures. The Secretary believes that the present procedures are consistent with an institution's record-keeping and fiduciary obligations; institution's complying with these obligations should have, and have had, no difficulty in meeting established deadlines. Further, requiring submission of documentation with a request for review allows cases to be resolved without hearing.

With respect to the comment that hearing transcripts need only be provided to the hearing participants, the Secretary agrees. Further since the records of these proceedings are generally available under the Freedom of Information Act, the Secretary agrees that reference to availability under that act is unnecessary. Those who are not parties to the proceedings can request the transcript pursuant to that act, subject to any applicable exceptions to release of the requested information.

Changes: Section 668.116(g)(2) is revise to require that the hearing transcript be sent only to the parties to the proceeding and eliminate the

reference to the Freedom of Information Act.

Part 682—Federal Family Education Loan Programs

Subpart D—Guaranty Agency Programs

Section 682.401 Basic Program Agreement

Comments: Several commenters suggested that the provision in this section relating to contract submissions be modified so that a third-party servicer would not be required to submit a copy of its contract to the Secretary unless so requested by the Secretary.

Discussion: The Secretary understands the commenters concerns that the copy of a third-party servicer's contract with a guaranty agency contains proprietary information that the servicer does not wish to be made public. Many of the commenters were concerned that a copy of a third-party servicer's contract would be released under the Freedom of Information Act (FOIA). The Secretary wishes to assure third-party servicers that trade secrets and confidential commercial or financial information is not releasable under FOIA. Parties concerned over possible release should, however, take appropriate precautions by marking submitted contracts as confidential. This provision is intended only to facilitate oversight and make the Secretary aware of all the services the third-party servicer has contracted to provide. Although many commenters believed that a third-party servicer could accomplish this by summarizing the services it has contracted to provide. In order to verify this information, the Secretary would need a copy of the actual contract. Therefore, the Secretary has decided to retain this requirement in the final rule.

Changes: None.

Section 682.413 Remedial Actions

Comments: Several commenters objected to a third-party servicer being held jointly and severally liable for any interest benefits and special allowance its client received on its FFELP loan portfolio when the servicer may not have been responsible for billing the Department for such monies. Some commenters believed that clarification to this provision is necessary to ensure that a third-party servicer is not held jointly or severally liable for any violations which it did not commit.

Discussion: The Secretary agrees with the commenters that a third-party servicer should not be held responsible for any program violations it did not commit. The regulations do not hold a third-party servicer jointly or severally liable for any interest benefits or special allowance received by a lender for which the lender was not eligible if that servicer complied with program regulations. However, a third-party servicer that is not responsible for billing the Department for interest benefits and special allowance may be responsible for the lender receiving interest benefits and special allowance for which the lender is not eligible because the servicer has violated other program requirements. The Secretary believes that a third-party servicer should be responsible for its actions and that holding a third-party servicer potentially liable for Federal monies expended because it has committed program violations helps accomplish this. The Secretary also believes that holding lenders and servicers jointly and severally liable is the best way to protect the Federal fiscal interest. See prior discussion on this issue under § 668.25 and in the February 17, 1994 NPRM.

The Secretary is sensitive that this provision makes a significant change in how responsibility for liabilities may be covered in contracts that servicers enter with lenders. Therefore, the Secretary has established an order in which he will attempt to collect such liabilities. The Secretary will first attempt to collect such liabilities from the lender and, if necessary, offset the lender's first future claim to the Secretary for interest benefits and special allowance for the amount of the liability. The Secretary believes that this is the most effective and efficient means to collect a liability and that he will be successful in collecting from the lender in most cases. However, the situation may arise when the Secretary is not able to collect these monies from a lender because the lender chooses not to submit further claims, discontinues its participation in the FFEL programs, or becomes insolvent and is taken over by banking regulators. Because such circumstances may arise, the Secretary retains the option of holding a third-party servicer jointly and severally liable with a lender for such liabilities. However, the Secretary intends to exercise his authority to collect a liability from a third-party servicer under this provision only when he is unable to collect such monies from the lender.

Changes: The Secretary has revised this provision so that the Secretary will not attempt to collect interest benefits or special allowance from a third-party servicer unless the Secretary is unable to collect from the lender with which the servicer has contracted.

Comments: Several commenters asked the Secretary to clarify this section to specify when the 30-day period begins that determines when a lender must repay or make satisfactory arrangements to repay a liability resulting from a third-party servicer's action before the Secretary will attempt to collect from the servicer. Several commenters also suggested that the Secretary should attempt to collect such monies by offsetting a lender's claim for interest benefits and special allowance.

Discussion: The Secretary agrees with the commenters that clarification is needed. The Secretary also agrees with the commenters that offsetting a lender's bill for interest benefits and special allowance for the amount of the liability may prove to be an effective means to collect the liability from the lender. The Secretary will exercise this option to collect such liabilities from a lender whenever he believes this method is in the best interests of the FFEL programs and the Federal fiscal interest.

Changes: The Secretary has amended this section to clarify that the lender must repay or make satisfactory arrangements to repay a liability within 30 days from the date the Secretary originally requests such repayment from the lender before the Secretary will attempt to collect from the third-party servicer.

Comments: Many commenters suggested that the liability of a third-party servicer acting as an agent for a guaranty agency be removed because the commenters believed that the servicer does not play a role under this provision that would subject it a liability.

Discussion: The Secretary does not agree with the commenters. A third-party servicer that is administering any aspect of a guaranty agency's FFEL programs may be responsible for the guaranty agency paying a claim that is not eligible for reinsurance. This situation may occur when the servicer is negligent in reviewing the history of the loans consolidated in a Federal Consolidation loan under 34 CFR 682.206(f) when a default claim is submitted that results in the agency subsequently receiving reinsurance on such a claim. This would result in a liability being created by the servicer's actions.

Changes: None.

Section 682.416 Requirements for Third-Party Servicers and Lenders Contracting With Third-Party Servicers

Standards for administrative capability.

Comments: Many commenters suggested that the Secretary qualify the term business systems so that it was

clear that such systems included combined automatic and manual systems. The commenters believed that this term, without qualification, implied only computer-supported systems.

Discussion: The Secretary agrees with the commenters that it is appropriate to qualify the term "business systems."

Changes: The Secretary has amended this provision to clarify that business systems include combined automated and manual systems.

Standards of financial responsibility. Comments: Many commenters believed that the financial standards the Secretary was proposing for an institution should not be used for third-party servicers because a third-party servicer in the FFEL programs has different financial obligations and responsibilities than an institution. Many commenters believed that any requirements related exclusively to functions that are not required by FFEL programs servicers should be deleted, such as deferred tuition accounts.

Discussion: The Secretary agrees with the commenters in that a third-party servicer should not be held responsible for meeting financial standards that are unrelated to the functions which it is not responsible to perform. The Secretary does not intend to require a third-party servicer that is administering aspects of the FFEL programs on behalf of a lender or guaranty agency to be required to meet financial standards with respect to items that are unrelated its contractual obligations with the lender or guaranty agency. The Secretary does not agree with the commenters that a third-party servicer should not otherwise meet financial standards that are similar to those an institution is required to meet. The Secretary believes that it was the intent of Congress to ensure that the FFEL programs are protected from any risk that may involve the servicer's financial status, persons responsible for administering or controlling the servicer, or the servicer's performance. Therefore, the Secretary has decided to require a third-party servicer to meet the standards for financial responsibility similar to those required of institutions of higher education.

Changes: The Secretary has clarified the regulations so that only the provisions of 34 CFR 668.15(b) (1) through (4) and (6) through (9) will apply to a third-party servicer under this part.

Past performance of third-party servicer or persons affiliated with servicer. Comments: Many commenters believed that these provisions are too inclusive and should only include corporate officers of only those third-party servicers handling Federal funds. Other commenters believed that the Secretary should qualify this restriction with respect to entities with which a third-party servicer contracts. The commenters suggested that only persons, entities, or officers or employees of an entity with which a third-party servicer contracts that act in a capacity that involves the administration of Title IV, HEA program funds should cause the servicer to not be considered financially responsible.

Discussion: The Secretary believes that a third-party servicer that has persons affiliated with it that have been convicted of or pled *nolo contendere* to the crimes described in these sections presents an unreasonable risk to the integrity of the FFEL programs and places Federal monies at risk. However, the Secretary believes that such risk is evident only when a person or entity acts in a capacity that involves the administration of Title IV, HEA program funds.

Changes: The Secretary has amended this provision to clarify that a third-party servicer that contracts with an outside entity will not be considered financially responsible if any person, entity, or officer or employee of such entity acts in a capacity that involves the administration of Title IV, HEA program funds.

Subpart G—Limitation, Suspension, or Termination of Lender Eligibility Under the FFEL Program and the PLUS Program

Section 682.701 Definitions and Terms Used in This Subpart

Comments: Many commenters suggested that a suspension of a third-party servicer should only apply to that servicer's ability to enter into new contracts with Title IV, HEA program participants.

Discussion: The Secretary does not agree with the commenters. The Secretary believes that when the servicer's actions are serious enough to warrant suspending that servicer, it presents an unreasonable risk to Federal monies to allow that servicer to continue to perform FFEL programs functions for any Title IV, HEA program participant for the duration of the suspension.

Changes: None.

Section 682.704 Emergency Action

Comments: Many commenters suggested that an emergency action should become effective after a period of time has elapsed after the third-party servicer receives notification from the Department that it intends to take such action.

Discussion: The Secretary does not agree with the commenters. The Secretary believes that an emergency action should be taken when continued participation of an entity in the FFEL programs seriously jeopardizes the integrity of the FFEL programs and puts Federal funds at risk. The Secretary believes that such action should be taken immediately when the behavior of the entity justifies taking such action.

Changes: None.

PART 690—FEDERAL PELL GRANT PROGRAM

Section 690.83 Submission of Reports

Comments: Four commenters believed that § 690.83(e) of the proposed regulations does not comply with the statute because, in implementing section 487(c)(7) of the HEA, it places undue restrictions on an institution seeking additional funds which the institution would have been eligible to receive if it had met Federal Pell Grant Program reporting deadlines. One commenter stated that the Secretary had unduly limited the scope of section 487(c)(7) of the HEA by making the provision of this section applicable only to funds received under the Federal Pell Grant Program.

Discussion: The Secretary believes that the proposed rule in § 690.83(e) is in accordance with the program statute. When an institution's auditor identifies underreported Federal Pell Grant expenditures beyond the normal reporting and reconciliation deadlines for the Federal Pell Grant Program, § 690.83(e) provides a mechanism for an institution to receive credit for having properly expended those funds. Congress intended that an institution have such a mechanism available. However, the Secretary does not believe that Congress intended for such accounting recaptures of properly expended funds to continue in perpetuity. In order for the Department to complete its own accounting for the Federal Pell Grant Program appropriations, institutions are expected to timely reconcile the expenditures throughout the award year, with a final accounting made on or before September 30. The procedures in § 690.83(e) will provide a further opportunity for an institution to seek credit for having properly expended these funds during a prior award year, but the Secretary believes it is appropriate to limit the circumstances and timing for receiving credit for such prior expenditures. Furthermore, § 690.83(e) is limited to the Federal Pell Grant Program because the auditing procedure permitted under § 690.83(e)

results in an adjustment to the institution's prior year funding authorization for the Federal Pell Grant Program. There is no corresponding capability to adjust prior year funding for the other Title IV, HEA programs.

Changes: None.

Paperwork Reduction Act of 1980

Comments: Several commenters disagreed with the Department's computation of the annual public reporting and recordkeeping burden contained in the regulations. Another commenter questioned whether the Department had complied with the requirements of the Paperwork Reduction Act and its implementing regulations in 5 CFR part 1320. This commenter also believed that students should be considered in computing the burden.

Discussion: The Department's computation of the annual public reporting and recordkeeping burden in the regulations is an estimate based on the best information available. The Department identified sections of the regulations containing information collection requirements in the preamble to the proposed regulations and complied with all applicable requirements of the Paperwork Reduction Act and its implementing regulations in 5 CFR part 1320. The Department appreciates the additional information provided by commenters regarding the estimated burden. To the extent that commenters identified specific regulatory provisions as imposing burdens or provided estimates of the amount of burden imposed, this information has been considered in developing the final regulations. The Department did not consider students in computing the estimated burden of the information collection requirements in the regulations because the regulations govern postsecondary institutions participating in the Title IV student financial assistance programs. If any burden is imposed on students, it is indirect and not subject to computation under the Paperwork Reduction Act. As a result of the comments and revisions to the regulations, the Department is modifying the burden estimates. The total annual reporting and recordkeeping burden that would result from the collection of the information is 123,485 burden hours for the package.

Changes: None.

Regulatory Flexibility Act Certification

Comments: In the NPRMs, the Secretary certified that the proposed regulations would not have a significant economic impact on a substantial number of small entities. Several commenters suggested that this statement was erroneous and that these rules will definitely have a significant impact on institutions, especially the smaller ones that are not computerized.

Discussion: The Secretary recognizes that the regulations will have an impact on small institutions. However, based on Department estimates of the impact, the Secretary does not believe that the impact will be disproportionately or economically significant. The Secretary therefore reaffirms his certification that the regulations would not have a significant economic impact or a substantial significant economic impact on a substantial number of small entities. To the extent that commenters are able to provide additional information on the economic impact of the regulations, the Secretary invites the commenters to submit this information so that it may be considered in reviewing the regulations to reduce regulatory burden.

Changes: None.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the Title IV, HEA programs effectively and efficiently. Burdens specifically associated with information collection requirements were identified and explained in the NPRMs that were published on February 17 and February 28, 1994, respectively.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal government in the exercise of their governmental functions.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these regulations. The Secretary will consider any comments received within the designated comment period in determining whether to make any changes in these rules. After reviewing any comments received during the comment period, the Secretary will publish changes to the regulations or will publish a notice in the **Federal Register** indicating that no further changes will be made.

Paperwork Reduction Act of 1980

Sections 668.3, 668.8, 668.12, 668.13, 668.14, 668.15, 668.16, 668.17, 668.22, 668.23, 668.25, 668.26, 668.90, 668.96, 668.113, appendix A to 34 CFR part 668, 682.414, 682.416, 682.711, and 690.83 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review. (44 U.S.C. 3504(h))

These regulations affect the following types of entities that participate in the programs authorized under Title IV of the HEA: Individuals, States, large and small businesses, for-profit institutions or other for-profit organizations, non-profit institutions, and public institutions. The Department needs and uses the information to enable the Secretary to improve the monitoring and accountability of institutions and third-party servicers participating in the Title IV, HEA programs.

Annual public collecting, reporting, and recordkeeping burden for this collection of information is estimated to total 123,485 hours for 64,695 respondents, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. These numbers represent aggregate totals. For further information contact the Department of Education contact person.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok. Comments on this burden estimate should be submitted by May 31, 1994.

Assessment of Educational Impact

In the Notices of Proposes Rulemaking published on February 17 and February 28, 1994, the Secretary requested comment on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that

is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 668

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

34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Loan programs—education, Reporting and recordkeeping requirements, Student Aid, Vocational education.

34 CFR Part 690

Education of disadvantaged, Grant programs—education, Reporting and recordkeeping requirements, Student Aid.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.268 Federal Direct Student Loan Program; and 84.272 National Early Intervention Scholarship and Partnership Program. Catalog of Federal Domestic Assistance Number for the Presidential Access Scholarship Program has not been assigned)

Dated: April 20, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends Parts 668, 682, and 690 of Title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

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

2. Section 668.1 is amended by revising paragraphs (a), (b)(2) and (3); removing paragraph (b)(4); and revising paragraph (c) to read as follows:

§ 668.1 Scope.

(a) This part establishes general rules that apply to an institution that participates in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA program). To the extent that an institution contracts with a third-party servicer to administer any aspect of the institution's participation in any Title IV, HEA program, the applicable rules in this part also apply to that servicer. An institution's use of a third-party servicer does not alter the institution's responsibility for compliance with the rules in this part.

(b) * * *

(2) A proprietary institution of higher education as defined in 34 CFR 600.5; and

(3) A postsecondary vocational institution as defined in 34 CFR 600.6.

(c) The Title IV, HEA programs include—

(1) The Federal Pell Grant Program (20 U.S.C. 1070a *et seq.*; 34 CFR part 690);

(2) The National Early Intervention Scholarship and Partnership (NEISP) Program (20 U.S.C. 1070a–21 *et seq.*; 34 CFR part 693);

(3) The Presidential Access Scholarship (PAS) Program (20 U.S.C. 1070a–31 *et seq.*; 34 CFR part 691);

(4) The Federal Supplemental Educational Opportunity Grant (FSEOG) Program (20 U.S.C. 1070b *et seq.*; 34 CFR part 676);

(5) The State Student Incentive Grant (SSIG) Program (20 U.S.C. 1070c *et seq.*; 34 CFR part 692);

(6) The Federal Stafford Loan Program (20 U.S.C. 1071 *et seq.*; 34 CFR part 682);

(7) The Federal Supplemental Loans for Students (Federal SLS) Program (20 U.S.C. 1078–1; 34 CFR part 682);

(8) The Federal PLUS Program (20 U.S.C. 1078–2; 34 CFR part 682);

(9) The Federal Consolidation Loan Program (20 U.S.C. 1078–3; 34 CFR part 682);

(10) The Federal Work-Study (FWS) Program (42 U.S.C. 2751 *et seq.*; 34 CFR part 675);

(11) The Federal Direct Student Loan (FDSL) Program (20 U.S.C. 1087a *et seq.*; 34 CFR part 685); and

(12) The Federal Perkins Loan Program (20 U.S.C. 1087aa *et seq.*; 34 CFR part 674).

(Authority: 20 U.S.C. 1070 *et seq.*)

3. Section 668.2 is revised to read as follows:

§ 668.2 General definitions.

(a) The following definitions are contained in the regulations for Institutional Eligibility under the Higher Education Act of 1965, as Amended, 34 CFR part 600:

Accredited
Award year
Branch campus
Clock hour
Correspondence course
Educational program
Eligible institution
Federal Family Education Loan (FFEL) programs
Incarcerated student
Institution of higher education
Legally authorized
Nationally recognized accrediting agency
Nonprofit institution
One-year training program
Postsecondary vocational institution
Preaccredited
Proprietary institution of higher education
Recognized equivalent of a high school diploma
Recognized occupation
Regular student
Secretary
State
Telecommunications course

(b) The following definitions apply to all Title IV, HEA programs:

Academic year: (1) A period that begins on the first day of classes and ends on the last day of classes or examinations and that is a minimum of 30 weeks (except as provided in § 668.3) of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least—

(i) Twenty-four semester or trimester hours or 36 quarter hours in an educational program whose length is measured in credit hours; or

(ii) Nine hundred clock hours in an educational program whose length is measured in clock hours.

(2) For purposes of this definition—

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

(ii)(A) For an educational program using a semester, trimester, or quarter system or an educational program using clock hours, the Secretary considers a week of instructional time to be any week in which at least one day of regularly scheduled instruction, examinations, or preparation for examinations occurs; and

(B) For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instructional time to be any week in which at least 5 days of regularly scheduled instruction, examinations, or preparation for examinations occurs; and

(iii) Instructional time does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examinations.

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

Campus-based programs: (1) The Federal Perkins Loan Program (34 CFR part 674);

(2) The Federal Work-Study (FWS) Program (34 CFR part 675); and

(3) The Federal Supplemental Educational Opportunity Grant (FSEOG) Program (34 CFR part 676).

Defense loan: A loan made before July 1, 1972, under Title II of the National Defense Education Act of 1958.

(Authority: 20 U.S.C. 421–429)

Dependent student: Any student who does not qualify as an independent student (see *Independent student*).

Designated department official: An official of the Department of Education to whom the Secretary has delegated responsibilities indicated in this part.

Direct loan: A loan made under Title IV–E of the HEA after June 30, 1972, that does not satisfy the definition of "Federal Perkins loan."

(Authority: 20 U.S.C. 1087aa *et seq.*)

Enrolled: The status of a student who—

(1) Has completed the registration requirements (except for the payment of tuition and fees) at the institution that he or she is attending; or

(2) Has been admitted into an educational program offered predominantly by correspondence and has submitted one lesson, completed by him or her after acceptance for enrollment and without the help of a representative of the institution.

Federal Consolidation Loan program: The loan program authorized by Title IV–B, section 428C, of the HEA that encourages the making of loans to borrowers for the purpose of consolidating their repayment obligations, with respect to loans received by those borrowers while they were students, under the Federal Insured Student Loan (FISL) Program as defined in 34 CFR part 682, the Federal Stafford Loan, Federal PLUS (as in effect before October 17, 1986), Federal SLS, ALAS (as in effect before October 17, 1986), Federal Direct Student Loan, and Federal Perkins Loan programs, and under the Health Professions Student Loan (HPSL) Program authorized by subpart II of part C of Title VII of the Public Health Service Act, for parent Federal PLUS borrowers whose loans were made after October 17, 1986, and for Higher Education Assistance Loans (HEAL) authorized by subpart I of part A of Title VII of the Public Health Services Act.

(Authority: 20 U.S.C. 1078–3)

Federal Direct PLUS loan: A Federal PLUS loan made under the Federal Direct Student Loan Program.

(Authority: 20 U.S.C. 1078–2 and 1087a *et seq.*)

Federal Direct Stafford loan: A Federal Stafford loan made under the Federal Direct Student Loan Program.

(Authority: 20 U.S.C. 1071 *et seq.* and 1087a *et seq.*)

Federal Direct Student loan: A loan made under Title IV–D of the HEA after August 10, 1993.

(Authority: 20 U.S.C. 1087a *et seq.*)

Federal Direct Student Loan (FDSL) program: The student loan program authorized on July 23, 1992, by Title IV–D of the HEA.

(Authority: 20 U.S.C. 1087a *et seq.*)

Federal Pell Grant Program: The grant program authorized by Title IV–A–1 of the HEA.

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

Federal Perkins loan: A loan made under Title IV–E of the HEA to cover the cost of attendance for a period of enrollment beginning on or after July 1, 1987, to an individual who on July 1, 1987, had no outstanding balance of principal or interest owing on any loan previously made under Title IV–E of the HEA.

(Authority: 20 U.S.C. 1087aa *et seq.*)

Federal Perkins Loan program: The student loan program authorized by Title IV–E of the HEA after October 16, 1986.

(Authority: 20 U.S.C. 1087aa–1087ii)

Federal PLUS loan: A loan made under the Federal PLUS Program.

(Authority: 20 U.S.C. 1078–2)

Federal PLUS program: The loan program authorized by Title IV–B, section 428B, of the HEA, that encourages the making of loans to parents of dependent undergraduate students. Before October 17, 1986, the PLUS Program also provided for making loans to graduate, professional, and independent undergraduate students. Before July 1, 1993, the PLUS Program also provided for making loans to parents of dependent graduate students.

(Authority: 20 U.S.C. 1078–2)

Federal SLS loan: A loan made under the Federal SLS Program.

(Authority: 20 U.S.C. 1078–1)

Federal Stafford loan: A loan made under the Federal Stafford Loan Program.

(Authority: 20 U.S.C. 1071 *et seq.*)

Federal Stafford Loan program: The loan program authorized by Title IV–B (exclusive of sections 428A, 428B, and 428C) that encourages the making of subsidized Federal Stafford and unsubsidized Federal Stafford loans as defined in 34 CFR part 682 to undergraduate, graduate, and professional students.

(Authority: 20 U.S.C. 1071 *et seq.*)

Federal Supplemental Educational Opportunity Grant (FSEOG) program: The grant program authorized by Title IV–A–2 of the HEA.

(Authority: 20 U.S.C. 1070b *et seq.*)

Federal Supplemental Loans for Students (Federal SLS) program: The loan program (formerly called the ALAS Program) authorized by Title IV–B, section 428A, of the HEA that encourages the making of loans to graduate, professional, independent undergraduate, and certain dependent undergraduate students.

(Authority: 20 U.S.C. 1078–1)

Federal Work Study (FWS) program: The part-time employment program for students authorized by Title IV–C of the HEA.

(Authority: 42 U.S.C. 2751–2756b)

FFELP loan: A loan made under the FFEL programs.

(Authority: 20 U.S.C. 1071 *et seq.*)

Full-time student: An enrolled student who is carrying a full-time academic workload (other than by correspondence) as determined by the institution under a standard applicable to all students enrolled in a particular educational program. The student's workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. However, for an undergraduate student, an institution's minimum standard must equal or exceed one of the following minimum requirements:

(1) Twelve semester hours or 12 quarter hours per academic term in an educational program using a semester, trimester, or quarter system.

(2) Twenty-four semester hours or 36 quarter hours per academic year for an educational program using credit hours but not using a semester, trimester, or quarter system, or the prorated equivalent for a program of less than one academic year.

(3) Twenty-four clock hours per week for an educational program using clock hours.

(4) In an educational program using both credit and clock hours, any combination of credit and clock hours where the sum of the following fractions is equal to or greater than one:

(i) For a program using a semester, trimester, or quarter system—

Number of credit hours per term

12
+
Number of clock hours per week

24

(ii) For a program not using a semester, trimester, or quarter system—

Number of semester or trimester hours per academic year

24
+
Number of quarter hours per academic year

36
+
Number of clock hours per week

24

(5) A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.

(6) The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.

HEA: The Higher Education Act of 1965, as amended.

(Authority: 20 U.S.C. 1070 *et seq.*)

Income Contingent Loan (ICL) program: The student loan program authorized by Title IV–D of the HEA prior to July 23, 1992.

(Authority: 20 U.S.C. 1087a *et seq.*)

Independent student: A student who qualifies as an independent student under section 480(d) of the HEA.

(Authority: 20 U.S.C. 1087vv)

Initiating official: The designated department official authorized to begin an emergency action under 34 CFR 668.83.

National Defense Student Loan program: The student loan program authorized by Title II of the National Defense Education Act of 1958.

(Authority: 20 U.S.C. 421–429)

National Direct Student Loan (NDSL) program: The student loan program authorized by Title IV–E of the HEA between July 1, 1972, and October 16, 1986.

(Authority: 20 U.S.C. 1087aa–1087ii)

National Early Intervention Scholarship and Partnership (NEISP) program: The scholarship program authorized by Chapter 2 of subpart 1 of Title IV–A of the HEA.

(Authority: 20 U.S.C. 1070a–21 *et seq.*)

One-third of an academic year: A period that is at least one-third of an academic year as determined by an institution. At a minimum, one-third of an academic year must be a period that begins on the first day of classes and ends on the last day of classes or examinations and is a minimum of 10 weeks of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least 8 semester or trimester hours or 12 quarter hours in an educational program whose length is measured in credit hours or 300 clock hours in an educational program whose length is measured in clock hours. For an institution whose academic year has been reduced under § 668.3, one-third of an academic year is the pro-rated equivalent, as measured in weeks and credit or clock hours, of at least one-third of the institution's academic year.

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

Output document: The Student Aid Report (SAR), Electronic Student Aid Report (ESAR), or other document or automated data generated by the Department of Education's central processing system or Multiple Data Entry processing system as the result of the processing of data provided in a Free Application for Federal Student Aid (FAFSA).

Parent: A student's natural or adoptive mother or father. A parent also includes a student's legal guardian who has been appointed by a court and who is specifically required by the court to use his or her own resources to support the student.

Participating institution: An eligible institution that meets the standards for participation in Title IV, HEA programs in subpart B and has a current program participation agreement with the Secretary.

Payment period: (1) With respect to the Federal Pell Grant and PAS programs, a payment period as defined in 34 CFR 690.2 and 691.2;

(2) With respect to the campus-based programs, a payment period as defined in 34 CFR 674.2, 675.2, and 676.2.

Presidential Access Scholarship (PAS) program: The scholarship program authorized by Chapter 3 of subpart 1 of Title IV–A of the HEA.

(Authority: 20 U.S.C. 1070a–31 *et seq.*)

Show-cause official: The designated department official authorized to conduct a show-cause proceeding for an emergency action under 34 CFR 668.83.

State Student Incentive Grant (SSIG) program: The grant program authorized by Title IV–A–3 of the HEA.

(Authority: 20 U.S.C. 1070c *et seq.*)

Third-party servicer: An individual or a State or private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. The Secretary considers administration of participation in a Title IV, HEA program to—

(1) Include performing any function required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA, such as, but not restricted to—

(i) Processing student financial aid applications;

(ii) Performing need analysis;

(iii) Determining student eligibility and related activities;

(iv) Certifying loan applications;

(v) Processing output documents for payment to students;

(vi) Receiving, disbursing, or delivering Title IV, HEA program funds, excluding lock-box processing of loan payments and normal bank electronic fund transfers;

(vii) Conducting activities required by the provisions governing student consumer information services in subpart D of this part;

(viii) Preparing and certifying requests for advance or reimbursement funding;

(ix) Loan servicing and collection;

(x) Preparing and submitting notices and applications required under 34 CFR part 600 and subpart B of this part; and

(xi) Preparing a Fiscal Operations Report and Application to Participate—FISAP;

(2) Exclude the following functions—

(i) Publishing ability-to-benefit tests;

(ii) Performing functions as a Multiple Data Entry Processor (MDE);

(iii) Financial and compliance auditing;

(iv) Mailing of documents prepared by the institution; and

(v) Warehousing of records; and

(3) Notwithstanding the exclusions referred to in paragraph (2) of this definition, include any activity comprised of any function described in paragraph (1) of this definition.

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

Two-thirds of an academic year: A period that is at least two-thirds of an academic year as determined by an institution. At a minimum, two-thirds of an academic year must be a period that

begins on the first day of classes and ends on the last day of classes or examinations and is a minimum of 20 weeks of instructional time during which, for an undergraduate educational program, a full-time student is expected to complete at least 16 semester or trimester hours or 24 quarter hours in an educational program whose length is measured in credit hours or 600 clock hours in an educational program whose length is measured in clock hours. For an institution whose academic year has been reduced under § 668.3, two-thirds of an academic year is the pro-rated equivalent, as measured in weeks and credit or clock hours, of at least two-thirds of the institution's academic year.

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

U.S. citizen or national: (1) A citizen of the United States; or

(2) A person defined in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(22), who, though not a citizen of the United States, owes permanent allegiance to the United States.

(Authority: 8 U.S.C. 1101)

Valid institutional student information report (valid ISIR): A valid institutional student information report as defined in 34 CFR 690.2 for purposes of the Federal Pell Grant Program and in 34 CFR 691.2 for purposes of the PAS Program.

Valid student aid report (valid SAR): A valid student aid report (valid SAR) as defined in 34 CFR 690.2 for purposes of the Federal Pell Grant Program and in 34 CFR 691.2 for purposes of the PAS Program.

(Authority: 20 U.S.C. 1070 *et seq.*, unless otherwise noted)

4. A new § 668.3 is added to part 668 to read as follows:

§ 668.3 Reductions in the length of an academic year.

(a) *General.* (1) An institution that provides at least a 2-year or 4-year educational program for which the institution awards an associate or baccalaureate degree, respectively, may request the Secretary to reduce the minimum period of instructional time of the academic year for any of the institution's educational programs to not less than 26 weeks.

(2) The institution must submit its request to the Secretary in writing and must include in the request—

(i) Identification of each educational program for which the institution requests a reduction and the requested length of its academic year, in weeks of instructional time, for that educational program. The requested length for its academic year may not be less than 26 weeks of instructional time;

(ii) Information demonstrating that the institution satisfies the requirements of this section; and

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

(b) *Transition period for institutions participating in at least one Title IV, HEA program on the effective date of this section.* The Secretary grants, for a period not to exceed 2 years from the effective date of this section, the request of an institution participating in at least one Title IV, HEA program on the effective date of this section for a reduction in the minimum period of instructional time of the academic year if the institution—

(1) Satisfies the requirements of paragraph (a) of this section;

(2) Has an academic year of less than 30 weeks of instructional time on the effective date of these regulations;

(3) Demonstrates that the institution awards, disburses, and delivers, and has since July 23, 1992, awarded, disbursed, and delivered, Title IV, HEA program funds in accordance with the definition of academic year in section 481(d) of the HEA; and

(4) Demonstrates that the institution is in the process of changing to a minimum of a 30-week academic year.

(c) *Institutions in general.* (1) The Secretary may grant the request of any institution that satisfies the requirements of paragraph (a) of this section. In making this determination, the Secretary considers circumstances including, but not limited to:

(i) A demonstration to the satisfaction of the Secretary by the institution of unique circumstances that justify granting the request;

(ii) In the case of a participating institution, demonstration that the institution awards, disburses, and delivers, and has since July 23, 1992, awarded, disbursed, and delivered, Title IV, HEA program funds in accordance with the definition of academic year in section 481(d) of the HEA;

(iii) Approval of the institution's nationally recognized accrediting agency or State body that legally authorizes the institution to provide postsecondary education, including specific review and approval of the length of the academic year for each educational program offered at the institution; and

(iv) The number of hours of attendance and other coursework that a full-time student is required to complete in the academic year for each of the institution's educational programs.

(2) An institution that is granted a reduction in the minimum of 30 weeks of instructional time for an academic year in accordance with paragraph (c)(1) of this section and that wishes to continue to use a reduced number of weeks of instructional time must reapply to the Secretary for a reduction whenever the institution is required to apply to continue to participate in a Title IV, HEA program.

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

5. Section 668.8 is revised to read as follows:

§ 668.8 Eligible program.

(a) *General.* An eligible program is an educational program that—

(1) Is provided by a participating institution; and

(2) Satisfies the other relevant requirements contained in this section.

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

(1) The Secretary considers the "equivalent of an associate degree" to be—

(i) An associate degree; or

(ii) The successful completion of at least a two-year program that is acceptable for full credit toward a bachelor's degree and qualifies a student for admission into the third year of a bachelor's degree program;

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

(3)(i) For an educational program using a semester, trimester, or quarter system or an educational program using clock hours, the Secretary considers a week of instruction to be any week in which at least one day of regularly scheduled instruction, examinations, or preparation for examinations occurs; or

(ii) For an educational program using credit hours but not using a semester, trimester, or quarter system, the Secretary considers a week of instruction to be any week in which at least 5 days of regularly scheduled instruction, examinations, or preparation for examinations occurs; and

(4) Instruction does not include periods of orientation, counseling, vacation, or other activity not related to class preparation or examinations.

(c) *Institution of higher education.* An eligible program provided by an institution of higher education must—

(1) Lead to an associate, bachelor's, professional, or graduate degree;

(2) Be at least a two-academic-year program that is acceptable for full credit toward a bachelor's degree; or

(3) Be at least a one-academic-year training program that leads to a certificate, degree, or other recognized

educational credential and that prepares a student for gainful employment in a recognized occupation.

(d) *Proprietary institution of higher education and postsecondary vocational institution.* An eligible program provided by a proprietary institution of higher education or postsecondary vocational institution—

(1)(i) Must require a minimum of 15 weeks of instruction, beginning on the first day of classes and ending on the last day of classes or examinations;

(ii) Must be at least 600 clock hours, 16 semester or trimester hours, or 24 quarter hours;

(iii) Must provide undergraduate training that prepares a student for gainful employment in a recognized occupation; and

(iv) May admit as regular students persons who have not completed the equivalent of an associate degree;

(2) Must—

(i) Require a minimum of 10 weeks of instruction, beginning on the first day of classes and ending on the last day of classes or examinations;

(ii) Be at least 300 clock hours, 8 semester or trimester hours, or 12 quarter hours;

(iii) Provide training that prepares a student for gainful employment in a recognized occupation; and

(iv)(A) Be a graduate or professional program; or

(B) Admit as regular students only persons who have completed the equivalent of an associate degree; or

(3) For purposes of the Federal Stafford Loan, Federal PLUS, and Federal SLS programs only, must—

(i) Require a minimum of 10 weeks of instruction, beginning on the first day of classes and ending on the last day of classes or examinations;

(ii) Be at least 300 clock hours but less than 600 clock hours;

(iii) Provide undergraduate training that prepares a student for gainful employment in a recognized occupation;

(iv) Admit as regular students some persons who have not completed the equivalent of an associate degree; and

(v) Satisfy the requirements of paragraph (e) of this section.

(e) *Qualitative factors.* (1) An educational program that satisfies the requirements of paragraphs (d)(3)(i) through (iv) of this section qualifies as an eligible program only if—

(i) The program has a substantiated completion rate of at least 70 percent, as calculated under paragraph (f) of this section;

(ii) The program has a substantiated placement rate of at least 70 percent, as calculated under paragraph (g) of this section;

(iii) The number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares students, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(iv) The program has been in existence for at least one year. The Secretary considers an educational program to have been in existence for at least one year only if an institution has been legally authorized to provide, and has continuously provided, the program during the 12 months (except for normal vacation periods and, at the discretion of the Secretary, periods when the institution closes due to a natural disaster that directly affects the institution or the institution's students) preceding the date on which the institution applied for eligibility for that program.

(2) An institution shall substantiate the calculation of its completion and placement rates by having the certified public accountant who prepares its audit report required under § 668.23 report on the institution's calculation based on performing an attestation engagement in accordance with the Statements on Standards for Attestation Engagements of the American Institute of Certified Public Accountants (AICPA).

(f) *Calculation of completion rate.* An institution shall calculate its completion rate for an educational program for any award year as follows:

(1) Determine the number of regular students who were enrolled in the program during the award year.

(2) Subtract from the number of students determined under paragraph (f)(1) of this section, the number of regular students who, during that award year, withdrew from, dropped out of, or were expelled from the program and were entitled to and actually received, in a timely manner in accordance with § 668.22(i)(2), a refund of 100 percent of their tuition and fees (less any permitted administrative fee) under the institution's refund policy.

(3) Subtract from the total obtained under paragraph (f)(2) of this section the number of students who were enrolled in the program at the end of that award year.

(4) Determine the number of regular students who, during that award year, received within 150 percent of the published length of the educational program the degree, certificate, or other recognized educational credential awarded for successfully completing the program.

(5) Divide the number determined under paragraph (f)(4) of this section by the total obtained under paragraph (f)(3) of this section.

(g) *Calculation of placement rate.* (1) An institution shall calculate its placement rate for an educational program for any award year as follows:

(i) Determine the number of students who, during the award year, received the degree, certificate, or other recognized educational credential awarded for successfully completing the program.

(ii) Of the total obtained under paragraph (g)(1)(i) of this section, determine the number of students who, within 180 days of the day they received their degree, certificate, or other recognized educational credential, obtained gainful employment in the recognized occupation for which they were trained or in a related comparable recognized occupation and, on the date of this calculation, are employed, or have been employed, for at least 13 weeks following receipt of the credential from the institution.

(iii) Divide the number of students determined under paragraph (g)(1)(ii) of this section by the total obtained under paragraph (g)(1)(i) of this section.

(2) An institution shall document that each student described in paragraph (g)(1)(ii) of this section obtained gainful employment in the recognized occupation for which he or she was trained or in a related comparable recognized occupation. Examples of satisfactory documentation of a student's gainful employment include, but are not limited to—

(i) A written statement from the student's employer;

(ii) Signed copies of State or Federal income tax forms; and

(iii) Written evidence of payments of Social Security taxes.

(h) *Eligibility for Federal Pell Grant and FSEOG programs.* In addition to satisfying other relevant provisions of this section, an educational program qualifies as an eligible program for purposes of the Federal Pell Grant or FSEOG Program only if the educational program is an undergraduate program.

(i) *Flight training.* In addition to satisfying other relevant provisions of this section, for a program of flight training to be an eligible program, it must have a current valid certification from the Federal Aviation Administration.

(j) *English as a second language (ESL).* (1) In addition to satisfying the relevant provisions of this section, an educational program that consists solely

of instruction in ESL qualifies as an eligible program if—

(i) The institution admits to the program only students who the institution determines need the ESL instruction to use already existing knowledge, training, or skills; and

(ii) The program leads to a degree, certificate, or other recognized educational credential.

(2) An institution shall test each student at the end of the educational program to substantiate that the student has attained adequate proficiency in written and spoken English to use already existing knowledge, training, or skills. The institution shall identify the test or tests given to the students and the basis for the judgment that the student has attained the adequate proficiency.

(3) An institution shall document its determination that ESL instruction is necessary to enable each student enrolled in its ESL program to use already existing knowledge, training, or skills with regard to the students that it admits to its ESL program under paragraph (j)(1)(i) of this section.

(4) An ESL program that qualifies as an eligible program under this paragraph is eligible for purposes of the Federal Pell Grant Program only.

(k) *Undergraduate educational program in credit hours.* If an institution offers an undergraduate educational program in credit hours, the institution must use the formula contained in paragraph (l) of this section to determine whether that program satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for purposes of the Title IV, HEA programs, unless—

(1) The program is at least two academic years in length and provides an associate degree, a bachelor's degree, or a professional degree; or

(2) Each course within the program is acceptable for full credit toward that institution's associate degree, bachelor's degree, or professional degree, provided that the institution's degree requires at least two academic years of study.

(l) *Formula.* For purposes of determining whether a program described in paragraph (k) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program with regard to the Title IV, HEA programs—

(1) A semester hour must include at least 30 clock hours of instruction;

(2) A trimester hour must include at least 30 clock hours of instruction; and

(3) A quarter hour must include at least 20 hours of instruction.

(Authority: 20 U.S.C. 1070a, 1070b, 1070c–1070c–2, 1085, 1087aa–1087hh, 1088, 1091, and 1141; 42 U.S.C. 2753)

6. Section 668.9 is revised to read as follows:

§ 668.9 Relationship between clock hours and semester, trimester, or quarter hours in calculating Title IV, HEA program assistance.

In determining the amount of Title IV, HEA program assistance that a student who is enrolled in a program described in § 668.8(k) is eligible to receive, the institution shall apply the formula contained in § 668.8(l) to determine the number of semester, trimester, or quarter hours in that program, if the institution measures academic progress in that program in semester, trimester, or quarter hours.

(Authority: 20 U.S.C. 1082, 1085, 1088, 1091, 1141)

7. Section 668.11 is revised to read as follows:

§ 668.11 Scope.

(a) This subpart establishes standards that an institution must meet in order to participate in any Title IV, HEA program.

(b) Noncompliance with these standards by an institution already participating in any Title IV, HEA program or with applicable standards in this subpart by a third-party servicer that contracts with the institution may subject the institution or servicer, or both, to proceedings under subpart G of this part. These proceedings may lead to any of the following actions:

(1) An emergency action.

(2) The imposition of a fine.

(3) The limitation, suspension, or termination of the participation of the institution in a Title IV, HEA program.

(4) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

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

§§ 668.12–668.16 [Redesignated as §§ 668.14–668.18]

8. Sections 668.12 through 668.16 are redesignated as §§ 668.14 through 668.18, respectively.

9. A new § 668.12 is added to read as follows:

§ 668.12 Application procedures.

(a) *Applications for initial participation.* An institution that wishes to participate in a Title IV, HEA program must first apply to the Secretary for a certification that the institution meets the standards in this subpart.

(b) *Applications for continued participation.* A participating institution must apply to the Secretary for a certification that the institution continues to meet the standards in this subpart upon the request of the Secretary or if the institution wishes to—

(1) Continue to participate in a Title IV, HEA program beyond the scheduled expiration of the institution's current period of participation in the program;

(2) Include in the institution's participation in a Title IV, HEA program—

(i) A branch campus that is not currently included in the institution's participation in the program; or

(ii) Another location that is not currently included in the institution's participation in the program, if—

(A) That location offers 100 percent of an educational program; or

(B) The Secretary requires the institution to apply for certification under paragraph (c) of this section;

(3) Reestablish participation in a Title IV, HEA program following a change in ownership that results in a change in control according to the provisions of 34 CFR part 600.

(c) *Notification and application requirements for additional locations.* (1) A participating institution must notify the Secretary, in writing, if the institution wishes to—

(i) Include in its participation in a Title IV, HEA program a location that is not currently included in the institution's participation in the program and that offers at least 50 percent, but less than 100 percent, of an educational program; or

(ii) Continue to include in its participation in a Title IV, HEA program a location that—

(A) Offers at least 50 percent, but less than 100 percent, of an educational program; and

(B) Has changed its name, location, or address.

(2) The Secretary considers the submission of the required notification under 34 CFR 600.30 with respect to that location to satisfy the notification requirement of this paragraph.

(3) The Secretary may require the institution to apply for a certification that the institution continues to meet the requirements of this subpart.

(d) *Notification and application requirements for changes in name, location, or address.* (1) A participating institution must notify the Secretary, in writing, if the institution wishes to continue to participate in a Title IV, HEA program following a change in

name, location, or address of the institution or continue to include in the institution's participation—

(i) A branch campus that has changed its name, location, or address; or

(ii) Another location that has changed its name, location, or address if that location offers 100 percent of an educational program.

(2) The Secretary considers the submission of the required notification under 34 CFR 600.30 with respect to that location to satisfy the notification requirement of this paragraph.

(e) *Required forms and information.* An institution that applies for participation under paragraph (a) or (b) of this section must—

(1) Apply on the form prescribed by the Secretary; and

(2) Provide all the information and documentation requested by the Secretary to certify that the institution meets the standards of this subpart.

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

10. A new § 668.13 is added to read as follows:

§ 668.13 Certification procedures.

(a) *Requirements for certification.* The Secretary certifies that an institution meets the standards of this subpart only if—

(1) The institution is an eligible institution;

(2) The institution meets the standards of this subpart;

(3) Each branch campus to be included in the institution's participation meets the applicable standards of this subpart; and

(4)(i) Except as provided in paragraph (a)(4)(ii) of this section, in the case of an institution seeking to participate for the first time in the Federal Pell Grant Program, the campus-based programs, the FDSL Program, or the Federal Stafford Loan, Federal SLS, or Federal PLUS Program, the institution requires the following individuals to complete Title IV, HEA program training provided or approved by the Secretary:

(A) The individual designated by the institution under § 668.16(b)(1).

(B)(*1*) In the case of a for-profit institution, the chief administrator of the institution; or

(*2*) In the case of an institution other than a for-profit institution, the chief administrator of the institution, or another administrative official of the institution designated by the chief administrator.

(ii) If either one of the two individuals who is otherwise required to complete training under paragraph (a)(4)(i) of this section has previously completed Title IV, HEA program training provided or approved by the Secretary, the institution may elect to request an on-site Title IV, HEA program certification review by the Secretary instead of requiring that individual to complete again the Title IV, HEA program training provided or approved by the Secretary.

(iii) An institution may not begin participation in the applicable Title IV, HEA program or programs—

(A) In the case of an institution that requires individuals to complete training in accordance with paragraph (a)(4)(i) of this section, until the individuals complete the required training; or

(B) In the case of an institution that requests an on-site review in accordance with paragraph (a)(4)(ii) of this section, until the Secretary conducts the review and notifies the institution that it is in compliance with Title IV, HEA program requirements.

(b) *Period of participation.* (1) If the Secretary certifies that an institution meets the standards of this subpart, the Secretary also specifies the period for which the institution may participate in a Title IV, HEA program. An institution's period of participation expires four years after the date that the Secretary certifies that the institution meets the standards of this subpart, except that the Secretary may specify a shorter period.

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

(c) *Provisional certification.* (1) The Secretary may provisionally certify an institution if—

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

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

(iii) The institution is a participating institution—

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

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

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

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

(v) The institution is a participating institution that was accredited or preaccredited by a nationally recognized accrediting agency on the day before the Secretary withdrew the Secretary's recognition of that agency according to the provisions contained in 34 CFR part 603.

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

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

(ii) Not later than the end of the third complete award year following the date on which the Secretary provisionally certified the institution under paragraph (c)(1)(ii), (iii), (iv), or (v) or (e)(2) of this section; and

(iii) If the Secretary provisionally certified the institution under paragraph (c)(1)(vi) of this section, not later than 18 months after the date that the Secretary withdrew recognition from the institution's nationally recognized accrediting agency.

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

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

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

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

(d) *Requirements for provisional certification to participate on a limited basis for institutions that are not financially responsible.* Notwithstanding paragraph (c)(1) of this section, the Secretary does not provisionally certify an institution that—

(1) Fails to meet the general standards of financial responsibility in § 668.15(b) or the exceptions to the general standards of financial responsibility in § 668.15(d), unless the institution—

(i) Demonstrates to the satisfaction of the Secretary that it has sufficient financial and administrative resources to participate in the Title IV, HEA programs under a funding arrangement other than the Department of Education's standard advance funding arrangement;

(ii) Submits to the Secretary a letter of credit in an amount and form acceptable to the Secretary equal to not less than 10 percent of the Title IV, HEA program funds received by the institution during the last complete award year for which figures are available; and

(iii) Demonstrates that, during the preceding two award years, it has met all of its financial obligations and was current on its debt payments in accordance with the provisions in § 668.15(b) (3) and (4); or

(2) Is not financially responsible under § 668.15(c)(2), or is required, and has been required at least one other time during the five-year period preceding the Secretary's decision, to certify the institution provisionally, to comply with paragraph (d)(1) of this section, unless—

(i) The institution, or one or more persons or entities that the Secretary determines under the provisions of § 668.15 exercise substantial control over the institution, or both, submit to the Secretary financial guarantees in an amount determined by the Secretary to be sufficient to satisfy the institution's potential liabilities arising from the institution's participation in the Title IV, HEA programs; and

(ii) One or more persons or entities that the Secretary determines under the provisions of § 668.15 exercise substantial control over the institution agree to be jointly or severally liable for any liabilities arising from the institution's participation in the Title IV, HEA programs and civil and criminal monetary penalties authorized under Title IV of the HEA.

(e) *Consequences for an institution whose State does not participate in the State Postsecondary Review program.* Notwithstanding any other provision of this section, if an institution or branch campus of the institution is in a State that does not participate in the State Postsecondary Review Program (34 CFR part 667), the Secretary, with regard to any particular Title IV, HEA program—

(1) Does not certify that the institution or branch campus, as applicable meets the standards of this subpart; and

(2) May provisionally certify the institution or branch campus, as applicable, unless—

(i) The institution or branch campus, as applicable, seeks initial participation in that program; or

(ii) The institution has undergone a change of ownership that results in a change of control, as determined under 34 CFR 600.31.

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

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

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

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

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

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

(A) Hand-delivered;

(B) Mailed; or

(C) Sent by facsimile transmission.

(iii) Documents filed by facsimile transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation. An institution filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Secretary.

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

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

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

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

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

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

(5)(i) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service.

(ii) The date on which a request for reconsideration of a revocation is submitted is—

(A) If the request was sent by a delivery service other than the U.S. Postal Service, the date evidenced on the original receipt by that service; and

(B) If the request was sent by facsimile transmission, the date that the document is recorded as received by facsimile equipment that receives the transmission.

(Authority: 20 U.S.C. 1099c and E.O. 12549 (3 CFR, 1989 Comp., p. 189) and E.O. 12689 (3 CFR, 1989 Comp., p. 235))

11. Newly redesignated § 668.14 is revised to read as follows:

§ 668.14 Program participation agreement.

(a)(1) An institution may participate in any Title IV, HEA program, other

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

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

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

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

(3) It will not request from or charge any student a fee for processing or handling any application, form, or data required to determine a student's eligibility for, and amount of, Title IV, HEA program assistance;

(4) It will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under the Title IV, HEA programs, together with assurances that the institution will provide, upon request and in a timely manner, information relating to the administrative capability and financial responsibility of the institution to—

(i) The Secretary;

(ii) The State postsecondary review entity designated under 34 CFR part 667 for the State or States in which the institution or any of the institution's branch campuses or other locations are located if the institution was referred by the Secretary under 34 CFR 667.5;

(iii) A guaranty agency, as defined in 34 CFR part 682, that guarantees loans made under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs for attendance at the institution or any of the institution's branch campuses or other locations;

(iv) The nationally recognized accrediting agency that accredits or preaccredits the institution or any of the institution's branch campuses, other locations, or educational programs;

(v) The State agency that legally authorizes the institution and any branch campus or other location of the institution to provide postsecondary education; and

(vi) In the case of a public postsecondary vocational educational institution that is approved by a State agency recognized for the approval of public postsecondary vocational education, that State agency;

(5) It will comply with the provisions of § 668.15 relating to factors of financial responsibility;

(6) It will comply with the provisions of § 668.16 relating to standards of administrative capability;

(7) It will submit reports to the Secretary and, in the case of an institution participating in the Federal Stafford Loan, Federal PLUS, Federal SLS, or the Federal Perkins Loan Program, to holders of loans made to the institution's students under that program at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs;

(8) It will not provide any statement to any student or certification to any lender under the Federal Stafford Loan, Federal PLUS, or Federal SLS Program that qualifies the student for a loan or loans in excess of the amount that the student is eligible to borrow in accordance with sections 425(a), 428(a)(2), 428(b)(1) (A) and (B), and 428H of the HEA;

(9) It will comply with the requirements of subpart D of this part concerning institutional and financial assistance information for students and prospective students;

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, it will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which an educational program offered by the institution is designed to prepare those prospective students;

(11) In the case of an institution participating in the Federal Stafford Loan, Federal PLUS, or Federal SLS Program, the institution will inform all eligible borrowers, as defined in 34 CFR part 682, enrolled in the institution about the availability and eligibility of those borrowers for State grant assistance from the State in which the institution is located, and will inform borrowers from another State of the source for further information concerning State grant assistance from that State;

(12) It will provide the certifications described in paragraph (c) of this section;

(13) In the case of an institution whose students receive financial assistance pursuant to section 484(d) of the HEA, the institution will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma;

(14) It will not deny any form of Federal financial aid to any eligible student solely on the grounds that the student is participating in a program of study abroad approved for credit by the institution;

(15) In the case of an institution seeking to participate for the first time in the Federal Stafford Loan, Federal PLUS, and Federal SLS programs, the institution has included a default management plan as part of its application under § 668.12 for participation in those programs and will use the plan for at least two years from the date of that application. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in appendix D to this part;

(16) In the case of an institution that changes ownership that results in a change of control, or that changes its status as a main campus, branch campus, or an additional location, the institution will, to participate in the Federal Stafford Loan, Federal PLUS, and Federal SLS programs, develop a default management plan for approval by the Secretary and implement the plan for at least two years after the change in control or status. The

Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in appendix D to this part;

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State postsecondary review entities designated under 34 CFR part 667, State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, and State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title IV, HEA programs or any information on fraud and abuse;

(18) It will not knowingly—

(i) Employ in a capacity that involves the administration of the Title IV, HEA programs or the receipt of funds under those programs, an individual who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(ii) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(iii) Contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been—

(A) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(19) It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions;

(20) In the case of an institution that offers athletically related student aid, it will comply with the provisions of paragraph (d) of this section;

(21) It will not impose any penalty, including, but not limited to, the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds for which interest or other charges are assessed, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a Title IV, HEA program loan due to compliance with statutory and regulatory requirements of or applicable to the Title IV, HEA programs, or delays attributable to the institution;

(22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assistance, except that this requirement shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance. This provision does not apply to the giving of token gifts to students or alumni for referring students for admission to the institution as long as: The gift is not in the form of money, check, or money order; no more than one such gift is given to any student or alumnus; and the gift has a value of not more than $25;

(23) It will meet the requirements established pursuant to part H of Title IV of the HEA by the Secretary, State postsecondary review entities designated under 34 CFR part 667, and nationally recognized accrediting agencies;

(24) It will comply with the institutional refund policy established in § 668.22;

(25) It is liable for all—

(i) Improperly spent or unspent funds received under the Title IV, HEA programs, including any funds administered by a third-party servicer; and

(ii) Refunds that the institution or its servicer may be required to make; and

(26) If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

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

(c) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), the institution must certify that it—

(1) Has in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution; and

(2)(i) Has established a campus security policy in accordance with section 485(f) of the HEA; and

(ii) Has complied with the disclosure requirements of § 668.47 as required by section 485(f) of the HEA.

(d) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), an institution that offers athletically related student aid must—

(1) Cause an annual compilation, independently audited not less often than every 3 years, to be prepared within 6 months after the end of the institution's fiscal year, of—

(i) The revenues derived by the institution from the institution's intercollegiate athletics activities, according to the following categories:

(A) Total revenues.

(B) Revenues from football.

(C) Revenues from men's basketball.

(D) Revenues from women's basketball.

(E) Revenues from all other men's sports combined.

(F) Revenues from all other women's sports combined;

(ii) Expenses made by the institution for the institution's intercollegiate athletics activities, according to the following categories:

(A) Total expenses.

(B) Expenses attributable to football.

(C) Expenses attributable to men's basketball.

(D) Expenses attributable to women's basketball.

(E) Expenses attributable to all other men's sports combined.

(F) Expenses attributable to all other women's sports combined; and

(iii) The total revenues and operating expenses of the institution; and

(2) Make the compilation and, where allowable by State law, the results of the audits required by paragraph (d)(1) of this section available for inspection by the Secretary and the public.

(e) For the purposes of paragraph (d) of this section—

(1) Revenues from intercollegiate athletics activities allocable to a sport shall include without limitation gate receipts, broadcast revenues and other conference distributions, appearance guarantees and options, concessions, and advertising;

(2) Revenues such as student activities fees, alumni contributions, and investment interest income that are not allocable to a sport shall be included in the calculation of total revenues only;

(3) Expenses for intercollegiate athletics activities allocable to a sport shall include without limitation grants-in-aid, salaries, travel, equipment, and supplies; and

(4) Expenses such as general and administrative overhead that are not allocable to a sport shall be included in the calculation of total expenses only.

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

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

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

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

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

(h) An institution's program participation agreement automatically expires on the date that—

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

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

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

(Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a-3, 1099c, and 1141)

12. Newly redesignated § 668.15 is revised to read as follows:

§ 668.15 Factors of financial responsibility.

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

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

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

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

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

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

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

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

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

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

(5)(i) Maintains, at all times, a minimum cash reserve for the repayment of refunds equal to at least one quarter of the total dollar amount of refunds paid by the institution in the previous fiscal year. The cash reserve must be maintained in a cash reserve fund, consisting of—

(A) A cash deposit in a federally insured bank account; or

(B) U.S. Treasury securities backed by the full faith and credit of the United States of America, having an original maturity date of three months or less; and

(ii) Provides, in notes to its audited financial statement, information showing the balance maintained in the fund for the institution's two most recently completed fiscal years, the institution's refund expenditures for it's previous completed fiscal year, and any accrued refunds at each fiscal year end;

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

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

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

(7) For a for-profit institution—

(i)(A) Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables. Should application of paragraph (b)(5) of this section cause a portion of the institution's cash reserves to be classified as a noncurrent asset, those cash reserves may be included in cash equivalents in calculating the institution's acid test ratio;

(B) Has not had operating losses over both of its 2 latest fiscal years that result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the 2-year period. The Secretary may calculate any operating loss for an institution by excluding from net income: extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and, the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth shall exclude all assets defined as intangible in accordance with generally accepted accounting principles; and

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

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

(8) For a nonprofit institution—

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

(B) Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. The acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables. Should application of paragraph (b)(5) of this section cause a portion of the institution's cash reserves to be classified as a non-current asset, those cash reserves may be included in cash equivalents in calculating the institution's acid test ratio;

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

(*2*) Has not had, an excess of current fund expenditures over current fund revenues over both of its 2 latest fiscal years that results in a decrease exceeding 10 percent in either the unrestricted current fund balance or the unrestricted net assets at the beginning of the first year of the 2-year period. The Secretary may exclude from net changes in fund balances for the operating loss calculation: Extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and the cumulative effect of changes in accounting principle. In calculating the institution's unrestricted current fund balance or the unrestricted net assets, the Secretary may include funds that are temporarily restricted in use by the institution's governing body that can be transferred to the current unrestricted fund or added to net unrestricted assets at the discretion of the governing body; or

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

(9) For a public institution—

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

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

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

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

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

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

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

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

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

(ii) That person, family member, institution, or servicer is not making payments in accordance with an agreement to repay that liability; or

(2) The institution has—

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

(ii) Had—

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

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

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

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

(d) *Exceptions to the general standards of financial responsibility.* (1) An institution is not required to meet the standard in paragraph (b)(5) of this section if the Secretary determines that the institution—

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

(ii) Contributes to that tuition recovery fund.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The total percentage of the ownership interest held in the institution or servicer that owes the liability that the person or any member or members of the person's family, either alone or in combination with one another, represents or represented under a voting trust, power of attorney, proxy, or similar agreement; or

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

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

(C) The institution demonstrates why—

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

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

(e) *Documentation of financial responsibility.* (1) The Secretary determines whether an institution is financially responsible under this section by evaluating documents submitted by the institution and information obtained from other sources, including outside sources of credit information. To enable the Secretary to make this determination, the institution shall submit to the Secretary for its two latest complete fiscal years, a set of financial statements of the institution, prepared on an accrual basis in accordance with generally accepted accounting principles and audited by an independent certified public accountant in accordance with generally accepted auditing standards. The Secretary may also require the institution to submit or otherwise make available, the accountant's work papers. If an institution submits audited consolidated financial statements of its parent corporation for the Secretary to use in determining the institution's level of financial responsibility, the consolidated financial statements must be supplemented with consolidating schedules showing the consolidation of each of the parent corporation's subsidiaries and divisions (each separate institution participating in the Title IV, HEA programs must be shown separately), intercompany eliminating entries, and derived consolidated totals. The Secretary may also require the institution to submit additional substantive information.

(2) An institution shall submit the documents required in paragraph (e)(1) of this section annually within four months after the end of the institution's fiscal year, unless the Secretary requests a more frequent submission. Upon a showing of good cause, the Secretary may grant a filing extension to an institution.

(3) The Secretary considers the audit submission requirement of this section to be satisfied by an audit conducted in accordance with—

(i) The Single Audit Act (Chapter 75 of title 31, United States Code); or

(ii) Office of Management and Budget Circular A–133, "Audits of Institutions of Higher Education and Other Nonprofit Organizations."

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

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

(ii) The term "ownership interest" includes, but is not limited to—

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

(B) A partnership; and

(C) An interest in a trust.

(iii) The term "ownership interest" does not include any share of the ownership or control of, or any right to share in the proceeds of the operation of—

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

(B) An institutional investor; or

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

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

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

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

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

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

(A) The institution or servicer; or

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

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

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

13. Newly redesignated § 668.16 is revised to read as follows:

§ 668.16 Standards of administrative capability.

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

(a) Administers the Title IV, HEA programs in accordance with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA;

(b)(1) Designates a capable individual to be responsible for administering all the Title IV, HEA programs in which it participates and for coordinating those programs with the institution's other Federal and non-Federal programs of student financial assistance. The Secretary considers an individual to be "capable" under this paragraph if the individual is certified by the State in which the institution is located, if the State requires certification of financial aid administrators. The Secretary may consider other factors in determining whether an individual is capable, including, but not limited to, the individual's successful completion of Title IV, HEA program training provided or approved by the Secretary, and previous experience and documented success in administering the Title IV, HEA programs properly;

(2) Uses an adequate number of qualified persons to administer the Title IV, HEA programs in which the institution participates. The Secretary considers the following factors to determine whether an institution uses an adequate number of qualified persons—

(i) The number and types of programs in which the institution participates;

(ii) The number of applications evaluated;

(iii) The number of students who receive any student financial assistance at the institution and the amount of funds administered;

(iv) The financial aid delivery system used by the institution;

(v) The degree of office automation used by the institution in the administration of the Title IV, HEA programs;

(vi) The number and distribution of financial aid staff; and

(vii) The use of third-party servicers to aid in the administration of the Title IV, HEA programs;

(3) Communicates to the individual designated to be responsible for administering Title IV, HEA programs, all the information received by any institutional office that bears on a student's eligibility for Title IV, HEA program assistance; and

(4) Has written procedures for or written information indicating the responsibilities of the various offices with respect to the approval, disbursement, and delivery of Title IV, HEA program assistance and the preparation and submission of reports to the Secretary;

(c)(1) Administers Title IV, HEA programs with adequate checks and balances in its system of internal controls; and

(2) Divides the functions of authorizing payments and disbursing or delivering funds so that no office has responsibility for both functions with respect to any particular student aided under the programs. For example, the functions of authorizing payments and disbursing or delivering funds must be divided so that for any particular student aided under the programs, the two functions are carried out by at least two organizationally independent individuals who are not members of the same family, as defined in § 668.15, or who do not together exercise substantial control, as defined in § 668.15, over the institution;

(d) Establishes and maintains records required under this part and the individual Title IV, HEA program regulations;

(e) Establishes, publishes, and applies reasonable standards for measuring whether an otherwise eligible student is maintaining satisfactory progress in his or her educational program. The Secretary considers an institution's standards to be reasonable if the standards—

(1) Conform with the standards of satisfactory progress of the nationally recognized accrediting agency that accredits or preaccredits the institution, if the institution is accredited or preaccredited, and if the agency has those standards;

(2) For a student enrolled in an eligible program who is to receive assistance under a Title IV, HEA program, are the same as or stricter than the institution's standards for a student enrolled in the same educational program who is not receiving assistance under a Title IV, HEA program;

(3) Include the following elements:

(i) Grades, work projects completed, or comparable factors that are measurable against a norm.

(ii) A maximum time frame in which a student must complete his or her educational program. The time frame must be—

(A) Based on the student's enrollment status;

(B) For an undergraduate program, no longer than 150 percent of the published length of the educational program for a full-time student; and

(C) Divided into increments of equal size, not to exceed the lesser of one academic year or one-half the published length of the educational program.

(iii) A schedule established by the institution designating the minimum percentage or amount of work that a

student must successfully complete at the end of each increment to complete his or her educational program within the maximum time frame.

(iv) A determination at the end of each increment by the institution whether the student has successfully completed the appropriate percentage or amount of work according to the established schedule.

(v) Consistent application of standards to all students within categories of students, e.g., full-time, part-time, undergraduate, and graduate students, and educational programs established by the institution.

(vi) Specific policies defining the effect of course incompletes, withdrawals, repetitions, and noncredit remedial courses on satisfactory progress.

(vii) Specific procedures under which a student may appeal a determination that the student is not making satisfactory progress.

(viii) Specific procedures for reinstatement of aid; and

(4) Meet or exceed the requirements of § 668.7(c);

(f) Develops and applies an adequate system to identify and resolve discrepancies in the information that the institution receives from different sources with respect to a student's application for financial aid under Title IV, HEA programs. In determining whether the institution's system is adequate, the Secretary considers whether the institution obtains and reviews—

(1) All student aid applications, need analysis documents, Statements of Educational Purpose, Statements of Registration Status, and eligibility notification documents presented by or on behalf of each applicant;

(2) Any documents, including any copies of State and Federal income tax returns, that are normally collected by the institution to verify information received from the student or other sources; and

(3) Any other information normally available to the institution regarding a student's citizenship, previous educational experience, documentation of the student's social security number, or other factors relating to the student's eligibility for funds under the Title IV, HEA programs;

(g) Refers to the Office of Inspector General of the Department of Education for investigation—

(1) After conducting the review of an application provided for under paragraph (f) of this section, any credible information indicating that an applicant for Title IV, HEA program assistance may have engaged in fraud or other criminal misconduct in connection with his or her application. The type of information that an institution must refer is that which is relevant to the eligibility of the applicant for Title IV, HEA program assistance, or the amount of the assistance. Examples of this type of information are—

(i) False claims of independent student status;

(ii) False claims of citizenship;

(iii) Use of false identities;

(iv) Forgery of signatures or certifications; and

(v) False statements of income; and

(2) Any credible information indicating that any employee, third-party servicer, or other agent of the institution that acts in a capacity that involves the administration of the Title IV, HEA programs, or the receipt of funds under those programs, may have engaged in fraud, misrepresentation, conversion or breach of fiduciary responsibility, or other illegal conduct involving the Title IV, HEA programs. The type of information that an institution must refer is that which is relevant to the eligibility and funding of the institution and its students through the Title IV, HEA programs;

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

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

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

(3) The rights and responsibilities of the student with respect to enrollment at the institution and receipt of financial aid. This information includes the institution's refund policy, its standards of satisfactory progress, and other conditions that may alter the student's aid package;

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

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

(1) Reviews of the institution conducted by the Secretary, the Department of Education's Office of Inspector General, nationally recognized accrediting agencies, guaranty agencies as defined in 34 CFR part 682, State postsecondary review entities designated under 34 CFR part 667, the State agency or official by whose authority the institution is legally authorized to provide postsecondary education, or any other law enforcement agency; or

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

(k) Is not, and does not have any principal or affiliate of the institution (as those terms are defined in 34 CFR part 85) that is—

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

(2) Engaging in any activity that is a cause under 34 CFR 85.305 or 85.405 for debarment or suspension under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4;

(l) Does not have more than 33 percent of its undergraduate regular students withdraw from the institution during the period specified in paragraph (l)(1) of this section. The institution must calculate this withdrawal rate according to the following procedure:

(1)(i) For an institution at which the majority of regular students begin and end the academic year on the same date, the institution must calculate the rate for that academic year.

(ii) For an institution at which the majority of regular students do not begin and end the academic year on the same date, the institution must calculate the rate for any eight-month period.

(2) The institution must count all regular students who are enrolled on the first day of classes of the period specified in paragraph (l)(1) of this section, except those students who, during that period—

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

(ii) Were entitled to and actually received in a timely manner, in accordance with § 668.22(i)(2), a refund of 100 percent of their tuition and fees (less any permitted administrative fee) under the institution's refund policy;

(m)(1) Has a cohort default rate—

(i) As defined in § 668.17, on loans made under the Federal Stafford Loan and Federal SLS programs to students for attendance at that institution of less than 25 percent for each of the three most recent fiscal years for which the Secretary has determined the institution's rate; and

(ii) As defined in 34 CFR 674.5, on loans made under the Federal Perkins Loan Program to students for attendance

at that institution that does not exceed 15 percent;

(2)(i) Except that, if the Secretary determines that the institution is not administratively capable solely because the institution fails to comply with paragraph (m)(1) of this section, the Secretary will provisionally certify the institution in accordance with § 668.13(c); and

(ii) The institution may appeal the loss of full participation in a Title IV, HEA program under paragraph (m)(1) of this section by submitting an appeal in writing to the Secretary in accordance with and on the grounds specified in § 668.17(d); and

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

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c; Section 4 of Pub. L. 95–452, 92 Stat. 1101–1109; E.O. 12549 (3 CFR, 1986 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

14. Newly redesignated § 668.17 is revised to read as follows:

§ 668.17 Default reduction measures.

(a) *Default rates.* If the Federal Stafford loan and Federal SLS cohort default rate for an institution exceeds 20 percent for any fiscal year, the Secretary notifies the institution of that rate and may, after consultation as the Secretary deems appropriate with cognizant guaranty agencies take one or more of the following actions:

(1) Initiate a proceeding under subpart G of this part to limit, suspend, or terminate the participation of the institution in the Title IV, HEA programs, if—

(i) The institution's Federal Stafford loan and Federal SLS cohort default rate exceeds 40 percent for any fiscal year after 1989 and has not been reduced by an increment of at least 5 percent from its rate for the previous fiscal year (e.g., a 50-percent rate was not reduced to 45 percent or below); or

(ii) The institution's Federal Stafford loan and Federal SLS cohort default rate exceeds—

(A) 60 percent for fiscal year 1989;

(B) 55 percent for fiscal year 1990;

(C) 50 percent for fiscal year 1991;

(D) 45 percent for fiscal year 1992; or

(E) 40 percent for any fiscal year after fiscal year 1992.

(2) To help the Secretary make a preliminary determination as to the appropriate action to be taken by the Secretary regarding the institution, require the institution to submit to the Secretary and one or more guaranty agencies, as defined in 34 CFR part 682, any information relating to that determination, as reasonably required by the Secretary, within a time frame specified by the Secretary.

(b) *Default management plan.* If the Federal Stafford loan and Federal SLS cohort default rate for an institution—

(1) Is greater than 20 percent but less than or equal to 40 percent, the institution must submit a default management plan that implements the measures described in appendix D to this part. An institution that wishes to submit a default management plan that deviates from the measures described in appendix D must submit a justification for the deviation that includes a rationale explaining why the measures from which the plan deviates are not appropriate for the institution's specific situation. The institution must implement the default management plan upon notification from the Secretary that the plan has been approved; or

(2) Exceeds 40 percent for any fiscal year, the institution must implement all of the default management reduction measures described in appendix D to this part no later than 60 days after the institution receives the Secretary's notification of the institution's cohort default rate. An institution is not required to submit any written plans to the Secretary or a guaranty agency unless the Secretary or guaranty agency specifically requests the institution to do so.

(c) *End of participation.* (1) Except as provided in paragraph (c)(6) of this section, an institution's participation in the FFEL programs ends if the Secretary determines that the institution's cohort default rate, for each of the three most recent fiscal years for which the Secretary has determined the institution's rate, is equal to or greater than the applicable threshold rates.

(2) For purposes of the determinations made under paragraph (c)(1) of this section, the threshold rates are—

(i) 35 percent for each of fiscal years 1991 and 1992;

(ii) 30 percent for fiscal year 1993; and

(iii) 25 percent for fiscal year 1994 and all subsequent fiscal years.

(3) Except as provided in paragraph (c)(7) of this section, an institution whose participation ends under paragraph (c)(1) of this section may not participate in the FFEL programs beginning with the date that the institution receives notification from the Secretary that its cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section and continuing—

(i) For the remainder of the fiscal year in which the Secretary determines that the institution's participation has ended under paragraph (c)(1) of this section; and

(ii) For the two subsequent fiscal years.

(4) An institution whose participation in the FFEL programs ends under paragraph (c)(1) of this section may not participate in the FFEL programs until the institution—

(i) Receives notification from the Secretary that the notice ending the institution's participation is withdrawn pursuant to paragraph (d)(6) of this section; or

(ii) Following the period described in paragraph (c)(3) of this section, satisfies the Secretary that the institution meets all requirements for participation in the FFEL programs and executes a new agreement with the Secretary for participation in the FFEL programs.

(5) If the Secretary withdraws the notification of an institution's loss of participation pursuant to paragraph (d)(6) of this section, the participation of the institution is restored effective as of the date that the institution received notification from the Secretary of the loss of participation.

(6) Until July 1, 1998, the provisions of paragraph (c)(1) of this section and the provisions of § 668.16(m) do not apply to a historically black college or university within the meaning of section 322(2) of the HEA, a tribally controlled community college within the meaning of section 2(a)(4) of the Tribally Controlled Community College Assistance Act of 1978, or a Navajo community college under the Navajo Community College Act.

(7)(i) If the Secretary's designated department official receives written notice from an institution whose participation ends under paragraph (c)(1) of this section, within seven calendar days from the date on which the institution receives notification from the Secretary that its cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section, that the institution intends to appeal the end of participation under paragraph (d) of this section, the institution may, notwithstanding § 668.26(d) continue to participate in the FFEL programs until no later than the 30th calendar day following the date on which the institution receives notification from the Secretary that its cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section, except as provided in paragraph (c)(7)(ii) of this section.

(ii) If an institution satisfies the conditions in paragraph (c)(7)(i) of this section for participating in the FFEL programs until the 30th calendar day following the date on which the

institution receives notification from the Secretary that its cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section, the institution may, notwithstanding § 668.26(d), continue to participate in the FFEL programs after that date, until the Secretary issues a decision on the institution's appeal, if the institution, by the 30th calendar day following the date on which the institution receives notification from the Secretary that its cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section, files an appeal that is complete in all respects in accordance with paragraph (d) of this section. However, the appeal of an institution relying on paragraph (d)(1)(i) of this section is not considered incomplete by virtue of a guaranty agency's not having yet complied with—or having failed to comply with—34 CFR 682.401(b)(14), which requires the agency to respond to an institution's request for verification of data within 15 working days, if the institution submitted that request within 10 working days from the date on which the institution received notification from the Secretary that its cohort default rate exceeds the thresholds specified in paragraph (c)(2) of this section, and the institution simultaneously submitted a copy of that request to the Secretary's designated department official. When the institution receives the guaranty agency's response, to complete its appeal, the institution must submit the verified data to the Secretary's designated department official within five working days in order to continue participating in the FFEL programs until the Secretary issues a decision on the institution's appeal.

(d) *Appeal procedures.* (1) An institution may appeal the loss of participation in the FFEL programs under paragraph (c)(1) of this section by submitting an appeal in writing to the Secretary's designated department official that is postmarked no later than 30 days after it receives notification of its loss of participation. The institution may appeal on the grounds that—

(i)(A) The calculation of the institution's cohort default rate for any of the three fiscal years relevant to the end of participation is not accurate; and

(B) A recalculation with corrected data verified by the cognizant guaranty agency or agencies would produce a cohort default rate for any of those fiscal years that is below the threshold percentage specified in paragraph (c)(2) of this section; or

(ii) The institution meets the following criteria:

(A)(*1*) Fifteen percent or fewer of the institution's students who are enrolled on at least a half-time basis receive Federal Stafford or Federal SLS loans for any twenty-four month period ending not more than six months prior to the date the institution submits its appeal; or

(*2*) For any twenty-four month period ending not more than six months prior to the date the institution submits its appeal, two-thirds or more of the institution's students who are enrolled on at least a half-time basis are individuals from disadvantaged economic backgrounds, as established by documentary evidence submitted by the institution. Such evidence must relate to qualification by those students for an Expected Family Contribution (EFC) (formerly institutions were required to use the Pell Grant index), as defined in 34 CFR 690.2, of zero for the applicable award year or attribution to those students of an adjusted gross income of the student and his or her parents or spouse, if applicable, reported for the applicable award year of less than the poverty level, as determined under criteria established by the Department of Health and Human Services.

(B)(*1*) Two-thirds or more of the institution's students who were enrolled on a full-time basis in any twenty-four month period ending not more than six months prior to the date the institution submits its appeal completed the educational programs in which they were enrolled. This rate is calculated by comparing the number of students who were classified as full-time at their initial enrollment in the institution, and were originally scheduled, at the time of enrollment, to complete their programs within the relevant twenty-four month period, with the number of these students who received a degree, certificate, or other recognized educational credential from the institution; transferred from the institution to a higher level educational program at another institution for which the prior program provided substantial preparation; or, at the end of the twenty-four month period, remained enrolled and were making satisfactory academic progress toward completion of their educational programs. The calculation does not include students who did not complete their programs because they left the institution to serve in the armed forces; and

(*2*) The institution had a placement rate of two-thirds or more with respect to its former students who received a degree, certificate, or other recognized educational credential from the institution in any twenty-four month period ending not more than six months prior to the date the institution submits its appeal. This rate is calculated by determining the percentage of all those students who, based on evidence submitted by the institution, are on that date employed, or had been employed for at least 13 weeks following receipt of the credential from the institution, in the occupation for which the institution provided training, or are enrolled or had been enrolled for at least 13 weeks following receipt of the credential from the institution, in a higher level educational program at another institution for which the prior educational program provided substantial preparation.

(2) For purposes of paragraph (d)(1)(ii)(A) of this section, a student is originally scheduled, at the time of enrollment, to complete the educational program on the date when the student will have been enrolled in the program for the amount of time normally required to complete the program. The "amount of time normally required to complete the program" is the period of time specified in the institution's enrollment contract, catalog, or other materials, for completion of the program by a full-time student, or the period of time between the date of enrollment and the anticipated graduation date appearing on the student's loan application, if any, whichever is less.

(3) An appeal submitted under paragraph (d)(1)(i) of this section is considered to be filed in a timely manner if the institution submits a letter of appeal by the 30-day deadline notifying the Secretary's designated department official that it is appealing on this basis, including with that letter a copy of the institution's request to each cognizant guaranty agency for verification of the cohort default rate data, and submits the verified data to the Secretary's designated department official within five working days of its receipt from the guaranty agency. For purposes of paragraph (d)(4) of this section, the institution's appeal is not considered complete until the institution submits the verified data to the Secretary's designated department official.

(4) The Secretary issues a decision on the institution's appeal within 45 days after the institution submits a complete appeal that addresses the applicable criteria in paragraphs (d)(1) (i) through (iii) of this section to the Secretary's designated department official.

(5) The Secretary's decision is based on the consideration of written material submitted by the institution. No oral hearing is provided.

(6) The Secretary withdraws the notification of loss of participation in the FFEL programs sent to an institution under paragraph (c)(1) of this section, if the Secretary determines that the institution's appeal satisfies one of the grounds specified in paragraphs (d)(1)(i) through (iii) of this section.

(7)(i) An institution that appeals under paragraph (d)(1)(i) of this section must submit a written request to the guaranty agency or agencies that guaranteed the loans used in the calculation of its cohort default rate to verify the data used to calculate its cohort default rate and simultaneously provide a copy of that request to the Secretary's designated department official.

(ii) The written request must include the names and social security numbers of the borrowers the institution wishes the agency to verify and detailed information on the nature of the suspected inaccuracy in the data the institution is requesting the agency to verify.

(8) An institution must include in its appeal a certification by the institution's chief executive officer that all information provided by the institution in support of its appeal is true and correct.

(9) An institution that appeals on the ground that it meets the criteria contained in paragraph (d)(1)(ii) of this section must include in its appeal the following information:

(i) For purposes of paragraph (d)(1)(ii)(A)(*1*) of this section—

(A) The number of students who were enrolled on at least a half-time basis at the institution in the relevant twenty-four month period; and

(B) The name, address, and social security number of each of the institution's current and former students who received Federal Stafford or Federal SLS loans during that twenty-four month period.

(ii) For purposes of paragraph (d)(1)(ii)(A)(*2*) of this section:

(A) The number of students who were enrolled on at least a half-time basis at the institution in the relevant twenty-four month period; and

(B) The name, address, social security number, and Expected Family Contribution (EFC) (formerly institutions were required to use the Pell Grant index), if applicable, of each student from a disadvantaged economic background who was enrolled on at least a half-time basis at the institution in the relevant twenty-four month period and the measure and data used to determine that the student is from a disadvantaged economic background.

(iii) For purposes of paragraph (d)(1)(ii)(B)(*1*) of this section—

(A) The number of students who were enrolled on a full-time basis at the institution in the relevant twenty-four month period;

(B) For each of those former students who received a degree, certificate, or other recognized educational credential from the institution, the student's name, address, and social security number;

(C) For each of those former students who transferred to a higher level educational program at another institution, the name, address, social security number of the student, and the name and address of the institution to which the student transferred and the name of the higher level program; and

(D) For each of those students who remained enrolled and was making satisfactory academic progress toward completion of the educational program, the student's name, address, and social security number.

(iv) For purposes of paragraph (d)(1)(ii)(B)(*2*) of this section—

(A) The number of students who received a degree, certificate, or other recognized educational credential at the institution in the relevant twenty-four month period;

(B) For each of those former students who is employed or had been employed for at least 13 weeks following receipt of a degree, certificate or other credential from the institution, the student's name, address, and social security number, the employer's name and address, the student's job title, and the dates the student was so employed; and

(C) For each of those former students who enrolled in a higher level educational program at another institution for which the appealing institution's educational program provided substantial preparation, the former student's name, address, and social security number, the subsequent institution's name and address, the name of the educational program, and the dates the former student was so enrolled.

(e) *Definitions*. The following definitions apply to this section and § 668.90:

(1)(i)(A) For purposes of the Federal Stafford loan and Federal SLS cohort default rate, except as provided in paragraph (e)(1)(ii) of this section, the term *cohort default rate* means—

(*1*) For any fiscal year in which 30 or more current and former students at the institution enter repayment on Federal Stafford loans or Federal SLS loans (or on the portion of a loan made under the Federal Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on such loans who default before the end of the following fiscal year; and

(*2*) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on Federal Stafford loans or Federal SLS loans (or on the portion of a loan made under the Federal Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on Federal Stafford loans or Federal SLS loans in any of the three most recent fiscal years, who default before the end of the fiscal year immediately following the year in which they entered repayment.

(B) In determining the number of students who default before the end of that following fiscal year, the Secretary includes only loans for which the Secretary or a guaranty agency has paid claims for insurance.

(ii)(A) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(B) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(C) Any loan that has been rehabilitated under section 428F of the HEA before the end of that following fiscal year is not considered as in default for purposes of this definition.

(D) For the purposes of this definition, a loan made in accordance with section 428A of the HEA (or a loan made under the Federal Consolidation Loan Program a portion of which is used to repay a Federal SLS loan) shall not be considered to enter repayment until after the borrower has ceased to be enrolled in an educational program leading to a degree, certificate, or other recognized educational credential at the participating institution on at least a half-time basis (as determined by the institution) and ceased to be in a period of forbearance based on such enrollment. Each eligible lender of a loan made under section 428A (or a loan made under the Federal Consolidation Loan Program a portion of which is used to repay a Federal SLS loan) of the HEA shall provide the guaranty agency with

the information necessary to determine when the loan entered repayment for purposes of this definition, and the guaranty agency shall provide that information to the Secretary.

(iii)(A) A cohort default rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(B) A cohort default rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

(iv)(A) For an institution that changes its status from that of a location of one institution to that of a free-standing institution, the Secretary determines the cohort default rate based on the institution's status as of October 1 of the fiscal year for which a cohort default rate is being calculated.

(B) For an institution that changes its status from that of a free-standing institution to that of a location of another institution, the Secretary determines the cohort default rate based on the combined number of students who enter repayment during the applicable fiscal year and the combined number of students who default during the applicable fiscal years from both the former free-standing institution and the other institution. This cohort default rate applies to the new, consolidated institution and all of its current locations.

(C) For free-standing institutions that merge to form a new, consolidated institution, the Secretary determines the cohort default rate based on the combined number of students who enter repayment during the applicable fiscal year and the combined number of students who default during the applicable fiscal years from all of the institutions that are merging. This cohort default rate applies to the new consolidated institution.

(D) For a location of one institution that becomes a location of another institution, the Secretary determines the cohort default rate based on the combined number of students who enter repayment during the applicable fiscal year and the number of students who default during the applicable fiscal years from both of the institutions in their entirety, not limited solely to the respective locations.

(2) *Fiscal year* means the period from and including October 1 of a calendar year through and including September 30 of the following calendar year.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

15. Section 668.22 is revised to read as follows:

§ 668.22 Institutional refunds and repayments.

(a) *General.* (1) An institution shall have a fair and equitable refund policy under which the institution makes a refund of unearned tuition, fees, room and board, and other charges to a student who received Title IV, HEA program assistance, or whose parent received a Federal PLUS loan on behalf of the student if the student—

(i) Does not register for the period of enrollment for which the student was charged; or

(ii) Withdraws, drops out, takes an approved leave of absence, is expelled from the institution, or otherwise fails to complete the program on or after his or her first day of class of the period of enrollment for which he or she was charged.

(2) The institution shall provide a clear and conspicuous written statement containing its refund policy, including the allocation of refunds and repayments to sources of aid to a prospective student prior to the earlier of the student's enrollment or the execution of the student's enrollment agreement. The institution must make available to students upon request examples of the application of this policy and inform students of the availability of these examples in the written statement. The institution shall make its policy known to currently enrolled students. The institution shall include in its statement the procedures that a student must follow to obtain a refund, but the institution shall return the portion of a refund allocable to the Title IV, HEA programs in accordance with paragraph (f) of this section whether the student follows those procedures or not. If the institution changes its refund policy, the institution shall ensure that all students are made aware of the new policy.

(3) The institution shall publish the costs of required supplies and equipment and shall substantiate to the Secretary upon request that the costs are reasonably related to the cost of providing the supplies and equipment to students.

(b) *Fair and equitable refund policy.* (1) For purposes of paragraph (a) of this section, an institution's refund policy is fair and equitable if the policy provides for a refund of at least the larger of the amount provided under—

(i) The requirements of applicable State law;

(ii) The specific refund standards established by the institution's nationally recognized accrediting agency if those standards are approved by the Secretary;

(iii) The *pro rata* refund calculation described in paragraph (c) of this section, for any student attending the institution for the first time whose withdrawal date is on or before the 60 percent point in time in the period of enrollment for which the student has been charged; or

(iv) For purposes of determining a refund when the *pro rata* refund calculation under paragraph (b)(1)(iii) of this section does not apply, and no standards for refund calculations exist under paragraph (b)(1)(i) and (ii) of this section, the larger of—

(A) The specific refund standards contained in Appendix A to this part; or

(B) The institution's refund policy.

(2) For purposes of paragraph (b)(1)(iii) of this section, "the 60 percent point in time in the period of enrollment for which the student has been charged" is—

(i) In the case of an educational program that is measured in credit hours, the point in calendar time when 60 percent of the period of enrollment for which the student has been charged, as defined in paragraph (d) of this section, has elapsed; and

(ii) In the case of an educational program that is measured in clock hours, the point in time when the student completes 60 percent of the clock hours scheduled for the period of enrollment for which the student is charged, as defined in paragraph (d) of this section.

(3) The institution must determine which policy under paragraph (b)(1) of this section provides for the largest refund to that student.

(c) *Pro Rata refund.* (1) "*Pro rata refund,*" as used in this section, means a refund by an institution to a student attending that institution for the first time of not less than that portion of the tuition, fees, room, board, and other charges assessed the student by the institution equal to the portion of the period of enrollment for which the student has been charged that remains on the withdrawal date, rounded downward to the nearest 10 percent of that period, less any unpaid amount of a scheduled cash payment for the period of enrollment for which the student has been charged.

(2) A "scheduled cash payment" is the amount of institutional charges that is not paid for by financial aid for the period of enrollment for which the student has been charged exclusive of—

(i) Any amount scheduled to be paid by Title IV, HEA program assistance that the student has been awarded that is

payable to the student even though the student has withdrawn;

(ii) Late disbursements of loans made under the Federal Stafford Loan, Federal SLS, and Federal PLUS programs in accordance with 34 CFR 682.207(d), and allowable late disbursements of unsubsidized Federal Stafford loans and loans made under the Federal Direct Student Loan Program; and

(iii) Late disbursements of State student financial assistance, for which the student is still eligible in spite of having withdrawn, made in accordance with the applicable State's written late disbursement policies. The late disbursement must be made within 60 days after the student's date of withdrawal, as defined in paragraph (i)(1) of this section, or the institution must—

(A) Recalculate the refund in accordance with this section, including recalculating the student's unpaid charges in accordance with this paragraph without consideration of the State late disbursement amount; and

(B) Return any additional refund amounts due as a result of the recalculation in accordance with paragraph (g) of this section.

(3) The "unpaid amount of a scheduled cash payment" is computed by subtracting the amount paid by the student for the period of enrollment for which the student has been charged from the scheduled cash payment for the period of enrollment for which the student has been charged.

(4) An institution may exclude from the calculation of a *pro rata* refund under this paragraph a reasonable administrative fee not to exceed the lesser of—

(i) Five percent of the tuition, fees, room and board, and other charges assessed the student; or

(ii) One hundred dollars.

(5)(i) For purposes of this section, "other charges assessed the student by the institution" include, but are not limited to, charges for any equipment (including books and supplies) issued by an institution to the student if the institution specifies in the enrollment agreement a separate charge for equipment that the student actually obtains or if the institution refers the student to a vendor operated by the institution or an entity affiliated or related to the institution.

(ii) The institution may exclude from the calculation of a *pro rata* refund under this paragraph the documented cost to the institution of unreturnable equipment issued to the student in accordance with paragraph (c)(5)(i) of this section or of returnable equipment issued to the student in accordance with paragraph (c)(5)(i) of this section if the student does not return the equipment in good condition, allowing for reasonable wear and tear, within 20 days following the date of the student's withdrawal. For example, equipment is not considered to be returned in good condition and, therefore, is unreturnable, if the equipment cannot be reused because of clearly recognized health and sanitary reasons. The institution must clearly and conspicuously disclose in the enrollment agreement any restrictions on the return of equipment, including equipment that is unreturnable. The institution must notify the student in writing prior to enrollment that return of the specific equipment involved will be required within 20 days of the student's withdrawal.

(iii) An institution may not delay its payment of the portion of a refund allocable under this section to a Title IV, HEA program or a lender under 34 CFR 682.607 by reason of the process for return of equipment prescribed in paragraph (c)(5) of this section.

(6) For purposes of this section—

(i) "Room" charges do not include charges that are passed through the institution from an entity that is not under the control of, related to, or affiliated with the institution; and

(ii) "Other charges assessed the student by the institution" do not include fees for group health insurance, if this insurance is required for all students and the purchased coverage remains in effect for the student throughout the period for which the student was charged.

(7)(i) For purposes of this section, a student attending an institution for the first time is a student who—

(A) Has not previously attended at least one class at the institution; or

(B) Received a refund of 100 percent of his or her tuition and fees (less any permitted administrative fee) under the institution's refund policy for previous attendance at the institution.

(ii) A student remains a first-time student until the student either—

(A) Withdraws, drops out, or is expelled from the institution after attending at least one class; or

(B) Completes the period of enrollment for which he or she has been charged.

(8) For purposes of this paragraph, "the portion of the period of enrollment for which the student has been charged that remains" is determined—

(i) In the case of an educational program that is measured in credit hours, by dividing the total number of weeks comprising the period of enrollment for which the student has been charged into the number of weeks remaining in that period as of the student's withdrawal date;

(ii) In the case of an educational program that is measured in clock hours, by dividing the total number of clock hours comprising the period of enrollment for which the student has been charged into the number of scheduled clock hours remaining to be completed by the student in that period as of the student's withdrawal date; and

(iii) In the case of an educational program that consists predominantly of correspondence courses, by dividing the total number of lessons comprising the period of enrollment for which the student has been charged into the number of lessons not submitted by the student.

(d) *Period of enrollment for which the student has been charged.* (1) For purposes of this section, "the period of enrollment for which the student has been charged," means the actual period for which an institution charges a student, except that the minimum period must be—

(i) In the case of an educational program that is measured in credit hours and uses semesters, trimesters, quarters, or other academic terms, the semester, trimester, quarter or other academic term; or

(ii) In the case of an educational program that is measured in credit hours and does not use semesters, trimesters, quarters, or other academic terms, or an educational program that is measured in clock hours, the lesser of the length of the educational program or an academic year.

(2) If an institution charges by different periods for different charges, the "period of enrollment for which the student has been charged" for purposes of this section is the longest period for which the student is charged. The institution must include any charges assessed the student for the period of enrollment or any portion of that period of enrollment when calculating the refund.

(e) *Overpayments.* (1) An institution shall determine whether a student has received an overpayment for noninstitutional costs for the period of enrollment for which the student has been charged if—

(i) The student officially withdraws, drops out, is expelled, or takes an approved leave of absence on or after his or her first day of class of that period; and

(ii) The student received Title IV, HEA program assistance other than from the FWS, Federal Stafford Loan, Federal PLUS, or Federal SLS Program for that period.

(2)(i) To determine if the student owes an overpayment, the institution shall subtract the noninstitutional costs that the student incurred for that portion of the period of enrollment for which the student has been charged from the amount of all assistance (other than from the FWS, Federal Stafford Loan, Federal PLUS, or Federal SLS Program) that the institution disbursed to the student.

(ii) Noninstitutional costs may include, but are not limited to, room and board for which the student does not contract with the institution, books, supplies, transportation, and miscellaneous expenses.

(f) *Repayments to Title IV, HEA programs of institutional refunds and overpayments.* (1)(i) An institution shall return a portion of the refund calculated in accordance with paragraph (b) of this section to the Title IV, HEA programs if the student to whom the refund is owed received assistance under any Title IV, HEA program other than the FWS Program.

(ii) The portion of the refund that an institution shall return to the Title IV, HEA programs may not exceed the amount of assistance that the student received under the Title IV, HEA programs other than under the FWS Program for the period of enrollment for which the student has been charged.

(2) For purposes of this section, except for the calculation of a *pro rata* refund required under paragraph (b)(1)(iii) of this section—

(i) An institutional refund means the amount paid for institutional charges for the period of enrollment for which the student has been charged minus the amount that the institution may retain under paragraph (f)(2)(iii) of this section for the portion of the period of enrollment for which the student has been charged that the student was actually enrolled at the institution;

(ii) An institution may not include any unpaid amount of a scheduled cash payment in determining the amount that the institution may retain for institutional charges. A scheduled cash payment is the amount of institutional charges that has not been paid by financial aid for the period of enrollment for which the student has been charged, exclusive of—

(A) Any amount scheduled to be paid by Title IV, HEA program assistance that the student has been awarded that is payable to the student even though the student has withdrawn;

(B) Late disbursements of loans made under the Federal Stafford, Federal SLS, and Federal PLUS programs in accordance with 34 CFR 682.207(d), and allowable late disbursements of unsubsidized Federal Stafford loans and loans made under the Federal Direct Student Loan Program; and

(C) Late disbursements of State student financial assistance, for which the student is still eligible in spite of having withdrawn, made in accordance with the applicable State's written late disbursement policies. The late disbursement must be made within 60 days after the student's date of withdrawal, as defined in paragraph (i)(1) of this section, or the institution must—

(*1*) Recalculate the refund in accordance with this section, including recalculating the student's unpaid charges in accordance with this paragraph without consideration of the State late disbursement amount; and

(*2*) Return any additional refund amounts due as a result of the recalculation in accordance with paragraph (g) of this section;

(iii) In determining the amount that the institution may retain for the portion of the period of enrollment for which the student has been charged during which the student was actually enrolled, an institution shall—

(A) Compute the unpaid amount of a scheduled cash payment by subtracting the amount paid by the student for that period of enrollment for which the student has been charged from the scheduled cash payment for the period of enrollment for which the student has been charged; and

(B) Subtract the unpaid amount of the scheduled cash payment from the amount that may be retained by the institution according to the institution's refund policy; and

(iv) An institution shall return the total amount of Title IV, HEA program assistance (other than amounts received from the FWS Program) paid for institutional charges for the period of enrollment for which the student has been charged if the unpaid amount of the student's scheduled cash payment is greater than or equal to the amount that may be retained by the institution under the institution's refund policy.

(3)(i) A student must repay to the institution or to the Title IV, HEA programs a portion of the overpayment as determined according to paragraph (e) of this section. The institution shall make every reasonable effort to contact the student and recover the overpayment in accordance with program regulations (34 CFR parts 673, 674, 675, 676, 690, and 691).

(ii) The portion of the overpayment that the student or the institution (if the institution recovers the overpayment) shall return to the Title IV, HEA programs may not exceed the amount of assistance received under the Title IV, HEA programs other than the FWS, Federal Stafford Loan, Federal PLUS, or Federal SLS Program for the period of enrollment for which the student has been charged.

(iii) Unless otherwise provided for in applicable program regulations, if the amount of the overpayment is less than $100, the student is considered not to owe an overpayment, and the institution is not required to contact the student or recover the overpayment.

(g) *Allocation of refunds and overpayments.* (1) Except as provided in paragraph (g)(2) of this section, if a student who received Title IV, HEA program assistance (other than assistance under the FWS Program) is owed a refund calculated in accordance with paragraph (b) of this section, or if a student who received Title IV, HEA program assistance (other than assistance under the FWS, Federal Stafford Loan, Federal PLUS, or Federal SLS Program) must repay an overpayment calculated in accordance with paragraph (e) of this section, an institution shall allocate that refund and any overpayment collected from the student in the following order:

(i) To eliminate outstanding balances on Federal SLS loans received by the student for the period of enrollment for which he or she was charged.

(ii) To eliminate outstanding balances on unsubsidized Federal Stafford loans received by the student for the period of enrollment for which he or she was charged.

(iii) To eliminate outstanding balances on subsidized Federal Stafford loans received by the student for the period of enrollment for which he or she was charged.

(iv) To eliminate outstanding balances on Federal PLUS loans received on behalf of the student for the period of enrollment for which he or she was charged.

(v) To eliminate outstanding balances on Federal Direct Stafford loans received by the student for the period of enrollment for which he or she was charged.

(vi) To eliminate outstanding balances on Federal Direct PLUS loans received on behalf of the student for the period of enrollment for which he or she was charged.

(vii) To eliminate outstanding balances on Federal Perkins loans received by the student for the period of enrollment for which he or she was charged.

(viii) To eliminate any amount of Federal Pell Grants awarded to the student for the period of enrollment for which he or she was charged.

(ix) To eliminate any amount of Federal SEOG Program aid awarded to the student for the period of enrollment for which he or she was charged.

(x) To eliminate any amount of other assistance awarded to the student under programs authorized by Title IV of the HEA for the period of enrollment for which he or she was charged.

(xi) To repay required refunds of other Federal, State, private, or institutional student financial assistance received by the student.

(xii) To the student.

(2) The institution must apply the allocation policy described in paragraph (g)(1) of this section consistently to all students who have received Title IV, HEA program assistance and must conform that policy to the following:

(i) No amount of the refund or of the overpayment may be allocated to the FWS Program.

(ii) No amount of overpayment may be allocated to the Federal Stafford Loan, Federal PLUS, or Federal SLS Program.

(iii) The amount of the Title IV, HEA program portion of the refund allocated to the Federal Stafford Loan, Federal PLUS, and Federal SLS programs must be returned to the appropriate borrower's lender by the institution in accordance with program regulations (34 CFR part 682).

(iv) The amount of the Title IV, HEA program portion of the refund allocated to the Title IV, HEA programs other than the FWS, Federal Stafford Loan, Federal PLUS, and Federal SLS programs must be returned to the appropriate program account or accounts by the institution within 30 days of the date that the student officially withdraws, is expelled, takes an approved leave of absence, or the institution determines that a student has unofficially withdrawn.

(v) The amount of the Title IV, HEA program portion of the overpayment allocated to the Title IV, HEA programs other than the FWS, Federal Stafford Loan, Federal PLUS, and Federal SLS programs must be returned to the appropriate program account or accounts within 30 days of the date that the student repays the overpayment.

(h) *Financial aid.* For purposes of this section "financial aid" is assistance that a student has been or will be awarded (including Federal PLUS loans received on the student's behalf) from Federal; State; institutional; or other scholarship, grant, or loan programs.

(i) *Refund dates*—(1) *Withdrawal date.* (i)(A) Except as provided in paragraph (i)(1)(i)(B) and (C) of this section, a student's withdrawal date is the earlier of—

(*1*) The date that the student notifies an institution of the student's withdrawal, or the date of withdrawal specified by the student, whichever is later; or

(*2*) If the student drops out of the institution without notifying the institution (does not withdraw officially), the last recorded date of class attendance by the student, as documented by the institution.

(B) If the student takes an approved leave of absence, the student's withdrawal date is the last recorded date of class attendance by the student, as documented by the institution.

(C) If the student is enrolled in an educational program that consists predominantly of correspondence courses, the student's withdrawal date is normally the date of the last lesson submitted by the student, if the student failed to submit the subsequent lesson in accordance with the schedule for lessons established by the institution. However, if the student establishes in writing, within 60 days of the date of the last lesson that he or she submitted, a desire to continue in the program and an understanding that the required lessons must be submitted on time, the institution may restore that student to "in school" status for purposes of funds received under the Title IV, HEA programs. The institution may not grant the student more than one restoration to "in school" status on this basis.

(ii) An institution must determine the student's withdrawal date within 30 days after the expiration of the earlier of the—

(A) Period of enrollment for which the student has been charged;

(B) Academic year in which the student withdrew; or

(C) Educational program from which the student withdrew.

(2) *Timely payment.* An institution shall pay a refund that is due to a student—

(i) If a student officially withdraws or is expelled, within 30 days after the student's withdrawal date;

(ii) If a student drops out, within 30 days of the earliest of the—

(A) Date on which the institution determines that the student dropped out;

(B) Expiration of the academic term in which the student withdrew; or

(C) Expiration of the period of enrollment for which the student has been charged; or

(iii) If a student takes an approved leave of absence, within 30 days after the last recorded date of class attendance by the student, as documented by the institution.

(Authority: 20 U.S.C. 1091b, 1092, 1094)

16. Section 668.23 is revised to read as follows:

§ 668.23 Audits, records, and examinations.

(a) An institution or a foreign institution as defined in 34 CFR 600.52 that participates in the Federal Perkins Loan, FWS, FSEOG, Federal Stafford Loan, Federal PLUS, Federal Pell Grant, PAS, or FDSL Program shall comply with the regulations for that program concerning—

(1) Fiscal and accounting systems;

(2) Program and fiscal recordkeeping; and

(3) Record retention.

(b)(1) An institution or a foreign institution as defined in 34 CFR 600.52 that participates in any Title IV, HEA program shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution participates, the appropriate nationally recognized accrediting agency, and the appropriate State postsecondary review entity designated under 34 CFR part 667, in the conduct of audits, investigations, and program reviews authorized by law.

(2) A third-party servicer shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, and the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution contracting with the servicer participates, the appropriate nationally recognized accrediting agency of an institution with which the servicer contracts, and the State postsecondary review entity designated under 34 CFR part 667, in the conduct of audits, investigations, and program reviews authorized by law.

(3) The institution's or servicer's cooperation must include—

(i) Providing timely access, for examination and copying, to the records (including computerized records) required by the applicable regulations and to any other pertinent books, documents, papers, computer programs, and records;

(ii) Providing reasonable access to personnel associated with the institution's or servicer's administration of the Title IV, HEA programs for the purpose of obtaining relevant information. In providing reasonable access, the institution or servicer shall not—

(A) Refuse to supply any relevant information;

(B) Refuse to permit interviews with those personnel that do not include the presence of the institution's or servicer's management; and

(C) Refuse to permit interviews with those personnel that are not tape recorded by the institution or servicer.

(c)(1)(i) An institution or a foreign institution as defined in 34 CFR 600.52 that participates in the FDSL, Federal Perkins Loan, FWS, FSEOG, Federal Stafford Loan, Federal PLUS, Federal SLS, Federal Pell Grant, or PAS Program shall have performed at least annually a compliance audit of its Title IV, HEA programs.

(ii) A third-party servicer shall have performed at least annually a compliance audit of every aspect of the servicer's administration of the participation in the Title IV, HEA programs of each institution with which the servicer has a contract, unless—

(A) The servicer contracts with only one participating institution; and

(B) The audit of that institution's participation involves every aspect of the servicer's administration of that Title IV, HEA program.

(iii) To meet the requirements of paragraph (c)(1)(ii) of this section, a third-party servicer that contracts with more than one participating institution may submit a single compliance audit report that covers every aspect of the servicer's administration of the participation in the Title IV, HEA programs for each institution with which the servicer contracts.

(iv) The audit required under paragraph (c)(1)(i) or (ii) of this section shall be conducted by an independent auditor in accordance with the general standards and the standards for compliance audits in the U.S. General Accounting Office's (GAO's) Standards for Audit of Governmental Organizations, Programs, Activities, and Functions. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.)

(2)(i) The institution's first audit must cover the institution's activities for the entire period of time since the institution began to participate in the Title IV, HEA program for which the audit is performed. Each subsequent audit must cover the institution's activities for the entire period of time since the preceding audit.

(ii) The servicer's first audit must cover the servicer's activities for its first full fiscal year beginning on or after July 1, 1994, and include any period from the effective date to the beginning of the first full fiscal year. Each subsequent audit that the servicer has performed must cover the servicer's activities for the entire period of time since the servicer's preceding audit.

(3) The institution or servicer, as applicable, shall submit its audit report to the Department of Education's Inspector General within 120 days of the end of the institution's or servicer's fiscal year or, if applicable, in accordance with deadlines established in the Single Audit Act.

(4) The Secretary may require the institution or servicer to provide, upon request, to cognizant guaranty agencies and eligible lenders under the FFEL programs, State agencies, the Secretary of Veterans Affairs, nationally recognized accrediting agencies, and State postsecondary review entities designated under 34 CFR part 667, the results of any audit conducted under this section.

(d) Procedures for audits are contained in audit guides developed by, and available from, the Department of Education's Office of Inspector General. These audit guides do not impose any requirements beyond those imposed under applicable statutes and regulations and GAO's Standards for Audit of Governmental Organizations, Programs, Activities, and Functions. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.)

(e)(1) An institution, a foreign institution as defined 34 CFR 600.52, or a third-party servicer that has an audit conducted in accordance with this section shall—

(i) Give the Secretary and the Inspector General access to records or other documents necessary to review the audit; and

(ii) Include in any arrangement with an individual or firm conducting an audit described in this section a requirement that the individual or firm shall give the Secretary and the Inspector General access to records or other documents necessary to review the audit.

(2) A third-party servicer shall give the Secretary and the Inspector General access to records or other documents necessary to review an institution's audit.

(3) An institution shall give the Secretary and the Inspector General access to records or other documents necessary to review a third-party servicer's audit.

(f) The Secretary considers the audit requirement in paragraph (c) of this section to be satisfied by an audit conducted in accordance with—

(1) The Single Audit Act (Chapter 75 of title 31, United States Code); or

(2) Office of Management and Budget Circular A-133, "Audits of Institutions of Higher Education and Other Nonprofit Organizations."

(g) Upon written request, an institution, a foreign institution as defined in 34 CFR 600.52, or a third-party servicer shall give the Secretary access to all Title IV, HEA program and fiscal records, including records reflecting transactions with any financial institution with which the institution or servicer deposits or has deposited any Title IV, HEA program funds.

(h)(1) In addition to the records required under the applicable program regulations and this part, for each recipient of Title IV, HEA program assistance, the institution or foreign institution as defined in 34 CFR 600.52 shall establish and maintain, on a current basis, records regarding—

(i) The student's admission to, and enrollment status at, the institution;

(ii) The educational program and courses in which the student is enrolled;

(iii) Whether the student is maintaining satisfactory progress in his or her educational program;

(iv) Any refunds due or paid to the student, the Title IV, HEA program or accounts, and the student's lender under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs;

(v) The student's placement by the institution in a job if the institution provides a placement service and the student uses that service;

(vi) The student's prior receipt of financial aid (see § 668.19);

(vii) The verification of student aid application data.

(viii) Financial and other institutional records necessary to determine the institutional eligibility, financial responsibility, and administrative capability of the institution; and

(2)(i) An institution or a foreign institution as defined in 34 CFR 600.52 shall establish and maintain records regarding the educational qualifications of each regular student it admits, whether or not the student receives Title IV, HEA program assistance, that are relevant to the institution's admission standards.

(ii) An institution or a foreign institution as defined in 34 CFR 600.52 at which only certain educational programs have been determined eligible shall establish and maintain records regarding the admission requirements and educational qualifications of each regular student enrolled in the eligible program or programs, whether the

student received Title IV, HEA program assistance or not.

(3) Records required under applicable program regulations and this part shall be—

(i) Systematically organized;

(ii) Readily available for review by the Secretary at the geographical location where the student will receive his or her degree or certificate of program or course completion; and

(iii) Retained by the institution for the longer of at least five years from the time the record is established or the period of time required under the applicable program regulations or this part.

(Authority: 20 U.S.C. 1088, 1094, 1099c, 1141 and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

17. Section 668.24 is revised to read as follows:

§ 668.24 Audit exceptions and repayments.

(a)(1) If, as a result of a Federal audit or an audit performed at the direction of an institution or third-party servicer, an expenditure made by the institution or servicer or the institution's or servicer's compliance with an applicable requirement (including the lack of proper documentation), is questioned, the Secretary notifies the institution or servicer of the questioned expenditure or compliance.

(2) If the institution or servicer believes that the questioned expenditure or compliance was proper, the institution or servicer shall notify the Secretary in writing of the institution's or servicer's position and the reasons for that position.

(3) The institution's or servicer's response must be based on performing an attestation engagement in accordance with the Standards for Attestation Engagements of the American Institute of Certified Public Accountants and must be received by the Secretary within 45 days of the date of the Secretary's notification to the institution or servicer.

(b)(1) Based on the audit finding and the institution's or third-party servicer's response, the Secretary determines the amount of liability, if any, owed by the institution or servicer and instructs the institution or servicer as to the manner of repayment.

(2) If the Secretary determines that a third-party servicer owes a liability for its administration of an institution's Title IV, HEA programs, the servicer shall notify each institution under whose contract the servicer owes a liability of the determination. The servicer shall also notify every institution that contracts with the servicer for the same service that the Secretary determined that a liability was owed.

(c)(1) An institution or third-party servicer that must repay funds under the procedures in this section shall repay those funds at the direction of the Secretary within 45 days of the date of the Secretary's notification, unless—

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

(ii) The Secretary permits a longer repayment period.

(2) Notwithstanding paragraphs (b) and (c)(1) of this section—

(i) If an institution or third-party servicer has posted surety or has provided a third-party guarantee and the Secretary questions expenditures or compliance with applicable requirements and identifies liabilities, then the Secretary may determine that deferring recourse to the surety or guarantee is not appropriate because—

(A) The need to provide relief to students or borrowers affected by the act or omission giving rise to the liability outweighs the importance of deferring collection action until completion of available appeal proceedings; or

(B) The terms of the surety or guarantee do not provide complete assurance that recourse to that protection will be fully available through the completion of available appeal proceedings; or

(ii) The Secretary may use administrative offset pursuant to 34 CFR part 30 to collect the funds owed under the procedures of this section.

(3) If, under the proceedings in subpart H, liabilities asserted in the Secretary's notification, under paragraph (a)(1) of this section, to the institution or third-party servicer are upheld, the institution or third-party servicer shall repay those funds at the direction of the Secretary within 30 days of the final decision under subpart H of this part unless—

(i) The Secretary permits a longer repayment period; or

(ii) The Secretary determines that earlier collection action is appropriate pursuant to paragraph (c)(2) of this section.

(d) An institution is held responsible for any liability owed by the institution's third-party servicer for a violation incurred in servicing any aspect of that institution's participation in the Title IV, HEA programs and remains responsible for that amount until that amount is repaid in full.

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

18. Section 668.25 is redesignated as § 668.26 and a new § 668.25 is added to read as follows:

§ 668.25 Contracts between an institution and a third-party servicer.

(a) An institution may enter into a written contract with a third-party servicer for the administration of any aspect of the institution's participation in any Title IV, HEA program only to the extent that the servicer's eligibility to contract with the institution has not been limited, suspended, or terminated under the proceedings of subpart G of this part.

(b) Subject to the provisions of paragraph (d) of this section, a third-party servicer is eligible to enter into a written contract with an institution for the administration of any aspect of the institution's participation in any Title IV, HEA program only to the extent that the servicer's eligibility to contract with the institution has not been limited, suspended, or terminated under the proceedings of subpart G of this part.

(c) In a contract with an institution, a third-party servicer shall agree to—

(1) Comply with all statutory provisions of or applicable to Title IV of the HEA, all regulatory provisions prescribed under that statutory authority, and all special arrangements, agreements, limitations, suspensions, and terminations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement to use any funds that the servicer administers under any Title IV, HEA program and any interest or other earnings thereon solely for the purposes specified in and in accordance with that program;

(2) Refer to the Office of Inspector General of the Department of Education for investigation any information indicating there is reasonable cause to believe that the institution might have engaged in fraud or other criminal misconduct in connection with the institution's administration of any Title IV, HEA program or an applicant for Title IV, HEA program assistance might have engaged in fraud or other criminal misconduct in connection with his or her application. Examples of the type of information that must be referred are—

(i) False claims by the institution for Title IV, HEA program assistance;

(ii) False claims of independent student status;

(iii) False claims of citizenship;

(iv) Use of false identities;

(v) Forgery of signatures or certifications; and

(vi) False statements of income;

(3) Be jointly and severally liable with the institution to the Secretary for any

violation by the servicer of any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, and any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA;

(4) In the case of a third-party servicer that disburses funds (including funds received under the Title IV, HEA programs) or delivers Federal Stafford Loan or Federal SLS Program proceeds to a student—

(i) Confirm the eligibility of the student before making that disbursement or delivering those proceeds. This confirmation must include, but is not limited to, any applicable information contained in the records required under § 668.23(h); and

(ii) Calculate and pay refunds and repayments due a student, the Title IV, HEA program accounts, and the student's lender under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs in accordance with the institution's refund policy, the provisions of §§ 668.21 and 668.22, and applicable program regulations; and

(5) If the servicer or institution terminates the contract, or if the servicer stops providing services for the administration of a Title IV, HEA program, goes out of business, or files a petition under the Bankruptcy Code, return to the institution all—

(i) Records in the servicer's possession pertaining to the institution's participation in the program or programs for which services are no longer provided; and

(ii) Funds, including Title IV, HEA program funds, received from or on behalf of the institution or the institution's students, for the purposes of the program or programs for which services are no longer provided.

(d) A third-party servicer may not enter into a written contract with an institution for the administration of any aspect of the institution's participation in any Title IV, HEA program, if—

(1)(i) The servicer has been limited, suspended, or terminated by the Secretary within the preceding five years;

(ii) The servicer has had, during the servicer's two most recent audits of the servicer's administration of the Title IV, HEA programs, an audit finding that resulted in the servicer's being required to repay an amount greater than five percent of the funds that the servicer administered under the Title IV, HEA programs for any award year; or

(iii) The servicer has been cited during the preceding five years for failure to submit audit reports required under Title IV of the HEA in a timely fashion; and

(2)(i) In the case of a third-party servicer that has been subjected to a termination action by the Secretary, either the servicer, or one or more persons or entities that the Secretary determines (under the provisions of § 668.15) exercise substantial control over the servicer, or both, have not submitted to the Secretary financial guarantees in an amount determined by the Secretary to be sufficient to satisfy the servicer's potential liabilities arising from the servicer's administration of the Title IV, HEA programs; and

(ii) One or more persons or entities that the Secretary determines (under the provisions of § 668.15) exercise substantial control over the servicer have not agreed to be jointly or severally liable for any liabilities arising from the servicer's administration of the Title IV, HEA programs and civil and criminal monetary penalties authorized under Title IV of the HEA.

(e)(1)(i) An institution that participates in a Title IV, HEA program shall notify the Secretary within 10 days of the date that—

(A) The institution enters into a new contract or significantly modifies an existing contract with a third-party servicer to administer any aspect of that program;

(B) The institution or a third-party servicer terminates a contract for the servicer to administer any aspect of that program; or

(C) A third-party servicer that administers any aspect of the institution's participation in that program stops providing services for the administration of that program, goes out of business, or files a petition under the Bankruptcy Code.

(ii) The institution's notification must include the name and address of the servicer.

(2) An institution that contracts with a third-party servicer to administer any aspect of the institution's participation in a Title IV, HEA program shall provide to the Secretary, upon request, a copy of the contract, including any modifications, and provide information pertaining to the contract or to the servicer's administration of the institution's participation in any Title IV, HEA program.

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

19. Newly redesignated § 668.26 is revised to read as follows:

§ 668.26 End of an institution's participation in the Title IV, HEA programs.

(a) An institution's participation in a Title IV, HEA program ends on the date that—

(1) The institution closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution or the institution's students;

(2) The institution loses its institutional eligibility under 34 CFR part 600;

(3) The institution's participation is terminated under the proceedings in subpart G of this part;

(4) The institution's period of participation, as specified under § 668.13, expires, or the institution's provisional certification is revoked under § 668.13;

(5) The institution's program participation agreement is terminated or expires under § 668.14;

(6) The institution's participation ends under § 668.17(c); or

(7) The Secretary receives a notice from the appropriate State postsecondary review entity designated under 34 CFR part 667 that the institution's participation should be withdrawn.

(b) If an institution's participation in a Title IV, HEA program ends, the institution shall—

(1) Immediately notify the Secretary of that fact;

(2) Submit to the Secretary within 45 days after the date that the participation ends—

(i) All financial, performance, and other reports required by appropriate Title IV, HEA program regulations; and

(ii) A letter of engagement for an independent audit of all funds that the institution received under that program, the report of which shall be submitted to the Secretary within 45 days after the date of the engagement letter;

(3) Inform the Secretary of the arrangements that the institution has made for the proper retention and storage for a minimum of five years of all records concerning the administration of that program;

(4) If the institution's participation in the Federal Perkins Loan or FDSL Program ended, inform the Secretary of how the institution will provide for the collection of any outstanding loans made under that program;

(5) If the institution's participation in the NEISP or SSIG Program ended—

(i) Inform immediately the State in which the institution is located of that fact; and

(ii) Notwithstanding paragraphs (c) through (e) of this section, follow the

instructions of that State concerning the end of that participation;

(6) If the institution's participation in all the Title IV, HEA programs ended, inform the Secretary of how the institution will provide for the collection of any outstanding loans made under the National Defense/Direct Student Loan and ICL programs; and

(7) Continue to distribute refunds according to § 668.22.

(c) If an institution closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution or the institution's students, the institution shall—

(1) Return to the Secretary, or otherwise dispose of under instructions from the Secretary, any unexpended funds that the institution has received under the Title IV, HEA programs for attendance at the institution, less the institution's administrative allowance, if applicable; and

(2) Return to the appropriate lenders any Federal Stafford Loan and Federal SLS program proceeds that the institution has received but not delivered to, or credited to the accounts of, students attending the institution.

(d)(1) An institution may use funds that it has received under the Federal Pell Grant or PAS Program or a campus-based program or request additional funds from the Secretary, under conditions specified by the Secretary, if the institution does not possess sufficient funds, to satisfy any unpaid commitment made to a student under that Title IV, HEA program only if—

(i) The institution's participation in that Title IV, HEA program ends during a payment period;

(ii) The institution continues to provide, from the date that the participation ends until the scheduled completion date of that payment period, educational programs to otherwise eligible students enrolled in the formerly eligible programs of the institution;

(iii) The commitment was made prior to the end of the participation; and

(iv) The commitment was made for attendance during that payment period or a previously completed payment period.

(2) An institution may credit to a student's account or deliver to the student the proceeds of a disbursement of a Federal Stafford or Federal SLS loan to satisfy any unpaid commitment made to the student under the Federal Stafford Loan or Federal SLS Program only if—

(i) The institution's participation in that Title IV, HEA program ends during a period of enrollment;

(ii) The institution continues to provide, from the date that the participation ends until the scheduled completion date of that period of enrollment, educational programs to otherwise eligible students enrolled in the formerly eligible programs of the institution;

(iii) The commitment was made prior to the end of the participation;

(iv) The commitment was made for attendance during that period of enrollment; and

(v) The proceeds of the first disbursement of the loan were delivered to the student or credited to the student's account prior to the end of the participation.

(3) An institution may use funds that it has received under the FDSL Program or request additional funds from the Secretary, under conditions specified by the Secretary, if the institution does not possess sufficient funds, to credit to a student's account or deliver to the student the proceeds of a disbursement of a Federal Direct Student loan only if—

(i) The institution's participation in the FDSL Program ends during a period of enrollment;

(ii) The institution continues to provide, from the date that the participation ends until the scheduled completion date of that period of enrollment, educational programs to otherwise eligible students enrolled in the formerly eligible programs of the institution;

(iii) The loan was made for attendance during that period of enrollment; and

(iv) The proceeds of the first disbursement of the loan were delivered to the student or credited to the student's account prior to the end of the participation.

(e) For the purposes of this section—

(1) A commitment under the Federal Pell Grant and PAS programs occurs when a student is enrolled and attending the institution and has submitted a valid Student Aid Report to the institution or when an institution has received a valid institutional student information report;

(2) A commitment under the campus-based programs occurs when a student is enrolled and attending the institution and has received a notice from the institution of the amount that he or she can expect to receive and how and when that amount will be paid; and

(3) A commitment under the Federal Stafford and Federal SLS programs occurs when the Secretary or a guaranty agency notifies the lender that the loan is guaranteed.

(Authority: 20 U.S.C. 1094, 1099a–3)

20. Section 668.81 is amended by redesignating paragraph (a)(1) introductory text as paragraph (a) introductory text; revising newly redesignated paragraph (a) introductory text; removing paragraph (a)(2); redesignating paragraph (a)(1)(i) through (a)(1)(iii) as paragraph (a)(1) through (3), respectively; adding a new paragraph (a)(4); revising paragraphs (b), (c), and (d); and removing paragraph (f) to read as follows:

§ 668.81 Scope and special definitions.

(a) This subpart establishes regulations for the following actions with respect to a participating institution or third-party servicer:

* * * * *

(4) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

(b) This subpart applies to an institution or a third-party servicer that violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA.

(c) This subpart does not apply to a determination that—

(1) An institution or any of its locations or educational programs fails to qualify for initial designation as an eligible institution, location, or educational program because the institution, location, or educational program fails to satisfy the statutory and regulatory provisions that define an eligible institution or educational program with respect to the Title IV, HEA program for which a designation of eligibility is sought;

(2) An institution fails to qualify for initial certification or provisional certification to participate in any Title IV, HEA program because the institution does not meet the factors of financial responsibility and standards of administrative capability contained in subpart B of this part;

(3) A participating institution's or a provisionally certified participating institution's period of participation, as specified under § 668.13, has expired; or

(4) A participating institution's provisional certification is revoked under the procedures in § 668.13.

(d) This subpart does not apply to a determination by the Secretary of the system to be used to disburse Title IV, HEA program funds to a participating

institution (i.e., advance payments and payments by way of reimbursements).

* * * * *

21. Section 668.82 is revised to read as follows:

§ 668.82 Standard of conduct.

(a) A participating institution or a third-party servicer that contracts with that institution acts in the nature of a fiduciary in the administration of the Title IV, HEA programs. To participate in any Title IV, HEA program, the institution or servicer must at all times act with the competency and integrity necessary to qualify as a fiduciary.

(b) In the capacity of a fiduciary—

(1) A participating institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs; and

(2) A third-party servicer is subject to the highest standard of care and diligence in administering any aspect of the programs on behalf of the institutions with which the servicer contracts and in accounting to the Secretary and those institutions for any funds administered by the servicer under those programs.

(c) The failure of a participating institution or any of the institution's third-party servicers to administer a Title IV, HEA program, or to account for the funds that the institution or servicer receives under that program, in accordance with the highest standard of care and diligence required of a fiduciary, constitutes grounds for—

(1) An emergency action against the institution, a fine on the institution, or the limitation, suspension, or termination of the institution's participation in that program; or

(2) An emergency action against the servicer, a fine on the servicer, or the limitation, suspension, or termination of the servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in that program.

(d)(1) A participating institution or a third-party servicer with which the institution contracts violates its fiduciary duty if—

(i)(A) The servicer has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds;

(B) A person who exercises substantial control over the servicer, as determined according to § 668.15, has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds;

(C) The servicer employs a person in a capacity that involves the administration of Title IV, HEA programs or the receipt of Title IV, HEA program funds who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or who has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds; or

(D) The servicer uses or contracts in a capacity that involves any aspect of the administration of the Title IV, HEA programs with any other person, agency, or organization that has been or whose officers or employees have been—

(*1*) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(*2*) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; and

(ii) Upon learning of a conviction, plea, or administrative or judicial determination described in paragraph (d)(1)(i) of this section, the institution or servicer, as applicable, does not promptly remove the person, agency, or organization from any involvement in the administration of the institution's participation in Title IV, HEA programs, or, as applicable, the removal or elimination of any substantial control, as determined according to § 668.15, over the servicer.

(2) A violation for a reason contained in paragraph (d)(1) of this section is grounds for terminating—

(i) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program; and

(ii) The participation in any Title IV, HEA program of any institution under whose contract the servicer committed the violation, if that institution had been aware of the violation and had failed to take the appropriate action described in paragraph (d)(1)(ii) of this section.

(e)(1) A participating institution or third-party servicer, as applicable, violates its fiduciary duty if—

(i)(A) The institution or servicer, as applicable, is debarred or suspended under Executive Order (E.O.) 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulations (FAR), 48 CFR part 9, subpart 9.4; or

(B) Cause exists under 34 CFR 85.305 or 85.405 for debarring or suspending the institution, servicer, or any principal or affiliate of the institution or servicer under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4; and

(ii) Upon learning of the debarment, suspension, or cause for debarment or suspension, the institution or servicer, as applicable, does not promptly—

(A) Discontinue the affiliation; or

(B) Remove the principal from responsibility for any aspect of the administration of an institution's or servicer's participation in the Title IV, HEA programs.

(2) A violation for a reason contained in paragraph (e)(1) of this section is grounds for terminating—

(i) The institution's participation in any Title IV, HEA program; and

(ii) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program. The violation is also grounds for terminating, under this subpart, the participation in any Title IV, HEA program of any institution under whose contract the servicer committed the violation, if that institution knew or should have known of the violation.

(f)(1) The debarment of a participating institution or third-party servicer, as applicable, under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4, by the Secretary or another Federal agency from participation in Federal programs, under procedures that comply with 5 U.S.C. 554–557 (formal adjudication requirements under the Administrative Procedure Act), terminates, for the duration of the debarment—

(i) The institution's participation in any Title IV, HEA program; and

(ii) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program.

(2)(i) The suspension of a participating institution or third-party servicer, as applicable, under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4, by the Secretary or another Federal agency from participation in Federal programs, under procedures that comply with 5 U.S.C. 554–557, suspends—

(A) The institution's participation in any Title IV, HEA program; and

(B) The servicer's eligibility to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program.

(ii) A suspension under this paragraph lasts for a period of 60 days, beginning on the date of the suspending official's decision, except that the suspension may last longer if—

(A) The institution or servicer, as applicable, and the Secretary, agree to an extension of the suspension; or

(B) The Secretary begins a limitation or termination proceeding against the institution or servicer, as applicable, under this subpart before the 60th day of the suspension.

(Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189), E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1070, *et seq.*, 1082(a)(1) and (h)(1), 1094(c)(1)(D) and (H), and 3474)

22. Section 668.83 is revised to read as follows:

§ 668.83 Emergency action.

(a) Under an emergency action, the Secretary may—

(1) Withhold Title IV, HEA program funds from a participating institution or its students, or from a third-party servicer, as applicable;

(2)(i) Withdraw the authority of the institution or servicer, as applicable, to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds; or

(ii) Withdraw the authority of the institution or servicer, as applicable, to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds except in accordance with a particular procedure; and

(3)(i) Withdraw the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program; or

(ii) Withdraw the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program except in accordance with a particular procedure.

(b)(1) An initiating official begins an emergency action against an institution or third-party servicer by sending the institution or servicer a notice by registered mail, return receipt requested. In an emergency action against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The official also may transmit the notice by other, more expeditious means if practical.

(2) The emergency action takes effect on the date the initiating official mails the notice to the institution or servicer, as applicable.

(3) The notice states the grounds on which the emergency action is based, the consequences of the emergency action, and that the institution or servicer, as applicable, may request an opportunity to show cause why the emergency action is unwarranted.

(c)(1) An initiating official takes emergency action against an institution or third-party servicer only if that official—

(i) Receives information, determined by the official to be reliable, that the institution or servicer, as applicable, is violating any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA;

(ii) Determines that immediate action is necessary to prevent misuse of Title IV, HEA program funds; and

(iii) Determines that the likelihood of loss from that misuse outweighs the importance of awaiting completion of any proceeding that may be initiated to limit, suspend, or terminate, as applicable—

(A) The participation of the institution in one or more Title IV, HEA programs; or

(B) The eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

(2) Examples of violations of a Title IV, HEA program requirement that cause misuse and the likely loss of Title IV, HEA program funds include—

(i) Causing the commitment, disbursement, or delivery by any party of Title IV, HEA program funds in an amount that exceeds—

(A) The amount for which students are eligible; or

(B) The amount of principal, interest, or special allowance payments that would have been payable to the holder of a Federal Stafford, Federal PLUS, or Federal SLS loan if a refund allocable to that loan had been made in the amount and at the time required;

(ii) Using, offering to make available, or causing the use or availability of Title IV, HEA program funds for educational services if—

(A) The institution, servicer, or agents of the institution or servicer have made a substantial misrepresentation as described in §§ 668.72, 668.73, or 668.74 related to those services;

(B) The institution lacks the administrative or financial ability to provide those services in full; or

(C) The institution, or servicer, as applicable, lacks the administrative or financial ability to compensate by appropriate refund for any portion of an educational program not completed by a student; and

(iii) Engaging in fraud involving the administration of a Title IV, HEA program. Examples of fraud include—

(A) Falsification of any document received from a student or pertaining to a student's eligibility for assistance under a Title IV, HEA program;

(B) Falsification, including false certifications, of any document submitted by the institution or servicer to the Secretary;

(C) Falsification, including false certifications, of any document used for or pertaining to—

(*1*) The legal authority of an institution to provide postsecondary education in the State in which the institution is located; or

(*2*) The accreditation or preaccreditation of an institution or any of the institution's educational programs or locations;

(D) Falsification, including false certifications, of any document submitted to a guaranty agency under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs or an independent auditor;

(E) Falsification of any document submitted to a third-party servicer by an institution or to an institution by a third-party servicer pertaining to the institution's participation in a Title IV, HEA program; and

(F) Falsification, including false certifications, of any document pertaining to the performance of any loan collection activity, including activity that is not required by the HEA or applicable program regulations.

(3) If the Secretary begins an emergency action against a third-party servicer, the Secretary may also begin an emergency action against any institution under whose contract a third-party servicer commits the violation.

(d)(1) Except as provided in paragraph (d)(2) of this section, after an emergency action becomes effective, an institution or third-party servicer, as applicable, may not—

(i) Make or increase awards or make other commitments of aid to a student under the applicable Title IV, HEA program;

(ii) Disburse either program funds, institutional funds, or other funds as assistance to a student under that Title IV, HEA program;

(iii) In the case of an emergency action pertaining to participation in the Federal Stafford Loan, Federal PLUS, or Federal SLS Program—

(A) Certify an application for a loan under that program;

(B) Deliver loan proceeds to a student under that program; or

(C) Retain the proceeds of a loan made under that program that are received after the emergency action takes effect; or

(iv) In the case of an emergency action against a third-party servicer, administer any aspect of any institution's participation in any Title IV, HEA program.

(2) If the initiating official withdraws, by an emergency action, the authority of the institution or servicer to commit, disburse, deliver, or cause the commitment, disbursement, or delivery of Title IV, HEA program funds, or the authority of the servicer to administer any aspect of any institution's participation in any Title IV, HEA program, except in accordance with a particular procedure specified in the notice of emergency action, the institution or servicer, as applicable, may not take any action described in paragraph (d)(1) of this section except in accordance with the procedure specified in the notice.

(e)(1) Upon request by the institution or servicer, as applicable, the Secretary provides the institution or servicer, as soon as practicable, with an opportunity to show cause that the emergency action is unwarranted or should be modified.

(2) An opportunity to show cause consists of an opportunity to present evidence and argument to a show-cause official. The initiating official does not act as the show-cause official for any emergency action that the initiating official has begun. The show-cause official is authorized to grant relief from the emergency action. The institution or servicer may make its presentation in writing or, upon its request, at an informal meeting with the show-cause official.

(3) The show-cause official may limit the time and manner in which argument and evidence may be presented in order to avoid unnecessary delay or the presentation of immaterial, irrelevant, or repetitious matter.

(4) The institution or servicer, as applicable, has the burden of persuading the show-cause official that the emergency action imposed by the notice is unwarranted or should be modified because—

(i) The grounds stated in the notice did not, or no longer, exist;

(ii) The grounds stated in the notice will not cause loss or misuse of Title IV, HEA program funds; or

(iii) The institution or servicer, as applicable, will use procedures that will reliably eliminate the risk of loss from the misuse described in the notice.

(5) The show-cause official continues, modifies, or revokes the emergency action promptly after consideration of any argument and evidence presented by the institution or servicer, as applicable, and the initiating official.

(6) The show-cause official notifies the institution or servicer, as applicable, of that official's determination promptly after the completion of the show-cause meeting or, if no meeting is requested, after the official receives all the material submitted by the institution in opposition to the emergency action. In the case of a notice to a third-party servicer, the official also notifies each institution that contracts with the servicer of that determination. The show-cause official may explain that determination by adopting or modifying the statement of reasons provided in the notice of emergency action.

(f)(1) An emergency action does not extend more than 30 days after initiated unless the Secretary initiates a limitation, suspension, or termination proceeding under this part or under 34 CFR part 600 against the institution or servicer, as applicable, within that 30-day period, in which case the emergency action continues until a final decision is issued in that proceeding, as provided in § 668.90(c), as applicable.

(2) Until a final decision is issued by the Secretary in a proceeding described in paragraph (f)(1) of this section, the continuation, modification, or revocation of the emergency action is at the sole discretion of the initiating official, or, if a show-cause proceeding is conducted, the show-cause official.

(3) If an emergency action extends beyond 180 days by virtue of paragraph (f)(1) of this section, the institution or servicer, as applicable, may then submit written material to the show-cause official to demonstrate that because of facts occurring after the later of the notice by the initiating official or the show-cause meeting, continuation of the emergency action is unwarranted and the emergency action should be modified or ended. The show-cause official considers any written material submitted and issues a determination that continues, modifies, or revokes the emergency action.

(g) The expiration, modification, or revocation of an emergency action against an institution or third-party servicer does not bar subsequent emergency action against that institution on grounds other than those specifically identified in the notice imposing the prior emergency action. Separate grounds may include violation by an institution or third-party servicer of an agreement or limitation imposed or resulting from the prior emergency action.

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

23. Section 668.84 is revised to read as follows:

§ 668.84 Fine proceedings.

(a) *Scope and consequences.* (1) The Secretary may impose a fine of up to $25,000 per violation on a participating institution or third-party servicer that—

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA; or

(ii) Substantially misrepresents the nature of—

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a fine proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(b) *Procedures.* (1) A designated department official begins a fine proceeding by sending the institution or servicer, as applicable, a notice by certified mail, return receipt requested. In the case of a fine proceeding against a third-party servicer, the official also sends the notice to each institution that is affected by the alleged violations identified as the basis for the fine action, and, to the extent possible, to each institution that contracts with the servicer for the same service affected by the violation. This notice—

(i) Informs the institution or servicer of the Secretary's intent to fine the institution or servicer, as applicable, and the amount of the fine and identifies the alleged violations that constitute the basis for the action;

(ii) Specifies the proposed effective date of the fine, which is at least 20 days from mailing of the notice of intent;

(iii) Informs the institution or servicer that the fine will not be effective on the date specified in the notice if the designated department official receives from the institution or servicer, as applicable, by that date a written request for a hearing or written material indicating why the fine should not be imposed; and

(iv) In the case of a fine proceeding against a third-party servicer, informs each institution that is affected by the alleged violations of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution affected by the alleged violations that—

(i) The fine will not be imposed; or

(ii) The fine is imposed as of a specified date, and in a specified amount.

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and the place. The date is at least 15 days after the designated department official receives the request.

(4) A hearing official conducts a hearing in accordance with § 668.88.

(c) *Expedited proceedings.* With the approval of the hearing official and the consent of the designated department official and the institution or servicer, any time schedule specified in this section may be shortened.

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

24. Section 668.85 is revised to read as follows:

§ 668.85 Suspension proceedings.

(a) *Scope and consequences.* (1) The Secretary may suspend an institution's participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the institution or servicer—

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA; or

(ii) Substantially misrepresents the nature of—

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a suspension proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(3) The suspension may not exceed 60 days unless—

(i) The institution or servicer and the Secretary agree to an extension if the institution or servicer, as applicable, has not requested a hearing; or

(ii) The designated department official begins a limitation or termination proceeding under § 668.86.

(b) *Procedures.* (1) A designated department official begins a suspension proceeding by sending a notice to an institution or third-party servicer by certified mail, return receipt requested. In the case of a suspension proceeding against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The designated department official may also transmit the notice by other, more expeditious means if practical. The notice—

(i) Informs the institution or servicer of the intent of the Secretary to suspend the institution's participation or the servicer's eligibility, as applicable, cites the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(ii) Specifies the proposed effective date of the suspension, which is at least 20 days after the date of mailing of the notice of intent;

(iii) Informs the institution or servicer that the suspension will not be effective on the date specified in the notice, except as provided in § 668.90(b)(2), if the designated department official receives from the institution or servicer, as applicable, by that date a request for a hearing or written material indicating why the suspension should not take place; and

(iv) In the case of a suspension proceeding against a third-party servicer, informs each institution that contracts with the servicer of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing, but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer that—

(i) The proposed suspension is dismissed; or

(ii) The suspension is effective as of a specified date.

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and the place. The date is at least 15 days after the designated department official receives the request. The suspension does not take place until after the requested hearing is held.

(4) A hearing official conducts a hearing in accordance with § 668.88.

(c) *Expedited proceedings.* With the approval of the hearing official and the consent of the designated department official and the institution or servicer, as applicable, any time period specified in this section may be shortened.

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

25. Section 668.86 is revised to read as follows:

§ 668.86 Limitation or termination proceedings.

(a) *Scope and consequences.* (1) The Secretary may limit or terminate an institution's participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the institution or servicer—

(i) Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA; or

(ii) Substantially misrepresents the nature of—

(A) In the case of an institution, its educational program, its financial charges, or the employability of its graduates; or

(B) In the case of a third-party servicer, as applicable, the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.

(2) If the Secretary begins a limitation or termination proceeding against a third-party servicer, the Secretary also may begin a fine, limitation, suspension, or termination proceeding against any institution under whose contract a third-party servicer commits the violation.

(3) The consequences of the limitation or termination of the institution's

participation or the servicer's eligibility are described in §§ 668.93 and 668.94, respectively.

(b) *Procedures.* (1) A designated department official begins a limitation or termination proceeding by sending an institution or third-party servicer a notice by certified mail, return receipt requested. In the case of a limitation or termination proceeding against a third-party servicer, the official also sends the notice to each institution that contracts with the servicer. The designated department official may also transmit the notice by other, more expeditious means if practical. This notice—

(i) Informs the institution or servicer of the intent of the Secretary to limit or terminate the institution's participation or servicer's eligibility, as applicable, cites the consequences of that action, and identifies the alleged violations that constitute the basis for the action, and, in the case of a limitation proceeding, states the limits to be imposed;

(ii) Specifies the proposed effective date of the limitation or termination, which is at least 20 days after the date of mailing of the notice of intent;

(iii) Informs the institution or servicer that the limitation or termination will not be effective on the date specified in the notice if the designated department official receives from the institution or servicer, as applicable, by that date a request for a hearing or written material indicating why the limitation or termination should not take place; and

(iv) In the case of a limitation or termination proceeding against a third-party servicer, informs each institution that contracts with the servicer of the consequences of the action to the institution.

(2) If the institution or servicer does not request a hearing but submits written material, the designated department official, after considering that material, notifies the institution or, in the case of a third-party servicer, the servicer and each institution that contracts with the servicer that—

(i) The proposed action is dismissed;

(ii) Limitations are effective as of a specified date; or

(iii) The termination is effective as of a specified date.

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and the place. The date is at least 15 days after the designated department official receives the request. The limitation or termination does not take place until after the requested hearing is held.

(4) A hearing official conducts a hearing in accordance with § 668.88.

(c) *Expedited proceeding.* With the approval of the hearing official and the consent of the designated department official and the institution or servicer, as applicable, any time schedule specified in this section may be shortened.

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

26. Section 668.87 is revised to read as follows:

§ 668.87 Prehearing conference.

(a) A hearing official may convene a prehearing conference if he or she thinks that the conference would be useful, or if the conference is requested by—

(1) The designated department official who brought a proceeding against an institution or third-party servicer under this subpart; or

(2) The institution or servicer, as applicable.

(b) The purpose of a prehearing conference is to allow the parties to settle or narrow the dispute.

(c) If the hearing official, the designated department official, and the institution, or servicer, as applicable, agree, a prehearing conference may consist of—

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

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

27. Section 668.88 is amended by revising paragraph (b) introductory text and paragraph (d) to read as follows:

§ 668.88 Hearing.

* * * * *

(b) If the hearing official, the designated department official who brought a proceeding against an institution or third-party servicer under this subpart, and the institution or servicer, as applicable, agree, the hearing process may be expedited. Procedures to expedite the hearing process may include, but are not limited to, the following—

* * * * *

(d) The designated department official makes a transcribed record of the proceeding and makes one copy of the record available to the institution or servicer.

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

28. Section 668.89 is amended by revising paragraphs (a), (b)(2), and (c) introductory text, and adding a new paragraph (d) to read as follows:

§ 668.89 Authority and responsibilities of the hearing official.

(a) The hearing official regulates the course of a hearing and the conduct of the parties during the hearing. The hearing official takes all necessary steps to conduct a fair and impartial hearing.

(b) * * *

(2) If requested by the hearing official, the parties to a hearing shall provide available personnel who have knowledge about the matter under review for oral or written examination.

(c) The hearing official takes whatever measures are appropriate to expedite a hearing. These measures may include, but are not limited to, the following—

* * * * *

(d) The hearing official is bound by all applicable statutes and regulations. The hearing official may not—

(1) Waive applicable statutes and regulations; or

(2) Rule them invalid.

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

29. Section 668.90 is revised to read as follows:

§ 668.90 Initial and final decisions—Appeals.

(a)(1)(i) A hearing official issues a written initial decision in a hearing by certified mail, return receipt requested to—

(A) The designated department official who began a proceeding against an institution or third-party servicer;

(B) The institution or servicer, as applicable; and

(C) In the case of a proceeding against a third-party servicer, each institution that contracts with the servicer.

(ii) The hearing official may also transmit the notice by other, more expeditious means if practical.

(iii) The hearing official issues the decision within the latest of the following dates:

(A) The 30th day after the last submission is filed with the hearing official.

(B) The 60th day after the last submission is filed with the hearing official if the Secretary, upon request of the hearing official, determines that the unusual complexity of the case requires additional time for preparation of the decision.

(C) The 50th day after the last day of the hearing, if the hearing official does not request the parties to make any posthearing submission.

(2) The hearing official's initial decision states whether the imposition of the fine, limitation, suspension, or termination sought by the designated department official is warranted, in whole or in part. If the designated department official brought a termination action against the institution or servicer, the hearing official may, if appropriate, issue an

initial decision to fine the institution or servicer, as applicable, or, rather than terminating the institution's participation or servicer's eligibility, as applicable, impose one or more limitations on the institution's participation or servicer's eligibility.

(3) Notwithstanding the provisions of paragraph (a)(2) of this section—

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of § 668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of § 668.82(d)(1), the hearing official also finds that termination of the institution's participation or servicer's eligibility, as applicable, is warranted;

(iii) If an action brought against an institution or third-party servicer involves its failure to provide surety in the amount specified by the Secretary under § 668.15, the hearing official finds that the amount of the surety established by the Secretary was appropriate, unless the institution can demonstrate that the amount was unreasonable;

(iv) In a limitation, suspension, or termination proceeding commenced on the grounds described in § 668.17(a)(1), if the hearing official finds that an institution's Federal Stafford loan and Federal SLS cohort default rate, as defined in § 668.17(e), meets the conditions specified in § 668.17(a)(1) for initiation of limitation, suspension, or termination proceedings, the hearing official also finds that the sanction sought by the designated department official is warranted, except that the hearing official finds that no sanction is warranted if the institution demonstrates that it has implemented the default reduction measures described in Appendix D to this part;

(v) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to comply with the requirements of § 668.23(c)(3), if the hearing official finds that the institution or servicer failed to meet those requirements, the hearing official finds that the termination is warranted;

(vi) In a termination action against an institution based on the grounds that the institution is not financially responsible under § 668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in § 668.15(d)(4) have been met; and

(vii) In a termination action against an institution or third-party servicer on the grounds that the institution or servicer, as applicable, engaged in fraud involving the administration of any Title IV, HEA program, the hearing official finds that the termination action is warranted if the hearing official finds that the institution or servicer, as applicable, engaged in that fraud. Examples of fraud include—

(A) Falsification of any document received from a student or pertaining to a student's eligibility for assistance under a Title IV, HEA program;

(B) Falsification, including false certifications, of any document submitted by the institution or servicer to the Department of Education;

(C) Falsification, including false certifications, of any document used for or pertaining to—

(*1*) The legal authority of an institution to provide postsecondary education in the State in which the institution is located; or

(*2*) The accreditation or preaccreditation of an institution or any of the institution's educational programs or locations;

(D) Falsification, including false certifications, of any document submitted to a guaranty agency under the Federal Stafford Loan, Federal PLUS, and Federal SLS programs, an independent auditor, an eligible institution, or a third-party servicer;

(E) Falsification of any document submitted to a third-party servicer by an institution or to an institution by a third-party servicer pertaining to the institution's participation in a Title IV, HEA program; and

(F) Falsification, including false certifications, of any document pertaining to the performance of any loan collection activity, including activity that is not required by the HEA or applicable program regulations.

(4) The hearing official bases findings of fact only on evidence considered at the hearing and on matters given judicial notice. If a hearing is conducted solely through written submissions, the parties must agree to findings of fact.

(b) (1) In a suspension proceeding, the Secretary reviews the hearing official's initial decision and issues a final decision within 20 days after the initial decision. The Secretary adopts the initial decision unless it is clearly unsupported by the evidence presented at the hearing.

(2) The Secretary notifies the institution or servicer and, in the case of a suspension proceeding against a third-party servicer, each institution that contracts with the servicer of the final decision. If the Secretary suspends the institution's participation or servicer's eligibility, the suspension takes effect on the later of—

(i) The day that the institution or servicer receives the notice; or

(ii) The date specified in the designated department official's original notice of intent to suspend the institution's participation or servicer's eligibility.

(3) A suspension may not exceed 60 days unless a designated department official begins a limitation or termination proceeding under this subpart before the expiration of that period. In that case, the period may be extended until a final decision is issued in that proceeding according to paragraph (c) of this section.

(c) (1) In a fine, limitation, or termination proceeding, the hearing official's initial decision automatically becomes the Secretary's final decision 30 days after the initial decision is issued and received by both parties unless, within that 30-day period, the institution or servicer, as applicable, or the designated department official appeals the initial decision to the Secretary.

(2) (i) A party may appeal the hearing official's initial decision by submitting to the Secretary, within 30 days after the party receives the initial decision, a brief or other written statement that explains why the party believes that the Secretary should reverse or modify the decision of the hearing official.

(ii) At the time the party files its appeal submission, the party shall provide a copy of that submission to the opposing party.

(iii) The opposing party shall submit its brief or other responsive statement to the Secretary, with a copy to the appellant, within 30 days after the opposing party receives the appellant's brief or written statement.

(iv) The appealing party may submit proposed findings of fact or conclusions of law. However, the proposed findings of fact must be supported by—

(A) The evidence introduced into the record at the hearing;

(B) Stipulations of the parties if the hearing consisted of written submissions; or

(C) Matters that may be judicially noticed.

(v) Neither party may introduce new evidence on appeal.

(vi) The initial decision of the hearing official imposing a fine or limiting or terminating the institution's participation or servicer's eligibility does not take effect pending the appeal.

(vii) The Secretary renders a final decision. The Secretary may delegate to a designated department official the

functions described in paragraph (c)(2)(vii) through (ix) of this section.

(viii) In rendering a final decision, the Secretary considers only evidence introduced into the record at the hearing and facts agreed to by the parties if the hearing consisted only of written submissions and matters that may be judicially noticed.

(ix) If the hearing official finds that a termination is warranted pursuant to paragraph (a)(3) of this section, the Secretary may affirm, modify, or reverse the initial decision, or may remand the case to the hearing official for further proceedings consistent with the Secretary's decision. If the Secretary affirms the initial decision without issuing a statement of reasons, the Secretary adopts the opinion of the hearing official as the decision of the Secretary. If the Secretary modifies, remands, or reverses the initial decision, in whole or in part, the Secretary's decision states the reasons for the action taken.

(Authority: 20 U.S.C. 1082, 1094)

30. Section 668.91 is amended by revising the heading; and revising paragraphs (a)(1), (a)(2), (b) heading, (b)(1), (b)(2) introductory text, and (c) to read as follows:

§ 668.91 Filing of requests for hearings and appeals; confirmation of mailing and receipt dates.

(a) * * *

(1) A request by an institution or third-party servicer for a hearing or show-cause opportunity, other material submitted by an institution or third-party servicer in response to a notice of proposed action under this subpart, or an appeal to the Secretary under this subpart must be filed with the designated department official by hand-delivery, mail, or facsimile transmission.

(2) Documents filed by facsimile transmission must be transmitted to the designated department official identified, either in the notice initiating the action, or, for an appeal, in instructions provided by the hearing official, as the individual responsible to receive them. A party filing a document by facsimile transmission must confirm that a complete and legible copy of the document was received by the Department of Education, and may be required by the designated department official to provide a hard copy of the document.

* * * * *

(b) *Confirmation of mailing and receipt dates.* (1) The mailing date of a notice from a designated department official initiating an action under this subpart is the date evidenced on the original receipt of mailing from the U.S. Postal Service.

(2) The date on which a request for a show-cause opportunity, a request for a hearing, other material submitted in response to a notice of action under this subpart, a decision by a hearing official, or a notice of appeal is received is, as applicable—

* * * * *

(c) *Refusals.* If an institution or third-party servicer refuses to accept a notice mailed under this subpart, the Secretary considers the notice as being received on the date that the institution or servicer refuses to accept the notice.

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

31. Section 668.92 is revised to read as follows:

§ 668.92 Fines.

(a) In determining the amount of a fine, the designated department official, hearing official, and Secretary take into account—

(1) (i) The gravity of an institution's or third-party servicer's violation or failure to carry out the relevant statutory provision, regulatory provision, special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA; or

(ii) The gravity of the institution's or servicer's misrepresentation;

(2) The size of the institution;

(3) The size of the servicer's business, including the number of institutions and students served by the servicer;

(4) In the case of a violation by a third-party servicer, the extent to which the servicer can document that the institution contributed to that violation; and

(5) For purposes of assessing a fine on a third-party servicer, the extent to which—

(i) Violations are caused by repeated mechanical systemic unintentional errors. The Secretary counts the total of violations caused by a repeated mechanical systemic unintentional error as a single violation, unless the servicer has been cited for a similar violation previously and had failed to make the appropriate corrections to the system; and

(ii) The financial loss of Title IV, HEA program funds was attributable to a repeated mechanical systemic unintentional error.

(b) In determining the gravity of the institution's or servicer's violation, failure, or misrepresentation under paragraph (a) of this section, the designated department official, hearing official, and Secretary take into account the amount of any liability owed by the institution and any third-party servicer that contracts with the institution, and the number of students affected as a result of that violation, failure, or misrepresentation on—

(1) Improperly expended or unspent Title IV, HEA program funds received by the institution or servicer, as applicable; or

(2) Required refunds.

(c) Upon the request of the institution or third-party servicer, the Secretary may compromise the fine.

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

32. Section 668.93 is revised to read as follows:

§ 668.93 Limitation.

A limitation may include, as appropriate to the Title IV, HEA program in question—

(a) A limit on the number or percentage of students enrolled in an institution who may receive Title IV, HEA program funds;

(b) A limit, for a stated period of time, on the percentage of an institution's total receipts from tuition and fees derived from Title IV, HEA program funds;

(c) A limit on the number or size of institutions with which a third-party servicer may contract;

(d) A limit on the number of borrower or loan accounts that a third-party servicer may service under a contract with an institution;

(e) A limit on the responsibilities that a third-party servicer may perform under a contract with an institution;

(f) A requirement for a third-party servicer to perform additional responsibilities under a contract with an institution;

(g) A requirement that an institution obtain surety, in a specified amount, to assure its ability to meet its financial obligations to students who receive Title IV, HEA program funds;

(h) A requirement that a third-party servicer obtain surety, in a specified amount, to assure the servicer's ability to meet the servicer's financial obligations under a contract; or

(i) Other conditions as may be determined by the Secretary to be reasonable and appropriate.

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

33. Section 668.94 is revised to read as follows:

§ 668.94 Termination.

(a) A termination.

(1) Ends an institution's participation in a Title IV, HEA program or ends a third-party servicer's eligibility to contract with any institution to

administer any aspect of the institution's participation in a Title IV, HEA program;

(2) Ends the authority of a third-party servicer to administer any aspect of any institution's participation in that program;

(3) Prohibits an institution or third-party servicer, as applicable, or the Secretary from making or increasing awards under that program;

(4) Prohibits an institution or third-party servicer, as applicable, from making any other new commitments of funds under that program; and

(5) If an institution's participation in the Federal Stafford Loan, Federal PLUS, or Federal SLS Program has been terminated, prohibits further guarantee commitments by the Secretary for loans under that program to students to attend that institution, and, if the institution is a lender under that program, prohibits further disbursements by the institution (whether or not guarantee commitments have been issued by the Secretary or a guaranty agency for those disbursements).

(b) After its participation in a Title IV, HEA program has been terminated, an institution may disburse or deliver funds under that Title IV, HEA program to students enrolled at the institution only in accordance with § 668.26 and with any additional requirements imposed under this part.

(c) If a third-party servicer's eligibility is terminated, the servicer must return to each institution that contracts with the servicer any funds received by the servicer under the applicable Title IV, HEA program on behalf of the institution or the institution's students or otherwise dispose of those funds under instructions from the Secretary. The servicer also must return to each institution that contracts with the servicer all records pertaining to the servicer's administration of that program on behalf of that institution.

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

34. Section 668.95 is revised to read as follows:

§ 668.95 Reimbursements, refunds, and offsets.

(a) The designated department official, hearing official, or Secretary may require an institution or third-party servicer to take reasonable and appropriate corrective action to remedy the institution's or servicer's violation, as applicable, of any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA.

(b) The corrective action may include payment of any funds to the Secretary, or to designated recipients, that the institution or servicer, as applicable, improperly received, withheld, disbursed, or caused to be disbursed. Corrective action may, for example, relate to—

(1) With respect to the Federal Stafford Loan, Federal PLUS, and Federal SLS programs—

(i) Ineligible interest benefits, special allowances, or other claims paid by the Secretary; and

(ii) Discounts, premiums, or excess interest paid in violation of 34 CFR part 682; and

(2) With respect to all Title IV, HEA programs—

(i) Refunds required under program regulations; and

(ii) Any grants, work-study assistance, or loans made in violation of program regulations.

(c) If any final decision requires an institution or third-party servicer to reimburse or make any other payment to the Secretary, the Secretary may offset these claims against any benefits or claims due to the institution or servicer.

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

35. Section 668.96 is revised to read as follows:

§ 668.96 Reinstatement after termination.

(a) (1) An institution whose participation in a Title IV, HEA program has been terminated may file a request for reinstatement of that participation.

(2) A third-party servicer whose eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program has been terminated may file a request for reinstatement of that eligibility.

(b) An institution whose participation has been terminated or a third-party servicer whose eligibility has been terminated may request reinstatement only after the later of the expiration of—

(1) Eighteen months from the effective date of the termination; or

(2) A debarment or suspension under Executive Order 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

(c) To be reinstated, an institution or third-party servicer must submit its request for reinstatement in writing to the Secretary and must—

(1) Demonstrate to the Secretary's satisfaction that it has corrected the violation or violations on which its termination was based, including payment in full to the Secretary or to other recipients of funds that the institution or servicer, as applicable, has improperly received, withheld, disbursed, or caused to be disbursed;

(2) Meet all applicable requirements of this part; and

(3) In the case of an institution, enter into a new program participation agreement with the Secretary.

(d) The Secretary, within 60 days of receiving the reinstatement request—

(1) Grants the request;

(2) Denies the request; or

(3) Grants the request subject to a limitation or limitations.

(Authority: 20 U.S.C. 1094; E.O. 12549 (3 CFR, 1986 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

36. Section 668.97 is revised to read as follows:

§ 668.97 Removal of limitation.

(a) An institution whose participation in a Title IV, HEA program has been limited may not apply for removal of the limitation before the expiration of 12 months from the effective date of the limitation.

(b) A third-party servicer whose eligibility to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program has been limited may request removal of the limitation.

(c) The institution or servicer may not apply for removal of the limitation before the later of the expiration of—

(1) Twelve months from the effective date of the limitation; or

(2) A debarment or suspension under Executive Order 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

(d) If the institution or servicer requests removal of the limitation, the request must be in writing and show that the institution or servicer, as applicable, has corrected the violation or violations on which the limitation was based.

(e) No later than 60 days after the Secretary receives the request, the Secretary responds to the institution or servicer—

(1) Granting its request;

(2) Denying its request; or

(3) Granting the request subject to other limitation or limitations.

(f) If the Secretary denies the request or establishes other limitations, the Secretary grants the institution or servicer, upon the institution's or servicer's request, an opportunity to show cause why the participation or eligibility, as applicable, should be fully reinstated.

(g) The institution's or servicer's request for an opportunity to show cause does not waive—

(1) The institution's right to participate in any or all Title IV, HEA programs if it complies with the continuing limitation or limitations pending the outcome of the opportunity to show cause; and

(2) The servicer's right to contract with any institution to administer any aspect of the institution's participation in any Title IV, HEA program, if the servicer complies with the continuing limitation pending the outcome of the opportunity to show cause.

(Authority: 20 U.S.C. 1094; E.O. 12549 (3 CFR, 1986 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

37. Section 668.111 is amended by revising paragraphs (a) and (b) to read as follows:

§ 668.111 Scope and purpose.

(a) This subpart establishes rules governing the appeal by an institution or third-party servicer from a final audit determination or a final program review determination arising from an audit or program review of the institution's participation in any Title IV, HEA program or of the servicer's administration of any aspect of an institution's participation in any Title IV, HEA program.

(b) This subpart applies to any participating institution or third-party servicer that appeals a final audit determination or final program review determination.

* * * * *

38. Section 668.112 is revised to read as follows:

§ 668.112 Definitions.

The following definitions apply to this subpart:

(a) *Final audit determination* means the written notice of a determination issued by a designated department official based on an audit of—

(1) An institution's participation in any or all of the Title IV, HEA programs; or

(2) A third-party servicer's administration of any aspect of an institution's participation in any or all of the Title IV, HEA programs.

(b) *Final program review determination* means the written notice of a determination issued by a designated department official and resulting from a program compliance review of—

(1) An institution's participation in any or all of the Title IV, HEA programs; or

(2) A third-party servicer's administration of any aspect of an institution's participation in any Title IV, HEA program.

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

39. Section 668.113 is revised to read as follows:

§ 668.113 Request for review.

(a) An institution or third-party servicer seeking the Secretary's review of a final audit determination or a final program review determination shall file a written request for review with the designated department official.

(b) The institution or servicer shall file its request for review and any records or materials admissible under the terms of § 668.116(e) and (f), no later than 45 days from the date that the institution or servicer receives the final audit determination or final program review determination.

(c) The institution or servicer shall attach to the request for review a copy of the final audit determination or final program review determination, and shall—

(1) Identify the issues and facts in dispute; and

(2) State the institution's or servicer's position, as applicable, together with the pertinent facts and reasons supporting that position.

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

40. Section 668.114 is revised to read as follows:

§ 668.114 Notification of hearing.

(a) Upon receipt of an institution's or third-party servicer's request for review, the designated department official arranges for a hearing before a hearing official.

(b) Within 30 days of the designated department official's receipt of an institution's or third-party servicer's request for review, the hearing official notifies the designated department official and the parties to the proceeding of the schedule for the submission of briefs by both the designated department official and, as applicable, the institution or servicer.

(c) The hearing official schedules the submission of briefs and of accompanying evidence admissible under the terms of § 668.116 (e) and (f) to occur no later than 120 days from the date that the hearing official notifies the institution or servicer.

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

41. Section 668.116 is amended by revising paragraphs (b), (d), (e)(1), (f), and (g) to read as follows:

§ 668.116 Hearing.

* * * * *

(b) The hearing process consists of the submission of written briefs to the hearing official by the institution or third-party servicer, as applicable, and by the designated department official, unless the hearing official determines, under paragraph (g) of this section, that an oral hearing is also necessary.

* * * * *

(d) An institution or third-party servicer requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving the following matters, as applicable:

(1) That expenditures questioned or disallowed were proper.

(2) That the institution or servicer complied with program requirements.

(e) (1) A party may submit as evidence to the hearing official only materials within one or more of the following categories:

(i) Department of Education audit reports and audit work papers for audits performed by the department's Office of Inspector General.

(ii) In the case of an institution, institutional audit work papers, records, and other materials, if the institution provided those work papers, records, or materials to the Department of Education no later than the date by which the institution was required to file its request for review in accordance with § 668.113.

(iii) In the case of a third-party servicer, the servicer's audit work papers and the records and other materials of the servicer or any institution that contracts with the servicer, if the servicer provided those work papers, records, or materials to the Department of Education no later than the date that the servicer was required to file the request for review under § 668.113.

(iv) Department of Education program review reports and work papers for program reviews.

(v) Institutional or servicer records and other materials (including records and other materials of any institution that contracts with the servicer) provided to the Department of Education in response to a program review, if the records or materials were provided to the Department of Education by the institution or servicer no later than the date by which the institution or servicer was required to file its request for review in accordance with § 668.113.

(vi) Other Department of Education records and materials if the records and materials were provided to the hearing official no later than 3 days after the institution's or servicer's filing of its request for review.

* * * * *

(f) The hearing official accepts only evidence that is both admissible and timely under the terms of paragraph (e) of this section, and relevant and material to the appeal. Examples of evidence that shall be deemed irrelevant and immaterial except upon a clear showing of probative value respecting the matters described in paragraph (d) of this section include—

(1) Evidence relating to a period of time other than the period of time covered by the audit or program review;

(2) Evidence relating to an audit or program review of an institution or third-party servicer other than the institution or servicer bringing the appeal, or the resolution thereof; and

(3) Evidence relating to the current practice of the institution or servicer bringing the appeal in the program areas at issue in the appeal.

(g) (1) The hearing official may schedule an oral argument if he or she determines that an oral argument is necessary to clarify the issues and the positions of the parties as presented in the parties' written submissions.

(2) In the event that an oral argument is conducted, the designated department official makes a transcribed record of the proceedings and makes one copy of that record available to each of the parties to the proceeding.

* * * * *

42. Section 668.123 is revised to read as follows:

§ 668.123 Collection.

To the extent that the decision of the Secretary sustains the final audit determination or program review determination, subject to the provisions of § 668.24(c)(3), the Department of Education will take steps to collect the debt at issue or otherwise effect the determination that was subject to the request for review.

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

43. A new Appendix A to part 668 is added to read as follows:

Appendix A to Part 668—Standards for Acceptable Refund Policies by Participating Institutions

For purposes of § 668.22(b)(1)(iv)(A), the Secretary considers an institution to have a fair and equitable refund policy if the institution uses a policy that meets the minimum requirements of this appendix. These requirements do not affect an institution's obligation to comply with other Department of Education regulations.

(I) *The governing board of the institution must review and approve the schedule of all institutional charges and refund policies applicable to students.* The pricing of services and refund policies have important consequences to students, parents, the institution, and society; as such, pricing and refund policies must receive board attention and approval.

(II) *The institution must seek consumer views in the process of establishing and amending charge and refund structures.* Decisions regarding institutional funds are ultimately the sole responsibility of the institution's legally designated fund custodians. However, consumer concerns do affect decision making, and involving consumers in decision making related to charges and refunds is an essential approach for assessing student needs and creating public awareness of institutional requirements.

(III) *The institution must publish a current schedule of all student charges (including the costs of required supplies and equipment), publish a statement of the purpose for such charges and related refund policies, have those statements readily available free of charge to current and prospective students, and substantiate that the costs of required supplies and equipment are reasonably related to the cost of providing the supplies and equipment to the students.* Students and parents have a right to know what charges they will be expected to pay and what will or will not be refunded. They also have a right to know what services accompany payment of the charges. Informational materials published free for students and prospective students are ideal for this purpose.

(IV) *The institution must clearly designate all optional charges as "optional" in all published schedules and related materials.* Charges that are mandatory and charges that are optional must be plainly differentiated in all printed materials. Statements accompanying the schedule may include institutional endorsements of the optional program or service. The institution must state clearly in its schedule if a charge is optional for some students but required for others.

(V) *The institution must clearly identify charges and deposits that are nonrefundable as "nonrefundable" on all published schedules.* Institutions determine on an individual basis which of their charges are refundable or nonrefundable. In general, admission fees, application fees, laboratory fees, facility and student activity fees, and other similar charges are not refundable. These fees are generally charged to cover the cost of activities such as processing applications and other student information, reserving academic positions and establishing the limits of institutional programs and services, reserving housing space, and otherwise setting the fixed costs of the institution for the coming academic periods.

Institutions determine on an individual basis which of their deposits are refundable or nonrefundable. Some deposits will be nonrefundable or will be credited to a student's account (e.g., tuition deposits). Others are refundable according to the terms of the deposit agreement (e.g., deposits for breakage).

(VI) *The institution must refund housing rental charges, less a deposit, as long as written notification of cancellation is made prior to a well-publicized date that provides reasonable opportunity to make the space available to other students.* Written notification on or before the beginning of the term of the contract is necessary to ensure utilization of housing units. During the term of the contract, room charges are generally not refundable. However, based on the program offered, space availability, debt service requirements, State and local laws, and other individual circumstances, institutions may provide for some more flexible refund guideline for housing.

(VII) *The institution must refund board charges in full, less a deposit, if written notification of cancellation is made prior to a well-publicized date that falls on or before the beginning of the term of the contract.* Subsequent board charges should be refunded on a *pro rata* basis. It is reasonable to make a refund for those goods and services not consumed. The deposit should reflect that portion of an institution's costs that are fixed for the term of the contract.

(VIII) *The institutional refund policy must include the following requirements:*

A. The institution must refund 100 percent of the tuition charges, less an administrative fee that does not exceed the lesser of $100 or 5 percent of the tuition, if the student submits written notice of cancellation on or before one week preceding the first day of classes for the period of enrollment for which the student was charged.

B. The institution must refund at least 90 percent of the tuition charges if the student submits written notice of cancellation between the end of the period of time specified in (VIII) A. and the end of the first 10 percent (in time) of the period of enrollment for which the student was charged.

C. The institution must refund at least 50 percent of the tuition charges if the student submits written notice of cancellation between the end of the first 10 percent (in time) of the period of enrollment for which the student was charged and the end of the first 25 percent (in time) of that period of enrollment.

D. The institution must refund at least 25 percent of the tuition charges if the student submits written notice of cancellation between the end of the first 25 percent (in time) of the period of enrollment for which the student was charged and the end of the first 50 percent (in time) of the period of enrollment.

E. For purposes of this policy, "tuition charges" include, but are not limited to, charges for any equipment (including books and supplies) issued by an institution to a student if the institution specifies in the enrollment agreement a separate charge for equipment that the student actually obtains or if the institution refers the student to a vendor operated by the institution or an entity affiliated or related to the institution.

(F) The institution may exclude from the calculation of a refund owed under this paragraph the documented cost to the institution of unreturnable equipment issued to the student in accordance with paragraph (VIII) E of this appendix or of returnable equipment issued to the student in accordance with paragraph (VIII) E of this appendix if the student does not return the equipment in good condition, allowing for

reasonable wear and tear, within 20 days following the date of the student's withdrawal. For example, equipment is not considered to be returned in good condition and, therefore, is unreturnable, if the equipment cannot be reused because of clearly recognized health and sanitary reasons. The institution must clearly and conspicuously disclose in the enrollment agreement any restrictions on the return of equipment, including equipment that is unreturnable. The institution must notify the student in writing prior to enrollment that return of the specific equipment involved will be required within 20 days of the student's withdrawal.

(IX) *The institution must assess no penalty charges where the institution, as opposed to the student, is in error.* Penalty charges, such as those involving late registration fees, change-of-schedule fees, and late payment fees, must not be assessed if it is determined that the student is not responsible for the action causing the charges to be levied.

(X) *The institution must advise students that any notifications of withdrawal or cancellation and requests for refund must be in writing and addressed to the designated institution officer.* A student's written notification of withdrawal or cancellation and request for a refund provides an accurate record of transactions and also ensures that the request will be processed on a timely basis. Acceptance of oral requests is an undesirable practice.

(XI) *The institution must pay or credit refunds due in accordance with § 668.22(i)(2).*

(XII) *The institution must publicize, as a part of its dissemination of information on charges and refunds, that an appeals process exists for students or parents who believe that individual circumstances warrant exceptions from published policy. The informational materials must include the name, title, and address of the official responsible for handling appeals.* Although charges and refund policies should reflect extensive consideration of student and institutional needs, it will not be possible to encompass in these structures the variety of personal circumstances that may exist or develop. Institutions are required to provide a system of due process to their students, and charges and refund policies are legitimately a part of that process. Students and parents should be informed regularly of procedures for requesting information concerning exceptions to published policies.

44. Appendix D to part 668 is amended by revising the introductory paragraphs to read as follows:

Appendix D to Part 668—Default Reduction Measures

This appendix describes measures that an institution with a high default rate under the Federal Stafford Loan and Federal SLS programs should find helpful in reducing defaults. An institution with a fiscal year default rate that exceeds the threshold rate for a limitation, suspension, or termination action under § 668.17 may avoid that sanction by demonstrating that the institution has implemented the measures included in this appendix. Other institutions should strongly consider taking these steps as well.

To reduce defaults, the Secretary recommends that the institution take the following measures:

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAMS

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

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

46. In § 682.200 paragraph (b) is amended by revising paragraph (1) and adding a new paragraph (5) in the definition of "Lender" and adding a new definition of "Third-party servicer" in alphabetical order, and by revising the authority citation to read as follows:

§ 682.200 Definitions.

* * * * *

(b) * * *

Lender. (1) The term "eligible lender" is defined in section 435(d) of the Act, and in paragraphs (2)–(5) of this definition.

* * * * *

(5) The term eligible lender does not include any lender that—

(i) Is debarred or suspended, or any of whose principals or affiliates (as those terms are defined in 34 CFR part 85) is debarred or suspended under Executive Order (E.O.) 12549 (3 CFR, 1986 Comp., p. 189) or the Federal Acquisition Regulation (FAR), 48 CFR part 9, subpart 9.4;

(ii) Is an affiliate, as defined in 34 CFR part 85, of any person who is debarred or suspended under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4; or

(iii) Employs a person who is debarred or suspended under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4, in a capacity that involves the administration or receipt of FFEL Program funds.

* * * * *

Third-party servicer. Any State or private, profit or nonprofit organization or any individual that enters into a contract with a lender or guaranty agency to administer, through either manual or automated processing, any aspect of the lender's or guaranty agency's FFEL programs required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA that governs the FFEL programs, including, any applicable function described in the definition of third-party servicer in 34 CFR part 668; originating, guaranteeing, monitoring, processing, servicing, or collecting loans; claims submission; or billing for interest benefits and special allowance.

* * * * *

(Authority: 8 U.S.C. 1101; 20 U.S.C. 1070 to 1087–2, 1088–1098, 1141; E.O. 12549 (3 CFR, 1986 Comp., p. 189), E.O. 12689 (3 CFR, 1989 Comp., p. 235))

47. Section 682.401 is amended by adding a new paragraph (b)(23) to read as follows:

§ 682.401 Basic program agreement.

* * * * *

(b) * * *

(23) *Third-party servicers.* The guaranty agency may not enter into a contract with a third-party servicer that the Secretary has determined does not meet the financial and compliance standards under § 682.416. The guaranty agency shall provide the Secretary with the name and address of any third-party servicer with which the agency enters into a contract and, upon request by the Secretary, a copy of that contract.

* * * * *

48. Section 682.413 is amended by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 682.413 Remedial actions.

(a) (1) The Secretary requires a lender and its third-party servicer administering any aspect of the FFEL programs under a contract with the lender to repay interest benefits and special allowance or other compensation received on a loan guaranteed by a guaranty agency, pursuant to paragraph (a)(2) of this section—

(i) For any period beginning on the date of a failure by the lender or servicer, with respect to the loan, to comply with any of the requirements set forth in § 682.406(a)(1)–(a)(6), (a)(9), and (a)(12);

(ii) For any period beginning on the date of a failure by the lender or servicer, with respect to the loan, to meet a condition of guarantee coverage established by the guaranty agency, to the date, if any, on which the guaranty agency reinstated the guarantee coverage pursuant to policies and procedures established by the agency;

(iii) For any period in which the lender or servicer, with respect to the loan, violates the requirements of subpart C of this part; and

(iv) For any period beginning on the day after the Secretary's obligation to pay special allowance on the loan terminates under § 682.302(d).

(2) For purposes of this section, a lender and any applicable third-party servicer shall be considered jointly and severally liable for the repayment of any interest benefits and special allowance paid as a result of a violation of applicable requirements by the servicer in administering the lender's FFEL programs.

(3) For purposes of paragraph (a)(2) of this section, the relevant third-party servicer shall repay any outstanding liabilities under paragraph (a)(2) of this section only if—

(i) The Secretary has determined that the servicer is jointly and severally liable for the liabilities; and

(ii) (A) The lender has not repaid in full the amount of the liability within 30 days from the date the lender receives notice from the Secretary of the liability;

(B) The lender has not made other satisfactory arrangements to pay the amount of the liability within 30 days from the date the lender receives notice from the Secretary of the liability; or

(C) The Secretary is unable to collect the liability from the lender by offsetting the lender's bill to the Secretary for interest benefits or special allowance, if—

(*1*) The bill is submitted after the 30 day period specified in paragraph (a)(3)(ii)(A) of this section has passed; and

(*2*) The lender has not paid, or made satisfactory arrangements to pay, the liability.

(b) The Secretary requires a guaranty agency to repay reinsurance payments received on a loan if the lender, third-party servicer, if applicable, or the agency failed to meet the requirements of § 682.406(a).

(c) (1) In addition to requiring repayment of reinsurance payments pursuant to paragraph (b) of this section, the Secretary may take one or more of the following remedial actions against a guaranty agency or third-party servicer administering any aspect of the FFEL programs under a contract with the guaranty agency, that makes an incomplete or incorrect statement in connection with any agreement entered into under this part or violates any applicable Federal requirement:

(i) Require the agency to return payments made by the Secretary to the agency.

(ii) Withhold payments to the agency.

(iii) Limit the terms and conditions of the agency's continued participation in the FFEL programs.

(iv) Suspend or terminate agreements with the agency.

(v) Impose a fine on the agency or servicer. For purposes of assessing a fine on a third-party servicer, a repeated mechanical systemic unintentional error shall be counted as one violation, unless the servicer has been cited for a similar violation previously and had failed to make the appropriate corrections to the system.

(vi) Require repayment from the agency and servicer pursuant to paragraph (c)(2) of this section, of interest, special allowance, and reinsurance paid on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1).

(vii) Require repayment from the agency or servicer, pursuant to paragraph (c)(2) of this section, of any related payments that the Secretary became obligated to make to others as a result of an incomplete or incorrect statement or a violation of an applicable Federal requirement.

(2) For purposes of this section, a guaranty agency and any applicable third-party servicer shall be considered jointly and severally liable for the repayment of any interest benefits, special allowance, reinsurance paid, or other compensation on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1) as a result of a violation by the servicer administering any aspect of the FFEL programs under a contract with that guaranty agency.

(3) For purposes of paragraph (c)(2) of this section, the relevant third-party servicer shall repay any outstanding liabilities under paragraph (c)(2) of this section only if—

(i) The Secretary has determined that the servicer is jointly and severally liable for the liabilities; and

(ii) (A) The guaranty agency has not repaid in full the amount of the liability within 30 days from the date the guaranty agency receives notice from the Secretary of the liability;

(B) The guaranty agency has not made other satisfactory arrangements to pay the amount of the liability within 30 days from the date the guaranty agency receives notice from the Secretary of the liability; or

(C) The Secretary is unable to collect the liability from the guaranty agency by offsetting the guaranty agency's first reinsurance claim to the Secretary, if—

(*1*) The claim is submitted after the 30-day period specified in paragraph (c)(3)(ii)(A) of this section has passed; and

(*2*) The guaranty agency has not paid, or made satisfactory arrangements to pay, the liability.

(d) (1) The Secretary follows the procedures described in 34 CFR part 668, subpart G, applicable to fine proceedings against schools, in imposing a fine against a lender, guaranty agency, or third-party servicer. References to "the institution" in those regulations shall be understood to mean the lender, guaranty agency, or third-party servicer, as applicable, for this purpose.

(2) The Secretary also follows the provisions of section 432(g) of the Act in imposing a fine against a guaranty agency or lender.

* * * * *

49. Section 682.414 is amended by revising paragraph (a)(1)(i) to read as follows:

§ 682.414 Records, reports, and inspection requirements for guaranty agency programs.

(a) *Records.* (1)(i) The guaranty agency shall maintain current, complete, and accurate records of each loan that it holds, including, but not limited to, the records described in paragraph (a)(1)(ii) of this section. The records must be maintained in a system that allows ready identification of each loan's current status, updated at least once every 10 business days. Any reference to a guaranty agency under this section includes a third-party servicer that administers any aspect of the FFEL programs under a contract with the guaranty agency, if applicable.

* * * * *

50. A new § 682.416 is added to subpart D to read as follows:

§ 682.416 Requirements for third-party servicers and lenders contracting with third-party servicers.

(a) *Standards for administrative capability.* A third-party servicer is considered administratively responsible if it—

(1) Provides the services and administrative resources necessary to fulfill its contract with a lender or guaranty agency, and conducts all of its contractual obligations that apply to the FFEL programs in accordance with FFEL programs regulations;

(2) Has business systems including combined automated and manual systems, that are capable of meeting the requirements of part B of Title IV of the Act and with the FFEL programs regulations; and

(3) Has adequate personnel who are knowledgeable about the FFEL programs.

(b) *Standards of financial responsibility.* The Secretary applies the provisions of 34 CFR 668.15(b) (1)–(4) and (6)–(9) to determine that a third-party servicer is financially responsible under this part. References to "the institution" in those provisions shall be understood to mean the third-party servicer, for this purpose.

(c) *Special review of third-party servicer.* (1) The Secretary may review a third-party servicer to determine that it meets the administrative capability and financial responsibility standards in this section.

(2) In response to a request from the Secretary, the servicer shall provide evidence to demonstrate that it meets the administrative capability and financial responsibility standards in this section.

(3) The servicer may also provide evidence of why administrative action is unwarranted if it is unable to demonstrate that it meets the standards of this section.

(4) Based on the review of the materials provided by the servicer, the Secretary determines if the servicer meets the standards in this part. If the servicer does not, the Secretary may initiate an administrative proceeding under subpart G.

(d) *Past performance of third-party servicer or persons affiliated with servicer.* Notwithstanding paragraphs (b) and (c) of this section, a third-party servicer is not financially responsible if—

(1) (i) The servicer; its owner, majority shareholder, or chief executive officer; any person employed by the servicer in a capacity that involves the administration of a Title IV, HEA program or the receipt of Title IV, HEA program funds; any person, entity, or officer or employee of an entity with which the servicer contracts where that person, entity, or officer or employee of the entity acts in a capacity that involves the administration of a Title IV, HEA program or the receipt of Title IV, HEA program funds has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving such funds, unless—

(A) The funds that were fraudulently obtained, or criminally acquired, used, or expended have been repaid to the United States, and any related financial penalty has been paid;

(B) The persons who were convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of the funds are no longer incarcerated for that crime; and

(C) At least five years have elapsed from the date of the conviction, *nolo contendere* plea, guilty plea, or administrative or judicial determination; or

(ii) The servicer, or any principal or affiliate of the servicer (as those terms are defined in 34 CFR part 85), is—

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

(B) Engaging in any activity that is a cause under 34 CFR 85.305 or 85.405 for debarment or suspension under E.O. 12549 (3 CFR, 1986 Comp., p. 189) or the FAR, 48 CFR part 9, subpart 9.4; and

(2) Upon learning of a conviction, plea, or administrative or judicial determination described in paragraph (d)(1) of this section, the servicer does not promptly remove the person, agency, or organization from any involvement in the administration of the servicer's participation in Title IV, HEA programs, including, as applicable, the removal or elimination of any substantial control, as determined under 34 CFR 668.15, over the servicer.

(e) *Independent audits.* (1) A third-party servicer shall arrange for an independent audit of its administration of the FFELP loan portfolio unless—

(i) The servicer contracts with only one lender or guaranty agency; and

(ii) The audit of that lender's or guaranty agency's FFEL programs involves every aspect of the servicer's administration of those FFEL programs.

(2) The audit must—

(i) Examine the servicer's compliance with the Act and applicable regulations;

(ii) Examine the servicer's financial management of its FFEL program activities;

(iii) Be conducted in accordance with the standards for audits issued by the United States General Accounting Office's (GAO's) *Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.* (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.) Procedures for audits are contained in an audit guide developed by and available from the Office of Inspector General of the Department of Education; and

(iv) Except for the initial audit, be conducted at least annually and be submitted to the Secretary within six months of the end of the audit period. The initial audit must be an annual audit of the servicer's first full fiscal year beginning on or after July 1, 1994, and include any period from the beginning of the first full fiscal year. The audit report must be submitted to the Secretary within six months of the end of the audit period. Each subsequent audit must cover the servicer's activities for the one-year period beginning no later than the end of the period covered by the preceding audit.

(3) With regard to a third-party servicer that is a governmental entity, the audit required by this paragraph must be conducted in accordance with 31 U.S.C. 7502 and 34 CFR part 80, Appendix G.

(4) With regard to a third-party servicer that is a nonprofit organization, the audit required by this paragraph must be conducted in accordance with Office of Management and Budget (OMB) Circular A–133, "Audit of Institutions of Higher Education and Other Nonprofit Institutions," as incorporated in 34 CFR 74.61(h)(3).

(f) *Contract responsibilities.* A lender that participates in the FFEL programs may not enter into a contract with a third-party servicer that the Secretary has determined does not meet the requirements of this section. The lender must provide the Secretary with the name and address of any third-party servicer with which the lender enters into a contract and, upon request by the Secretary, a copy of that contract. A third-party servicer that is under contract with a lender to perform any activity for which the records in § 682.414(a)(3)(ii) are relevant to perform the services for which the servicer has contracted shall maintain current, complete, and accurate records pertaining to each loan that the servicer is under contract to administer on behalf of the lender. The records must be maintained in a system that allows ready identification of each loan's current status.

(Authority: 20 U.S.C. 1078, 1078–1, 1078–2, 1078–3, 1082; E.O. 12549 (3 CFR, 1986 Comp., p. 189), 12689 (3 CFR, 1989 Comp., p. 235))

Subpart G—Limitation, Suspension, or Termination of Lender or Third-party Servicer Eligibility and Disqualification of Lenders and Schools

51. The title of subpart G is revised to read as set forth above.

52. Section 682.700 is amended by revising paragraphs (a) and (b)(1) to read as follows:

§ 682.700 Purpose and scope.

(a) This subpart governs the limitation, suspension, or termination by the Secretary of the eligibility of an otherwise eligible lender to participate in the FFEL programs or the eligibility of a third-party servicer to enter into a contract with an eligible lender to administer any aspect of the lender's FFEL programs. The regulations in this subpart apply to a lender or third-party

servicer that violates any statutory provision governing the FFEL programs or any regulations, special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA prescribed under the FFEL programs. These regulations apply to lenders that participate only in a guaranty agency program, lenders that participate in the FFEL programs, and third-party servicers that administer aspects of a lender's FFELP portfolio. These regulations also govern the Secretary's disqualification of a lender or school from participation in the FFEL programs under section 432(h)(2) and (h)(3) of the Act.

(b) * * *

(1) (i) To a determination that an organization fails to meet the definition of "eligible lender" in section 435(d)(1) of the Act or the definition of "lender" in § 682.200, for any reason other than a violation of the prohibitions in section 435(d)(5) of the Act; or

(ii) To a determination that an organization fails to meet the standards in § 682.416;

* * * * *

53. Section 682.701 is amended by revising the definitions of *Limitation*, *Suspension*, and *Termination* to read as follows:

§ 682.701 Definitions of terms used in this subpart.

* * * * *

Limitation. The continuation of a lender's or third-party servicer's eligibility subject to compliance with special conditions established by agreement with the Secretary or a guaranty agency, as applicable, or imposed as the result of a limitation or termination proceeding.

Suspension. The removal of a lender's eligibility, or a third-party servicer's eligibility to contract with a lender or guaranty agency, for a specified period of time or until the lender or servicer fulfills certain requirements.

Termination. (1) The removal of a lender's eligibility for an indefinite period of time—

(i) By a guaranty agency; or

(ii) By the Secretary, based on an action taken by the Secretary, or a designated Departmental official under § 682.706; or

(2) The removal of a third-party servicer's eligibility to contract with a lender or guaranty agency for an indefinite period of time by the Secretary based on an action taken by the Secretary, or a designated Departmental official under § 682.706.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

54. Section 682.702 is amended by redesignating paragraph (c) as paragraph (d); adding a new paragraph (c); and removing "(c)" in paragraph (a) and adding, in its place "(d)" to read as follows:

§ 682.702 Effect on participation.

* * * * *

(c) A limitation imposes on a third-party servicer—

(1) A limit on the number of loans or accounts or total amount of loans that the servicer may service;

(2) A limit on the number of loans or accounts or total amount of loans that the servicer is administering under its contract with a lender or guaranty agency; or

(3) Other reasonable requirements or conditions, including those described in § 682.709.

* * * * *

55. Section 682.703 is amended by revising paragraph (a) and paragraph (b) introductory text to read as follows:

§ 682.703 Informal compliance procedure.

(a) The Secretary may use the informal compliance procedure in paragraph (b) of this section if the Secretary receives a complaint or other reliable information indicating that a lender or third-party servicer may be in violation of applicable laws, regulations, special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA.

(b) Under the informal compliance procedure, the Secretary gives the lender or servicer a reasonable opportunity to—

* * * * *

56. Section 682.704 is amended by revising paragraphs (a)(1), (b), (c), and (d)(2)(ii) to read as follows:

§ 682.704 Emergency action.

(a) * * *

(1) Receives reliable information that the lender or a third-party servicer with which the lender contracts is in violation of applicable laws, regulations, special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA pertaining to the lender's portfolio of loans;

* * * * *

(b) The Secretary begins an emergency action by notifying the lender or third-party servicer, by certified mail, return receipt requested, of the action and the basis for the action.

(c) The action becomes effective on the date the notice is mailed to the lender or third-party servicer.

(d) * * *

(2) * * *

(ii) Upon the written request of the lender or third-party servicer, the Secretary may provide the lender or servicer with an opportunity to demonstrate that the emergency action is unwarranted.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

57. Section 682.705 is revised to read as follows:

§ 682.705 Suspension proceedings.

(a) *Scope.* (1) A suspension by the Secretary removes a lender's eligibility under the FFEL programs or a third-party servicer's ability to enter into contracts with eligible lenders, and the Secretary does not guarantee or reinsure a new loan made by the lender or new loan serviced by the servicer during a period not to exceed 60 days from the date the suspension becomes effective, unless—

(i) The lender or servicer and the Secretary agree to an extension of the suspension period, if the lender or third-party servicer has not requested a hearing; or

(ii) The Secretary begins a limitation or a termination proceeding.

(2) If the Secretary begins a limitation or a termination proceeding before the suspension period ends, the Secretary may extend the suspension period until the completion of that proceeding, including any appeal to the Secretary.

(b) *Notice.* (1) The Secretary, or a designated Departmental official, begins a suspension proceeding by sending the lender or servicer a notice by certified mail with return receipt requested.

(2) The notice—

(i) Informs the lender or servicer of the Secretary's intent to suspend the lender's or servicer's eligibility for a period not to exceed 60 days;

(ii) Describes the consequences of a suspension;

(iii) Identifies the alleged violations on which the proposed suspension is based;

(iv) States the proposed date the suspension becomes effective, which is at least 20 days after the date of mailing of the notice;

(v) Informs the lender or servicer that the suspension will not take effect on the proposed date, except as provided in paragraph (c)(8) of this section, if the Secretary receives at least five days prior to that date a request for an oral hearing or written material showing why the suspension should not take effect; and

(vi) Asks the lender or servicer to correct voluntarily any alleged violations.

(c) *Hearing.* (1) If the lender or servicer does not request an oral hearing

but submits written material, the Secretary, or a designated Departmental official, considers the material and—

(i) Dismisses the proposed suspension; or

(ii) Determines that the proposed suspension should be implemented and notifies the lender or servicer of the effective date of the suspension.

(2) If the lender or servicer requests an oral hearing within the time specified in paragraph (b)(2)(v) of this section, the Secretary schedules the date and place of the hearing. The date is at least 15 days after receipt of the request from the lender or servicer. No proposed suspension takes effect until a hearing is held.

(3) The oral hearing is conducted by a presiding officer who—

(i) Ensures that a written record of the hearing is made;

(ii) Considers relevant written material presented before the hearing and other relevant evidence presented during the hearing; and

(iii) Issues a decision based on findings of fact and conclusions of law that may suspend the lender's or servicer's eligibility only if the presiding officer is persuaded that the suspension is warranted by the evidence.

(4) The formal rules of evidence do not apply, and no discovery, as provided in the Federal Rules of Civil Procedure, (28 U.S.C. Appendix) is required.

(5) The presiding officer shall base findings of fact only on evidence considered at or before the hearing and matters given official notice.

(6) The initial decision of the presiding officer is mailed to the lender or servicer.

(7) The Secretary automatically reviews the initial decision of the presiding officer. The Secretary notifies the lender or servicer of the Secretary's decision by mail.

(8) A suspension takes effect on either a date that is at least 20 days after the date the notice of a decision imposing the suspension is mailed to the lender or servicer, or on the proposed effective date stated in the notice sent under paragraph (b) of this section, whichever is later.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

58. Section 682.706 is revised to read as follows:

§ 682.706 Limitation or termination proceedings.

(a) *Notice.* (1) The Secretary, or a designated Departmental official, begins a limitation or termination proceeding, whether a suspension proceeding has begun, by sending the lender or third-party servicer a notice by certified mail with return receipt requested.

(2) The notice—

(i) Informs the lender or servicer of the Secretary's intent to limit or terminate the lender's or servicer's eligibility;

(ii) Describes the consequences of a limitation or termination;

(iii) Identifies the alleged violations on which the proposed limitation or termination is based;

(iv) States the limits which may be imposed, in the case of a limitation proceeding;

(v) States the proposed date the limitation or termination becomes effective, which is at least 20 days after the date of mailing of the notice;

(vi) Informs the lender or servicer that the limitation or termination will not take effect on the proposed date if the Secretary receives, at least five days prior to that date, a request for an oral hearing or written material showing why the limitation or termination should not take effect;

(vii) Asks the lender or servicer to correct voluntarily any alleged violations; and

(viii) Notifies the lender or servicer that the Secretary may collect any amount owed by means of offset against amounts owed to the lender by the Department and other Federal agencies.

(b) *Hearing.* (1) If the lender or servicer does not request an oral hearing but submits written material, the Secretary, or a designated Departmental official, considers the material and—

(i) Dismisses the proposed limitation or termination; or

(ii) Notifies the lender or servicer of the date the limitation or termination becomes effective.

(2) If the lender or servicer requests a hearing within the time specified in paragraph (a)(2)(vi) of this section, the Secretary schedules the date and place of the hearing. The date is at least 15 days after receipt of the request from the lender or servicer. No proposed limitation or termination takes effect until a hearing is held.

(3) The hearing is conducted by a presiding officer who—

(i) Ensures that a written record of the hearing is made;

(ii) Considers relevant written material presented before the hearing and other relevant evidence presented during the hearing; and

(iii) Issues an initial decision, based on findings of fact and conclusions of law, that may limit or terminate the lender's or servicer's eligibility if the presiding officer is persuaded that the limitation or termination is warranted by the evidence.

(4) The formal rules of evidence do not apply, and no discovery, as provided in the Federal Rules of Civil Procedure (28 U.S.C. appendix), is required.

(5) The presiding officer shall base findings of fact only on evidence presented at or before the hearing and matters given official notice.

(6) If a termination action is brought against a lender or third-party servicer and the presiding officer concludes that a limitation is more appropriate, the presiding officer may issue a decision imposing one or more limitations on a lender or third-party servicer rather than terminating the lender's or servicer's eligibility.

(7) The initial decision of the presiding officer is mailed to the lender or servicer.

(8) Any time schedule specified in this section may be shortened with the approval of the presiding officer and the consent of the lender or servicer and the Secretary or designated Departmental official.

(9) The presiding officer's initial decision automatically becomes the Secretary's final decision 20 days after it is issued and received by both parties unless the lender, servicer, or designated Departmental official appeals the decision to the Secretary within this period.

(c) Notwithstanding the other provisions of this section, if a lender or a lender's owner or officer or third-party servicer or servicer's owner or officer, respectively, is convicted of or pled *nolo contendere* or guilty to a crime involving the unlawful acquisition, use, or expenditure of FFEL program funds, that conviction or guilty plea is grounds for terminating the lender's or servicer's eligibility, respectively, to participate in the FFEL programs.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

59. Section 682.707 is amended by revising paragraphs (a) introductory text and (d) to read as follows:

§ 682.707 Appeals in a limitation or termination proceeding.

(a) If the lender, third-party servicer, or designated Departmental official appeals the initial decision of the presiding officer in accordance with § 682.706(b)(9)—

* * * * *

(d) If the presiding officer's initial decision would limit or terminate the lender's or servicer's eligibility, it does not take effect pending the appeal unless the Secretary determines that a stay of the date it becomes effective would seriously and adversely affect the

FFEL programs or student or parent borrowers.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

60. Section 682.708 is amended by revising paragraph (b) to read as follows:

§ 682.708 Evidence of mailing and receipt dates.

* * * * *

(b) If a lender or third-party servicer refuses to accept a notice mailed under this subpart, the Secretary considers the notice as being received on the date that the lender or servicer refuses to accept the notice.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

61. Section 682.709 is revised to read as follows:

§ 682.709 Reimbursements, refunds, and offsets.

(a) As part of a limitation or termination proceeding, the Secretary, or a designated Departmental official, may require a lender or third-party servicer to take reasonable corrective action to remedy a violation of applicable laws, regulations, special arrangements, agreements, or limitations entered into under the authority of statutes applicable to Title IV of the HEA.

(b) The corrective action may include payment to the Secretary or recipients designated by the Secretary of any funds, and any interest thereon, that the lender, or, in the case of a third-party servicer, the servicer or the lender that has a contract with a third-party servicer, improperly received, withheld, disbursed, or caused to be disbursed. A third-party servicer may be held liable up to the amounts specified in § 682.413(a)(2).

(c) If a final decision requires a lender, a lender that has a contract with a third-party servicer, or a third-party servicer to reimburse or make any payment to the Secretary, the Secretary may, without further notice or opportunity for a hearing, proceed to offset or arrange for another Federal agency to offset the amount due against any interest benefits, special allowance, or other payments due to the lender, the lender that has a contract with the third-party servicer, or the third-party servicer. A third-party servicer may be held liable up to the amounts specified in § 682.413(a)(2).

(Authority: 20 U.S.C. 1080, 1082, 1094)

62. Section 682.710 is amended by revising paragraphs (a), (b), and (d) to read as follows:

§ 682.710 Removal of limitation.

(a) A lender or third-party servicer may request removal of a limitation imposed by the Secretary in accordance with the regulations in this subpart at any time more than 12 months after the date the limitation becomes effective.

(b) The request must be in writing and must show that the lender or servicer has corrected any violations on which the limitation was based.

* * * * *

(d)(1) If the Secretary denies the request or establishes other limitations, the lender or servicer, upon request, is given an opportunity to show why all limitations should be removed.

(2) A lender or third-party servicer may continue to participate in the FFEL programs, subject to any limitation imposed by the Secretary under paragraph (c)(3) of this section, pending a decision by the Secretary on a request under paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

63. Section 682.711 is amended by revising paragraphs (a), (b)(1), (b)(2), (e), and the authority citation following the section to read as follows:

§ 682.711 Reinstatement after termination.

(a) A lender or third-party servicer whose eligibility has been terminated by the Secretary in accordance with the regulations in this subpart may request reinstatement of its eligibility at any time more than 18 months after the date the termination becomes effective.

(b) * * *

(1) The lender or servicer has corrected any violations on which the termination was based; and

(2) The lender or servicer meets all requirements for eligibility.

* * * * *

(e) (1) If the Secretary denies the lender's or servicer's request or allows reinstatement subject to limitations, the lender or servicer, upon request, is given an opportunity to show why its eligibility should be reinstated and all limitations removed.

(2) A lender or third-party servicer whose eligibility to participate in the FFEL programs is reinstated subject to limitations imposed by the Secretary pursuant to paragraph (d)(3) of this section, may participate in those programs, subject to those limitations, pending a decision by the Secretary on a request under paragraph (e)(1) of this section.

(Authority: 20 U.S.C. 1080, 1082, 1085, 1094)

* * * * *

PART 690—FEDERAL PELL GRANT PROGRAM

64. The heading for part 690 is revised to read as set forth above.

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

Authority: 20 U.S.C. 1070a through 1070a–6, unless otherwise noted.

66. Section 690.83 is amended by adding a new paragraph (e) to read as follows:

§ 690.83 Submission of reports.

* * * * *

(e) (1) Notwithstanding paragraph (a), (b), (c) (1) or (2), or (d) of this section, if an institution demonstrates to the satisfaction of the Secretary that the institution has provided Federal Pell Grants in accordance with this part but has not received credit or payment for those grants, the institution may receive payment or a reduction in accountability for those grants in accordance with paragraph (e) of this section.

(2) The institution must demonstrate that it qualifies for a credit or payment by means of a finding contained in an audit report as initially submitted to the Department that was conducted after December 31, 1988 and timely submitted in accordance with 34 CFR 668.23(c), with respect to grants made during the period of that audit.

(3) In determining whether the institution qualifies for a payment or reduction in accountability, the Secretary takes into account any liabilities of the institution arising from that audit or any other source. The Secretary collects those liabilities by offset in accordance with 34 CFR part 30.

(Authority: 20 U.S.C. 1070a, 1094, 1226a–1)

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April 29, 1994

Part IX

Department of Education

34 CFR Part 682

Federal Family Education Loan Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 682

RIN 1840–AB83

Federal Family Education Loan Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the Federal Family Education Loan (FFEL) Program. The FFEL Program consists of the Federal Stafford, Federal Supplemental Loans for Students (SLS), Federal PLUS, and the Federal Consolidation Loan programs. These amendments are needed to implement changes made to the Higher Education Act of 1965, as amended (HEA), by the Higher Education Amendments of 1992, and certain technical changes made by the Cash Management Improvement Act Amendments of 1992, the Omnibus Budget Reconciliation Act of 1993, and the Higher Education Technical Amendments of 1993. The regulations amend the FFEL Program loan discharge provisions and enhance the ability of lenders and guaranty agencies to service and collect FFEL Program loans.

DATES: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments, with the exception of §§ 682.202, 682.208, 682.402, 682.410, and 682.411. These sections will become effective after the information collection requirements contained in these sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

Subject to approval under the Paperwork Reduction Act, the following applicability dates also apply to certain provisions of these regulations:

Section 682.202(c), which reduces the amount of the origination fee charged on an FFEL Program loan, applies to loans for which the first disbursement is made on or after July 1, 1994, if the period of enrollment for which the loan is intended either includes that date or begins on or after that date.

Section 682.202(d), which reduces the amount of the insurance premium charged on an FFEL Program loan, applies to loans for which the first disbursement is made on or after July 1, 1994, if the period of enrollment for which the loan is intended either includes that date or begins on or after that date.

Section 682.410(b)(5)–(7), which requires guaranty agencies to warn defaulters that they may be subject to administrative wage garnishment and offset against federal or state income tax refunds, applies to claims paid by the agency on or after 120 days following the date of publication.

Section 682.411, which requires lenders to warn delinquent borrowers that they may be subject to administrative wage garnishment and offset against federal or state income tax refunds if they default on their loans, applies to loans on which the first day of delinquency is on or after 120 days following the date of publication.

FOR FURTHER INFORMATION CONTACT: George Harris, Senior Program Specialist, Loans Branch, Division of Policy Development, Policy, Training, and Analysis Service, U.S. Department of Education, 400 Maryland Avenue, SW. (Room 4310, ROB–3), Washington, DC 20202–5449. Telephone: (202) 708–8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Secretary is amending 34 CFR part 682 to implement changes made to the HEA by Public Law 102–325, enacted July 23, 1992, as well as certain changes added by Public Law 103–66, enacted August 10, 1993 and Public Law 103–208, enacted December 20, 1993. These regulations seek to improve the efficiency of federal student aid programs, and, by so doing, to improve their capacity to enhance opportunities for postsecondary education.

On January 14, 1994, the Secretary published a notice of proposed rulemaking (NPRM) for part 682 in the **Federal Register** (59 FR 2486). The NPRM included a discussion of the major issues surrounding the proposed changes which will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the NPRM on which a discussion of those issues may be found:

- Amendment to § 682.208 to provide for borrower notification when there is a servicing change (page 2488);
- Addition to § 682.402 to implement loan discharges if the student could not complete the educational program because the school closed (page 2491);
- Addition to § 682.402 to implement loan discharges if the student's eligibility to borrow was falsely certified by the school (pages 2488–2490);
- Addition to § 682.410 to implement administrative wage garnishment of borrowers who owe defaulted loans (page 2491).

Executive Order 12866

These regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently, as discussed in those sections of the preamble that relate to specific sections of the regulations.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs, and do not interfere with State, local, and tribal governments in the exercise of their governmental functions. Substantive revisions to the Notice of Proposed Rulemaking.

Section 682.202 Permissible Charges by Lenders to Borrowers

- The Secretary has incorporated into the regulations the changes made by Public Law 103–66 and Public Law 103–208 to origination fees and insurance premiums. Section 682.202(a)(6) of the proposed regulations, which discussed the refund of excess interest paid on Stafford loans, has been deleted. Those refund provisions were substantially amended by Public Law 103–208, and will be the subject of future proposed regulations.

Section 682.208 Due Diligence in Servicing a Loan

- The Secretary has incorporated into the regulations the changes made by Public Law 103–208 to the notification requirements that apply to the sale or transfer of a loan.

Section 682.402 Death, Disability, Closed School, False Certification, and Bankruptcy Payments

- The Secretary has expanded the definition of what constitutes a school's "false certification of a student's eligibility to borrow" to include cases where a school signed a putative borrower's name on the loan application or the promissory note. The Secretary will also provide relief under these procedures to borrowers who

demonstrate that the school, without authorization by the borrower, endorsed the borrower's loan check or signed the borrower's authorization for electronic funds transfer, if the student did not receive the loan proceeds, either by actual delivery of the funds or by application of the loan proceeds to institutional charges owed to the school.

• The Secretary has partially deleted the requirement that, as a condition of eligibility for a closed school or false certification discharge, a borrower must assign to and relinquish in favor of the Secretary any right to a loan refund (up to the amount discharged) from any public fund. However, a borrower will still be required to assign to and relinquish in favor of the Secretary any right to a loan refund (up to the amount discharged) from any private fund, including the portion of a public fund that represents funds received from a private party.

• The Secretary has deleted the requirement for the student to certify that, as a condition of eligibility for a false certification discharge, he or she was certified by the school on the application for the loan as an eligible student.

Section 682.410 Fiscal, Administrative, and Enforcement Requirements

• The regulations have been revised to incorporate the Secretary's guidance sent to guaranty agencies in July 1993 concerning (Pub. L. 102–589). That guidance explained that a guaranty agency was no longer required to assign loans to the Secretary for federal income tax refund offsets.

• The Secretary has deleted the provision of the proposed regulations that would have made a self-employed borrower subject to wage garnishment.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 40 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes made to the regulations as a result of those comments follows.

Major issues are grouped according to subject, with references to the appropriate sections of the regulations. Other substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes, and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority, are not addressed.

Section 682.202 Permissible Charges by Lenders to Borrowers

1. *Comment:* A number of commenters noted that Public Law 103–66 and Public Law 103–208 made changes to the statute upon which the NPRM was based. The commenters recommended that regulatory provisions applying to borrower interest rates, refunds of excess interest paid, origination fees, and insurance premiums, should be updated to reflect current law. Some commenters recommended that a separate NPRM be issued to address the complex changes made by Public Law 103–208 to the provisions that mandate the refunding of excess interest.

Discussion: To the extent that such changes can be readily made, the Secretary agrees that they should be. The Secretary has decided to issue a new notice of proposed rulemaking to implement the changes affecting the refund of excess interest paid, which had been the subject of § 682.202(a)(6) of the proposed regulations.

Change: The final regulations have been amended to incorporate the changes made by Public Law 103–208 to loan origination fees and insurance premiums. Interest rate changes will be in a subsequent NPRM. Section 682.202(a)(6) of the proposed regulations has been deleted, however, the Secretary has reserved that paragraph in these final regulations as the location for future regulations relating to the refunding of excess interest that is required by section 427A(i) of the HEA.

Section 682.202(c)(2)

2. *Comment:* Some commenters objected to the requirement that a lender must charge an unsubsidized Federal Stafford Loan borrower a 6.5 percent origination/insurance fee. The commenters believed that the lender should have an option to charge the borrower a lesser amount, as is permitted for a subsidized Federal Stafford Loan.

Discussion: Prior to Public Law 103–66, section 428H(f)(1) of the HEA required the lender to charge an unsubsidized Federal Stafford Loan borrower a 6.5 percent origination/insurance fee. Public Law 103–66 split the combined origination/insurance fee into two separate components: a 3 percent origination fee that is required to be charged to the borrower, and a 1 percent insurance premium that may be charged to the borrower. The origination and insurance fees applicable to a subsidized Federal Stafford Loan were also reduced by Public Law 103–66 to 3 percent and 1 percent respectively. However, the HEA continues to permit a lender to charge a subsidized Federal Stafford Loan borrower a lesser amount than the maximum loan origination fee, whereas no similar option exists for an unsubsidized Federal Stafford Loan origination fee.

Change: The final regulations have been revised to incorporate the reduced fees resulting from Public Law 103–66.

Section 682.202(c)(4)

3. *Comment:* Some commenters noted a conflict between § 682.202(c)(1) which stated that a lender may charge a borrower an origination fee on a subsidized Stafford loan, whereas § 682.202(c)(4) mandated that the lender shall deduct a *pro rata* portion of such fee from each disbursement of the loan proceeds.

Discussion: The Secretary agrees with the commenters.

Change: Section 682.202(c)(4) has been amended to clarify that the *pro rata* deduction requirement applies only if the lender has chosen to charge an origination fee to the borrower.

Section 682.208 Due Diligence in Servicing a Loan

4. *Comment:* A number of commenters favored an expansion in the notification requirements pertaining to an assignment of a loan or a change in the identity of the party to whom the borrower sends payments or communications concerning the loan. The commenters believed that the notice required to be sent by the holder of the loan should apply to all borrowers, and not be limited to only those borrowers in the grace or repayment periods. Some commenters also noted that Public Law 103–208 made two changes to section 428(b)(2)(F) of the HEA: (1) The transferee (instead of the transferor) is now required to notify the guaranty agency when a loan is sold or transferred; and (2) the transferor and the transferee may now notify the borrower of the sale or transfer of a loan either jointly or separately (instead of only separately).

Discussion: Section 428(b)(2)(F) of the HEA states that the notification requirements "* * * shall only apply if the borrower is in the grace period * * * or is in repayment status."

Change: No changes are made with respect to the commenters' first comment. The final regulations have been revised to incorporate the notification changes resulting from Public Law 103–208.

Section 682.402 Death, Disability, Closed School, False Certification, and Bankruptcy Payments

Section 682.402(a)

5. *Comment:* A number of commenters objected to the requirement that, in general, the borrower's loan must be a legally enforceable debt under applicable law by the holder of the loan to qualify a guaranty agency for a reinsurance payment under the closed school and false certification discharge provisions. The commenters believed that students should have their loans discharged, and the Secretary should reimburse guaranty agencies for such discharges, even if the borrower's debt is legally unenforceable by the holder of the loan. Of particular concern to some commenters were cases where the school signed the borrower's name on the loan documents or check. While the commenters generally recognized that the borrower technically does not owe the amount of the unenforceable debt, they were concerned that borrowers may not have the resources to pursue a legal or administrative determination of loan enforceability. The commenters also believed that even if the borrower did pursue that avenue, it could take many years to reach a resolution, during which the borrower would be subject to collection activity, damaged credit rating, and if in default, would be considered to be ineligible for additional federal student financial aid.

In a related area, some commenters expressed concern that, under current federal regulations, a borrower would not receive a closed school or false certification discharge if federal reinsurance on the loan had been lost because of violations of due diligence or other programmatic requirements committed by the lender or the guarantor. The commenters believed that Congress intended to help a borrower who was victimized by a school's closing or false certification of eligibility to borrow, events that are beyond the control of the borrower.

Discussion: The Secretary is persuaded that the term "falsely certified," as used in section 437(c)(1) of the HEA, should be defined to include certain cases where a school signed the borrower's name on the loan application or promissory note. The definition of the term "falsely certified" is extensively discussed in response to comment 48. Because of the similarity of such cases to those involving the execution of the application or note by the school in the name of the borrower, the Secretary concluded that cases in which the school improperly endorsed the borrower's signature on the loan check or the authorization for electronic funds transfer should also be addressed under these regulatory procedures, although such misconduct is not by itself a false certification. Under these final regulations, therefore, the Secretary will provide relief to borrowers in cases of unauthorized endorsements, but except for the instances in which the school both falsely created a loan application or promissory note for a student and then endorsed the student's name on the loan check, the lender is responsible for ensuring the authenticity of a borrower's signature on the lender's loan check, and should continue to bear the risk of an improper endorsement. In those instances, although a borrower may under the procedure as modified here receive a discharge of any obligation to repay that portion of a loan disbursed by a check which he or she neither endorsed nor received the proceeds of, the lender will not be permitted to receive or retain a claim payment for that amount. Because the Secretary considers the lender to have not had routine access to the written authorization for electronic funds transfer, on the other hand, the lender would not have occasion to know of an unauthorized execution of that authorization in the name of the borrower, and would not be held at risk for such unauthorized disbursements under these procedures.

The Secretary also agrees that the loss of federal reinsurance on the loan due to violations of due diligence or other programmatic requirements committed by the lender or the guarantor should not prevent an eligible borrower from receiving a closed school or false certification discharge. In such cases, the Secretary will use his authority pursuant to § 682.406(b) to waive his right to refuse to make a reinsurance payment on the loan. Thus, (except in the case of a falsely endorsed check, as noted above) a lender may receive a claim payment and a guaranty agency may receive a reinsurance payment on a loan for which an eligible borrower would qualify for a closed school or false certification discharge, even though violations of program requirements committed by the lender or guarantor may have otherwise sufficed to cause federal reinsurance on the loan to have been lost.

During the last few years, Congress and the Secretary have taken steps to combat unscrupulous individuals and program participants who have used the FFEL Program to exploit innocent students and taxpayers. The discharge of loans owed by the innocent victims is consistent with those actions. The Department intends to pursue the individuals and organizations who caused this situation so that the taxpayer can be reimbursed, and future students are protected.

Change: As will be further discussed in response to comment 48, the Secretary has expanded the definition of what constitutes a school's "false certification of a student's eligibility to borrow" to include a loan for which the school signed the name of an innocent victim on the application for the loan or the promissory note. The regulations will also provide relief in cases in which the borrower signed the loan application or promissory note, but the school signed the borrower's name on a loan check or authorization for electronic funds transfer, providing that the student did not receive, directly or indirectly, the benefits of the loan proceeds disbursed by that loan check or by virtue of the authorization for electronic funds transfer signed by the school.

6. *Comment:* Some commenters believed that information concerning closed school or false certification discharges should be made available to the borrower at the time the loan is made or while the student is in school. The commenters believed that this important information may be easily overlooked by or not reach the borrower after the school has closed or the student has withdrawn.

Discussion: This information is made available to the student in the common application/promissory note used by all guaranty agencies. In addition, if a borrower has questions concerning his or her loan obligation, a lender is required under § 682.208(c)(1) to respond within 30 days after receipt of an inquiry from the borrower or any endorser on a loan.

Change: None.

Section 682.402(b)(1)

7. *Comment:* Some commenters believed that the regulations should state that a discharge of a Federal PLUS or Federal Consolidation Loan because of a borrower's death would apply only if both co-makers of the loan died.

Discussion: This was stated in § 682.402(a)(2) of the proposed regulations. Section § 682.402(b)(1) addresses the loan obligation of an individual borrower who dies.

Change: None.

8. *Comment:* Some commenters recommended that the regulations state that the discharge of a Federal PLUS Loan because of the student's death applies only to student deaths occurring on or after July 23, 1992.

Discussion: The Secretary agrees that clarification is needed to reflect the effective date of section 437(d) of the HEA.

Change: The final regulations have been revised accordingly.

Section 682.402(c)(1)

9. *Comment:* Some commenters objected to the requirement that a Federal Consolidation Loan borrower must provide the disbursement dates of the underlying loans if the borrower requests a loan discharge for total and permanent disability based on a condition that pre-dated the Consolidation Loan. The commenters believed that this information is present in the borrower's Consolidation Loan file and the borrower should not be required to submit information already in the possession of the lender.

Discussion: The regulations are designed to cover all cases, including those in which the information may not be present in the borrower's loan file, and it may be necessary in some cases, for the borrower to provide this documentation. For example, the lender's information may be incomplete or destroyed due to fire, flood, theft, *etc.* However, in other cases where the lender already possesses this information in the borrower's loan file, the Secretary agrees that the borrower should not be required to provide the same documentation.

Change: Section 682.402(c)(1) has been revised to specify that the borrower's requirement to provide such documentation only applies if the lender does not already possess it.

Section 682.402(d)(1)(i)

10. *Comment:* Some commenters were confused by references to "the loan" and thought that a borrower with multiple loans would not be completely covered under the closed school loan discharge provisions.

Discussion: In general, regulatory language is more precise if it is based on the singular form of a noun. In the case of a closed school loan discharge, this permits each loan to be evaluated individually, and not be dependent on factors associated only with other loans. If the borrower qualifies for a discharge of more than one loan, then each loan will be discharged.

Change: None.

11. *Comment:* Some commenters believed that a borrower should be eligible for a closed-school loan discharge for the portion of a Federal Consolidation Loan that repaid a loan that would have otherwise been discharged under the closed school provisions.

Discussion: The Secretary agrees with the commenters. The Secretary has been given authority pursuant to section 437(c)(1) of the HEA to "* * * discharge the borrower's liability on the loan * * *" if the student could not complete the program in which the student was enrolled because of the school's closure. Because section 437(c) provides for discharge of loans because of events that occur before the borrower enters repayment, the borrower's liability on the loan is the amount outstanding at that time, before the borrower enters repayment. If the borrower repays some or all of that amount, the discharge would be ineffective unless it includes relief from that liability through reimbursement for the amounts paid on the loan, and those amounts include amounts borrowed through a Consolidation Loan. The Secretary believes that the borrower's Consolidation Loan should be credited for the amount of the closed school loan discharge that would have been applicable to the borrower's loan before it was consolidated.

Change: The final regulations have been revised accordingly.

12. *Comment:* Some commenters believed that the 90-day period prior to a school's closing during which a student who withdrew would be eligible for a loan discharge is too short for many students who attended correspondence schools. The commenters noted that such students frequently are considered "withdrawn" as of the date of the last lesson submitted by the student if the student did not submit the next scheduled lesson in accordance with the schedule of lessons established under § 682.602. However, the school may not have been considered to have officially closed until more than 90 days have elapsed from the date the student would be considered to have withdrawn under § 682.605(b)(3). The commenters observed that in many cases, it was the school that withdrew from the student by its failure to grade lessons or provide subsequent lessons, or to otherwise communicate with a student who attempted to learn if the school was still operating. The commenters believed that correspondence students, unlike other students who attended a school at a school's actual location, are not in a position to see an obvious deterioration in the school's ability to provide education to students.

Discussion: The Secretary believes that the 90-day period generally is sufficient for all categories of students. The Secretary notes that correspondence students may actually be in a better position than other students to realize that a school's ability to provide training and services is deteriorating. The absence of communication from a correspondence school to a student is an unmistakable sign that the school is not fulfilling its part of the enrollment agreement with the student. Other types of schools may be able to effectively camouflage their deteriorating capabilities and prevent students from seeing the true state of the school's fiscal and administrative situation, but a correspondence school student cannot be so easily deceived. The lack of communication from a school is a clear fact that speaks for itself. However, the Secretary agrees with the commenters that in some unique circumstances an extension of the 90-day period may be appropriate.

Change: The final regulations have been revised to include a provision for the Secretary to extend the 90-day period if he believes an extension is appropriate in a particular case.

Section 682.402(d)(1)(ii)(A)

13. *Comment:* Some commenters noted that schools that close will frequently phase-out their operations by sequentially eliminating individual programs even though the school remains open. The commenters believed that by linking a borrower's eligibility for a loan discharge to the date that the school ceased to provide educational instruction in all programs, the regulations would penalize a borrower who withdrew from school because of a terminated or deteriorated program earlier than 90 days before the school officially closed.

Discussion: The Secretary has been given authority pursuant to section 437(c)(1) of the HEA to discharge the borrower's liability on the loan if the student could not complete the program "* * * due to the closure of the institution.* * *" The Secretary has no authority to discharge the borrower's loan obligation if the student's program was terminated but the school did not close.

Change: None.

14. *Comment:* Some commenters did not understand the reference to "the designated agency in the state in which the school is located." The commenters asked if the agency making the determination that a school had closed would be the guaranty agency, the state school licensing agency, or some other agency.

Discussion: The Secretary understands the commenters' concerns and has concluded that he is in the best position to evaluate the information provided by various sources concerning whether a school has closed and the

date of closure. Therefore, the determination of a school's closure date will be made by the Secretary and communicated to FFEL Program participants.

Change: The regulation has been amended to read "A school's closure date is the date that the school ceases to provide educational instruction in all programs, as determined by the Secretary;"

Section 682.402(d)(1)(ii)(C)

15. *Comment:* Some commenters recommended that the regulations clarify that only a loan made for attendance at an *eligible* school could be discharged under the closed school loan discharge provisions. Some commenters also wanted the regulations to make it clear that the discharge provisions would apply only if the branch or location of the school where the student actually attended was itself "eligible."

Discussion: The closed school loan discharge authorized in section 437(c)(1) of the HEA is not restricted only to a loan made for attendance at an eligible school. The Secretary believes that Congress was aware of instances in which a school or its branch may have lost eligibility, but the school continued to certify loan applications under an eligible school identification code. The Secretary believes this is the reason why there is no requirement in section 437(c)(1) of the HEA that links a borrower's eligibility for a closed school loan discharge to only a loan certified by an eligible school.

Change: None.

Section 682.402(d)(2)(iv)

16. *Comment:* Some commenters recommended that the regulations require the holder of a loan discharged under the closed school loan discharge provision to forward the original promissory note marked "canceled" or "satisfied in full" to the borrower within 30 days after discharging the borrower's loan obligation.

Discussion: A loan that is discharged due to the borrower's death, permanent and total disability, or bankruptcy, is considered "paid in full" for the purposes of § 682.414(a)(2). The Secretary will add a closed school loan discharge to the definition of the term "paid in full" found in § 682.414(a)(2), but does not believe it is necessary to otherwise amend the requirements pertaining to the return of promissory notes (found in § 682.414(a)(4) of the current regulations) in the manner recommended by the commenters. The return of a borrower's promissory note pursuant to a closed school discharge does not need to be accomplished any differently than the return of a borrower's promissory note pursuant to any other type of discharge.

Change: Section 682.414(a)(2) has been amended to add a closed school loan discharge.

Section 682.402(d)(3)

17. *Comment:* Some commenters recommended that the Secretary prescribe a standardized form for the closed school loan discharge application and associated sworn statement from the borrower.

Discussion: The Secretary agrees that this would be helpful. Pursuant to the requirements of section 432(l) of the HEA, the Secretary will consult with FFEL participants to develop a standardized form.

Change: None.

18. *Comment:* Some commenters objected to the requirement that a borrower who requests a closed school loan discharge must submit the sworn statement described in the regulations. The commenters believed the sworn statement is unnecessary in cases where the holder of the loan or the guaranty agency has reliable information in their possession showing that the borrower was in attendance at the school when it closed or within 90 days before it closed. The commenters believed the borrower's loan obligation should be discharged based on those existing records.

Discussion: The Secretary believes the borrower's sworn statement is necessary to adequately protect the interests of the taxpayers. The information provided on the borrower's sworn statement is not limited to the isolated historical record of the borrower's attendance at the closed school. For example, the borrower must state whether he or she took advantage of a teach-out or transferred academic credits from the closed school to another school. The borrower must also agree to cooperate with the Secretary or the Secretary's designee in enforcement actions in accordance with § 682.402(d)(4). This information, and the borrower's agreement to cooperate, will not be in the possession of the guaranty agency and must be obtained in the borrower's sworn statement.

Change: None.

Section 682.402(d)(3)(ii)(A)

19. *Comment:* Some commenters requested clarification of whether the closed school loan discharge applied to a loan that was partially disbursed on or after January 1, 1986.

Discussion: The Secretary has been given authority pursuant to section 437(c)(1) of the HEA to discharge the borrower's liability on a loan "* * * received, on or after January 1, 1986 "* * *" if the student could not complete the program due to the closure of the school. For purposes of the closed school loan discharge, the Secretary will consider the borrower's entire loan eligible if any part of it was disbursed by the lender on or after January 1, 1986.

Change: The final regulations have been revised to incorporate this clarification.

Section 682.402(d)(3)(ii)(C)

20. *Comment:* Some commenters believed that a borrower who was unable to transfer all of the academic credits or hours earned at the closed school to another school should qualify for a partial loan discharge.

Discussion: If a student chooses to transfer any amount of academic credits or hours earned at the closed school to another school, and as a result of that action is able to complete the program of study that the student was enrolled in at the closed school, the student would not meet the requirement contained in section 437(c)(1) of the HEA that restricts a closed school loan discharge to a student "* * * unable to complete the program* * *" because of the school's closing. Thus, there would be no statutory basis for discharging the borrower's loan obligation.

Change: None.

21. *Comment:* Some commenters believed that a borrower who transferred academic credits or hours earned at the closed school to another school should not qualify for a discharge if the borrower enrolled in a different program of study at the new school or enrolled in a similar program but quickly withdrew.

Discussion: The Secretary believes that the borrower is entitled to a loan discharge under the HEA in any case in which a student's program of education is disrupted by the closing of the school to the extent that the student does not, for any reason, complete the program. The presumption must be that the school's closing directly hindered the student's achievement of his or her educational goals.

Change: None.

22. *Comment:* Some commenters recommended that the regulations define the term "teach-out at another school." The commenters believed that the absence of a definition would result in widespread confusion as to what constitutes a "teach-out" for purposes of a closed school loan discharge. The commenters suggested that the key elements of a teach-out are: (a) No charges additional to the original

program cost; (b) identity of subject matter taught; (c) geographic proximity between the original and teach-out schools; (d) demonstrated compatibility of program structure and scheduling (*e.g.*, student is able to begin the teach-out within a reasonable time after the school closure, and the completion dates, class times, and instructional methodology are comparable); and (e) review and approval by the state licensing agency.

Discussion: The Secretary believes that a prescriptive regulatory definition of "teach-out" is unnecessary. The Secretary notes that because a student may decline to complete the program through a teach-out at another school for any reason, it is therefore reasonable to conclude that a student who chooses to participate in a teach-out and completes the program, has demonstrated an acceptance of those teach-out conditions. In short, a student can be protected from being forced to accept what he or she believes to be an onerous teach-out condition by simply declining the teach-out. A student who, even though inconvenienced, chooses to complete his or her program through a teach-out, has received value from the loan and needs no loan discharge.

The Secretary asks interested parties to submit information to him concerning the actual costs paid by students who completed their programs through teach-outs. The Secretary will evaluate those costs to determine if the regulations should be revised in the future to permit a discharge based on certain circumstances.

Change: None.

Section 682.402(d)(3)(iv)

23. *Comment:* Some commenters, while believing that borrower cooperation is important in an enforcement action undertaken against a school or other related parties, were concerned that a borrower may be unable to take time away from work, home, or other activities to travel to multiple court appearances needed to assist the Secretary or his designee in the enforcement action. The commenters believed that a borrower should be required to assist in an enforcement action only to the extent practicable for the borrower.

Discussion: It would not be in the interests of the Secretary or the taxpayer to make unreasonable demands on the borrower when pursuing an enforcement action. It would equally not be in the interests of the Secretary or the taxpayer to create an opportunity for a borrower to frustrate the Secretary's enforcement action by claiming that he or she was unavailable to testify. The use of the word "cooperate" in the regulations implies a process of two or more parties reasonably working together toward a common goal, and needs no further elaboration.

Change: None.

Section 682.402(d)(5)(i)

24. *Comment:* Some commenters opposed the requirement that a borrower must assign to and relinquish in favor of the Secretary any right to a loan refund (up to the amount discharged) from any private or public fund. The commenters were particularly concerned with the effect they believed this requirement would have upon state tuition recovery funds. The commenters also believed that the Secretary has no statutory right to any claim against a state tuition recovery fund because the HEA fails to specifically provide the secretary with that right. The commenters noted that section 437(c)(2) of the HEA limits the assignment to the Secretary of a borrower's right to a loan refund only to the borrower's rights "* * * against the institution and its affiliates and principals." The commenters contended that there is no indication that Congress intended the Secretary to have access to state funds or to require states to participate economically in closed school loan discharges. The commenters believed that the HEA's omission of state tuition recovery funds (or any other private or public fund) reflects the principal of statutory construction "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of another).

Discussion: The Secretary believes that the statutory authority permitting the assignment to the Secretary of a borrower's right to recover a loan refund from the school, its affiliates, or principals clearly contemplates the recovery of refunds from private funds. A private fund is funded by parties who are directly or indirectly associated with the school, and the HEA intends that the Secretary shall have a legal claim to a private tuition recovery fund in the event of a school closure. Although they may be categorized as "public funds," it is the Secretary's understanding that many state tuition recovery funds rely in whole, or in part, on private funding provided by a school, its owners, or affiliates. Therefore, the Secretary believes that a borrower's assignment of recovery rights against a public fund is applicable only to the extent that a state tuition recovery fund or any other such public fund contains private money. The public money in those funds should not be considered.

Change: The final regulations have been revised to exclude the portion of a public fund that represents public money.

25. *Comment:* Some commenters questioned why a borrower must assign to and relinquish in favor of the Secretary any right to a *loan* refund (up to the amount discharged) with respect to the enrollment agreement for the program for which the loan was received. The commenters believed that the assignment of a borrower's rights pursuant to the enrollment agreement would not gain anything for the Secretary. They were concerned that the borrower would be forced to surrender some rights (unspecified) unnecessarily, despite the statement in § 682.402(d)(5)(iii) that permits the borrower (or student) to pursue legal and equitable relief regarding disputes arising from matters otherwise unrelated to the loan discharged.

Discussion: The requirement that the borrower must assign to and relinquish in favor of the Secretary any right to a loan refund (up to the amount discharged) does not preclude the borrower from pursuing legal action against the school or any related party with respect to the terms of the student's enrollment agreement with the school, or with respect to any other grievance the student may have against the school or those parties.

Change: None.

Section 682.402(d)(6)(i) and (ii)

26. *Comment:* Some commenters believed it was confusing to link guaranty agency requirements to a date other than the actual date that a school closed.

Discussion: In some cases, a guaranty agency may not become aware of a school's closure until significantly after the date the school actually closed. Therefore, the only workable way to create timeframes for guaranty agencies to perform certain actions, such as notifying lenders to suspend collection efforts, would be to tie those timeframes to the date that the agency first became aware, or was notified by the Secretary, that a school had closed.

Change: None.

Section 682.402(d)(6)(i)(C)

27. *Comment:* Some commenters asked why August 29, 1994 was proposed as the effective date for this provision.

Discussion: As a requirement for publishing the NPRM in the **Federal Register**, a specific date had to be used instead of a generic reference such as "prior to the effective date of these regulations." Therefore, August 29, 1994

was the Secretary's estimation (made prior to the date the NPRM was published) of when the final regulations would be effective.

Change: This date, and all other dates based on it, will be revised when the actual effective date is known.

Section 682.402(d)(6)(i)(D)

28. *Comment:* Some commenters believed that the regulations should require a guaranty agency to provide loan-specific information to lenders so that lenders can more effectively suspend collection efforts against individuals with respect to loans made at closed schools. The commenters noted that a lender would not be able to identify a PLUS borrower if the guarantor notified the lender of the school code and closure date only.

Discussion: The Secretary believes that because the loan application retained by the lender will have the name of the school and the period of enrollment for which the loan was made, the lender should be able to determine which individuals it should suspend collection efforts against once the lender is notified of the date a school closed. The Secretary encourages a guaranty agency to provide assistance to a lender that believes it is unable to identify the appropriate PLUS borrowers.

Change: None.

Section 682.402(d)(6)(i)(E)

29. *Comment:* Some commenters recommended that a guaranty agency be required to suspend collection activities on loans that it holds for borrowers who the agency believes may be eligible for a closed school loan discharge. The commenters noted that this is a requirement in the analogous regulation in § 682.402(e)(6)(iv) and (v) with respect to false certification discharges.

Discussion: The Secretary had intended that this requirement would be in the NPRM.

Change: The regulations have been amended to require a guaranty agency to take the same actions with respect to a borrower who may be eligible for a closed school loan discharge as the agency is required to take under § 682.402(e)(6)(iv) and (v) with respect to a borrower who may be eligible for a false certification discharge.

30. *Comment:* Some commenters noted that § 682.402(d)(6)(i) of the proposed regulations did not specify what a guaranty agency would be required to do upon the receipt of a complete application from a borrower whose loan is held by the guaranty agency. The commenters recommended that the procedures required under § 682.402(d)(6)(ii) should also apply to § 682.402(d)(6)(i).

Discussion: The Secretary agrees that the requirement for notifying the borrower that he or she does not qualify for a loan discharge should be in both § 682.402(d)(6)(i) and § 682.402(d)(6)(ii).

Change: The final regulations have been revised to add this requirement.

Section 682.402(d)(6)(i)(F)

31. *Comment:* Some commenters objected to the requirement that a guaranty agency must consult with representatives of the closed school, the school's licensing agency, the accrediting agency, and other appropriate parties to learn the current address of borrowers whose loans are held by the guaranty agency, and who have been identified as potentially eligible for a closed school loan discharge. The commenters believed that the skiptracing efforts required under § 682.410(b)(6) are more likely to be successful than contacts with the closed school and its related agencies.

Discussion: The Secretary believes that special efforts should be made to contact borrowers who may be eligible for a closed school loan discharge, but whose current address is unknown. Therefore, the interests of fairness to all borrowers justifies the additional skiptracing efforts required by the regulations.

Change: None.

Section 682.402(d)(6)(ii)(C)

32. *Comment:* Some commenters believed that a guaranty agency should not be the party that mails a discharge application to a borrower identified under this subparagraph of the regulations. Instead, the commenters believed it would be more appropriate for the guaranty agency to mail the application package to the lender or servicer, who would then mail it to the borrower. The commenters believed that this change would assist the lender in determining when to cease collections and would also avoid any borrower confusion.

Discussion: This provision of the proposed regulations requires a guaranty agency to "* * * review *its records* of loans that *it holds* * * *" (emphasis added). The lender is not the holder of loans held by the guaranty agency. The guaranty agency will mail the application package to a borrower whose loan is held by the agency. For loans held by a lender, the lender will mail the application package to the borrower.

Change: None.

Section 682.402(d)(6)(ii)(D)

33. *Comment:* Some commenters noted that, in the case of a loan held by the guaranty agency, the proposed regulations did not require the guaranty agency to inform a borrower that the borrower's loan obligation has been discharged.

Discussion: The Secretary agrees with the commenters.

Change: The final regulations have been revised to require a guaranty agency, in the case of a borrower whose loan is held by the agency, to send written notification to the borrower no later than 30 days after the agency determines that the borrower has satisfied all of the conditions required for discharge of the loan.

Section 682.402(d)(6)(ii)(E)

34. *Comment:* Some commenters believed it is counterproductive to set time limits that the borrower must meet if there is no penalty incurred by a borrower who fails to comply with those time limits. The commenters recommended a deletion of the prohibition against a borrower being denied a closed school loan discharge solely on the basis of the borrower's failure to meet any time limits set by the lender, guaranty agency, or Secretary.

Discussion: There are no time-driven requirements with respect to the submission of information that a borrower must meet to qualify for a closed school loan discharge. Perhaps the commenters misinterpreted the lender's requirement in § 682.402(d)(7)(ii) to resume collection efforts against a borrower who failed to submit, within 60 days, the written request and sworn statement necessary for loan discharge. However, that requirement only has the effect of reactivating collection efforts, and does not disqualify the borrower from later submitting a complete application for loan discharge.

Change: None.

Section 682.402(d)(7)(i)

35. *Comment:* Some commenters believed that a lender should not be permitted to suspend collection efforts against a borrower for whom the lender has received reliable information from a source other than a guaranty agency or the Secretary indicating that the borrower may be eligible for a closed school loan discharge.

Discussion: The Secretary does not believe that either he or a guaranty agency will always be the first to know that a specific borrower may be eligible for a closed school loan discharge. For example, the school itself could notify

the lender that it had closed, or a legal aid group working on behalf of students could notify the lender of students who it believed were eligible. The Secretary believes that it would be in the best interests of the borrower to permit a lender to exercise its judgment concerning the reliability of the sources of information it receives.

Change: None.

Section 682.402(d)(7)(ii)

36. *Comment:* Some commenters believed that a lender that resumes collection activity against a borrower who fails to submit the documentation required for a closed school loan discharge should be required to grant forbearance to the borrower to absolve the borrower of any delinquency status existing on the loan, including delinquency that occurred before the date the lender suspended collection activity. The commenters believed that the borrower's delinquency is generally the result of the borrower's inability to pay due to circumstances caused by the school.

Discussion: The Secretary believes there is no reason to conclude that a borrower who did not qualify for a closed school loan discharge should, nevertheless, be presumed to have been harmed by the school to the extent that the borrower could not comply with the terms of his or her repayment agreement with the lender.

Change: None.

37. *Comment:* Some commenters believed the 60-day administrative forbearance period permitted while a lender awaited the borrower's submission of documentation is too short. The commenters believed that up to 90 days would be necessary to address the borrower's questions and for the borrower to submit documentation to the lender.

Discussion: A 60-day period is the standard administrative forbearance period permitted for purposes of awaiting documentation for other purposes *e.g.*, death, disability, or bankruptcy cancellations. The Secretary believes that 60 days is more than adequate for the borrower to submit the request for discharge and sworn statement for a closed school discharge.

Change: None.

Section 682.402(d)(7)(iii)

38. *Comment:* Some commenters objected to the requirement that a payment received by the lender from or on behalf of the borrower after the lender filed a claim on the loan with the guaranty agency must be forwarded to the guaranty agency within 30 days of its receipt. The commenters contended that the guaranty agency is not the legal holder of the loan until it pays a claim, and therefore has no right to the payment.

Discussion: The Secretary sees no benefit in having the borrower's payment in the possession of the party that has forwarded other loan related documents to the guaranty agency. The Secretary is aware of at least two ways for a lender to forward the borrower's payment to a guaranty agency so that it can be applied to the borrower's outstanding loan balance: the lender could cash the borrower's check and forward its own check payable to the guaranty agency on behalf of the borrower, or the lender could forward the borrower's original check to the agency and the agency could hold the check until it paid the lender's claim.

Change: None.

Section 682.402(d)(7)(iv)

39. *Comment:* Some commenters believed that in the case of a claim filed by a lender, the guaranty agency, not the lender, should notify the borrower that a closed school loan discharge has been granted.

Discussion: The borrower had an obligation to repay the loan to the lender. The borrower has no obligation to repay the loan (it has been discharged) to the guaranty agency. The borrower should be informed by the party to whom the borrower had been obligated (the lender, if the claim was filed by the lender, or the guaranty agency, if the borrower's loan was held by the guaranty agency) that the borrower's obligation to repay the loan to that party has been discharged.

Change: None.

40. *Comment:* Some commenters noted that the proposed regulations did not specify the actions that a lender must take when it is informed by a guaranty agency that a borrower's request for a closed school discharge has been denied.

Discussion: The Secretary had intended that the procedures that applied in the case of a false certification request would apply to a closed school claim also.

Change: The final regulations have been revised to specify in § 682.402(d)(7)(v) the responsibilities of a lender when it is notified by a guaranty agency that a borrower's request for a closed school discharge has been denied.

Section 682.402(e) False Certification by a School of a Student's Eligibility to Borrow

41. *Comment:* Some commenters requested the Secretary to specifically state in the regulations what the effect of a false certification discharge would be on a school's cohort default rate.

Discussion: This issue would be more appropriately addressed in the definition of a school's cohort default rate in 34 CFR Part 668. While the Secretary does not believe that a school that falsely certified a borrower's eligibility should be allowed to benefit from that false certification by having its default rate reduced as a consequence, he is studying this issue to determine the appropriate treatment of such cases, and will make a decision when information concerning actual cases of false certification discharges is available.

Change: None.

Section 682.402(e)(1)

42. *Comment:* Some commenters believed that a parent should not have a Federal PLUS Loan discharged if the school falsely certified the eligibility of the student for whom the parent obtained the PLUS Loan. The commenters believed that only loans obtained directly by the student should be discharged under this section.

Discussion: Section 437(c)(1) of the HEA was amended by (Pub. L. 103–208) to permit a parent to receive a discharge of a PLUS Loan if the school falsely certified the eligibility of the student for whom the parent obtained the PLUS Loan.

Change: None.

43. *Comment:* Some commenters requested clarification of whether the false certification discharge applied to a loan that was partially disbursed on or after January 1, 1986.

Discussion: The Secretary has been given authority pursuant to section 437(c)(1) of the HEA to discharge the borrower's liability on a loan "* * * received, on or after January 1, 1986 * * *" if the student's eligibility to borrow was falsely certified by the school. For purposes of the false certification discharge, the Secretary will consider the borrower's entire loan eligible if any part of it was disbursed by the lender on or after January 1, 1986.

Change: The final regulations have been revised to incorporate this clarification.

44. *Comment:* Some commenters objected to the restriction that a false certification discharge would only apply if the false certification was made by an "eligible" institution. The commenters believed that the HEA intended the false certification discharge provision to apply to certifications made by both "eligible" and "ineligible" schools.

Discussion: This was discussed in detail on page 2490 of the NPRM published on January 14, 1994 (FR 59, No. 10). The Secretary has been given authority pursuant to section 437(c)(1) of the HEA to discharge the borrower's liability on a loan if the student's eligibility to borrow "* * * was falsely certified by the *eligible* institution * * *." (emphasis added.) The statute prescribes the scope of the discharge for false certification under section 437(c) as extending to those instances in which the "student's eligibility to borrow under this part was falsely certified by the *eligible institution* * * *." 20 U.S.C. 1087(c)(1).

The commenters proposal would have the effect of ignoring this language, which on its face limits relief to individuals whose personal eligibility status was falsely certified, rather than to those who contend that they were ineligible because the school at which they were enrolled was not an "eligible institution." This limitation embodies a congressional choice to exclude those grounds that were really challenges to the eligibility status of the school itself, and nothing in the language or the legislative history suggests that this limitation is inadvertent or unintended. Moreover, institutional eligibility rests directly and indirectly on a host of qualifications. The lack of one or more of these qualities in a school mistakenly determined to be eligible by the Department would, under the commenters' view, suffice to make eligible for discharge *all* borrowers enrolled at the institution while the deficiency persisted—a period that could stretch over several years—regardless of whether that deficiency related to the adequacy of the training and skills provided to the borrower.

The text itself and the legislative history show no intention of such a broad and costly view of the discharge provision. The Secretary does not, however, consider borrowers who attended schools that allegedly lacked eligibility to be barred by that alleged deficiency from relief under the false certification provision, but merely that the falsity on which they would seek relief must relate to a certification about their personal eligibility, and not that of the allegedly ineligible institution. The Secretary does not have the authority to discharge a loan that was made to a borrower for attendance at an ineligible school.

Change: None.

Section 682.402(e)(2)(ii)

45. *Comment*: Some commenters noted that lenders and guaranty agencies generally are not required to keep loan records longer than five years after the date a loan is paid in full. In light of the borrower's statutory right to a false certification discharge for loans received on or after January 1, 1986, the commenters recommended that the regulations prescribe the procedures to be followed by lenders and guaranty agencies who learn of borrowers who claim to have repaid their loans in full more than five years ago, but for whom the lender or guaranty agency has no existing records.

Discussion: In these cases, the Secretary expects the lender and guaranty agency will examine records reasonably available to them from other sources. If the lender or guaranty agency are unable to locate records of a loan paid in full more than five years ago, it would be the responsibility of a borrower who requests a loan discharge to provide the required documentation needed for a discharge of the loan.

Change: None.

Section 682.402(e)(2)(iv)

46. *Comment*: Some commenters recommended that the regulations require the holder of a loan discharged under the false certification discharge provision to forward the original promissory note marked "canceled" or "satisfied in full" to the borrower within 30 days after discharging the borrower's loan obligation.

Discussion: The discussion following comment 16 also applies to a false certification discharge.

Change: Section 682.414(a)(2) has been amended to add a false certification discharge.

Section 682.402(e)(3)

47. *Comment*: Some commenters recommended that the Secretary prescribe a standardized form for the false certification discharge application and associated sworn statement from the borrower.

Discussion: The discussion following comment 17 also applies to a false certification discharge.

Change: None.

Section 682.402(e)(3)(ii)(B)

48. *Comment*: Some commenters objected to the proposed regulation that would limit a false certification discharge to only those cases where a student admitted to a school on the basis of a purported ability to benefit from the school's training did not meet the applicable requirements for admission on the basis of ability to benefit. The commenters believed that the HEA did not envision any restriction as to what would constitute a school's false certification of a student's eligibility to borrow under the FFEL Program. Other commenters believed that some restrictions should apply, and proposed additional acts and certifications of a school that should be construed as false certifications. Some commenters were pleased with the regulations as written, and recommended no changes.

Discussion: The additional acts and certifications by a school that the commenters proposed were the same as those discussed in the NPRM published on January 14, 1994 (FR 59, No. 10). For the reasons stated on pages 2488–2490 of the NPRM, and for the additional reasons discussed earlier in response to comment 5, the Secretary believes that the term "falsely certified," when used for purposes of a false certification discharge, applies to cases involving a school's invalid certification that a student had the ability to benefit from the training offered by the school, or cases where the school signed a person's name on the loan application or the promissory note, and certain cases where the school wrongfully endorsed a person's name on the loan check, or the borrower's authorization for electronically transferring loan proceeds.

The Secretary believes that if the school rather than the student signed a person's name on the loan application or the promissory note, the putative borrower is not aware that a loan was being applied for and had no intention of entering into an agreement to repay a loan. Therefore, it is reasonable to conclude that a borrower who did not sign the application or promissory note could not have completely understood that a check later presented for endorsement would represent the proceeds of such a loan, and would not have intended to signify by endorsing such a check or authorization to release funds that he or she agreed to become obligated to repay a loan. A school that signed a person's name on a precursory document (the loan application or the promissory note) effectively prevented the person from being fully aware of the relationship normally apparent to a borrower who first completes an application for a loan and later receives a loan disbursement as a result of that application.

The Secretary understands that in some cases, an unscrupulous school may obtain the valid signature of a borrower on the loan application or promissory note and will later sign the student's name on the loan check or the authorization for electronic funds transfer. However, despite these actions, a student could have materially benefitted from the loan proceeds by a

reduction of the charges owed to the school or by otherwise receiving proceeds of the loan delivered by the school. The Secretary believes that a person who signed the loan application and promissory note should be considered an individual who was aware that he or she requested a loan. Therefore, if the borrower (or student on whose behalf a parent borrowed a PLUS Loan) was enrolled at the school during the period of time that the loan (or an installment thereof) was intended to cover, and someone other than the borrower signed the borrower's name on a loan check or authorization for electronic funds transfer, causing the loan proceeds to be applied to the student's account to satisfy a liability for tuition and other charges owed to the school, or to be delivered to the borrower, it is reasonable to conclude that the borrower by that action received the proceeds of the loan he or she had applied. Because that borrower obtained the benefits of the loan disbursement, even though the borrower realized that he or she did not sign the loan check or the authorization for electronic funds transfer, that borrower would be legally obligated with respect to that disbursement. In this case, the Secretary does not believe that a loan discharge was contemplated by Congress. However, if it is determined that the borrower or student did not benefit from the loan proceeds, the Secretary believes that the borrower should be relieved of any obligation to repay the amount of the loan proceeds transmitted as a result of a falsely signed loan check or authorization for electronic funds transfer, and that such relief can be included in the procedures adopted for discharges under section 437(c) of the HEA.

The Secretary is concerned with the plight of students who have been misled by unscrupulous schools, or who have been harmed by a school's failure to fulfill its obligations (such as the payment of a refund to the student). Practices of this sort are violations of 34 CFR part 668, subpart F, which governs misrepresentations by schools. The Secretary will take a broad range of sanctions against schools to enforce these provisions. The Secretary also notes that recent changes made to Title IV, Part H of the HEA will reduce the incidence of school malfeasance. Further, the Secretary will determine if relief can be provided to such students in future regulations or legislative amendments. However, not all cases of school malfeasance can currently be classified as a school's "false certification of a student's eligibility to borrow" that would permit a borrower to receive a loan discharge under the HEA. For example, although misrepresentations regarding the school's educational program or its financial or administrative capability, including the school's placement services or the quality of the school's facilities, faculty, or equipment, may well have induced the student to enroll at the school, those representations are not part of the process of "certification" of the student's eligibility to borrow.

Change: The final regulations have been revised to permit false certification discharges in cases where the school, without the authorization of the individual, signed a person's name on the loan application or the promissory note. In addition, the regulations provide relief where the school, without borrower authorization, endorsed the borrower's name on a loan check or authorization for electronic funds transfer, providing that the student did not receive, directly or indirectly, the benefits of the loan proceeds disbursed by that loan check or authorization for electronic funds transfer that was signed by the school. The regulations will include provisions for a borrower to appeal to the Secretary if the borrower disagrees with a guaranty agency's decision that the signatures in question were signed by the borrower.

Section 682.402(e)(3)(ii)(C)

49. *Comment:* Some commenters believed it was unnecessary for the student to certify that he or she was certified by the school on the application for the loan as an eligible student. The commenters believed that this information is seldom known to students because they may never see or understand what the school wrote on the application. The commenters noted that the student could generally deduce that the school had made such a certification by the fact that a lender made the loan, but believe that the same deduction could just as easily be made by a guaranty agency or the Secretary.

Discussion: The Secretary agrees with the commenters.

Change: The final regulations have been revised to delete this requirement.

Section 682.402(e)(3)(ii)(D)

50. *Comment:* Some commenters believed there is no statutory justification for denying a false certification discharge if the student was able to obtain employment in the occupation for which the student's program was intended to provide training.

Discussion: In the case of a discharge based on a school's defective certification that the student had the ability to benefit from the school's training, this was discussed in detail on pages 2488–2490 of the NPRM published on January 14, 1994 (FR 59, No. 10). The Secretary believes that the ability of a student to obtain employment in the occupation for which the student's program was intended to provide training is evidence that the student was able to benefit from the education received, even though the school may have improperly tested, or failed to test, the student's ability to benefit from the school's training.

Change: None.

51. *Comment:* Some commenters questioned what would constitute a student's "reasonable attempt to obtain employment" and questioned whether it would be fair to expect the student to be able to document, or even remember such attempts that may have been made many years ago.

Discussion: In the absence of evidence to the contrary, a student who states that he or she made a "reasonable attempt to obtain employment" will be presumed to have done so. The student is simply being asked to sign a statement to that effect.

Change: None.

Section 682.402(e)(3)(iv)

52. *Comment:* Some commenters, while believing that borrower cooperation is important in an enforcement action undertaken against a school or other related parties, were concerned that a borrower may be unable to take time away from work, home, or other activities to travel to multiple court appearances needed to assist the Secretary or his designee in the enforcement action. The commenters believed that a borrower should be required to assist in an enforcement action only to the extent practicable for the borrower.

Discussion: The discussion following comment 23 also applies to a false certification discharge.

Change: None.

Section 682.402(e)(5)(i)

53. *Comment:* Some commenters opposed the requirement that a borrower must assign to and relinquish in favor of the Secretary any right to a loan refund (up to the amount discharged) from any private or public fund. The commenters were particularly concerned with the effect they believed this requirement would have upon state tuition recovery funds. The commenters also believed that the Secretary has no statutory right to any claim against a state tuition recovery fund because the HEA fails to specifically provide the

secretary with that right. The commenters noted that the section 437(c)(2) of the HEA limits the assignment to the Secretary of a borrower's right to a loan refund only to the borrower's rights "* * * against the institution and its affiliates and principals." The commenters contend that there is no indication that Congress intended the Secretary to have access to state funds or to require states to participate economically in false certification discharges. The commenters believed that the HEA's omission of state tuition recovery funds (or any other private or public fund) reflects the principal of statutory construction *"expressio unius est exclusio alterius"* (the expression of one thing is the exclusion of another).

Discussion: The discussion following comment 24 also applies to a false certification discharge.

Change: The final regulations have been revised to exclude the portion of a public fund that represents public money.

54. *Comment:* Some commenters questioned why a borrower must assign to and relinquish in favor of the Secretary any right to a loan refund (up to the amount discharged) with respect to the enrollment agreement for the program for which the loan was received. The commenters believed that the assignment of a borrower's rights pursuant to the enrollment agreement would not gain anything for the Secretary. They were concerned that the borrower would be forced to surrender some rights (unspecified) unnecessarily, despite the statement in § 682.402(e)(5)(iii) that permits the borrower (or student) to pursue legal and equitable relief regarding disputes arising from matters otherwise unrelated to the loan discharged.

Discussion: The discussion following comment 25 also applies to a false certification discharge.

Change: None.

Section 682.402(e)(6)(i)

55. *Comment:* Some commenters objected to the requirement that a guaranty agency must review records available from sources other than the guarantor after receiving a false certification claim from a lender or a discharge request from a borrower. The commenters believed this requirement is logistically unrealistic and unnecessarily complicates and delays the processing of a false certification claim.

Discussion: The Secretary believes that the guaranty agency is in the best position to consult with other knowledgeable parties concerning a school's alleged false certification of a student's eligibility to borrow. The Secretary believes that the 90-day time period allows sufficient time for an agency to examine the lender's false certification claim in light of the information available to the agency and to either pay or return the claim to the lender.

Change: None.

Section 682.402(e)(7)(ii)

56. *Comment:* Some commenters believed that a lender that resumes collection activity against a borrower who fails to submit the documentation required for a false certification discharge should be required to grant forbearance to the borrower to absolve the borrower of any delinquency status existing on the loan, including delinquency that occurred before the date the lender suspended collection activity. The commenters believed that the borrower's delinquency is generally the result of the borrower's inability to pay due to circumstances caused by the school.

Discussion: The discussion following comment 36 also applies to a false certification discharge.

Change: None.

Section 682.402(e)(7)(iii)

57. *Comment:* Some commenters objected to the requirement that a payment received by the lender from or on behalf of the borrower after the lender filed a claim on the loan with the guaranty agency must be forwarded to the guaranty agency within 30 days of its receipt. The commenters contended that the guaranty agency is not the legal holder of the loan until it pays a claim, and therefore has no right to the payment.

Discussion: The discussion following comment 38 also applies to a false certification discharge.

Change: None.

Section 682.402(e)(7)(iv)

58. *Comment:* Some commenters believed the guaranty agency, not the lender, should notify the borrower that a false certification discharge has been granted.

Discussion: The discussion following comment 39 also applies to a false certification discharge.

Change: None.

Section 682.402(l)(3)

59. *Comment:* Some commenters believed that any payments received by a guaranty agency from or on behalf of a borrower whose loan obligation has been discharged should be returned to the borrower or the party who made the payment.

Discussion: If a borrower, or a borrower's representative remits a payment for a loan obligation that has been discharged, even though he or she previously has had the payment returned with a notice that the obligation has been discharged and no further payments are required, the Secretary believes it is reasonable to conclude that a subsequent payment from that individual is an indication that he or she has expressed a desire to repay the discharged loan. The Secretary does not believe that the borrower's (or his or her representative's) desire to repay the loan should be frustrated or the taxpayer denied the recovery of such payments.

Change: None.

Section 682.410(b)(6)(i)

60. *Comment:* Some commenters believed the proposed regulations would prohibit a guaranty agency from attempting an annual IRS offset against a borrower if the agency had initiated wage garnishment procedures against the borrower.

Discussion: Under the proposed regulations, a guaranty agency was required to attempt an annual IRS offset against a borrower who owed a defaulted loan if the agency had not attempted to garnish the borrower's wages. Conversely, if an agency had initiated wage garnishment procedures against the borrower, it was not required to attempt an annual IRS offset, but could do so if it decided that it would be an appropriate action to take in addition to wage garnishment. Based on Public Law 102–589, the Secretary will now require a guaranty agency to attempt an annual IRS tax refund offset against both categories of borrowers.

Change: The final regulations have been revised to incorporate this requirement.

Section 682.410(b)(6)(vii)(B)

61. *Comment:* Some commenters noted that the Secretary's guidance to guaranty agencies in July 1993 concerning Public Law 102–589 explained that the law no longer required the Secretary to hold a loan to be collected by IRS offset, therefore, a guaranty agency was no longer required to assign a loan temporarily to the Secretary in order to allow the Secretary to collect the loan by federal income tax refund offset. The commenters recommended that references to such assignments be deleted from the regulations.

Discussion: The Secretary agrees with the commenters.

Change: Sections 682.410(b)(5)(vi)(H) and (L), § 682.410(b)(6)(i), (iii), (iv)(B),

(vii)(A)-(D), (viii)(A), (xii), and § 682.410(b)(7(iv)(B) of the final regulations have been revised, renumbered, or deleted to remove references to such assignments.

Section 682.410(b)(10)(i)

62. *Comment:* Some commenters objected to the requirement that a guaranty agency must follow the procedures prescribed in the regulations if it decided to garnish the wages of a borrower who owed a defaulted loan. The commenters believed that a guaranty agency that possessed authority under state law to effect a garnishment should be permitted to garnish the borrower's wages under the state's wage garnishment procedures.

Discussion: The procedures that a guaranty agency must follow when attempting to garnish a borrower's wages are mandated by section 488A of the HEA. Those procedures supersede any state garnishment laws that do not comply with the requirements of the national wage garnishment authority established by the HEA.

Change: None.

63. *Comment:* Some commenters asked if the wage garnishment procedures would apply against borrowers and employers who were subject to tribal laws. The commenters noted that section 488A(a) of the HEA does not refer to tribal laws, but simply states that the garnishment provisions of the HEA apply "* * * (N)otwithstanding any provision of State law * * *." The commenters observed that because of the difficulty and low success ratio of obtaining a judgment through tribal courts, most creditors no longer even make the attempt.

Discussion: Section 488A(a) of the HEA preempts state laws that might prohibit garnishment to collect student loan debts; it does not preempt such laws of a foreign nation. Certain tribes of American Indians are considered to have the same relationship with the United States as do foreign nations. Therefore, the laws of those tribes are not preempted by the wage garnishment provisions of the HEA.

Change: None.

Section 682.410(b)(10)(i)(A)

64. *Comment:* Some commenters believed the regulations should specify that the amount of a borrower's wages that may be garnished is the lesser of 10 percent of the borrower's disposable pay or the amount allowed by 15 U.S.C. 1673.

Discussion: The Secretary agrees with the commenters.

Change: The final regulations have been revised to incorporate this clarification.

65. *Comment:* Some commenters believed the regulations should specify the deductions from a borrower's wages that would take precedence over a wage garnishment order.

Discussion: Only a borrower's disposable pay is subject to garnishment. Since "disposable pay" is defined as that part of a borrower's compensation from an employer remaining after the deduction of any amounts required by law to be withheld, any such deductions "take precedence" and will affect the amount recovered from the borrower through garnishment. The Secretary has no authority to modify the withholding orders issued by other entities legally empowered to garnish the borrower's pay for other purposes.

Change: None.

Section 682.410(b)(10)(i)(D)

66. *Comment:* Some commenters believed that a guaranty agency should be permitted to automatically garnish the wages of a borrower who failed to maintain the terms of a repayment agreement with the guaranty agency. The commenters believed that it is unnecessary to provide further notice or appeal opportunities to a borrower who has broken the terms of the repayment agreement. Similarly, other commenters believed that a guaranty agency should be permitted to proceed with wage garnishment against a borrower who has defaulted on a loan without being required to offer a repayment opportunity to the borrower. The commenters believed that a borrower who has defaulted on a loan has already had numerous opportunities to repay the loan. Some commenters suggested that a borrower be limited to only one repayment opportunity.

Discussion: All attempted garnishments must be preceded by a notice to the borrower of the guaranty agency's intention to initiate garnishment proceedings and an explanation of the borrower's rights, including the right to a hearing. The due process protection afforded the borrower under the HEA's garnishment rules renders previous repayment arrangements between the borrower and the agency irrelevant. Each garnishment action must be able to stand on its own as far as compliance with the requirements of the statute and regulations is concerned.

Change: None.

67. *Comment:* Some commenters believed that the wage garnishment provisions of the HEA applied only to a borrower who entered into a repayment agreement with the guaranty agency and then later failed to comply with the terms of that agreement. The commenters believed there is no statutory authority to garnish the wages of a borrower simply because the borrower has defaulted on the loan obligation and has not made arrangements with the guaranty agency to repay the debt.

Discussion: The HEA permits a guaranty agency to garnish the pay of a borrower who "* * * is not currently making required repayment under a repayment agreement * * *." A borrower who owes a defaulted loan and has simply refused to make any repayment arrangement with a guaranty agency would certainly fit that description. Otherwise, borrowers could shield themselves from wage garnishment by refusing to enter into agreements to repay their loans to guaranty agencies. The HEA and the regulations are not designed to provide incentives to borrowers who refuse to repay their debts.

Change: None.

68. *Comment:* Some commenters believed that the terms of the repayment agreement opportunity that a guaranty agency must offer a borrower prior to wage garnishment must be similar to the terms offered to a borrower under the loan rehabilitation program, that is, the borrower may not be required to pay more than a reasonable and affordable amount.

Discussion: Section 488A(a)(4) of the HEA states that an individual subject to wage garnishment shall be provided an opportunity to enter into a written agreement with the guaranty agency under terms agreeable to the guaranty agency. Unlike other areas of the HEA that contain provisions mandating that the borrower's payment be "reasonable and affordable," the wage garnishment section of the HEA contains no such requirement. The Secretary believes this is because Congress realized that a borrower who has not repaid his or her loan will have had numerous opportunities to have done so prior to the initiation of a wage garnishment proceeding. For example, the borrower will have already declined the opportunity to make payments under the loan rehabilitation program.

However, since it would make no sense to demand a payment amounts from a borrower who could document that he or she was unable to pay those amounts, the Secretary encourages a guaranty agency, even at this late point, to attempt to accommodate a borrower who expresses a willingness to repay the loan but who is unable to do so

under the terms proposed by the guaranty agency because of a documented hardship explained by the borrower.

Change: None.

Section 682.410(b)(10)(i)(E)

69. *Comment:* Some commenters believed a guaranty agency should be permitted to include a notice to the borrower about wage garnishment with the agency's other notices to the borrower about hearing opportunities available to the borrower with respect to IRS offset procedures and credit bureau reporting. The commenters recommended that a guaranty agency not be required to provide the borrower with an opportunity for a hearing more than once every 12 months. The commenters also believed that if the borrower had received a hearing and unsuccessfully contested the existence or the amount of the debt, the borrower need not be provided another hearing on those issues.

Discussion: As permitted under § 682.410(b)(5)(vi)(H), a guaranty agency may send a combined notice, or separate notices to a borrower concerning credit bureau reporting, IRS offset, wage garnishment, and any other enforcement action that may be taken to collect the debt. However, each garnishment proceeding taken against a borrower must comply with the notice and due process requirements that are unique to wage garnishment.

Change: None.

Section 682.410(b)(10)(i)(F)

70. *Comment*: Some commenters objected to the requirement that a guaranty agency must sue an employer who fails to comply with a garnishment order. The commenters note that section 488A(a)(6) of the HEA provides an option by stating that a guaranty agency "* * * may sue the employer." Other commenters recommended that the regulations permit a guaranty agency to decline to sue an employer who fails to comply with the wage garnishment order if the agency can demonstrate that the expected cost and probability of success of the litigation did not justify a lawsuit.

Discussion: The statutory language provides the authority for a guaranty agency to sue the employer. A guaranty agency is not required to garnish the wages of borrowers who owe defaulted loans, but if an agency chooses to do so, it must follow the garnishment procedures prescribed in these regulations. In order to protect the interests of borrowers and taxpayers, the Secretary believes a guaranty agency should make use of the full extent of the statutory authority available to it under the HEA to compel an employer to comply with a wage garnishment order. The Secretary cannot envision any realistic probability that an agency would be unsuccessful in its suit against an employer that was in clear violation of the garnishment order. Given the expectation of such success, the Secretary believes the agency's litigation efforts and costs would be minimal. Accordingly, this would be part of the agency's normal performance of its role of ensuring the maximum collection of defaulted loans, and the Secretary may refuse to make reinsurance payments, or may recover reinsurance payments already made to an agency that fails to sue an employer that was in clear violation of the garnishment order.

Change: None.

71. *Comment*: Some commenters did not believe that a self-employed borrower should be considered an "employer" for wage garnishment purposes. The commenters believed that garnishment should be considered a proceeding to seize the wages of a debtor paid by another party.

Discussion: The Secretary agrees with the commenters.

Change: The reference to a self-employed borrower in § 682.410(b)(10)(i)(F) has been deleted from the final regulations.

Section 682.410(b)(10)(i)(G)

72. *Comment*: Some commenters were opposed to the qualified prohibition in the regulations that prevents a guaranty agency from garnishing the wages of a borrower whom it knows has been involuntarily separated from employment until the borrower has been reemployed continuously for at least 12 months. The commenters believed that the proposed regulations appear to condone garnishment as long as the guarantor is not aware that the borrower has been involuntarily separated from employment and has not been reemployed continuously for at least 12 months. They believed that the HEA does not permit garnishment under any circumstances until a borrower who has been involuntarily separated from employment has been reemployed continuously for at least 12 months.

Discussion: The borrower will be informed of his or her rights with respect to wage garnishment in the notice sent to the borrower at least 30 days before the initiation of garnishment proceedings. That notice will include information about the exception provided for a borrower who has been involuntarily separated from employment.

Note: All garnishments initiated by guaranty agencies on or after March 1, 1994 must comply with the standardized administrative wage garnishment procedures approved by the Secretary on February 1, 1994. As part of those standardized procedures, a guaranty agency must send a notice to the borrower prior to initiating garnishment. The standardized notice fully explains the exception for involuntarily separated borrowers and includes a simple form for the borrower to fill out to request this exception.

If a borrower who meets the conditions necessary for this exception wishes to take advantage of it, the borrower will be able to do so quite easily, either before the garnishment proceedings are initiated, or during the hearing available to the borrower. If the borrower chooses not to divulge information concerning an involuntary separation, and there is no reasonable expectation that the guaranty agency should have known about the borrower's undisclosed involuntary separation, the Secretary believes that a resulting garnishment of the borrower's wages should not be invalidated if the borrower later contests the garnishment on those grounds or if the agency later learns that the borrower would have been eligible for the exception.

Change: None.

Section 682.410(b)(10)(i)(I)

73. *Comment*: Some commenters believed the withholding notice sent to a borrower's employer should inform the employer that the HEA prohibits wage garnishment if the borrower has not been reemployed continuously for at least 12 months.

Discussion: All information relating to the borrower's rights will be disclosed to the borrower. The borrower's employer needs to know only that information necessary for the employer to comply with the withholding order.

Change: None.

Section 682.410(b)(10)(i)(J)

74. *Comment*: Some commenters believed that, to avoid a misunderstanding, the regulations should state that the location of a borrower's wage garnishment hearing is established by the guaranty agency.

Discussion: The Secretary agrees with the commenters.

Change: The final regulations have been revised to incorporate this clarification.

75. *Comment:* Some commenters believed that a wage garnishment hearing held by a guaranty agency should be a taped hearing held in a location accessible to the borrower. The commenters also believed that the borrower should be given the right to

appeal any adverse decision of the guaranty agency to the Secretary, and the borrower should be informed of that right.

Discussion: The regulations require a guaranty agency to provide a hearing by a telephone conference with a borrower who requests that type of hearing. All telephonic costs associated with the hearing will be the responsibility of the guaranty agency. The Secretary believes this option reasonably accommodates borrowers who either choose to or who are unable to attend an in-person hearing with the guaranty agency. The Secretary sees no reason to compel a guaranty agency to tape the hearing, but would not object if an agency wished to do so. The Secretary does not intend to second-guess an agency's decisions about wage garnishments on a case-by-case basis. However, if the Secretary learns that a guaranty agency has failed to comply with procedures prescribed by the HEA and the regulations, or has failed to adhere to the standardized procedures required of all agencies (see note included in the discussion for § 682.410(b)(10)(i)(G) above), the Secretary will take appropriate action.

Change: None.

Section 682.410(b)(10)(i)(K)

76. *Comment:* Some commenters believed that the regulations should clarify that, absent evidence to the contrary, the borrower shall be deemed to have received the notice of intent to garnish five days after its mailing date. The commenters believed this would prevent disputes about the date the borrower received the notice.

Discussion: The Secretary agrees with the commenters.

Change: The final regulations have been revised to incorporate this clarification in this paragraph, and the associated paragraph 682.410(b)(10)(i)(L).

Section 682.410(b)(10)(i)(L)

77. *Comment:* Some commenters opposed the requirement that a guaranty agency must provide a hearing to a borrower whose written request for the hearing is received later than 15 days after the borrower received a notice of withholding. The commenters believed there is no statutory support for any exception to what they perceive to be a rigid 15-day deadline for a borrower to make such a request.

Discussion: The commenters are incorrect. Section 488A(b) of the HEA specifically requires a guaranty agency to provide a hearing upon a borrower's request, even if the borrower's request is not made timely. Although the agency is not required to delay the issuance of a withholding order to the borrower's employer, the agency could do so, as explained in comment 78, if the agency believes a delay would be appropriate.

Change: None.

78. *Comment:* Some commenters believed that even though a borrower's written request for a hearing is submitted late, there could nevertheless be valid reasons why the guaranty agency should not issue a withholding order to the borrower's employer. The commenters believed that this section of the regulations conflicted with § 682.410(b)(10)(i)(H) which permits a guaranty agency to delay or cancel the withholding order if the agency receives information that it believes justifies the delay or cancellation.

Discussion: The Secretary agrees with the commenters.

Change: The final regulations have been revised to permit a guaranty agency to exercise this option

Section 682.410(b)(10)(i)(M)

79. *Comment:* Some commenters believed that the regulations should clarify that guaranty agencies may use alternative types of hearing examiners and are not limited to appointing only an administrative law judge.

Discussion: The Secretary did not intend that the regulations be interpreted in the limited manner that some commenters have done, or in a manner that the commenters believe that other parties will do. A guaranty agency's hearing official may be any qualified individual, including an administrative law judge, who is not under the supervision or control of the head of the guaranty agency.

Change: The final regulations have been revised to incorporate this clarification.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 682

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

(Catalog of Federal Domestic Assistance Numbers: 84.032 Federal Family Education Loan Program)

Dated: April 21, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends part 682 of title 34 of the Code of Federal Regulations as follows:

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

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

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

2. Section 682.202 is amended by adding paragraph (a) introductory text, revising paragraphs (a)(1) through (a)(4), and revising paragraphs (c) and (d) to read as follows:

§ 682.202 Permissible charges by lenders to borrowers.

* * * * *

(a) *Interest.* The applicable interest rates for FFEL Program loans are given in paragraphs (a)(1) through (a)(4) of this section.

(1) *Stafford Loan Program.* (i) If the borrower, on the date the promissory note evidencing the loan is signed, has an outstanding balance of principal or interest on a previous Stafford loan, the interest rate is the applicable interest rate on that previous Stafford loan.

(ii) If the borrower, on the date the promissory note evidencing the loan is signed, has no outstanding balance on any FFEL Program loan, and the first disbursement is made—

(A) Prior to October 1, 1992, for a loan covering a period of instruction beginning on or after July 1, 1988, the interest rate is 8 percent until 48 months elapse after the repayment period begins, and 10 percent thereafter; or

(B) On or after October 1, 1992, the interest rate is a variable rate, applicable to each July 1–June 30 period, that equals the lesser of—

(*1*) The bond equivalent rate of the 91-day Treasury bills auctioned at the final auction prior to the June 1 immediately preceding the July 1–June 30 period, plus 3.10 percent; or

(*2*) 9 percent.

(iii) For a Stafford loan for which the first disbursement is made before October 1, 1992—

(A) If the borrower, on the date the promissory note evidencing the loan is signed, has no outstanding balance on a Stafford loan but has an outstanding balance of principal or interest on a PLUS or SLS loan made for a period of enrollment beginning before July 1, 1988, or on a Consolidation loan that repaid a loan made for a period of enrollment beginning before July 1, 1988, the interest rate is 8 percent; or

(B) If the borrower, on the date the promissory note evidencing the loan is signed, has an outstanding balance of principal or interest on a PLUS or SLS loan made for a period of enrollment beginning on or after July 1, 1988, or on a Consolidation loan that repaid a loan made for a period of enrollment beginning on or after July 1, 1988, the interest rate is 8 percent until 48 months elapse after the repayment period begins, and 10 percent thereafter.

(iv) For a Stafford loan for which the first disbursement is made on or after October 1, 1992, if the borrower, on the date the promissory note evidencing the loan is signed, has no outstanding balance on a Stafford loan but has an outstanding balance of principal or interest on a PLUS, SLS, or Consolidation loan, the interest rate is 8 percent.

(2) *PLUS Program.* (i) For a combined repayment schedule under § 682.209(d), the interest rate is the weighted average of the rates of all loans included under that schedule.

(ii) For a loan disbursed on or after July 1, 1987 but prior to October 1, 1992, and for any loan made under § 682.209 (e) or (f), the interest rate is a variable rate, applicable to each July 1–June 30 period, that equals the lesser of—

(A) The bond equivalent rate of the 52-week Treasury bills auctioned at the final auction prior to the June 1 immediately preceding the July 1–June 30 period, plus 3.25 percent; or

(B) 12 percent.

(iii) For a loan disbursed on or after October 1, 1992, the interest rate is a variable rate, applicable to each July 1–June 30 period, that equals the lesser of—

(A) The bond equivalent rate of the 52-week Treasury bills auctioned at the final auction prior to the June 1 immediately preceding the July 1–June 30 period, plus 3.10 percent; or

(B) 10 percent.

(3) *SLS Program.* (i) For a combined repayment schedule under § 682.209(d), the interest rate is the weighted average of the rates of all loans included under that schedule.

(ii) For a loan disbursed on or after July 1, 1987 but prior to October 1, 1992, and for any loan made under § 682.209 (e) or (f), the interest rate is a variable rate, applicable to each July 1–June 30 period, that equals the lesser of—

(A) The bond equivalent rate of the 52-week Treasury bills auctioned at the final auction prior to the June 1 immediately preceding the July 1–June 30 period, plus 3.25 percent; or

(B) 12 percent.

(iii) For a loan disbursed on or after October 1, 1992, the interest rate is a variable rate, applicable to each July 1–June 30 period, that equals the lesser of—

(A) The bond equivalent rate of the 52-week Treasury bills auctioned at the final auction prior to the June 1 immediately preceding the July 1–June 30 period, plus 3.10 percent; or

(B) 11 percent.

(4) *Consolidation Program.* A Consolidation Program loan bears interest at the rate that is the greater of—

(i) The weighted average of interest rates on the loans consolidated, rounded to the nearest whole percent; or

(ii) 9 percent.

* * * * *

(c) *Fees for FFEL Program loans.* A lender—

(1) May charge a borrower an origination fee on a subsidized Stafford loan not to exceed the maximum rate specified by federal statute;

(2) Shall charge a borrower an origination fee on an unsubsidized Stafford loan of 3 percent of the principal amount of the loan;

(3) Shall charge a borrower an origination fee on an SLS or a PLUS loan of 3 percent of the principal amount of the loan;

(4) Shall deduct a pro rata portion of the fee (if charged) from each disbursement; and

(5) Shall refund by a credit against the borrower's loan balance the portion of the fee previously deducted from the loan that is attributable to any portion of the loan that is—

(i) Returned by the school to the lender;

(ii) Repaid within 120 days of disbursement; or

(iii) Not delivered within 120 days of disbursement.

(d) *Insurance Premium.* A lender may charge the borrower the amount of the insurance premium paid by the lender to the guarantor up to 1 percent of the principal amount of the loan, if that charge is provided for in the promissory note.

* * * * *

(Authority: 20 U.S.C. 1077, 1078, 1078–1, 1078–2, 1078–3, 1079, 1082, 1087–1, 1091a)

3. Section 682.208 is amended by revising paragraphs (e)(1) and (e)(2), and adding new paragraphs (e)(4), (e)(5), and (h) to read as follows:

§ 682.208 Due diligence in servicing a loan.

* * * * *

(e)(1) If the assignment of a Stafford, PLUS, or SLS loan is to result in a change in the identity of the party to whom the borrower must send subsequent payments, the assignor and assignee of the loan shall, no later than 45 days from the date the assignee acquires a legally enforceable right to receive payment from the borrower on the assigned loan, provide, either jointly or separately, a notice to the borrower of—

(i) The assignment;

(ii) The identity of the assignee;

(iii) The name and address of the party to whom subsequent payments or communications must be sent; and

(iv) The telephone numbers of both the assignor and the assignee.

(2) If the assignor and assignee separately provide the notice required by paragraph (e)(1) of this section, each notice must indicate that a corresponding notice will be sent by the other party to the assignment.

* * * * *

(4) The assignee, or the assignor on behalf of the assignee, shall notify the guaranty agency that guaranteed the loan within 45 days of the date the assignee acquires a legally enforceable right to receive payment from the borrower on the loan of—

(i) The assignment; and

(ii) The name and address of the assignee, and the telephone number of the assignee that can be used to obtain information about the repayment of the loan.

(5) The requirements of this paragraph (e), as to borrower notification, apply if the borrower is in a grace period or has entered the repayment period.

* * * * *

(h) *Notifying the borrower about a servicing change.* If an FFEL Program loan has not been assigned, but there is a change in the identity of the party to whom the borrower must send subsequent payments or direct any communications concerning the loan, the holder of the loan shall, no later than 45 days after the date of the change, provide notice to the borrower of the name, telephone number, and address of the party to whom subsequent payments or communications must be sent. The requirements of this paragraph apply if the borrower is in a grace period or has entered the repayment period.

* * * * *

(Authority: 20 U.S.C. 1077, 1078, 1078–1, 1078–2, 1078–3, 1079, 1080, 1082, 1085)

4. Section 682.402 is amended by revising the heading; by revising paragraph (a); by revising paragraphs (b) and (c)(1); by redesignating paragraphs (d), (e), (f), (g), (h), (i), (j), and (k) as paragraphs (f), (g), (h), (i), (j), (k), (l), and (m), respectively; by further

redesignating newly designated paragraphs (g)(2)(ii), (h)(2)(ii) and (k)(3) as paragraphs (g)(2)(iv), (h)(2)(iii), and (k)(5), respectively; by adding new paragraphs (d), (e), (g)(1)(vi), (g)(1)(vii), (g)(2)(ii), (g)(2)(iii), (h)(1)(iii), (h)(2)(ii), (h)(2)(iv), (h)(2)(v), (k)(4), and (m)(5); by revising newly redesignated paragraphs (f)(2) and (f)(3), (f)(4) introductory text, (g) heading, (g)(1) introductory text, (g)(1)(i), (g)(2) introductory text, (g)(2)(i), (h) heading, (h)(2)(iii), (h)(3)(i), (h)(3)(ii), (i)(2) heading and introductory text, (i)(2)(iv), (j) heading, (j)(1) introductory text, (j)(2), (k)(2), (k)(5), (l), and (m) introductory text; by removing the word "and" at the end of paragraph (m)(3)(ii); by adding and reserving paragraph (k)(3); and by removing the period at the end of paragraph (m)(4), and adding in its place, a semicolon, to read as follows:

§ 682.402 Death, disability, closed school, false certification, and bankruptcy payments.

(a) *General.* (1) Rules governing the payment of claims based on filing for relief in bankruptcy, and discharge of loans due to death, total and permanent disability, attendance at a school that closes, and false certification by a school of a borrower's eligibility for a loan, are set forth in this section.

(2) If a PLUS loan was obtained by two parents as co-makers, or a Consolidation loan was obtained by a married couple, and only one of the borrowers dies, becomes totally and permanently disabled, has collection of his or her loan obligation stayed by a bankruptcy filing, or has that obligation discharged in bankruptcy, the other borrower remains obligated to repay the loan.

(3) Except for a borrower's loan obligation discharged by the Secretary under the false certification discharge provision of paragraphs (e)(1)(ii) of this section, a loan qualifies for payment under this section only to the extent that the loan is legally enforceable under applicable law by the holder of the loan.

(4) For purposes of this section—

(i) The legal enforceability of a loan is conclusively determined on the basis of a ruling by a court or administrative tribunal of competent jurisdiction with respect to that loan, or a ruling with respect to another loan in a judgment that collaterally estops the holder from contesting the enforceability of the loan;

(ii) A loan is conclusively determined to be legally unenforceable to the extent that the guarantor determines, pursuant to an objection presented in a proceeding conducted in connection with credit bureau reporting, tax refund offset, wage garnishment, or in any other administrative proceeding, that the loan is not legally enforceable; and

(iii) If an objection has been raised by the borrower or another party about the legal enforceability of the loan and no determination has been made under paragraph (a)(4) (i) or (ii) of this section, the Secretary may authorize the payment of a claim under this section under conditions the Secretary considers appropriate. If the Secretary determines in that or any other case that a claim was paid under this section with respect to a loan that was not a legally enforceable obligation of the borrower, the recipient of that payment must refund that amount of the payment to the Secretary.

(b) *Death.* (1) If an individual borrower dies, or, on or after July 23, 1992 the student for whom a parent received a PLUS loan dies, the obligation of the borrower and any endorser to make any further payments on the loan is discharged.

(2) In determining that a borrower (or student) has died, the lender may rely on a death certificate or other proof of death that is acceptable under applicable state law. If a death certificate or other acceptable proof of death is not available, the borrower's obligation on the loan can be discharged only if the guaranty agency determines that other evidence establishes that the borrower (or student) has died.

(3) After receiving information indicating that the borrower (or student) has died, the lender, if it believes the information to be reliable, shall suspend any collection activity against the borrower and promptly request that the borrower's representative (or the student's parent in the case of a PLUS loan) provide the documentation described in paragraph (b)(2) of this section. During the suspension of collection activity, which may not exceed 60 days, the lender shall diligently attempt to obtain documentation verifying the borrower's (or student's) death. If, despite diligent attempts, the lender is not able to confirm the borrower's (or student's) death within 60 days, the lender shall resume collection activity from the point that it had been discontinued and is deemed to have exercised forbearance as to repayment of the loan during the period when collection activity was suspended.

(4) Once the lender has determined under paragraph (b)(2) of this section that the borrower (or student) has died, the lender may not attempt to collect on the loan from the borrower's estate or from any endorser.

(5) The lender shall return to the sender any payments received from the estate or paid on behalf of the borrower after the date of the borrower's (or student's) death.

(c) *Total and permanent disability.* (1) If the lender determines that an individual borrower is totally and permanently disabled, the obligation of the borrower and any endorser to make any further payments on the loan is discharged. A borrower is not considered totally and permanently disabled on the basis of a condition that existed at the time he or she applied for the loan, unless the borrower's condition has substantially deteriorated later, so as to render the borrower totally and permanently disabled. In the case of a Consolidation loan, the borrower must certify that the condition did not exist prior to the time the borrower applied for each of the underlying loans, unless the condition has substantially deteriorated, so as to render the borrower totally and permanently disabled. If the condition existed prior to the date the Consolidation loan was made, the borrower must provide the lender with the disbursement dates of the underlying loans if the information does not already appear in the borrower's loan file possessed by the lender.

* * * * *

(d) *Closed school.*—(1) *General.* (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges the borrower's obligation with respect to the loan in accordance with the provisions of paragraph (d) of this section, if the borrower (or the student for whom a parent received a PLUS loan) could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled, closed, or the borrower (or student) withdrew from the school not more than 90 days prior to the date the school closed. This 90-day period may be extended if the Secretary determines that exceptional circumstances related to a school's closing would justify an extension.

(ii) For purposes of the closed school discharge authorized by this section—

(A) A school's closure date is the date that the school ceases to provide educational instruction in all programs, as determined by the Secretary;

(B) The term "borrower" includes all endorsers on a loan; and

(C) A "school" means a school's main campus or any location or branch of the main campus, regardless of whether the school or its location or branch is considered eligible.

(2) *Relief available pursuant to discharge.* (i) Discharge under paragraph

(d) of this section relieves the borrower of an existing or past obligation to repay the loan and any charges imposed or costs incurred by the holder with respect to the loan that the borrower is, or was otherwise obligated to pay.

(ii) A discharge of a loan under paragraph (d) of this section qualifies the borrower for reimbursement of amounts paid voluntarily or through enforced collection on a loan obligation discharged under paragraph (d) of this section.

(iii) A borrower who has defaulted on a loan discharged under paragraph (d) of this section is not regarded as in default on the loan after discharge, and is eligible to receive assistance under the Title IV, HEA programs.

(iv) A discharge of a loan under paragraph (d) of this section must be reported by the loan holder to all credit reporting agencies to which the holder previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(3) *Borrower qualification for discharge.* In order to qualify for discharge of a loan under paragraph (d) of this section a borrower shall submit to the holder of the loan a written request and sworn statement. The statement need not be notarized, but must be made by the borrower under penalty of perjury, and, in the statement, the borrower shall state—

(i) Whether the student has made a claim with respect to the school's closing with any third party, such as the holder of a performance bond or a tuition recovery program, and if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation;

(ii) That the borrower (or the student for whom a parent received a PLUS loan)—

(A) Received, on or after January 1, 1986, the proceeds of any disbursement of a loan disbursed, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the educational program at that school because the school closed while the student was enrolled or on an approved leave of absence in accordance with § 682.605(c), or the student withdrew from the school not more than 90 days before the school closed; and

(C) Did not complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

(iii) That the borrower agrees to provide, upon request by the Secretary or the Secretary's designee, other documentation reasonably available to the borrower that demonstrates, to the satisfaction of the Secretary or the Secretary's designee, that the student meets the qualifications in paragraph (d) of this section; and

(iv) That the borrower agrees to cooperate with the Secretary or the Secretary's designee in enforcement actions in accordance with paragraph (d)(4) of this section, and to transfer any right to recovery against a third party in accordance with paragraph (d)(5) of this section.

(4) *Cooperation by borrower in enforcement actions.* (i) In any judicial or administrative proceeding brought by the Secretary or the Secretary's designee to recover for amounts discharged under paragraph (d) of this section or to take other enforcement action with respect to the conduct on which those claims were based, a borrower who requests or receives a discharge under paragraph (d) of this section must cooperate with the Secretary or the Secretary's designee. At the request of the Secretary or the Secretary's designee, and upon the Secretary's or the Secretary's designee's tendering to the borrower the fees and costs as are customarily provided in litigation to reimburse witnesses, the borrower shall—

(A) Provide testimony regarding any representation made by the borrower to support a request for discharge; and

(B) Produce any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(ii) The Secretary revokes the discharge, or denies the request for discharge, of a borrower who—

(A) Fails to provide testimony, sworn statements, or documentation to support material representations made by the borrower to obtain the discharge; or

(B) Provides testimony, a sworn statement, or documentation that does not support the material representations made by the borrower to obtain the discharge.

(5) *Transfer to the Secretary of borrower's right of recovery against third parties.* (i) Upon discharge under paragraph (d) of this section, the borrower is deemed to have assigned to and relinquished in favor of the Secretary any right to a loan refund (up to the amount discharged) that the borrower (or student) may have by contract or applicable law with respect to the loan or the enrollment agreement for the program for which the loan was received, against the school, its principals, affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party.

(ii) The provisions of paragraph (d) of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of such rights by the borrower (or student), limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this section shall be construed as limiting or foreclosing the borrower's (or student's) right to pursue legal and equitable relief regarding disputes arising from matters otherwise unrelated to the loan discharged.

(6) *Guaranty agency responsibilities*—(i) *Procedures applicable if a school closed on or after January 1, 1986, but prior to June 13, 1994.* (A) If a borrower received a loan for attendance at a school with a closure date on or after January 1, 1986, but prior to June 13, 1994, the loan may be discharged in accordance with the procedures specified in paragraph (d)(6)(i) of this section.

(B) If a loan subject to paragraph (d) of this section was discharged in part in accordance with the Secretary's "Closed School Policy" as authorized by section IV of Bulletin 89–G–159, the guaranty agency shall initiate the discharge of the remaining balance of the loan not later than August 13, 1994.

(C) A guaranty agency shall review its records and identify all schools that appear to have closed on or after January 1, 1986 and prior to June 13, 1994, and shall identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 90 days prior to the closure date.

(D) A guaranty agency shall notify the Secretary immediately if it determines that a school not previously known to have closed appears to have closed, and, within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 90 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency shall—

(*1*) Notify all lenders participating in its program to mail a discharge application explaining the procedures

and eligibility criteria for obtaining a discharge and an explanation of the information that must be included in the sworn statement (which may be combined) to all borrowers who may be eligible for a closed school discharge; and

(*2*) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 90 days prior to the closure date, and mail a discharge application and an explanation of the information that must be included in the sworn statement (which may be combined) to the borrower. The application shall inform the borrower of the procedures and eligibility criteria for obtaining a discharge.

(E) If a loan identified under paragraph (d)(6)(i)(D)(*2*) of this section is held by the guaranty agency as a defaulted loan and the borrower's current address is known, the guaranty agency shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments), and notify the borrower that the agency will provide additional information about the procedures for requesting a discharge after the agency has received confirmation from the Secretary that the school had closed.

(F) If a loan identified under paragraph (d)(6)(i)(D)(*2*) of this section is held by the guaranty agency as a defaulted loan and the borrower's current address is unknown, the agency shall, by June 13, 1995, further refine the list of borrowers whose loans are potentially subject to discharge under paragraph (d) of this section by consulting with representatives of the closed school, the school's licensing agency, accrediting agency, and other appropriate parties. Upon learning the new address of a borrower who would still be considered potentially eligible for a discharge, the guaranty agency shall, within 30 days after learning the borrower's new address, mail to the borrower a discharge application that meets the requirements of paragraph (d)(6)(i)(E) of this section.

(G) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(i)(E) or (F) of this section has satisfied all of the conditions required for a discharge, the agency shall notify the borrower in writing of that determination within 30 days after making that determination.

(H) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(i)(E) or (F) of this section does not qualify for a discharge, the agency shall notify the borrower in writing of that determination and the reasons for it within 30 days after the date the agency—

(*1*) Made that determination based on information available to the guaranty agency;

(*2*) Was notified by the Secretary that the school had not closed;

(*3*) Was notified by the Secretary that the school had closed on a date that was more than 90 days after the borrower (or student) withdrew from the school;

(*4*) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(*5*) Received the borrower's completed application and sworn statement.

(I) If a borrower described in paragraph (d)(6)(i)(E) or (F) of this section fails to submit the written request and sworn statement described in paragraph (d)(3) of this section within 60 days of being notified of that option, the guaranty agency shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(J) A borrower's request for discharge may not be denied solely on the basis of failing to meet any time limits set by the lender, guaranty agency, or the Secretary.

(ii) *Procedures applicable if a school closed on or after June 13, 1994.* (A) A guaranty agency shall notify the Secretary immediately whenever it becomes aware of reliable information indicating a school may have closed. The designated guaranty agency in the state in which the school is located shall promptly investigate whether the school has closed and, within 30 days after receiving information indicating that the school may have closed, report the results of its investigation to the Secretary concerning the date of the school's closure and whether a teach-out of the closed school's program was made available to students.

(B) If a guaranty agency determines that a school appears to have closed, it shall, within 30 days of making that determination, notify all lenders participating in its program to suspend collection efforts against individuals with respect to loans made for attendance at the closed school, if the student to whom (or on whose behalf) a loan was made, appears to have been enrolled at the school on the closing date, or withdrew not more than 90 days prior to the date the school appears to have closed. Within 30 days after receiving confirmation of the date of a school's closure from the Secretary, the agency shall—

(*1*) Notify all lenders participating in its program to mail a discharge application explaining the procedures and eligibility criteria for obtaining a discharge and an explanation of the information that must be included in the sworn statement (which may be combined) to all borrowers who may be eligible for a closed school discharge; and

(*2*) Review the records of loans that it holds, identify the loans made to any borrower (or student) who appears to have been enrolled at the school on the school closure date or who withdrew not more than 90 days prior to the closure date, and mail a discharge application and an explanation of the information that must be included in the sworn statement (which may be combined) to the borrower. The application shall inform the borrower of the procedures and eligibility criteria for obtaining a discharge.

(C) If a loan identified under paragraph (d)(6)(ii)(B)(*2*) of this section is held by the guaranty agency as a defaulted loan and the borrower's current address is known, the guaranty agency shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments), and notify the borrower that the agency will provide additional information about the procedures for requesting a discharge after the agency has received confirmation from the Secretary that the school had closed.

(D) If a loan identified under paragraph (d)(6)(ii)(B)(*2*) of this section is held by the guaranty agency as a defaulted loan and the borrower's current address is unknown, the agency shall, within one year after identifying the borrower, attempt to locate the borrower and further determine the borrower's potential eligibility for a discharge under paragraph (d) of this section by consulting with representatives of the closed school, the school's licensing agency, accrediting agency, and other appropriate parties. Upon learning the new address of a borrower who would still be considered potentially eligible for a discharge, the guaranty agency shall, within 30 days after learning the borrower's new address, mail to the borrower a discharge application that meets the requirements of paragraph (d)(6)(ii)(B) of this section.

(E) If the guaranty agency determines that a borrower identified in paragraph

(d)(6)(ii)(C) or (D) of this section has satisfied all of the conditions required for a discharge, the agency shall notify the borrower in writing of that determination within 30 days after making that determination.

(F) If the guaranty agency determines that a borrower identified in paragraph (d)(6)(ii)(C) or (D) of this section does not qualify for a discharge, the agency shall notify the borrower in writing of that determination and the reasons for it within 30 days after the date the agency—

(*1*) Made that determination based on information available to the guaranty agency;

(*2*) Was notified by the Secretary that the school had not closed;

(*3*) Was notified by the Secretary that the school had closed on a date that was more than 90 days after the borrower (or student) withdrew from the school;

(*4*) Was notified by the Secretary that the borrower (or student) was ineligible for a closed school discharge for other reasons; or

(*5*) Received the borrower's completed application and sworn statement.

(G) Upon receipt of a closed school discharge claim filed by a lender, the agency shall review the borrower's request and supporting sworn statement in the light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations, and shall take the following actions—

(*1*) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (d) of this section, it shall pay the claim in accordance with § 682.402(h) not later than 90 days after the agency received the claim; or

(*2*) If the agency determines that the borrower does not qualify for a discharge, the agency shall, not later than 90 days after the agency received the claim, return the claim to the lender with an explanation of the reasons for its determination.

(H) If a borrower fails to submit the written request and sworn statement described in paragraph (d)(3) of this section within 60 days of being notified of that option, the lender or guaranty agency shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The lender or guaranty agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(I) A borrower's request for discharge may not be denied solely on the basis of failing to meet any time limits set by the lender, guaranty agency, or the Secretary.

(7) *Lender responsibilities.* (i) A lender shall comply with the requirements prescribed in paragraph (d) of this section. In the absence of specific instructions from a guaranty agency or the Secretary, if a lender receives information from a source it believes to be reliable indicating that an existing or former borrower may be eligible for a loan discharge under paragraph (d) of this section, the lender shall immediately notify the guaranty agency, and suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments).

(ii) If the borrower fails to submit the written request and sworn statement described in paragraph (d)(3) of this section within 60 days after being notified of that option, the lender shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(iii) The lender shall file a closed school claim with the guaranty agency in accordance with § 682.402(g) no later than 60 days after the lender receives the borrower's written request and sworn statement described in paragraph (d)(3) of this section. If a lender receives a payment made by or on behalf of the borrower on the loan after the lender files a claim on the loan with the guaranty agency, the lender shall forward the payment to the guaranty agency within 30 days of its receipt. The lender shall assist the guaranty agency and the borrower in determining whether the borrower is eligible for discharge of the loan.

(iv) Within 30 days after receiving reimbursement from the guaranty agency for a closed school claim, the lender shall notify the borrower that the loan obligation has been discharged, and request that all credit bureaus to which it previously reported the status of the loan delete all adverse credit history assigned to the loan.

(v) Within 30 days after being notified by the guaranty agency that the borrower's request for a closed school discharge has been denied, the lender shall resume collection and notify the borrower of the reasons for the denial. The lender shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity, and may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(e) *False certification by a school of a student's eligibility to borrow and unauthorized disbursements.*—(1) *General.* (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges a current or former borrower's obligation with respect to the loan in accordance with the provisions of paragraph (e) of this section, if the borrower's (or the student for whom a parent received a PLUS loan) eligibility to receive the loan was falsely certified by an eligible school. For purposes of a false certification discharge, the term "borrower" includes all endorsers on a loan. A student's eligibility to borrow shall be considered to have been falsely certified by the school if the school—

(A) Admitted the student on the basis of ability to benefit from its training and the student did not meet the applicable requirements for admission on the basis of ability to benefit as described in paragraph (e)(13) of this section; or

(B) Signed the borrower's name without authorization by the borrower on the loan application or promissory note.

(ii) The Secretary discharges the obligation of a borrower with respect to a loan disbursement for which the school, without the borrower's authorization, endorsed the borrower's loan check or authorization for electronic funds transfer, unless the student for whom the loan was made received the proceeds of the loan either by actual delivery of the loan funds or by a credit in the amount of the contested disbursement applied to charges owed to the school for that portion of the educational program completed by the student. However, the Secretary does not reimburse the lender with respect to any amount disbursed by means of a check bearing an unauthorized endorsement unless the school also executed the application or promissory note for that loan for the named borrower without that individual's consent.

(2) *Relief available pursuant to discharge.* (i) Discharge under paragraph (e)(1)(i) of this section relieves the borrower of an existing or past obligation to repay the loan certified by the school, and any charges imposed or costs incurred by the holder with respect to the loan that the borrower is, or was, otherwise obligated to pay.

(ii) A discharge of a loan under paragraph (e) of this section qualifies the borrower for reimbursement of amounts paid voluntarily or through enforced collection on a loan obligation

discharged under paragraph (e) of this section.

(iii) A borrower who has defaulted on a loan discharged under paragraph (e) of this section is not regarded as in default on the loan after discharge, and is eligible to receive assistance under the Title IV, HEA programs.

(iv) A discharge of a loan under paragraph (e) of this section is reported by the loan holder to all credit reporting agencies to which the holder previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(v) Discharge under paragraph (e)(1)(ii) of this section qualifies the borrower for relief only with respect to the amount of the disbursement discharged.

(3) *Borrower qualification for discharge.* In order to qualify for discharge of a loan under paragraph (e) of this section the borrower shall submit to the holder of the loan a written request and a sworn statement. The statement need not be notarized, but must be made by the borrower under penalty of perjury, and, in the statement, the borrower shall—

(i) State whether the student has made a claim with respect to the school's false certification with any third party, such as the holder of a performance bond or a tuition recovery program, and if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation;

(ii) In the case of a borrower requesting a discharge based on the school's defective testing of the student's ability to benefit, state that the borrower (or the student for whom a parent received a PLUS loan)—

(A) Received, on or after January 1, 1986, the proceeds of any disbursement of a loan disbursed, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Was admitted to that school on the basis of ability to benefit from its training and did not meet the applicable requirements for admission on the basis of ability to benefit as described in paragraph (e)(13) of this section; and

(C) Withdrew from the school and did not find employment in the occupation for which the program was intended to provide training, or completed the training program for which the loan was made and made a reasonable attempt to obtain employment in the occupation for which the program was intended to provide training, and—

(*1*) Was not able to find employment in that occupation; or

(*2*) Obtained employment in that occupation only after receiving additional training that was not provided by the school that certified the loan;

(iii) In the case of a borrower requesting a discharge because the school signed the borrower's name on the loan application or promissory note—

(A) State that the signature on either of those documents was not the signature of the borrower; and

(B) Provide five different specimens of his or her signature, two of which must be not earlier or later than one year before or after the date of the contested signature;

(iv) In the case of a borrower requesting a discharge because the school, without authorization of the borrower, endorsed the borrower's name on the loan check or signed the authorization for electronic funds transfer, the borrower shall—

(A) Certify that he or she did not endorse the loan check or sign the authorization for electronic funds transfer, or authorize the school to do so;

(B) Provide five different specimens of his or her signature, two of which must be not earlier or later than one year before or after the date of the contested signature; and

(C) State that the proceeds of the contested disbursement were not received either through actual delivery of the loan funds or by a credit in the amount of the contested disbursement applied to charges owed to the school for that portion of the educational program completed by the student;

(v) That the borrower agrees to provide upon request by the Secretary or the Secretary's designee, other documentation reasonably available to the borrower, that demonstrates, to the satisfaction of the Secretary or the Secretary's designee, that the student meets the qualifications in paragraph (e) of this section; and

(vi) That the borrower agrees to cooperate with the Secretary or the Secretary's designee in enforcement actions in accordance with paragraph (e)(4) of this section, and to transfer any right to recovery against a third party in accordance with paragraph (e)(5) of this section.

(4) *Cooperation by borrower in enforcement actions.* (i) In any judicial or administrative proceeding brought by the Secretary or the Secretary's designee to recover for amounts discharged under paragraph (e) of this section or to take other enforcement action with respect to the conduct on which those claims were based, a borrower who requests or receives a discharge under paragraph (e) of this section must cooperate with the Secretary or the Secretary's designee. At the request of the Secretary or the Secretary's designee, and upon the Secretary's or the Secretary's designee's tendering to the borrower the fees and costs as are customarily provided in litigation to reimburse witnesses, the borrower shall—

(A) Provide testimony regarding any representation made by the borrower to support a request for discharge; and

(B) Produce any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(ii) The Secretary revokes the discharge, or denies the request for discharge, of a borrower who—

(A) Fails to provide testimony, sworn statements, or documentation to support material representations made by the borrower to obtain the discharge; or

(B) Provides testimony, a sworn statement, or documentation that does not support the material representations made by the borrower to obtain the discharge.

(5) *Transfer to the Secretary of borrower's right of recovery against third parties.* (i) Upon discharge under paragraph (e) of this section, the borrower is deemed to have assigned to and relinquished in favor of the Secretary any right to a loan refund (up to the amount discharged) that the borrower (or student) may have by contract or applicable law with respect to the loan or the enrollment agreement for the program for which the loan was received, against the school, its principals, affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party.

(ii) The provisions of paragraph (e) of this section apply notwithstanding any provision of state law that would otherwise restrict transfer of such rights by the borrower (or student), limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this section shall be construed as limiting or foreclosing the borrower's (or student's) right to pursue legal and equitable relief regarding disputes arising from matters otherwise unrelated to the loan discharged.

(6) *Guaranty agency responsibilities—general.* (i) A guaranty agency shall notify the Secretary immediately whenever it becomes aware of reliable information indicating that a school may have falsely certified a student's eligibility or caused an unauthorized

disbursement of loan proceeds, as described in paragraph (e)(3) of this section. The designated guaranty agency in the state in which the school is located shall promptly investigate whether the school has falsely certified a student's eligibility and, within 30 days after receiving information indicating that the school may have done so, report the results of its preliminary investigation to the Secretary.

(ii) If the guaranty agency receives information it believes to be reliable indicating that a borrower whose loan is held by the agency may be eligible for a discharge under paragraph (e) of this section, the agency shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments), and inform the borrower of the procedures for requesting a discharge.

(iii) If the borrower fails to submit the written request and sworn statement described in paragraph (e)(3) of this section within 60 days of being notified of that option, the guaranty agency shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date it suspended collection activity. The agency may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(iv) Upon receipt of a discharge claim filed by a lender or a request submitted by a borrower with respect to a loan held by the guaranty agency, the agency shall have up to 90 days to determine whether the discharge should be granted. The agency shall review the borrower's request and supporting sworn statement in light of information available from the records of the agency and from other sources, including other guaranty agencies, state authorities, and cognizant accrediting associations.

(v) A borrower's request for discharge and sworn statement may not be denied solely on the basis of failing to meet any time limits set by the lender or the guaranty agency.

(7) *Guaranty agency responsibilities with respect to a claim filed by a lender based on the borrower's assertion that he or she did not sign the loan application or the promissory note, or that the school failed to test, or improperly tested, the student's ability to benefit.* (i) The agency shall evaluate the borrower's request and consider relevant information it possesses and information available from other sources, and follow the procedures described in paragraph (e)(7) of this section.

(ii) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (e) of this section, it shall, not later than 30 days after the agency makes that determination, pay the claim in accordance with § 682.402(h) and—

(A) Notify the borrower that his or her liability with respect to the amount of the loan has been discharged, and that the lender has been informed of the actions required under paragraph (e)(7)(ii)(C) of this section;

(B) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(C) Notify the lender that the borrower's liability with respect to the amount of the loan has been discharged, and that the lender must—

(*1*) Immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the lender related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay; and

(*2*) Within 30 days, report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(iii) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination—

(A) Notify the lender that the borrower's liability on the loan is not discharged and that, depending on the borrower's decision under paragraph (e)(7)(iii)(B) of this section, the loan shall either be returned to the lender or paid as a default claim; and

(B) Notify the borrower that the borrower does not qualify for discharge, and state the reasons for that conclusion. The agency shall advise the borrower that he or she remains obligated to repay the loan and warn the borrower of the consequences of default, and explain that the borrower will be considered to be in default on the loan unless the borrower submits a written statement to the agency within 30 days stating that the borrower—

(*1*) Acknowledges the debt and, if payments are due, will begin or resume making those payments to the lender; or

(*2*) Requests the Secretary to review the agency's decision.

(iv) Within 30 days after receiving the borrower's written statement described in paragraph (e)(7)(iii)(B)(*1*) of this section, the agency shall return the claim file to the lender and notify the lender to resume collection efforts if payments are due.

(v) Within 30 days after receiving the borrower's request for review by the Secretary, the agency shall forward the claim file to the Secretary for his review and take the actions required under paragraph (e)(11) of this section.

(vi) The agency shall pay a default claim to the lender within 30 days after the borrower fails to return either of the written statements described in paragraph (e)(7)(iii)(B) of this section.

(8) *Guaranty agency responsibilities with respect to a claim filed by a lender based only on the borrower's assertion that he or she did not sign the loan check or the authorization for the electronic transfer of loan funds.* (i) The agency shall evaluate the borrower's request and consider relevant information it possesses and information available from other sources, and follow the procedures described in paragraph (e)(8) of this section.

(ii) If the agency determines that a borrower who asserts that he or she did not endorse the loan check satisfies the requirements for discharge under paragraph (e)(3)(iv) of this section, it shall, within 30 days after making that determination—

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged, and that the lender has been informed of the actions required under paragraph (e)(8)(ii)(B) of this section;

(B) Notify the lender that the borrower's liability with respect to the amount of the contested disbursement of the loan has been discharged, and that the lender must—

(*1*) Immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the lender related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay;

(*2*) Within 30 days, report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan;

(*3*) Refund to the borrower, within 30 days, all amounts paid by the borrower with respect to the loan disbursement that was discharged, including any charges imposed or costs incurred by the lender related to the discharged loan amount; and

(*4*) Refund to the Secretary, within 30 days, all interest benefits and special allowance payments received from the Secretary with respect to the loan disbursement that was discharged; and

(C) Transfer to the lender the borrower's written assignment of any rights the borrower may have against third parties with respect to a loan disbursement that was discharged because the borrower did not sign the loan check.

(iii) If the agency determines that a borrower who asserts that he or she did not sign the electronic funds transfer authorization satisfies the requirements for discharge under paragraph (e)(3)(iv) of this section, it shall, within 30 days after making that determination, pay the claim in accordance with § 682.402(h) and—

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged, and that the lender has been informed of the actions required under paragraph (e)(8)(iii)(C) of this section;

(B) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(C) Notify the lender that the borrower's liability with respect to the contested disbursement of the loan has been discharged, and that the lender must—

(*1*) Immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the lender related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay; and

(*2*) Within 30 days, report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(iv) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination—

(A) Notify the lender that the borrower's liability on the loan is not discharged and that, depending on the borrower's decision under paragraph (e)(8)(iv)(B) of this section, the loan shall either be returned to the lender or paid as a default claim; and

(B) Notify the borrower that the borrower does not qualify for discharge, and state the reasons for that conclusion. The agency shall advise the borrower that he or she remains obligated to repay the loan and warn the borrower of the consequences of default, and explain that the borrower will be considered to be in default on the loan unless the borrower submits a written statement to the agency within 30 days stating that the borrower—

(*1*) Acknowledges the debt and, if payments are due, will begin or resume making those payments to the lender; or

(*2*) Requests the Secretary to review the agency's decision.

(v) Within 30 days after receiving the borrower's written statement described in paragraph (e)(8)(iv)(B)(*1*) of this section, the agency shall return the claim file to the lender and notify the lender to resume collection efforts if payments are due.

(vi) Within 30 days after receiving the borrower's request for review by the Secretary, the agency shall forward the claim file to the Secretary for his review and take the actions required under paragraph (e)(11) of this section.

(vii) The agency shall pay a default claim to the lender within 30 days after the borrower fails to return either of the written statements described in paragraph (e)(8)(iv)(B) of this section.

(9) *Guaranty agency responsibilities in the case of a loan held by the agency for which a discharge request is submitted by a borrower based on the borrower's assertion that he or she did not sign the loan application or the promissory note, or that the school failed to test, or improperly tested, the student's ability to benefit.* (i) The agency shall evaluate the borrower's request and consider relevant information it possesses and information available from other sources, and follow the procedures described in paragraph (e)(9) of this section.

(ii) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (e)(3) of this section, it shall immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the agency related to the discharged loan amount that the borrower is, or was otherwise obligated to pay and, not later than 30 days after the agency makes the determination that the borrower satisfies the requirements for discharge—

(A) Notify the borrower that his or her liability with respect to the amount of the loan has been discharged;

(B) Report to all credit reporting agencies to which the agency previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan; and

(C) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount.

(iii) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination, notify the borrower that the borrower's liability with respect to the amount of the loan is not discharged, state the reasons for that conclusion, and if the borrower is not then making payments in accordance with a repayment arrangement with the agency on the loan, advise the borrower of the consequences of continued failure to reach such an arrangement, and that collection action will resume on the loan unless within 30 days the borrower—

(A) Acknowledges the debt and, if payments are due, reaches a satisfactory arrangement to repay the loan or resumes making payments under such an arrangement to the agency; or

(B) Requests the Secretary to review the agency's decision.

(iv) Within 30 days after receiving the borrower's request for review by the Secretary, the agency shall forward the borrower's discharge request and all relevant documentation to the Secretary for his review and take the actions required under paragraph (e)(11) of this section.

(v) The agency shall resume collection action if within 30 days of giving notice of its determination the borrower fails to seek review by the Secretary or agree to repay the loan.

(10) *Guaranty agency responsibilities in the case of a loan held by the agency for which a discharge request is submitted by a borrower based only on the borrower's assertion that he or she did not sign the loan check or the authorization for the electronic transfer of loan funds.* (i) The agency shall evaluate the borrower's request and consider relevant information it possesses and information available from other sources, and follow the procedures described in paragraph (e)(10) of this section.

(ii) If the agency determines that a borrower who asserts that he or she did not endorse the loan check satisfies the requirements for discharge under paragraph (e)(3)(iv) of this section, it shall refund to the Secretary the amount of reinsurance payment received with respect to the amount discharged on that loan less any repayments made by the lender under paragraph (e)(10)(ii)(D)(*2*) of this section, and

within 30 days after making that determination—

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged;

(B) Report to all credit reporting agencies to which the agency previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan;

(C) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount;

(D) Notify the lender to whom a claim payment was made that the lender must refund to the Secretary, within 30 days—

(*1*) All interest benefits and special allowance payments received from the Secretary with respect to the loan disbursement that was discharged; and

(*2*) The amount of the borrower's payments that were refunded to the borrower by the guaranty agency under paragraph (e)(10)(iii)(C) of this section that represent borrower payments previously paid to the lender with respect to the loan disbursement that was discharged;

(E) Notify the lender to whom a claim payment was made that the lender must, within 30 days, reimburse the agency for the amount of the loan that was discharged, minus the amount of borrower payments made to the lender that were refunded to the borrower by the guaranty agency under paragraph (e)(10)(iii)(C) of this section; and

(F) Transfer to the lender the borrower's written assignment of any rights the borrower may have against third parties with respect to the loan disbursement that was discharged.

(iii) In the case of a borrower who requests a discharge because he or she did not sign the electronic funds transfer authorization, if the agency determines that the borrower meets the conditions for a discharge, it shall immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the agency related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay, and within 30 days after making that determination—

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged;

(B) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(C) Report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(iv) The agency shall take the actions required under paragraphs (e)(9) (iii) through (v) if the agency determines that the borrower does not qualify for a discharge.

(11) *Guaranty agency responsibilities if a borrower requests a review by the Secretary.* (i) Within 30 days after receiving the borrower's request for review under paragraph (e)(7)(iii)(B)(*2*), (e)(8)(iv)(B)(*2*), (e)(9)(iii)(B), or (e)(10)(iv)(B) of this section, the agency shall forward the borrower's discharge request and all relevant documentation to the Secretary for his review.

(ii) The Secretary notifies the agency and the borrower of a determination on review. If the Secretary determines that the borrower is not eligible for a discharge under paragraph (e) of this section, within 30 days after being so informed, the agency shall take the actions described in paragraphs (e)(8) (iv) through (vii) or (e)(9)(iii) through (v) of this section, as applicable.

(iii) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (e) of this section, the agency shall, within 30 days after being so informed, take the actions required under paragraph (e)(7)(ii), (e)(8)(ii), (e)(8)(iii), (e)(9)(ii), (e)(10)(ii), or (e)(10)(iii) of this section, as applicable.

(12) *Lender Responsibilities.* (i) If the lender is notified by a guaranty agency or the Secretary, or receives information it believes to be reliable from another source indicating that a current or former borrower may be eligible for a discharge under paragraph (e) of this section, the lender shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments) and, within 30 days of receiving the information or notification, inform the borrower of the procedures for requesting a discharge.

(ii) If the borrower fails to submit the written request and sworn statement described in paragraph (e)(3) of this section within 60 days of being notified of that option, the lender shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(iii) The lender shall file a claim with the guaranty agency in accordance with § 682.402(g) no later than 60 days after the lender receives the borrower's written request and sworn statement described in paragraph (e)(3) of this section. If a lender receives a payment made by or on behalf of the borrower on the loan after the lender files a claim on the loan with the guaranty agency, the lender shall forward the payment to the guaranty agency within 30 days of its receipt. The lender shall assist the guaranty agency and the borrower in determining whether the borrower is eligible for discharge of the loan.

(iv) The lender shall comply with all instructions received from the Secretary or a guaranty agency with respect to loan discharges under paragraph (e) of this section.

(v) The lender shall review a claim that the borrower did not endorse and did not receive the proceeds of a loan check. The lender shall take the actions required under paragraphs (e)(8)(ii)(A) and (B) of this section if it determines that the borrower did not endorse the loan check, unless the lender secures persuasive evidence that the proceeds of the loan were received by the borrower or the student for whom the loan was made, as provided in paragraph (e)(1)(ii). If the lender determines that the loan check was properly endorsed or the proceeds were received by the borrower or student, the lender may consider the borrower's objection to repayment as a statement of intention not to repay the loan, and may file a claim with the guaranty agency for reimbursement on that ground, but shall not report the loan to credit bureaus as in default until the guaranty agency, or, as applicable, the Secretary, reviews the claim for relief. By filing such a claim, the lender shall be deemed to have agreed to the following—

(A) If the guarantor or the Secretary determines that the borrower endorsed the loan check or the proceeds of the loan were received by the borrower or the student, any failure to satisfy due diligence requirements by the lender prior to the filing of the claim that would have resulted in the loss of reinsurance on the loan in the event of default will be waived by the Secretary; and

(B) If the guarantor or the Secretary determines that the borrower did not endorse the loan check and that the proceeds of the loan were not received by the borrower or the student, the lender will comply with the

requirements specified in paragraph (e)(8)(ii)(B) of this section.

(vi) Within 30 days after being notified by the guaranty agency that the borrower's request for a discharge has been denied, the lender shall notify the borrower of the reasons for the denial and, if payments are due, resume collection against the borrower. The lender shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity, and may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(13) *Requirements for admission on the basis of ability to benefit.* (i) For periods of enrollment beginning between July 1, 1987 and June 30, 1991, a student who had a general education diploma or received one before the scheduled completion of the program of instruction is deemed to have the ability to benefit from the training offered by the school.

(ii) A student not described in paragraph (e)(8)(i) of this section is considered to have the ability to benefit from training offered by the school if the student—

(A) For periods of enrollment beginning prior to July 1, 1987, was determined by the school to have the ability to benefit from the school's training in accordance with the requirements of 34 CFR 668.6;

(B) For periods of enrollment beginning on or after July 1, 1987, achieved a passing grade on a test—

(*1*) Approved by the Secretary, for periods of enrollment beginning on or after July 1, 1991, or by the accrediting agency, for other periods; and

(*2*) Administered substantially in accordance with the requirements for use of the test; or

(C) Successfully completed a program of developmental or remedial education provided by the school.

(iii) Notwithstanding paragraphs (e)(8)(i) and (ii) of this section, a student did not have the ability to benefit from training offered by the school if the student had, at the time of enrollment, a condition or status, including one based on a physical or mental condition, age, or criminal record, that would have prevented the student from satisfying the physical requirements or the legal requirements of the State in which the student resided when the loan was made for either acceptance into the educational program offered by the school or performance of the occupation for which the program of instruction was designed to prepare the student.

(f) * * *

(2) *Suspension of collection activity.* If the lender is notified that a borrower has filed a petition for relief in bankruptcy, the lender shall immediately suspend any collection efforts outside the bankruptcy proceeding against the borrower and—

(i) Against any co-maker or endorser if the borrower has filed for relief under Chapters 12 or 13; and

(ii) Against any co-maker or endorser who has filed for relief in bankruptcy.

(3) *Determination of filing.* The lender shall determine that a borrower has filed a petition for relief in bankruptcy on the basis of receiving a notice of the first meeting of creditors or other confirmation issued by the bankruptcy court.

(4) *Proof of claim.* Unless instructed otherwise by the guaranty agency, the lender shall file a proof of claim with the bankruptcy court within—

* * * * *

(g) *Claim procedures for a loan held by a lender*—(1) *Documentation.* A lender shall provide the guaranty agency with the following documentation when filing a death, disability, closed school, false certification, or bankruptcy claim:

(i) The original promissory note, or, if the lender no longer has the original promissory note, a copy of the note certified by the lender as a true and accurate copy;

* * * * *

(vi) In the case of a closed school claim, the documentation described in paragraph (d)(3) of this section, or any other documentation as the Secretary may require;

(vii) In the case of a false certification claim, the documentation described in paragraph (e)(3) of this section.

(2) *Filing deadlines.* A lender shall file a death, disability, closed school, false certification, or bankruptcy claim within the following periods:

(i) Within 60 days of the date on which the lender determines that a borrower (or the student on whose behalf a parent obtained a PLUS loan) has died, or the lender determines that the borrower is totally and permanently disabled.

(ii) In the case of a closed school claim, the lender shall file a claim with the guaranty agency no later than 60 days after the borrower submits to the lender the written request and sworn statement described in paragraph (d)(3) of this section or after the lender is notified by the Secretary or the Secretary's designee or by the guaranty agency to do so.

(iii) In the case of a false certification claim, the lender shall file a claim with the guaranty agency no later than 60 days after the borrower submits to the lender the written request and sworn statement described in paragraph (e)(3) of this section or after the lender is notified by the Secretary or the Secretary's designee or by the guaranty agency to do so.

* * * * *

(h) *Payment of death, disability, closed school, false certification, and bankruptcy claims by the guaranty agency.*

(1) * * *

(iii) In the case of a closed school claim or a false certification claim based on the determination that the borrower did not sign the loan application, the promissory note, or the authorization for the electronic transfer of loan funds, or that the school failed to test, or improperly tested, the student's ability to benefit, the guaranty agency shall document its determination that the borrower is eligible for discharge under paragraphs (d) or (e) of this section and pay the borrower or the holder the amount determined under paragraph (h)(2) of this section.

(2) * * *

(ii) The amount of loss payable to a lender on a closed school claim or on a false certification claim is equal to the sum of the remaining principal balance and interest accrued on the loan, collection costs incurred by the lender and applied to the borrower's account within 30 days of the date those costs were actually incurred, and unpaid interest determined in accordance with paragraph (h)(3) of this section.

(iii) In the case of a claim filed by a lender on an outstanding loan owed by the borrower, on the same date that the agency pays a claim to the lender, the agency shall pay the borrower an amount equal to the amount paid on the loan by or on behalf of the borrower, less any school tuition refunds or payments received by the holder or the borrower from a tuition recovery fund, performance bond, or other third-party source.

(iv) In the case of a claim filed by a lender based on a request received from a borrower whose loan had been repaid in full by, or on behalf of the borrower to the lender, on the same date that the agency notifies the lender that the borrower is eligible for a closed school or false certification discharge, the agency shall pay the borrower an amount equal to the amount paid on the loan by or on behalf of the borrower, less any school tuition refunds or payments received by the holder or the borrower from a tuition recovery fund, performance bond, or other third-party source.

(v) In the case of a loan that has been included in a Federal Consolidation Loan, the agency shall pay to the holder of the borrower's Consolidation Loan, an amount equal to—

(A) The amount paid on the loan by or on behalf of the borrower at the time the loan was paid through consolidation;

(B) The amount paid by the consolidating lender to the holder of the loan when it was repaid through consolidation; minus

(C) Any school tuition refunds or payments received by the holder or the borrower from a tuition recovery fund, performance bond, or other third-party source if those refunds or payments were—

(*1*) Received by the borrower or received by the holder and applied to the borrower's loan balance before the date the loan was repaid through consolidation; or

(*2*) Received by the borrower or received by the Consolidation Loan holder on or after the date the consolidating lender made a payment to the former holder to discharge the borrower's obligation to that former holder.

(3) * * *

(i) During the period before the claim is filed, not to exceed the period provided for in paragraph (g)(2) of this section for filing the claim.

(ii) During a period not to exceed 30 days following the receipt date by the lender of a claim returned by the guaranty agency for additional documentation necessary for the claim to be approved by the guaranty agency.

* * * * *

(i) * * *

(2) *Response by a guaranty agency to plans proposed under Chapters 11, 12, and 13.* The guaranty agency shall take the following actions when a petition for relief in bankruptcy under Chapters 11, 12, or 13 is filed:

* * * * *

(iv) The agency shall monitor the debtor's performance under a confirmed plan. If the debtor fails to make payments required under the plan or seeks but does not demonstrate entitlement to discharge under 11 U.S.C. 1328(b), the agency shall oppose any requested discharge or move to dismiss the case if the costs of litigation together with the costs incurred for objections to the plan are not reasonably expected to exceed one-third of the amount of the loan to be discharged under the plan.

* * * * *

(j) *Mandatory purchase by a lender of a loan subject to a bankruptcy claim.* (1) The lender shall repurchase from the guaranty agency a loan held by the agency pursuant to a bankruptcy claim paid to that lender, unless the guaranty agency sells the loan to another lender, promptly after the earliest of the following events:

* * * * *

(2) The lender may capitalize all outstanding interest accrued on a loan purchased under paragraph (j) of this section to cover any periods of delinquency prior to the bankruptcy action through the date the lender purchases the loan and receives the supporting loan documentation from the guaranty agency.

(k) *Claims for reimbursement from the Secretary on loans held by guaranty agencies.* * * *

* * * * *

(2) The Secretary pays a death, disability, bankruptcy, closed school, or false certification claim in an amount determined under § 682.402(k)(5) on a loan held by a guaranty agency after the agency has paid a default claim to the lender thereon and received payment under its reinsurance agreement. The Secretary reimburses the guaranty agency only if—

(i) The guaranty agency determines that the borrower (or the student for whom a parent obtained a PLUS loan or each of the co-makers of a PLUS loan) has died, or the borrower (or each of the co-makers of a PLUS loan) has become totally and permanently disabled since applying for the loan, or has filed for relief in bankruptcy, in accordance with the procedures in paragraphs (b), (c), or (f) of this section, or the student was unable to complete an educational program because the school closed, or the borrower's eligibility to borrow (or the student's eligibility in the case of a PLUS loan) was falsely certified by an eligible school. For purposes of this paragraph, references to the "lender" and "guaranty agency" in paragraphs (b) through (f) of this section mean the guaranty agency and the Secretary respectively;

(ii) In the case of a Stafford, SLS, or PLUS loan, the guaranty agency determines that the borrower (or the student for whom a parent obtained a PLUS loan, or each of the co-makers of a PLUS loan) has died, or the borrower (or each of the co-makers of a PLUS loan) has become totally and permanently disabled since applying for the loan, or has filed the petition for relief in bankruptcy within 10 years of the date the borrower entered repayment, exclusive of periods of deferment or periods of forbearance granted by the lender that extended the 10-year maximum repayment period, or the borrower (or the student for whom a parent received a PLUS loan) was unable to complete an educational program because the school closed, or the borrower's eligibility to borrow (or the student's eligibility in the case of a PLUS loan) was falsely certified by an eligible school;

(iii) In the case of a Consolidation loan, the guaranty agency determines that the borrower (or each of the co-makers) has died, become totally and permanently disabled since applying for the Consolidation loan, or has filed the petition for relief in bankruptcy within the maximum repayment period described in § 682.209(h)(2), exclusive of periods of deferment or periods of forbearance granted by the lender that extended the maximum repayment period;

(iv) The guaranty agency has not written off the loan in accordance with the procedures established by the agency under § 682.410(b)(6)(x), except for closed school and false certification discharges; and

(v) The guaranty agency has exercised due diligence in the collection of the loan in accordance with the procedures established by the agency under § 682.410(b)(6)(x), until the borrower (or the student for whom a parent obtained a PLUS loan, or each of the co-makers of a PLUS loan) has died, or the borrower (or each of the co-makers of a PLUS loan) has become totally and permanently disabled or filed a Chapter 12 or Chapter 13 petition, or had the loan discharged in bankruptcy, or for closed school and false certification claims, the guaranty agency receives a request for discharge from the borrower or another party.

(3) [Reserved]

(4) Within 30 days of receiving reimbursement for a closed school or false certification claim, the guaranty agency shall pay—

(i) The borrower an amount equal to the amount paid on the loan by or on behalf of the borrower, less any school tuition refunds or payments received by the holder, guaranty agency, or the borrower from a tuition recovery fund, performance bond, or other third-party source; or

(ii) The amount determined under paragraph (h)(2)(iv) of this section to the holder of the borrower's Consolidation Loan.

(5) The Secretary pays the guaranty agency a percentage of the outstanding principal and interest that is equal to the complement of the reinsurance percentage paid on the loan. This interest includes interest that accrues during—

(i) For death, disability, or bankruptcy claims, the shorter of 60 days or the period from the date the guaranty agency determines that the borrower (or the student for whom a parent obtained a PLUS loan, or each of the co-makers of a PLUS loan) died, became totally and permanently disabled, or filed a petition for relief in bankruptcy until the Secretary authorizes payment; or

(ii) For closed school or false certification claims, the period from the date on which the guaranty agency received payment from the Secretary on a default claim to the date on which the Secretary authorizes payment of the closed school or false certification claim.

(l) *Payments received after the Secretary's payment of a death, disability, closed school, false certification, or bankruptcy claim.* (1) If the guaranty agency receives any payments from or on behalf of the borrower on or attributable to a loan on which the Secretary previously paid a bankruptcy claim, the guaranty agency shall remit 100 percent of these payments to the Secretary.

(2) The guaranty agency shall remit to the Secretary all payments received from a tuition recovery fund, performance bond, or other third-party with respect to a loan on which the Secretary previously paid a closed school or false certification claim. The guaranty agency shall promptly return to the borrower or the borrower's representative, any payment on a discharged loan made by the borrower (or representative) and received after the Secretary pays a closed school or false certification claim. At the same time that the agency returns the payment, it shall notify the borrower (or representative) that there is no obligation to repay a loan discharged by virtue of death, disability, false certification, or closing of the school.

(3) If the guaranty agency has returned a payment to the borrower, or the borrower's representative, with the notice described in paragraph (l)(2) of this section, and the borrower (or representative) continues to send payments to the guaranty agency, the agency shall remit all of those payments to the Secretary.

(m) *Applicable suspension of the repayment period.* For purposes of this section and 11 U.S.C. 523(a)(8)(A) with respect to loans guaranteed under the FFEL Program, an applicable suspension of the repayment period—

* * * * *

(5) Includes the period between the filing of the petition for relief and the date on which the proceeding is completed or dismissed, unless payments have been made during that period in amounts sufficient to meet the amount owed under the repayment schedule in effect when the petition was filed.

* * * * *

(**Authority:** 20 U.S.C. 1078, 1078–1, 1078–2, 1078–3, 1082, 1087)

5. Section 682.410 is amended by revising paragraphs (b)(5)(vi)(H) and (b)(5)(vi)(L), (b)(6)(i), (b)(6) (iii) introductory text and (b)(6)(iii)(A), (b)(6)(iv) introductory and (b)(6)(iv)(B), (B)(6)(vii) introductory text, (b)(6)(vii)(A), removing paragraphs (B)(6)(vii)(B) and (b)(6)(vii)(C) and redesignating paragraph (b)(6)(vii)(D) as paragraph (b)(6)(vii)(B) and reserving it, revising paragraph (b)(6)(xii), revising paragraph (b)(7)(iv)(B), and by adding a new paragraph (b)(10), and by revising the authority citation to read as follows:

§ 682.410 Fiscal, administrative, and enforcement requirements.

* * * * *

(b) * * *

(5) * * *

(vi) * * *

(H) Unless the agency uses a separate notice to advise the borrower regarding other proposed enforcement actions, describe specifically any other enforcement action, such as offset against federal or state income tax refunds or wage garnishment that the agency intends to use to collect the debt, and explain the procedures available to the borrower prior to those other enforcement actions for access to records, for an administrative review, or for agreement to alternative repayment terms;

* * * * *

(L) Describe the collection actions that the agency may take in the future if those presently proposed do not result in repayment of the loan obligation, including the filing of a lawsuit against the borrower by the agency and assignment of the loan to the Secretary for the filing of a lawsuit against the borrower by the Federal Government.

(6) *Collection efforts on defaulted loans.* (i) A guaranty agency shall engage in at least the collection activities described in paragraphs (b)(6) (iii) through (xii) of this section on a loan on which it pays a default claim filed by a lender, and shall attempt an annual IRS offset on each eligible loan, except that the agency may engage in the collection activities described in paragraph (b)(7) of this section in lieu of the activities described in paragraphs (b)(6) (iii) through (vi) of this section.

If, after initiating wage garnishment procedures, the agency terminates those procedures for a particular borrower, the agency shall, within 30 days, commence collection efforts at least as forceful as those described in paragraphs (b)(6) (iii) through (xii) of this section. The agency's collection efforts shall begin with the same collection activities as those that immediately preceded the initiation of garnishment procedures, or, if no collection activities had been performed, the agency shall begin with the activities described in paragraph (b)(6)(iii) of this section, except that the agency may engage in the collection activities described in paragraph (b)(7) of this section in lieu of the activities described in paragraphs (b)(6) (iii) through (vi) of this section.

* * * * *

(iii) One-45 days: During this period, the agency shall—

(A) Send to the borrower the written notice described in paragraph (b)(5)(ii) of this section, and a written notice stating that the agency either will initiate procedures to garnish the borrower's wages, or institute a civil suit to compel repayment of the amount that the borrower owes plus related collection costs; and

* * * * *

(iv) 46–180 days: During this period the agency shall—

* * * * *

(B) Send at least three written notices to the borrower forcefully demanding that the borrower immediately commence repayment of the loan, and informing the borrower that the default has been reported to all national credit bureaus (if that is the case) and that the borrower's credit rating may thereby have been damaged. The final notice also must indicate that it is the final notice the borrower will receive before the agency will take more forceful action, including the initiation of procedures to garnish the borrower's wages, or to offset the borrower's state and federal income tax refunds, or instituting a civil suit to compel repayment of the amount that the borrower owes plus related collection costs.

* * * * *

(vii) 181–545 days:

(A) Except as provided in paragraph (b)(6)(vii)(B) of this section, during this period, but not sooner than 30 days after sending the notice described in paragraph (b)(5)(vi) of this section, the agency shall initiate proceedings to offset the borrower's state and federal income tax refunds, and shall either initiate wage garnishment proceedings against the borrower by the 225th day, or, by the 545th day, institute a civil suit

against the borrower for repayment of the loan.

(B) The agency need not file suit if the agency determines and documents in the borrower's file that—

(1) The cost of litigation would exceed the likely recovery if litigation was begun; or

(2) The borrower does not have the means to satisfy a judgment on the debt or a substantial portion thereof.

* * * * *

(xii) Not later than 10 days after its receipt of information indicating that it does not know the current address of a borrower on a loan on which the agency has neither declined to sue under paragraph (b)(6)(vii)(B) of this section nor discontinued semi-annual inquiries under paragraph (b)(6)(x) of this section, or the 60th day after its payment of a default claim on the loan, whichever is later, the agency shall attempt diligently to locate the borrower through the use of all available skip-tracing techniques, including, but not limited to, any skip-tracing assistance available from the IRS, credit bureaus, and state motor vehicle departments. A guaranty agency shall use any information provided by a school about a borrower's location in conducting skip-tracing activities.

* * * * *

(7) * * *

(iv) * * *

(B) By the end of this period, the agency shall refer the loan to a collection contractor in accordance with paragraph (b)(7)(iv)(C) of this section.

* * * * *

(10) *Administrative Garnishment.* (i) If a guaranty agency decides to garnish the disposable pay of a borrower who is not making payments on a loan held by the agency, on which the Secretary has paid a reinsurance claim, it shall do so in accordance with the following procedures:

(A) The employer shall deduct and pay to the agency from a borrower's wages an amount that does not exceed the lesser of 10 percent of the borrower's disposable pay for each pay period or the amount permitted by 15 U.S.C. 1673, unless the borrower provides the agency with written consent to deduct a greater amount. For this purpose, the term "disposable pay" means that part of the borrower's compensation from an employer remaining after the deduction of any amounts required by law to be withheld.

(B) At least 30 days before the initiation of garnishment proceedings, the guaranty agency shall mail to the borrower's last known address, a written notice of the nature and amount of the debt, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the borrower's rights.

(C) The guaranty agency shall offer the borrower an opportunity to inspect and copy agency records related to the debt.

(D) The guaranty agency shall offer the borrower an opportunity to enter into a written repayment agreement with the agency under terms agreeable to the agency.

(E) The guaranty agency shall offer the borrower an opportunity for a hearing in accordance with paragraph (b)(10)(i)(J) of this section concerning the existence or the amount of the debt and, in the case of a borrower whose proposed repayment schedule under the garnishment order is established other than by a written agreement under paragraph (b)(10)(i)(D) of this section, the terms of the repayment schedule.

(F) The guaranty agency shall sue any employer for any amount that the employer, after receipt of the garnishment notice provided by the agency under paragraph (b)(10)(i)(H) of this section, fails to withhold from wages owed and payable to an employee under the employer's normal pay and disbursement cycle.

(G) The guaranty agency may not garnish the wages of a borrower whom it knows has been involuntarily separated from employment until the borrower has been reemployed continuously for at least 12 months.

(H) Unless the guaranty agency receives information that the agency believes justifies a delay or cancellation of the withholding order, it shall send a withholding order to the employer within 20 days after the borrower fails to make a timely request for a hearing, or, if a timely request for a hearing is made by the borrower, within 20 days after a final decision is made by the agency to proceed with garnishment.

(I) The notice given to the employer under paragraph (b)(10)(i)(H) of this section must contain only the information as may be necessary for the employer to comply with the withholding order.

(J) The guaranty agency shall provide a hearing, which, at the borrower's option, may be oral or written, if the borrower submits a written request for a hearing on the existence or amount of the debt or the terms of the repayment schedule. The time and location of the hearing shall be established by the agency. An oral hearing may, at the borrower's option, be conducted either in-person or by telephone conference. All telephonic charges must be the responsibility of the guaranty agency.

(K) If the borrower's written request is received by the guaranty agency on or before the 15th day following the borrower's receipt of the notice described in paragraph (b)(10)(i)(B) of this section, the guaranty agency may not issue a withholding order until the borrower has been provided the requested hearing. For purposes of this paragraph, in the absence of evidence to the contrary, a borrower shall be considered to have received the notice described in paragraph (b)(10)(i)(B) of this section 5 days after it was mailed by the agency. The guaranty agency shall provide a hearing to the borrower in sufficient time to permit a decision, in accordance with the procedures that the agency may prescribe, to be rendered within 60 days.

(L) If the borrower's written request is received by the guaranty agency after the 15th day following the borrower's receipt of the notice described in paragraph (b)(10)(i)(B) of this section, the guaranty agency shall provide a hearing to the borrower in sufficient time that a decision, in accordance with the procedures that the agency may prescribe, may be rendered within 60 days, but may not delay issuance of a withholding order unless the agency determines that the delay in filing the request was caused by factors over which the borrower had no control, or the agency receives information that the agency believes justifies a delay or cancellation of the withholding order. For purposes of this paragraph, in the absence of evidence to the contrary, a borrower shall be considered to have received the notice described in paragraph (b)(10)(i)(B) of this section 5 days after it was mailed by the agency.

(M) The hearing official appointed by the agency to conduct the hearing may be any qualified individual, including an administrative law judge, not under the supervision or control of the head of the guaranty agency.

(N) The hearing official shall issue a final written decision at the earliest practicable date, but not later than 60 days after the guaranty agency's receipt of the borrower's hearing request.

(O) As specified in section 488A(a)(8) of the HEA, the borrower may seek judicial relief, including punitive damages, if the employer discharges, refuses to employ, or takes disciplinary action against the borrower due to the issuance of a withholding order.

(ii) References to "the borrower" in this paragraph include all endorsers on a loan.

* * * * *

(Authority: 20 U.S.C. 1078, 1078–1, 1078–2, 1078–3, 1080a, 1082, 1087, 1091a, and 1099)

6. Section 682.411 is amended by revising paragraph (d)(2) and the authority citation to read as follows:

§ 682.411 Due diligence by lenders in the collection of guaranty agency loans.

* * * * *

(d) * * *

(2) At least two of the collection letters required under paragraph (d)(1) of this section must warn the borrower that if the loan is not paid, the lender will assign the loan to the guaranty agency that, in turn, will report the default to all national credit bureaus, and that the agency may institute proceedings to offset the borrower's state and federal income tax refunds, to garnish the borrower's wages, and to bring suit against the borrower to compel repayment of the loan.

* * * * *

(Authority: 20 U.S.C. 1078, 1078–1, 1078–2, 1078–3, 1080a, 1082, 1087)

7. Section 682.414 is amended by revising paragraph (a)(2) and the authority citation to read as follows:

§ 682.414 Records, reports, and inspection requirements for guaranty agency programs.

(a) * * *

(2) The guaranty agency shall retain records for each loan for at least five years after the loan is paid in full or has been determined to be uncollectible in accordance with the agency's write-off procedures. For the purpose of this section, the term "paid in full" includes loans paid by the Secretary due to the borrower's death (or student's death in the case of a PLUS loan), the borrower's permanent and total disability or bankruptcy, the discharge of the borrower's loan obligation because of attendance at a closed school, or because the student's eligibility to borrow had been falsely certified by the school.

* * * * *

(Authority: 20 U.S.C. 1078, 1078–1, 1078–2, 1078–3, 1082, 1087)

[FR Doc. 94–10250 Filed 4–28–94; 8:45 am]

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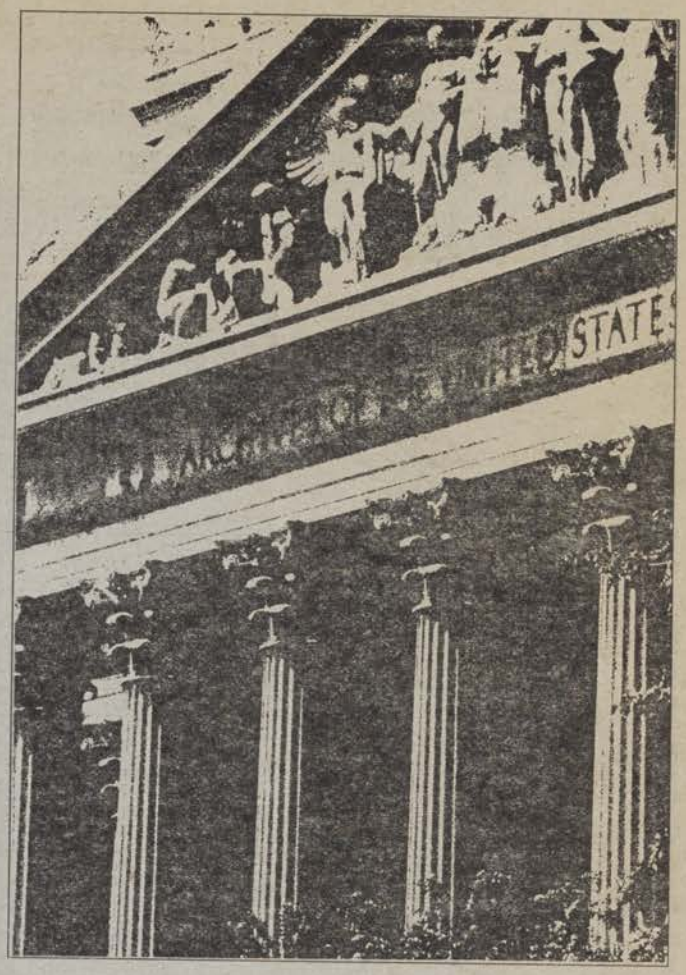

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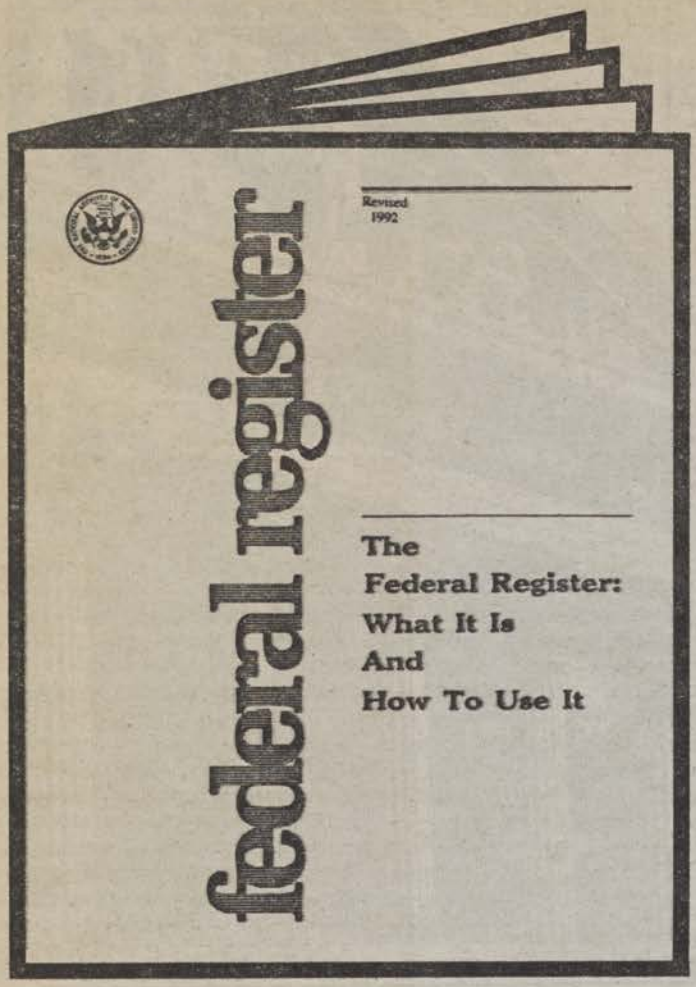

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