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Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 602

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[Docket ID ED–2009–OPE–0009]

Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final rule.

SUMMARY: The Secretary amends its regulations governing institutional eligibility and the Secretary's recognition of accrediting agencies. The Secretary is amending these regulations to implement changes to the Higher Education Act of 1965, as amended (HEA), resulting from enactment of the Higher Education Reconciliation Act of 2005 (HERA), and the Higher Education Opportunity Act (HEOA), and to clarify, improve, and update the current regulations.

DATES: These regulations are effective July 1, 2010.

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SUPPLEMENTARY INFORMATION: On August 6, 2009, the Secretary published a notice of proposed rulemaking (NPRM) for the regulations governing institutional eligibility and the Secretary's recognition of accrediting agencies in the **Federal Register** (74 FR 39498).

In the preamble to the NPRM, the Secretary discussed on page 39499 the major regulations proposed in that document to implement the changes made to the HEA by the HERA and the HEOA, including the following:

- Amending §§ 600.2 and 602.3 to include the statutory definition of ''distance education'', and adding a definition of ''correspondence education'' to § 600.3.
- Amending § 602.3 to include a definition of a ''direct assessment program'', an instructional program that uses or recognizes direct assessment of a student's learning in lieu of credit or clock hours.
- Amending § 602.3 to include a definition of a ''teach-out plan'' and § 602.24 to require agencies to require the institutions they accredit to submit a teach-out plan to the agency under certain circumstances.
- Amending §§ 602.16, 602.17, 602.18 and 602.27 to implement several new requirements pertaining to distance education and correspondence education.
- Amending §§ 602.18, 602.23 and 602.25 to expand due process requirements for agencies.
- Amending § 602.24 to require agencies to confirm that institutions they accredit have transfer of credit policies.
- Amending § 602.15 to require that accreditation team members be well-trained and knowledgeable about their responsibilities regarding distance education.
- Amending § 602.19 to require that agencies monitor enrollment growth at institutions they accredit.
- Amending § 602.26 to expand agency disclosure requirements. (*See* section 496(c)(7) of the HEA).

In addition, on pages 39499 through 39500 of the preamble to the NPRM, the Secretary discussed proposed changes to existing regulations governing institutional eligibility by amending the definition of ''correspondence course'' to be compatible with the new definition of ''correspondence education'' in the accrediting agency recognition regulations.

Further, the Secretary discussed the following proposed changes to existing regulations governing the process for recognizing accrediting agencies:

- Amending § 602.3 to include a definition of ''recognition''.
- Amending §§ 602.15 and 602.27 to modify record-keeping and confidentiality requirements.
- Amending subpart C by combining current subparts C and D into one subpart in order to streamline procedures for agency review; establishing the senior Department official as the deciding official, with appeal to the Secretary; and providing a list of various laws regarding public requests for information with which the Secretary must comply.
- Amending § 602.22 to clarify existing requirements related to substantive change and add flexibility to accrediting agencies in granting prior approval of additional locations under specified circumstances.

As the result of public comment, the final regulations contain a significant change in the due process provisions regarding appeals panels. In addition to these changes, these final regulations make a number of minor technical corrections and conforming changes. Changes that are statutory or that involve only minor technical corrections are generally not discussed in the *Analysis of Comments and Changes* section.

Analysis of Comments and Changes

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

These regulations were published in proposed form on August 6, 2009, in conformance with the consensus of the negotiated rulemaking committee. Under the committee's protocols, consensus meant that no member of the committee dissented from the agreed-upon language. The Secretary invited comments on the proposed regulations by September 8, 2009. Twenty-one parties submitted comments. An analysis of the comments and the changes in the regulations since publication of the NPRM follows.

We group major issues according to subject, with appropriate sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes and suggested changes the law does not authorize the Secretary to make. We also do not address comments pertaining to issues that were not within the scope of the NPRM.

Definitions

Correspondence Course (§ 600.2)

Comment: Several commenters expressed their support for the revised definition of ''correspondence course'' in 34 CFR 600.2, noting that it draws a useful distinction between this mode of educational delivery and distance education.

Discussion: We appreciate the commenters' support.

Changes: None.

Compliance Report (§ 602.3)

Comment: One commenter questioned the meaning of the phrase ''demonstrate that the agency has addressed deficiencies specified'' in the definition of ''compliance report'' in § 602.3. The commenter noted that ''deficiencies'' could range from an agency's complaint procedure not including contact information to an agency's finances being in precarious shape and questioned whether in all cases an agency would be expected to submit a compliance report.

Discussion: The definition provides that a compliance report must address deficiencies that are specified in a decision letter from the senior Department official or the Secretary. The senior Department official or Secretary will make a judgment, based on the record and the recommendations of the Advisory Committee and staff, about what must be addressed in the compliance report.

Changes: None.

Recognition (§ 602.3)

Comment: One commenter asked for further information about what the term ''effective'' means in the phrase ''is effective in its application of those criteria.''

Discussion: The phrase ''apply effectively'' is taken directly from section 496(l) of the HEA and pertains to the Secretary's recognition decision. ''Effective application'' requires a demonstration on the part of the agency that it has followed through on its written policies and standards to provide, through its accrediting activities and each accrediting decision, a reliable judgment about the quality of postsecondary education. Under the statute, the Secretary is required to determine whether an agency is in compliance with the criteria for recognition. Compliance is determined based on a review of an agency's policies and its effective application of those policies. The discussion regarding subpart C later in this preamble explains this concept more thoroughly.

Changes: None.

Other Major Issues

Administrative and Fiscal Responsibilities (§ 602.15)

Comment: Two commenters raised concerns about the potential for an increase in the volume of information an agency will have to maintain under § 602.15(b)(2). This provision requires an agency to maintain records of all decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of any institution or program and substantive changes, including all correspondence that is significantly related to those decisions. One of the commenters, while generally supporting the changes made to this section, requested that the Department strike the phrase ''including all correspondence that is significantly related to those decisions;'' and apply the requirement only to final agency determinations. The second commenter made a similar request. Another commenter, while supportive of the reduction in the amount of material an agency will have to retain over the long term, indicated that the description of which records must be retained was ambiguous.

Another commenter raised a concern about the language in § 602.15(a)(2), regarding the requirement for an agency to ensure that those individuals conducting on-site reviews are adequately trained. The commenter stated that use of the word ''trained'' may lead to the Department establishing minimum standards for an acceptable training program.

Discussion: An important change to this section of the regulations includes the change in timeframe (one full accreditation cycle) for which an agency must maintain records. Under current regulations, an agency must maintain complete and accurate records for the last two full accreditation or preaccreditation reviews of each institution or program it accredits. The amended § 602.15(b) requires the maintenance of records for only the last full accreditation or preaccreditation review. Additionally, the requirement that an agency maintain all decisions regarding the accreditation and preaccreditation of any institution or program, including all correspondence that is significantly related to those decisions, is not new; it has been in the regulations for a number of years. Similarly, although the current regulations do not explicitly mention documents relating to substantive change decisions, the requirement for agencies to maintain these documents exists under the regulatory requirement that agencies maintain all documents related to accrediting decisions and special reports. While the amended regulations now explicitly include a retention requirement for decisions relating to substantive changes, they create no additional burden, and the reduction in the number of cycles for which information must be maintained should significantly reduce the overall burden for agencies.

Agencies must retain key records pertaining to each decision in order to fulfill their role as gatekeepers for Federal programs. Agencies have not always been able to provide the Department with information related to substantive changes. Given the significant increase in substantive changes over time, this documentation is critical. The Department does not agree that the description of the required documents is ambiguous, as an agency is fully aware of its requirements for accreditation, preaccreditation, and substantive change decisions and will be expected to retain those and the other required documents.

Finally, the use of the word ''trained'' in § 602.15(a)(2) is not new. Current regulations contain the same requirement. The language in the new regulations makes clear that the training provided by the agency should be appropriate for the individual's role.

Changes: None.

Accreditation and Preaccreditation Standards (§ 602.16)

Comment: One commenter raised concerns about the effects of the statutory change on § 602.16(a)(1)(i). The statute allows an agency to apply different standards for different institutions and programs, established by the institution. The commenter expressed confusion about how this provision relates to existing regulatory language that an agency's standards assess an institution's or program's success with respect to student achievement in relation to the institution's mission and to the new statutory provision reflected in § 602.16(f)(2). The commenter inquired whether an accrediting agency would be required to permit an institution to set its own standards for student achievement in light of a self-defined mission. For example, the commenter asked, would an agency have to permit an institution to set its own standards for job placement for an institution whose self-defined mission involves serving an economically challenged city or region? Further, the commenter asked whether an agency would be required to accept an institution's demand that it apply different standards to one or more of an institution's approved additional locations. A second commenter expressed ''ardent support'' of the revisions to §§ 602.16(a)(1)(i) and 602.16(f).

Discussion: As provided in § 602.16(f)(1), an accrediting agency has the authority to set, with the involvement of its members, and to

apply accreditation standards for or to institutions or programs that seek review by the agency. This accrediting agency authority remains even if, as provided in § 602.16(f)(2), an institution develops and uses its own standards to demonstrate its success with respect to student achievement, which may be considered as part of any accreditation review. In that case, the accrediting agency would need to make a judgment about whether an institution developed and used reasonable standards to demonstrate its success with respect to student achievement. Likewise, an accrediting agency would not be required to accept an institution's demand that it apply different standards to one or more of an institution's approved locations. We appreciate the second commenter's support.

Changes: None.

Distance Education and Correspondence Education (§ 602.17)

Comment: None.

Discussion: The Department determined that there was an error in § 602.17(g)(1)(iii) with the use of the word ''identification'' in the phrase ''that are effective in verifying student identification.'' The appropriate word to use in the phrase is ''identity'', not ''identification.'' Verifying student identification is making certain that an ID card is not a fake. Verifying student identity is making certain that the student is who he or she is purporting to be. Under the statute, agencies are required to do the latter.

Changes: Section 602.17(g)(1)(iii) has been amended by replacing the word ''identification'' with the word ''identity''.

Comment: One commenter questioned whether the requirements proposed in § 602.17 for verifying the identity of distance education and correspondence education students go far enough. The commenter noted a distinction between systems that verify the identity of an individual through the use of measures such as personal identification numbers (PINs), passwords, and knowledge-based questions, and those that authenticate an individual's identity by means of anatomical or behavioral characteristics unique to the individual, such as fingerprints or unique patterns of movement. The commenter suggested that continued use of secure logins and passwords as the sole means of identification is inconsistent with the intent of the statutory change, and claimed that only biometric-based authentication can provide positive identification. The commenter described software that can be used to capture a student's movements and create a unique biometric student identity that can be used to ensure that the person who registers for an online course is the person who does the work and receives the credit. A second commenter supported the proposed language and called the provision a common-sense rule.

Discussion: The regulations governing verification of student identity were developed using information provided during the negotiated rulemaking discussions and the explanation of the new requirement that was included in the conference report accompanying the HEOA (H. Rep. 110–803, p. 567). In explaining the intent of the new statutory provision that agencies require institutions that offer distance education or correspondence education to have processes for establishing that the students who register for courses are the same students who complete the program and receive the credit, the conference report stated that institutions are expected to have security mechanisms, such as identification numbers or other pass code information, in place and to use them each time a student participates online. Therefore, the continued use of PINs and passwords is consistent with both the statutory language and the intent of the Congress.

In the conference report, it is clear that Congress anticipated that as new identification technologies are developed and become more mainstream and less expensive, agencies and institutions would consider using them. For this reason, the regulations provide for the use of new technologies and practices that are effective in verifying the identity of students, in addition to methods such as secure logins, pass codes, and proctored examinations. There are at least two reasons for not mandating specific types of identity verification procedures in the regulations: Cost and availability. Different types of institutions have different levels of risk, and a technology that one institution considers necessary and affordable may be neither needed nor cost-effective at another institution. It would also be inappropriate for the Department to include specific institutional requirements in its regulations that govern the recognition of accrediting agencies.

Changes: None.

Due Process (§§ 602.18; 602.25)

Comment: One commenter noted the addition to § 602.18, Ensuring consistency of decision making, of new paragraphs (a) and (e), which require agencies to have written specification of the requirements for accreditation that include clear standards for an institution or program to be accredited and to provide an institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards. This commenter asked about the standards and the reporting requirements for non-compliance that are envisioned under these paragraphs. The commenter asked whether consistency was expected among classrooms, programs, or campuses.

Regarding the due process provisions set forth in § 602.25, several commenters recommended changes to the regulations governing appeals panels, specifically § 602.25(f)(1)(iii). A number of commenters provided alternate language. Many of the commenters recommended permitting the appeals panel to remand cases to the original decision-making body. Most of the commenters who made this suggestion wanted to delete the authority of the appeals panel to amend or reverse the adverse action of the original decision-making body; other commenters wanted the appeals panel to also have the authority to remand cases as a fourth option. In addition, most of the commenters who provided alternate language wanted to amend the language that requires the original decision-making body to act in a manner consistent with the appeals panel's findings or decision, by requiring instead that the original decision-making body give deference or due consideration to the appeals panel's decision. One commenter wanted to delete this language.

The rationale provided to support the recommended changes varied, but there were several major points. Many commenters questioned the authority of the appeals panel to render a final decision. Several commenters suggested that the reading of the statute to imply that appeals panels have the authority to make final accreditation decisions rested solely on the lack of a comma in the language of the final bill. They claimed that the appeals panel was not intended to render a final adverse decision; rather, they claimed, the panel was to conduct a hearing prior to the final decision of the accrediting body. One commenter specifically stated that the new provisions for findings of appeals panels are not in the statute and expressed the view that the findings of the appeals panels would compete with the independent, decision-making role of agencies.

One commenter opined that the new appeals panel provisions would create a problem because final accreditation

decisions may be made by an entity, an appeals panel, that is not recognized by the Secretary. Other commenters claimed that the new provision conflicts with regulatory provisions for recognition of accrediting agencies and said that neither the law nor the regulations provide for the Secretary to recognize appeals panels. A few commenters stated that requiring appeals panels to make decisions is inconsistent with the Department's prior position that accreditation decisions may be made only by properly composed decision-making bodies recognized by the Department. Another commenter opined that the new provisions undermine the traditional purpose served by accrediting appeals and violate the independence of the accrediting body.

Some commenters said the new requirements for appeals panels would impair the normal function of the accreditation process because even though accreditation decisions are based on a number of factors, an institution or program may appeal only one or two factors; thus, they claimed, even if those one or two findings are overturned, an adverse action may still be warranted. Other commenters said that an action to amend or reverse a decision can occur only if an appeals panel conducts a new substantive review, rather than a review of the decision-making process, and that appeals panels typically lack the expertise to assess content-specific compliance with accreditation standards. One commenter said that accrediting bodies do not produce a record that allows for reconsideration of matters of substance. Another commenter noted that because the original body conducts a significant amount of research and spends time making decisions, that body has an intimate and comprehensive understanding of the factual situation at hand and it would not be appropriate for an appeals panel to make a final decision.

Commenters also expressed concern that decisions will be made by smaller and less diverse bodies, ones that typically meet infrequently and do not have the experience of the original decision-making body; that the new provision will create situations in which decisions of appeals panels may be inconsistent with other agency decisions; that the change to the regulations will lead to many unwarranted appeals; and that the change will require training of appeals panels.

Several commenters supported allowing an appeals panel to remand a case to the original decision-making body.

Several commenters referenced appellate court processes and suggested that some accrediting agencies might prefer that appeals panels remand cases back to the original decision-making body with instructions either for implementation of a decision or for the consideration of factors to be used to render a decision consistent with the appeals panel decision.

One commenter said that providing the option to remand cases would provide more flexibility to agencies in developing their appeal process. This commenter suggested a change to provide agencies with the option of either giving appeals panels final decision-making authority or requiring that the appeals panel either affirm the original decision or remand the case. The commenter suggested that a remand could include a modification of the original decision.

One commenter questioned whether reversal of a denial of recognition means that an appeals panel would be empowered to determine the period of accreditation. Another commenter appreciated the Department's attempt to provide for implementation of the appeals panel's decision by the original decision-making body, but said it was not clear what was meant by requiring that the original decision-making body's action must be consistent with the appeals panel decision. One other commenter asked about the scope of authority retained by an accrediting agency that reserves the right to implement appeals panel decisions.

One commenter requested that § 602.25(h)(1)(iii), regarding reconsideration of adverse actions based solely on financial criteria, be deleted from the regulations, but cited no authority for the request.

Discussion: It is important to note that the HEOA, in amending section 496(a)(6) of the HEA, included the requirement for clear and consistent accreditation standards and specification of any deficiencies, in addition to providing additional requirements regarding the appeal process. Clear and consistent standards, which let institutions and programs know what they are being measured against, and detailed written descriptions of any deficiencies identified by the accrediting agency, are critical to providing an effective due process procedure. An agency is expected to apply its standards consistently across either the programs or the institutions it accredits, as applicable.

The Department acknowledges that there are situations, such as reversal of a decision to withdraw accreditation, in which it is appropriate, and may be necessary, to involve the original decision-making body in a revised decision. Because of these situations, the Department agreed that agencies would have the option of giving the original decision-making bodies the responsibility to implement decisions, as long as the implementation was consistent with the appeals panel's decision. However, several commenters made a persuasive argument that appeals panels should also have the option of remanding a case to the original decision-making body. Therefore, the language in the proposed regulations has been changed to give appeals panels the option of remanding cases.

However, the Department is concerned that without making additional changes, the regulations would be ambiguous and subject to an interpretation that would allow agencies to write their procedures to provide that their appeals panels are authorized only to affirm a decision or order a remand. This reading would not be consistent with Congressional intent, as the appeal would then be simply an additional procedural step involving a body that has no ultimate authority to effect a change in the accrediting decision. Therefore, the language in the proposed regulations has been changed to specify that an appeals panel has and uses the authority to affirm, amend, or reverse adverse actions of the original decision-making body, and does not serve only an advisory or procedural role. The language regarding affirmation, reversal, or amendment reflects a straightforward reading of Congress's directives to agencies to provide for appeals in front of a different decision-maker.

The Department agrees with those commenters who note that the new regulations may necessitate changes in agency procedures and the structure of the appeals panels. To implement the HEOA, some agencies may need to seek recognition of their appeals panels. Appeals panels will need to meet the requirements for agency recognition, such as having a public member, as provided in §§ 602.14(b)(2) and 602.15(a)(3).

Under the HEOA, appeals panels are subject to a conflict of interest policy and may not include any current members of the underlying decision-making body that made the adverse decision. The Department reads these new provisions as reflecting Congressional intent that appeals panels be decision-making bodies that address

substantive matters, as necessary, not just matters relating to process. Therefore, the entire accreditation process, including accreditation decisions, must be well-documented. The Department recognizes that agencies may need to adopt new procedures for documenting decisions and to ensure that appeals panel members have knowledge of prior agency decisions so the panel's actions and decisions are consistent with agency policies and requirements. Under § 602.15(a)(2), agencies also must provide sufficient training to appeals panel members to ensure that these members have the requisite background to make sound decisions.

We disagree with the commenter who suggested that we remove § 602.25(h)(1)(iii). This section is needed to implement the new statutory provision that an institution or program otherwise subject to a final adverse action may seek agency review of significant new financial information if it meets certain conditions, including that the review take place before a final adverse action that is based solely upon failure to meet financial criteria.

Changes: Section 602.25(f)(1) has been amended by adding a new section 602.25(f)(1)(iii) that requires appeals panels to have and use the authority to make decisions to affirm, amend, or reverse actions of the original decision-making body, and specifies that an appeals panel does not serve only an advisory or procedural role. Section 602.25(f)(1)(iii) in the proposed regulations has been renumbered and amended to allow appeals panels the option of remanding the accrediting action to the original decision-making body. The amendments to this provision require that a decision to remand identify the specific issues to be addressed and that the original decision-making body must act in a manner consistent with the appeals panel's decision or instructions.

Monitoring and Reevaluation of Accredited Institutions and Programs (§ 602.19)

Comment: Several commenters raised concerns about the monitoring provisions in § 602.19 and the impact the regulations would have on smaller accrediting agencies. These commenters requested that the regulations reflect the differences in size and scope of accreditors. One commenter noted that, although these regulations may have no real impact on agencies that recognize hundreds or thousands of institutions, an agency that recognizes 50 institutions may find them impossible to implement. Another commenter raised a different concern related to the scale of the monitoring required of accrediting agencies, stating that monitoring will not capture all non-compliance, and asked the Department to clarify its intent with these regulations.

Still another commenter contended that the Department is exceeding its authority by requiring agencies to collect and analyze measures of student achievement, because the Department is not permitted to regulate student achievement. Another commenter asked for clarification about the implementation of the growth monitoring provisions contained in § 602.19(e) of the regulations. Additionally, two commenters expressed support for the monitoring provisions contained in these regulations with one citing the ability of institutions to establish their own standards of student achievement and the other stating that these monitoring regulations will serve as a possible safeguard against waste, fraud, and abuse in the title IV student aid programs.

Finally, one commenter raised a concern with the reporting requirement that applies to accrediting agencies that have added distance education or correspondence education to their scope of recognition by means of notification to the Department. The commenter asked if an institution that experiences an enrollment increase of distance education students from ten students to fifteen students must go through what the commenter described as an elaborate process.

Discussion: These regulations recognize the need for flexibility raised by the commenters and provide this flexibility. The preamble to the NPRM addressed the Department's desire to ensure flexibility for accrediting agencies in their monitoring of institutions and programs while meeting the intent of the law. These regulations reflect statutory requirements and provide for greater consistency in identifying noncompliant institutions and programs while also accommodating the differences that exist across institutions and programs.

The Department recognizes that accrediting agencies and the institutions and programs they accredit are diverse. Therefore, in addition to providing a framework for monitoring, the Department requires each agency to demonstrate why the approaches it takes to monitoring and evaluating its accredited institutions or programs are effective given the particular circumstances. Moreover, we expect reasonable and prudent implementation of the statute and regulations by the agencies. For each institution or program accredited, an agency should consider factors such as the size of the institution or program, the number of students, the nature of the programs offered, past history, and other knowledge the agency has about that institution or program, including previous reviews. The regulatory language provides accrediting agencies with flexibility regarding their monitoring of institutions and programs and at the same time ensures they review and analyze key data and indicators.

The Department does not agree that it is exceeding its authority by requiring an agency to monitor measures of student achievement. The Department is not specifying, defining, or prescribing the standards that accrediting agencies use to assess an institution's success with respect to student achievement. Rather, student achievement is one of several areas that an agency must review when monitoring the institutions or programs it accredits. Further, under these regulations the approaches taken by the agency must be consistent with § 602.16(f). This section provides that an agency is not restricted from setting and applying accreditation standards for or to institutions or programs seeking review and that an institution is not restricted from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

Finally, the growth monitoring provision in § 602.19(e) requires certain agencies to report to the Secretary information about any institution they accredit that experiences an increase in institutional headcount enrollment of 50 percent or more within one institutional fiscal year, not a 50 percent increase in headcount enrollment in a particular program or particular educational delivery modality. It is important to note that § 602.19(e) only affects institutional accrediting agencies and predominantly programmatic accrediting agencies that accredit freestanding institutions that notify the Secretary of a change in scope of recognition to include distance education or correspondence education in accordance with § 602.27(a)(5).

Changes: None.

Operating Procedures All Agencies Must Have (§ 602.23)

Comment: One commenter did not understand the rationale for the removal of the phrase ''upon request'' from § 602.23(a), regarding making certain written materials and information

available to the public. The same commenter expressed support for the additional language added to the end of § 602.23(c)(1), which seeks to ensure that institutions have sufficient opportunity to provide a response to a third-party complaint before an accrediting agency completes the review of the complaint and makes a decision.

Discussion: The phrase ''upon request'' was removed in response to a statutory change. Section 496(a)(8) of the HEA requires agencies to make available to the public, upon request, a summary of any review resulting in a final accrediting decision involving denial, termination, or suspension of accreditation, together with the comments of the affected institution. Section 496(c)(7) of the HEA, which was added in the 2008 reauthorization, requires agencies to make available to the public a summary of agency or association actions, which includes a final denial, withdrawal, suspension, or termination of accreditation, and any findings made in connection with the action taken, together with the official comments of the affected institution. We consider the most recent language to reflect Congressional intent and, accordingly, made the provision of information to the public without a specific request for the information a regulatory requirement. We appreciate the support for the change to § 602.23(c)(1).

Teach-Out Plans and Agreements (§ 602.24)

Comment: Two commenters noted that agencies must require the institutions they accredit to submit a ''teach-out plan'' to the agency under the circumstances specified in § 602.24(c)(1) and expressed concern that agencies may have little or no ability to enforce such a requirement. One of these commenters stated that the requirement is unrealistic. The other commenter concluded that an agency must have a written policy to require plans from all institutions that meet the regulatory provisions, even institutions that do not participate in the title IV, HEA programs. Regarding ''teach-out agreements,'' one commenter asserted that the regulations specify that an agency may not approve an agreement unless it is with a qualified teach-out institution and characterized that requirement as a matter over which the accrediting agency may have no control.

Two commenters supported the new teach-out provisions. The commenters noted that the regulations regarding ''teach-out plans'' and ''teach-out agreements'' will benefit the affected students and the institutions serving those students, as well as protect both their interests and the interests of agencies and the Department.

Discussion: The teach-out regulations reflect statutory provisions in section 496(c)(3) of the HEA. The statute does not distinguish between participating and non-participating institutions with regard to teach-out plan policies. Therefore, agencies must have a policy to require ''teach-out plans'' from all institutions that meet one of the circumstances described, even if the institution at issue does not have a program participation agreement with the Department. The Department does not agree with the assertion that an agency may lack control over the approval of a ''teach-out agreement.'' The regulations specify that agencies must require the institutions they accredit and that enter into ''teach-out agreements'' to submit those agreements for approval. The agency has control over whether it approves a ''teach-out agreement,'' and the agency may approve a ''teach-out agreement'' only if the agreement complies with the requirements of § 602.24(c)(5).

Changes: None.

Transfer of Credit (§ 602.24)

Comment: One commenter recommended deleting § 602.24(e)(2), which requires that agencies confirm that institutions have transfer of credit policies that include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education. The commenter stated that conforming transfer of credit policies is impossible due to the variety of situations in which transfers of credit may arise. The commenter also said that requiring institutions to specify detailed transfer of credit criteria could inadvertently reduce student mobility. Another commenter supported the wording in the proposed regulations regarding public disclosure of transfer of credit policies.

Discussion: Section 496(c)(7) of the HEA requires accrediting agencies to confirm that an institution has transfer of credit policies that include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution. The regulations reflect this requirement, and we do not have the authority to modify the requirement.

Changes: None.

Other Information an Agency Must Provide the Department (§ 602.27)

Comment: Several commenters expressed concern about § 602.27(b). This provision requires any agency that has a policy regarding notification to an institution or program of contact with the Department, as it pertains to information provided to the Secretary about an institution it accredits failing to meet its title IV program responsibilities or possibly engaging in fraud or abuse, to review on a case-by-case basis the need for confidentiality of the contact with the Department. This section also requires that, in the event the Department specifically requests the contact remain confidential, the agency consider that contact confidential. The commenters stated that failing to inform an institution of a contact or inquiry made by the Department adversely affects the relationship between the institution or program and the agency by undermining the trust relationship between the two. Another commenter raised a concern that the changes to § 602.27(b), taken together with the authority provided the Department in § 602.27(a)(7) to request information that may bear upon an institution's compliance with its title IV program responsibilities, is inconsistent with the obligation of an agency to allow its institutions to respond to allegations made against them. Two commenters requested that § 602.27(b) be removed and another commenter requested that all of § 602.27 be removed.

Discussion: The Department understands and respects the need for an honest and open exchange between an institution or program and its accreditor. During negotiated rulemaking the Department agreed to change its initial approach to this regulation, which would have prohibited an agency from having a policy providing notice to an institution when the agency was contacted by the Department. We do not agree that these regulations, as amended, undermine the relationship between the accreditor and its institutions or programs or that the language is inconsistent with an agency's obligation to afford its institutions or programs an opportunity to respond to allegations. Rather, they honor that relationship by ensuring that, absent a specific request for confidentiality from the Department, an agency may notify an institution of inquiries it receives from the Department as long as the agency has concluded, based on a careful consideration of the circumstances, that disclosure is appropriate. Moreover, the Department also has a fiduciary responsibility to protect the Federal fiscal interest as well as the interest of students. These regulations ensure that the Federal fiscal interest is not put at risk by compromising the Department's

investigations of potential fraud or abuse in the title IV programs. As a condition of participating in the title IV programs, each institution acknowledges the authority of the Department, accrediting agencies, and other gatekeepers to share information about the institution.

Changes: None.

Subpart C—The Recognition Process

Comment: Several commenters asked for clarification about how Department staff will evaluate an agency's effective application of its standards. One commenter expressed concern about the subjectivity of the evaluation and the lack of bright-line standards for Department staff to enforce. Another commenter asked for clarification about what constituted the submission of ''evidence, including documentation'' under § 602.31(a)(2) and expressed concern that the requirement to provide evidence to Department staff could evolve into an unreasonable requirement for agencies.

Discussion: The concept of ''effective application'' comes from section 496(l) of the HEA and is not new. It is discussed here alongside the provision of evidence because the two concepts are related. The phrase ''effective application'' in these new regulations replaces the phrase ''performance with respect to the criteria'' in the current regulations. The Department selected the phrase ''effective application'' based on its origin in the statute and its greater specificity in describing the standard for an agency's compliance. The Department's evaluation of an agency is based on a review of the evidence provided by the agency that it has compliant policies and standards and that it effectively applies those standards.

Evidence is submitted primarily in the form of documentation that substantiates the agency's claim that it effectively applies its standards. For example, agencies provide sample self-studies and team reports to substantiate that they apply their policies for requiring an in-depth self-study and an on-site review of their institutions or programs. Evidence may also be in the form of direct observation by Department staff during its on-site reviews of an agency's decision meeting or training session. Although testimony, written or oral, may accompany an agency's application for initial or continued recognition, a description of processes alone does not meet the Department's standard for evidence. This is illustrated in the example of an agency seeking initial recognition that provides evidence of policies and standards that appear to be compliant but that, upon further examination, are not effectively applied. Accordingly, review of whether agency standards are effectively applied is critical to ensure the quality of training and education offered by institutions and programs accredited by agencies that are recognized by the Secretary.

The concept of ''effective application'' also allows for a reasonable degree of judgment in cases where a particular policy involves circumstances that do not occur with any regularity. For example, an agency may have compliant ''teach-out'' policies, but its accredited institutions may never have had to submit a teach-out plan or agreement for approval by the agency. In this example, no evidence of application of standards would be necessary.

The standard for evaluating an agency's ''effective application of standards'' on the basis of ''evidence, including documentation,'' strikes a balance between the commenters' concerns about the absence of bright-line standards and the potential for unreasonable standards of evidence.

Changes: None.

Comment: One commenter objected to the entirety of subpart C and suggested that no changes be made to the current regulations.

Discussion: Changes to subpart C were necessary to incorporate the new provisions of the HEA, including the procedures for review of agencies that have expanded their scope of recognition by notice, following receipt by the Department of information of an increase in headcount enrollment, and the authority of the National Advisory Committee on Institutional Quality and Integrity (''NACIQI'') in establishing the agenda. Other changes were necessary because the current regulations do not include procedures for review of applications for expansion of scope, procedures for review of agencies during the period of recognition, appeal procedures, and procedures for review of compliance reports defined under § 602.3. Subpart C outlines and clarifies these procedures, making the Department's review process more transparent and increasing due process for agencies.

Changes: None.

Comment: Several commenters raised concerns about § 602.31(f), which clarifies the limits on the Department's ability to keep confidential records submitted to the Department for the purposes of agency recognition by the Secretary. Some commenters stated their belief that all information institutions provide to their accreditors is subject to public disclosure. Other commenters stated their belief that the regulations require all documents submitted to the Department to be available for public disclosure via the Freedom of Information Act (FOIA). Some commenters want the Department to change the regulations to permit Department review of necessary documents to occur at agency offices, instead of requiring submission of the documents to the Department. Another commenter suggested that documents be submitted to the Department and later returned to the agency without copies being made or maintained by the Department.

Discussion: The commenters misunderstand the requirements of § 602.31(f). The regulation applies to records the Department obtains during an agency's recognition proceedings, not to all documents an institution submits to its accrediting agency. The Department must comply with the HEA, the FOIA, the Federal Advisory Committee Act (FACA), and other applicable laws. These regulations reference the most commonly invoked of public disclosure laws and state that an agency may designate or identify information that the agency believes in good faith is exempt from disclosure in the event of a FOIA request. The regulations also make clear that agencies should submit only those documents required for Department review or specifically requested by Department officials.

The Department understands the need for confidentiality between institutions and accrediting agencies. However, it is necessary for the Department both to maintain a complete and accurate record of documents to substantiate its review, and to comply with FOIA and other disclosure laws. The regulations provide several methods an agency can use to make it less likely that sensitive information it provides in recognition proceedings about the institutions or programs it accredits will be publicly disclosed, including redacting information that would identify individuals or institutions that is not essential to the Department's review of the agency.

Changes: None.

Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant

regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this final regulatory action will not have an annual effect on the economy of more than $100 million. Therefore, this action is not ''economically significant'' and not subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, the Secretary has assessed the potential costs and benefits of this regulatory action and has determined that the benefits justify the costs.

Need for Federal Regulatory Action

As discussed in the proposed regulations, these regulations are needed to implement the provisions of the HEA, as amended. In particular, these regulations address the provisions related to the recognition of accrediting agencies by the Secretary.

In addition, these regulations are needed to ensure that the Department fulfills its fiduciary responsibility regarding the appropriate use of Federal funds made available by the Department to institutions of higher education under title IV of the HEA. The Secretary grants recognition to accrediting agencies that are considered by the Department to be reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit. Congress requires that an institution of higher education be accredited by an agency recognized by the Secretary in order to receive Federal funds authorized under title IV, HEA programs.

Regulatory Alternatives Considered

Alternatives to the regulations were considered as part of the rulemaking process. These alternatives were reviewed in detail in the preamble to the proposed regulations under both the Regulatory Impact Analysis and the Reasons sections accompanying the discussion of each proposed regulatory provision. To the extent that they were addressed in response to comments received on the proposed regulations, alternatives are also considered elsewhere in the preamble to these final regulations under the Discussion sections related to each provision. No comments were received related to the Regulatory Impact Analysis discussion of these alternatives.

As discussed above in the Analysis of Comments and Changes section, the final regulations reflect statutory amendments included in the HEOA and one substantive revision made in response to public comments. The change did not result in revisions to cost estimates prepared for and discussed in the Regulatory Impact Analysis of the proposed regulations.

Benefit-Cost Analysis

Benefits

The benefits of these final regulations include: ensuring that accrediting agencies are reliable authorities as to the quality of education or training offered by an institution or program they accredit; ensuring that the Department fulfills its fiduciary responsibility for institutional funding under title IV, HEA programs; and establishing consistency between statutory language and regulatory language. An additional benefit of the final regulations is providing accrediting agencies with greater clarity on regulations regarding the following: distance and correspondence education; accreditation team members; transfer of credit; teach-out plan approval; definition of recognition; demonstration of compliance; recognition procedures, including procedures for NACIQI; direct assessment programs; monitoring; substantive change; record keeping and confidentiality; and due process and appeals.

Costs

These final regulations do not require accrediting agencies and institutions to develop new disclosures, materials, or accompanying dissemination processes. Other regulations generally require discrete changes in specific parameters associated with existing guidance rather than wholly new requirements. Overall, the Department believes that accrediting agencies wishing to continue to be recognized by the Secretary and institutions wishing to continue to participate in title IV, HEA programs have already absorbed most of the administrative costs related to implementing these final regulations. Marginal costs over this baseline are primarily related to one-time changes that are not expected to be significant.

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

Accounting Statement

In Table 1, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these final regulations. As shown in the table, the Department estimates that these final regulations will increase expenditure by accrediting agencies, institutions of higher education, and the Department by a total of $114,850.

TABLE 1—ESTIMATED EXPENDITURES ASSOCIATED WITH THE PROVISIONS OF FINAL REGULATIONS

Entity	Costs
U.S. Department of Education	$55,300
Accrediting agencies and institutions of higher education	59,550
Total	114,850

Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities. These final regulations affect accrediting agencies and institutions of higher education that participate in title IV, HEA programs. The U.S. Small Business Administration (SBA) Size Standards define organizations as ''small entities'' if they are for-profit or nonprofit organizations with total annual revenue below $5,000,000 or if they are organizations controlled by governmental entities with populations below 50,000.

A significant percentage of the accrediting agencies and institutions participating in title IV, HEA programs meet the definition of ''small entities''. The Department estimates that approximately 40 accrediting agencies and 2,310 postsecondary institutions meet the definition of ''small entity''.

While these accrediting agencies and institutions fall within the SBA size guidelines, these final regulations do not impose significant new costs on these entities. Specific burden concerns are discussed in more detail elsewhere in this preamble, primarily in the *Paperwork Reduction Act of 1995* section.

Paperwork Reduction Act of 1995

Sections 602.15, 602.19, 602.24, 602.25, 602.26, 602.27, 602.31, and 602.32 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of these sections to OMB for its review.

Section 602.15—Administrative and Fiscal Responsibilities

The final regulations require accrediting agencies to demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution or program the agency accredits from the last full accreditation or preaccreditation review and all documents regarding substantive change decisions.

The Department has determined that this modification to the current document retention requirements reduces the administrative burden to maintenance of only one full accreditation or preaccreditation review. Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, the reduced hours for maintaining only one complete review cycle are negligible because the agencies already collect the information.

Section 602.19—Monitoring and Reevaluation of Accredited Institutions and Programs

The final regulations require agencies to collect data to ensure that the institutions they accredit remain in compliance with their accrediting standards. Agencies must periodically collect and analyze key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement.

In addition, the final regulations require agencies to annually monitor the enrollment growth of institutions or programs they accredit.

The final regulations also require accrediting agencies that expanded their scope to include distance education or correspondence education by notice to the Secretary to monitor enrollment growth of the institutions they accredit that offer distance education or correspondence education. These agencies must report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. The regulation only affects institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition.

The Department estimates that the final monitoring regulations will increase burden on accrediting agencies by a total of 182 hours under OMB Control Number 1840–0788.

Section 602.24—Additional Procedures Certain Institutional Accreditors Must Have

The final regulations mandate that an accrediting agency require an institution it accredits to submit a teach-out plan for approval by the accrediting agency if any of following events occurs: The Department initiates an emergency action against an institution, or an action by the Secretary to limit, suspend, or terminate an institution participating in any title IV, HEA program; the accrediting agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution; the institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or a State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. If the teach-out plan requires a teach-out agreement, the regulations identify the components of the teach-out agreement.

The Department estimates that the requirements related to submission of teach-out plans in the final regulations will place an additional burden on 70 institutions each year for a total of 280 hours under OMB Control Number 1840–0788.

Section 602.25—Due Process

The final regulations provide for an institution's or program's right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body. An institution or program is provided a right for the review of new financial information, if it meets certain conditions, before the accrediting agency takes a final adverse action.

The Department estimates that the appeals process in the final regulations will increase the burden on accrediting agencies by 3,050 hours under OMB Control Number 1840–0788.

Section 602.26—Notification of Accrediting Decisions

The final regulations require agencies to provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action and of final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Agencies are also required to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include either the official comments from the affected institution or program regarding that decision or evidence that the affected institution or program was offered the opportunity to provide comments.

The Department has determined that the notification requirements in the final regulations do not represent any additional burden on accrediting agencies under OMB Control Number 1840–0788.

Section 602.27—Other Information an Agency Must Provide the Department

The final regulations require an accrediting agency to provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes to its policies, procedures, or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, an agency must provide a summary of the major accrediting activities conducted during the year. The final regulations also require an accrediting agency to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities. The final regulations remove the requirement for institutional accrediting agencies, and programmatic accrediting agencies that accredit freestanding institutions, to submit an application to the Department if an agency wishes to add distance education or correspondence education to its scope of recognition; the final regulations only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education.

The Department estimates the reporting burden on accrediting agencies will be reduced by 300 hours under OMB Control Number 1840–0788.

Section 602.31—Agency Submissions to the Department

The final regulations require accrediting agencies to submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years, and clarify what documents should be provided with an agency's application for recognition. The application must demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 part 602. The final regulations also specify that accrediting agencies that wish to expand their scope of recognition must submit an application to the Secretary and describe the contents of the application. They further require agencies to provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered by their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602, subpart B. Therefore, although no requirement to submit a compliance report exists in the current regulations, the language reflects the existing practice of the Department.

The final regulations also require agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education to annually monitor enrollment growth of the institutions they accredit that offer distance education. Agencies must submit a report to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. This provision of the final regulations will only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition.

The Department estimates that the requirements for submitting information to the Department in the final regulations will increase the burden on accrediting agencies by 60 hours under OMB Control Number 1840–0788.

Section 602.32—Procedures for Department Review of Applications for Recognition or for Change in Scope, Compliance Reports, and Increases in Enrollment

The final regulations require the Department to forward to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency will then provide a written response to the draft staff analysis and the third-party comments. The current regulations also require that the Department invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department.

The procedures for the review of applications in the final regulations will not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Collection of Information

Consistent with the discussion in this Paperwork Reduction Act of 1995 section, the following chart describes the sections of the final regulations involving information collections, the information being collected, and the collections that the Department has submitted or will submit to the Office of Management and Budget for approval and public comment under the Paperwork Reduction Act of 1995.

Regulatory section	Information section	Collection
602.15	Accrediting agencies must demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution from the last full accreditation or preaccreditation review. Previously, agencies were required to maintain this information covering the previous two accreditation or preaccreditation reviews. Although the current regulation does not explicitly mention documents relating to substantive change decisions, the requirement for agencies to maintain these documents was covered under the current regulation's requirement to maintain all documents related to accrediting decisions and special reports. A substantive change request would be considered a special report that had to be submitted to the agency for a decision. Further, an agency's decision regarding the substantive change request was, in fact, an accreditation decision and was reflected in a decision letter that either allowed the substantive change to be covered under the agency's grant of accreditation or denied the request and did not allow the change to be covered under the agency's grant of accreditation. Section 496(c)(1) of the HEA.	OMB 1840–0788—Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, since the agencies already collect the information, the reduced hours for maintaining only one complete review cycle is negligible.
602.19(b)	Agencies must collect data to ensure that the institutions or programs they accredit remain in compliance with their accrediting standards. The final regulations clarify the language in the current regulations regarding the data agencies should collect to ensure that institutions and programs remain in compliance with their accrediting standards. Section 496(a)(4)(A) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.
602.19(c)	Agencies must monitor the enrollment growth of institutions each year. The final regulations represent a change in the information that accrediting agencies must collect. They require that agencies collect information to monitor enrollment growth for the institutions or programs that they accredit. Section 496(c)(2) of the HEA.	OMB 1840–0788—It is estimated that this regulation would increase the burden to the 61 recognized accrediting agencies by 122 hours.

Regulatory section	Information section	Collection
602.19(e)	Accrediting agencies that expand their scope to include distance education or correspondence education by notice to the Secretary must monitor enrollment growth of institutions that offer distance education or correspondence education and report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. Section 496(q) of the HEA.	OMB 1840–0788—It is estimated that this regulation would increase the burden for 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future.
602.24	Institutions are required to submit a teach-out plan to their accrediting agency. Approximately 70 institutions per year will be required to do so. Most of the institutions and locations that close offer only one or two programs. For some institutions, the plan will be very simple: The institution will teach out its students. For other institutions, preparing a plan may involve doing some research to determine what nearby schools offer similar programs but in most cases, the institution will already know, as the nearby schools will have been their competitors. In a few cases, more work may be needed to develop a plan. Given the wide variety of situations, our best estimate is that the average amount of time needed to complete a plan is four hours. Therefore, the total amount of time is 280 hours (70 institutions x 4 hours).	OMB 1840–0788—It is estimated that this regulation would increase the burden on 70 institutions each year for a total of 280 hours.
602.25(f)	The final regulations provide institutions and programs with a right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body. Agencies are already required to have an appeal process; the negligible burden is estimated to be 610 hours, which is based on 61 accrediting agencies x 10 hours.	OMB 1840–0788—It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 610 hours.
602.25(h)	The final regulations provide institutions and programs with a right to seek review of new financial information, if it meets current provisions, before the accrediting agency takes a final adverse action. The estimated burden is associated primarily with implementing the regulation in the initial year as agencies establish new procedures. The time is estimated to be 2440 hours, based on 61 accrediting agencies x 40 hours.	OMB 1840–0788—It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 2440 hours.
602.26(b)	Agencies must provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action as well as final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Section 496(c)(7) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.
602.26(d)	Agencies are required to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include any comments that affected institutions or programs want to make with regard to that decision or evidence that the institution or program was offered the opportunity to provide official comments. The final regulations clarify the requirements and add a requirement that the statement must provide evidence that an institution or program was offered an opportunity to provide comments if no comments were received. Section 496(c)(7) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.
602.27(a)	Every agency must provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes in an agency's policies procedures or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, agencies must provide a summary of the major accrediting activities conducted during the year. The final regulations also require agencies to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities. Although the final regulations primarily clarify language that is in the current regulations, the changes would impact the reporting requirement regarding adding distance education or correspondence education to an agency's scope of recognition. The final regulations would remove the requirement for institutional accrediting agencies to submit an application to the Department if an agency wished to add distance education or correspondence education to its scope of recognition and only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education. Sections 496(a)(4) and 487(a)(15) of the HEA.	OMB 1840–0788—It is estimated that burden on the 15 agencies that would be affected by the final regulations would be reduced by 300 hours if all the agencies decided to add distance education or correspondence education to their scope of recognition.
602.31(a)	Accrediting agencies must submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years. The application must demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 part 602. The final regulations clarify what documents should be provided with an agency's application for recognition. Section 496(d) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.

Regulatory section	Information section	Collection
602.31(b)	Accrediting agencies that wish to expand their scope of recognition must submit an application to the Secretary. The requirement does not place any additional reporting burden on accrediting agencies since the current regulations also require the submission of an application when an agency seeks to expand its scope of recognition. Section 496(a)(4)(B) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.
602.31(c)	Accrediting agencies must provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered through by their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602 subpart B. Therefore, while the requirement to submit a compliance report is not identified in the current regulation, the final regulations place in writing what has been the practice of the Department in order to comply with Higher Education Act, as amended. Sections 496(a) and (c) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.
602.31(d)	Agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education must annually monitor enrollment growth of the institutions they accredit that offer distance education and submit a report to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. These final regulations would only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Section 496(a)(4)(B) and (q) of the HEA.	OMB 1840–0788—It is estimated that this regulation would increase the burden of 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future. Based on prior experiences with institutions experiencing significant growth, the burden is estimated to apply to 3 institutions per year.
602.32	The Department forwards to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency could then provide a written response to the draft staff analysis and the third-party comments. The final regulations simplify the language of the current regulations, which also require the Department to invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department. Section 496(o) of the HEA.	OMB 1840–0788—There is no additional paperwork burden associated with this section of the regulation.

Assessment of Educational Impact

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

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

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(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Parts 600 and 602

Colleges and universities, Education, Reporting and recordkeeping requirements.

Dated: October 15, 2009.

Arne Duncan,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends parts 600 and 602 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 continues to read as follows:

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

■ 2. Section 600.2 is amended by:

■ A. Revising the definition of *Correspondence course.*

■ B. Adding in alphabetical order a new definition of *Distance education.*

■ C. Removing the definition of *Telecommunications course.*

The addition and revision read as follows:

§ 600.2 Definitions.

* * * * *

Correspondence course: (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. Interaction between the instructor and student is limited, is not regular and substantive, and is primarily initiated by the student. Correspondence courses are typically self-paced.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

* * * * *

Distance education means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

* * * * *

PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

■ 3. The authority citation for part 602 continues to read as follows:

Authority: 20 U.S.C. 1099b, unless otherwise noted.

■ 4. Section 602.3 is amended by:

■ A. Adding in alphabetical order a new definition of *Compliance report.*

■ B. Adding in alphabetical order a new definition of *Correspondence education.*

■ C. Adding in alphabetical order a new definition of *Designated Federal Official.*

■ D. Adding in alphabetical order a new definition of *Direct assessment program.*

■ E. Revising the definition of *Distance education.*

■ F. Adding in alphabetical order a new definition of *Recognition.*

■ G. Revising paragraph (5) of the definition of *Scope of recognition.*

■ H. Revising the definition of *Teach-out agreement.*

■ I. Adding in alphabetical order a new definition of *Teach-out plan.*

The additions and revisions read as follows:

§ 602.3 What definitions apply to this part?

* * * * *

Compliance report means a written report that the Department requires an agency to file to demonstrate that the agency has addressed deficiencies specified in a decision letter from the senior Department official or the Secretary.

Correspondence education means:

(1) Education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor.

(2) Interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student.

(3) Correspondence courses are typically self-paced.

(4) Correspondence education is not distance education.

Designated Federal Official means the Federal officer designated under section 10(f) of the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1.

Direct assessment program means an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, and meets the conditions of 34 CFR 668.10. For title IV, HEA purposes, the institution must obtain approval for the direct assessment program from the Secretary under 34 CFR 668.10(g) or (h) as applicable. As part of that approval, the accrediting agency must—

(1) Evaluate the program(s) and include them in the institution's grant of accreditation or preaccreditation; and

(2) Review and approve the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

Distance education means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

* * * * *

Recognition means an unappealed determination by the senior Department official under § 602.36, or a determination by the Secretary on appeal under § 602.37, that an accrediting agency complies with the criteria for recognition listed in subpart B of this part and that the agency is effective in its application of those criteria. A grant of recognition to an agency as a reliable authority regarding the quality of education or training offered by institutions or programs it accredits remains in effect for the term granted except upon a determination made in accordance with subpart C of this part that the agency no longer complies with the subpart B criteria or that it has become ineffective in its application of those criteria.

* * * * *

Scope of recognition or *scope* * * *

(5) Coverage of accrediting activities related to distance education or correspondence education.

* * * * *

Teach-out agreement means a written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study.

Teach-out plan means a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

* * * * *

■ 5. Section 602.15 is amended by:

■ A. Revising paragraph (a)(2).

■ B. In paragraph (b)(1), removing the word ''two'' and removing the letter ''s'' from the word ''reviews'' the first time it appears.

■ C. Revising paragraph (b)(2).

The revisions read as follows:

§ 602.15 Administrative and fiscal responsibilities.

* * * * *

(a) * * *

(2) Competent and knowledgeable individuals, qualified by education and experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles, regarding the agency's standards, policies, and procedures, to conduct its on-site evaluations, apply or establish

its policies, and make its accrediting and preaccrediting decisions, including, if applicable to the agency's scope, their responsibilities regarding distance education and correspondence education;

* * * * *

(b) * * *

(2) All decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of any institution or program and substantive changes, including all correspondence that is significantly related to those decisions.

* * * * *

■ 6. Section 602.16 by amended by:

■ A. Revising paragraph (a)(1)(i).

■ B. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively.

■ C. Adding new paragraphs (c) and (f).

The additions and revision read as follows:

§ 602.16 Accreditation and preaccreditation standards.

(a) * * *

(1) * * *

(i) Success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates.

* * * * *

(c) If the agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, the agency's standards must effectively address the quality of an institution's distance education or correspondence education in the areas identified in paragraph (a)(1) of this section. The agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education.

* * * * *

(f) Nothing in paragraph (a) of this section restricts—

(1) An accrediting agency from setting, with the involvement of its members, and applying accreditation standards for or to institutions or programs that seek review by the agency; or

(2) An institution from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

* * * * *

■ 7. Section 602.17 is amended:

■ A. In paragraph (e), by removing the word ''and'' at the end of the paragraph.

■ B. In paragraph (f)(2), by removing the punctuation ''.'' and adding, in its place, the words ''; and''.

■ C. By adding a new paragraph (g).

The addition reads as follows:

§ 602.17 Application of standards in reaching an accrediting decision.

* * * * *

(g) Requires institutions that offer distance education or correspondence education to have processes in place through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. The agency meets this requirement if it—

(1) Requires institutions to verify the identity of a student who participates in class or coursework by using, at the option of the institution, methods such as—

(i) A secure login and pass code;

(ii) Proctored examinations; and

(iii) New or other technologies and practices that are effective in verifying student identity; and

(2) Makes clear in writing that institutions must use processes that protect student privacy and notify students of any projected additional student charges associated with the verification of student identity at the time of registration or enrollment.

* * * * *

■ 8. Section 602.18 is amended by:

■ A. Revising the introductory text.

■ B. Redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d), respectively.

■ C. In newly redesignated paragraph (c), removing the word ''and'' at the end of the paragraph.

■ D. In newly redesignated paragraph (d), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

■ E. Adding new paragraphs (a) and (e).

The additions and revision read as follows:

§ 602.18 Ensuring consistency in decision-making.

The agency must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission, and that ensure that the education or training offered by an institution or program, including any offered through distance education or correspondence education, is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency. The agency meets this requirement if the agency—

(a) Has written specification of the requirements for accreditation and preaccreditation that include clear standards for an institution or program to be accredited;

* * * * *

(e) Provides the institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards.

* * * * *

■ 9. Section 602.19 is amended by:

■ A. Revising paragraph (b).

■ B. Adding new paragraphs (c), (d), and (e).

The revision and additions read as follows:

§ 602.19 Monitoring and reevaluation of accredited institutions and programs.

* * * * *

(b) The agency must demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables the agency to identify problems with an institution's or program's continued compliance with agency standards and that takes into account institutional or program strengths and stability. These approaches must include periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of § 602.16(f). This provision does not require institutions or programs to provide annual reports on each specific accreditation criterion.

(c) Each agency must monitor overall growth of the institutions or programs it accredits and, at least annually, collect headcount enrollment data from those institutions or programs.

(d) Institutional accrediting agencies must monitor the growth of programs at institutions experiencing significant enrollment growth, as reasonably defined by the agency.

(e) Any agency that has notified the Secretary of a change in its scope in accordance with § 602.27(a)(5) must monitor the headcount enrollment of each institution it has accredited that offers distance education or correspondence education. If any such institution has experienced an increase in headcount enrollment of 50 percent or more within one institutional fiscal year, the agency must report that

information to the Secretary within 30 days of acquiring such data.

* * * * *

■ 10. Section 602.22 is amended by:

■ A. In paragraph (a)(2)(iii), removing the words '', in either content'' and adding, in their place, the words ''from the existing offerings of educational programs,''.

■ B. In paragraph (a)(2)(iv), removing the words ''courses or'', adding the words ''of study'' after the word ''programs'' the first time it appears, and removing the word ''above'' and adding, in its place, the words ''different from''.

■ C. Revising paragraph (a)(2)(vii).

■ D. Adding new paragraphs (a)(2)(viii), (a)(2)(ix), and (a)(2)(x).

■ E. Adding a new paragraph (a)(3).

■ F. Revising paragraph (b).

■ G. Revising paragraph (c), introductory text.

■ H. In paragraph (c)(2), adding the words ''a representative sample of'' immediately after the words ''visits to''.

The additions and revisions read as follows:

§ 602.22 Substantive change.

(a) * * *

(2) * * *

(vii) If the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the entering into a contract under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 percent of one or more of the accredited institution's educational programs.

(viii)(A) If the agency's accreditation of an institution enables it to seek eligibility to participate in title IV, HEA programs, the establishment of an additional location at which the institution offers at least 50 percent of an educational program. The addition of such a location must be approved by the agency in accordance with paragraph (c) of this section unless the accrediting agency determines, and issues a written determination stating that the institution has—

(*1*) Successfully completed at least one cycle of accreditation of maximum length offered by the agency and one renewal, or has been accredited for at least ten years;

(*2*) At least three additional locations that the agency has approved; and

(*3*) Met criteria established by the agency indicating sufficient capacity to add additional locations without individual prior approvals, including at a minimum satisfactory evidence of a system to ensure quality across a distributed enterprise that includes—

(*i*) Clearly identified academic control;

(*ii*) Regular evaluation of the locations;

(*iii*) Adequate faculty, facilities, resources, and academic and student support systems;

(*iv*) Financial stability; and

(*v*) Long-range planning for expansion.

(B) The agency's procedures for approval of an additional location, pursuant to paragraph (a)(2)(viii)(A) of this section, must require timely reporting to the agency of every additional location established under this approval.

(C) Each agency determination or redetermination to preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section may not exceed five years.

(D) The agency may not preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section after the institution undergoes a change in ownership resulting in a change in control as defined in 34 CFR 600.31 until the institution demonstrates that it meets the conditions for the agency to preapprove additional locations described in this paragraph.

(E) The agency must have an effective mechanism for conducting, at reasonable intervals, visits to a representative sample of additional locations approved under paragraph (a)(2)(viii)(A) of this section.

(ix) The acquisition of any other institution or any program or location of another institution.

(x) The addition of a permanent location at a site at which the institution is conducting a teach-out for students of another institution that has ceased operating before all students have completed their program of study.

(3) The agency's substantive change policy must define when the changes made or proposed by an institution are or would be sufficiently extensive to require the agency to conduct a new comprehensive evaluation of that institution.

(b) The agency may determine the procedures it uses to grant prior approval of the substantive change. However, these procedures must specify an effective date, which is not retroactive, on which the change is included in the program's or institution's accreditation. An agency may designate the date of a change in ownership as the effective date of its approval of that substantive change if the accreditation decision is made within 30 days of the change in ownership. Except as provided in paragraph (c) of this section, these procedures may, but need not, require a visit by the agency.

(c) Except as provided in paragraph (a)(2)(viii)(A) of this section, if the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the agency's procedures for the approval of an additional location where at least 50 percent of an educational program is offered must provide for a determination of the institution's fiscal and administrative capacity to operate the additional location. In addition, the agency's procedures must include—

* * * * *

■ 11. Section 602.23 is amended by:

■ A. Revising paragraph (a) introductory text.

■ B. Revising paragraph (c)(1).

The revisions read as follows:

§ 602.23 Operating procedures all agencies must have.

(a) The agency must maintain and make available to the public written materials describing—

* * * * *

(c) * * *

(1) Review in a timely, fair, and equitable manner any complaint it receives against an accredited institution or program that is related to the agency's standards or procedures. The agency may not complete its review and make a decision regarding a complaint unless, in accordance with published procedures, it ensures that the institution or program has sufficient opportunity to provide a response to the complaint;

* * * * *

■ 12. Section 602.24 is amended by:

■ A. Revising paragraph (c).

■ B. Adding new paragraphs (d) and (e).

The addition and revision read as follows:

§ 602.24 Additional procedures certain institutional accreditors must have.

* * * * *

(c) *Teach-out plans and agreements.* (1) The agency must require an institution it accredits or preaccredits to submit a teach-out plan to the agency for approval upon the occurrence of any of the following events:

(i) The Secretary notifies the agency that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required.

(ii) The agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution.

(iii) The institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program.

(iv) A State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked.

(2) The agency must evaluate the teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency, specifies additional charges, if any, and provides for notification to the students of any additional charges.

(3) If the agency approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency, it must notify that accrediting agency of its approval.

(4) The agency may require an institution it accredits or preaccredits to enter into a teach-out agreement as part of its teach-out plan.

(5) The agency must require an institution it accredits or preaccredits that enters into a teach-out agreement, either on its own or at the request of the agency, to submit that teach-out agreement for approval. The agency may approve the teach-out agreement only if the agreement is between institutions that are accredited or preaccredited by a nationally recognized accrediting agency, is consistent with applicable standards and regulations, and provides for the equitable treatment of students by ensuring that—

(i) The teach-out institution has the necessary experience, resources, and support services to—

(A) Provide an educational program that is of acceptable quality and reasonably similar in content, structure, and scheduling to that provided by the institution that is ceasing operations either entirely or at one of its locations; and

(B) Remain stable, carry out its mission, and meet all obligations to existing students; and

(ii) The teach-out institution demonstrates that it can provide students access to the program and services without requiring them to move or travel substantial distances and that it will provide students with information about additional charges, if any.

(d) *Closed institution.* If an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

(e) *Transfer of credit policies.* The accrediting agency must confirm, as part of its review for initial accreditation or preaccreditation, or renewal of accreditation, that the institution has transfer of credit policies that—

(1) Are publicly disclosed in accordance with § 668.43(a)(11); and

(2) Include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education.

* * * * *

■ 13. Section 602.25 is revised to read as follows:

§ 602.25 Due process.

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. The agency meets this requirement if the agency does the following:

(a) Provides adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited.

(b) Uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.

(c) Provides written specification of any deficiencies identified at the institution or program examined.

(d) Provides sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken.

(e) Notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis for the action.

(f) Provides an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final.

(1) The appeal must take place at a hearing before an appeals panel that—

(i) May not include current members of the agency's decision-making body that took the initial adverse action;

(ii) Is subject to a conflict of interest policy;

(iii) Does not serve only an advisory or procedural role, and has and uses the authority to make the following decisions: to affirm, amend, or reverse adverse actions of the original decision-making body; and

(iv) Affirms, amends, reverses, or remands the adverse action. A decision to affirm, amend, or reverse the adverse action is implemented by the appeals panel or by the original decision-making body, at the agency's option. In a decision to remand the adverse action to the original decision-making body for further consideration, the appeals panel must identify specific issues that the original decision-making body must address. In a decision that is implemented by or remanded to the original decision-making body, that body must act in a manner consistent with the appeals panel's decisions or instructions.

(2) The agency must recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, including to make any presentation that the agency permits the institution or program to make on its own during the appeal.

(g) The agency notifies the institution or program in writing of the result of its appeal and the basis for that result.

(h)(1) The agency must provide for a process, in accordance with written procedures, through which an institution or program may, before the agency reaches a final adverse action decision, seek review of new financial information if all of the following conditions are met:

(i) The financial information was unavailable to the institution or program until after the decision subject to appeal was made.

(ii) The financial information is significant and bears materially on the financial deficiencies identified by the agency. The criteria of significance and materiality are determined by the agency.

(iii) The only remaining deficiency cited by the agency in support of a final adverse action decision is the institution's or program's failure to meet an agency standard pertaining to finances.

(2) An institution or program may seek the review of new financial information described in paragraph (h)(1) of this section only once and any determination by the agency made with respect to that review does not provide a basis for an appeal.

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

■ 14. Section 602.26 is amended:

■ A. In paragraph (b)(2), by removing the punctuation ''; '' and adding, in its place, the punctuation ''.''.

■ B. By adding a new paragraph (b)(3).

■ C. In paragraph (c), by removing the words ''(b)(1) and (b)(2)'' and adding, in

their place, the words ''(b)(1), (b)(2), and (b)(3)''.

■ D. Revising paragraph (d).

The addition and revision read as follows:

§ 602.26 Notification of accrediting decisions.

* * * * *

(b) * * *

(3) A final decision to take any other adverse action, as defined by the agency, not listed in paragraph (b)(2) of this section;

* * * * *

(d) For any decision listed in paragraph (b)(2) of this section, makes available to the Secretary, the appropriate State licensing or authorizing agency, and the public, no later than 60 days after the decision, a brief statement summarizing the reasons for the agency's decision and the official comments that the affected institution or program may wish to make with regard to that decision, or evidence that the affected institution has been offered the opportunity to provide official comment;

* * * * *

■ 15. Section 602.27 is revised to read as follows:

§ 602.27 Other information an agency must provide the Department.

(a) The agency must submit to the Department—

(1) A copy of any annual report it prepares;

(2) A copy, updated annually, of its directory of accredited and preaccredited institutions and programs;

(3) A summary of the agency's major accrediting activities during the previous year (an annual data summary), if requested by the Secretary to carry out the Secretary's responsibilities related to this part;

(4) Any proposed change in the agency's policies, procedures, or accreditation or preaccreditation standards that might alter its—

(i) Scope of recognition, except as provided in paragraph (a)(5) of this section; or

(ii) Compliance with the criteria for recognition;

(5) Notification that the agency has expanded its scope of recognition to include distance education or correspondence education as provided in section 496(a)(4)(B)(i)(I) of the HEA. Such an expansion of scope is effective on the date the Department receives the notification;

(6) The name of any institution or program it accredits that the agency has reason to believe is failing to meet its title IV, HEA program responsibilities or is engaged in fraud or abuse, along with the agency's reasons for concern about the institution or program; and

(7) If the Secretary requests, information that may bear upon an accredited or preaccredited institution's compliance with its title IV, HEA program responsibilities, including the eligibility of the institution or program to participate in title IV, HEA programs.

(b) If an agency has a policy regarding notification to an institution or program of contact with the Department in accordance with paragraph (a)(6) or (a)(7) of this section, it must provide for a case-by-case review of the circumstances surrounding the contact, and the need for the confidentiality of that contact. Upon a specific request by the Department, the agency must consider that contact confidential.

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

■ 16. Subpart C is revised to read as follows:

Subpart C—The Recognition Process

Application and Review by Department Staff

Sec.

602.30 Activities covered by recognition procedures.

602.31 Agency submissions to the Department.

602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.

602.33 Procedures for review of agencies during the period of recognition.

Review by the National Advisory Committee on Institutional Quality and Integrity

602.34 Advisory Committee meetings.

602.35 Responding to the Advisory Committee's recommendation.

Review and Decision by the Senior Department Official

602.36 Senior Department official's decision.

Appeal Rights and Procedures

602.37 Appealing the senior Department official's decision to the Secretary.

602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.

Subpart C—The Recognition Process

Application and Review by Department Staff

§ 602.30 Activities covered by recognition procedures.

Recognition proceedings are administrative actions taken on any of the following matters:

(a) Applications for initial or continued recognition submitted under § 602.31(a).

(b) Applications for an expansion of scope submitted under § 602.31(b).

(c) Compliance reports submitted under § 602.31(c).

(d) Reviews of agencies that have expanded their scope of recognition by notice, following receipt by the Department of information of an increase in headcount enrollment described in § 602.19(e).

(e) Staff analyses identifying areas of non-compliance based on a review conducted under § 602.33.

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

§ 602.31 Agency submissions to the Department.

(a) *Applications for recognition or renewal of recognition.* An accrediting agency seeking initial or continued recognition must submit a written application to the Secretary. Each accrediting agency must submit an application for continued recognition at least once every five years, or within a shorter time period specified in the final recognition decision. The application must consist of—

(1) A statement of the agency's requested scope of recognition;

(2) Evidence, including documentation, that the agency complies with the criteria for recognition listed in subpart B of this part and effectively applies those criteria; and

(3) Evidence, including documentation, of how an agency that includes or seeks to include distance education or correspondence education in its scope of recognition applies its standards in evaluating programs and institutions it accredits that offer distance education or correspondence education.

(b) *Applications for expansions of scope.* An agency seeking an expansion of scope by application must submit a written application to the Secretary. The application must—

(1) Specify the scope requested;

(2) Include documentation of experience in accordance with § 602.12(b); and

(3) Provide copies of any relevant standards, policies, or procedures developed and applied by the agency and documentation of the application of these standards, policies, or procedures.

(c) *Compliance reports.* If an agency is required to submit a compliance report, it must do so within 30 days following the end of the period for achieving compliance as specified in the decision of the senior Department official or Secretary, as applicable.

(d) *Review following an increase in headcount enrollment.* If an agency that

has notified the Secretary in writing of its change in scope to include distance education or correspondence education in accordance with § 602.27(a)(5) reports an increase in headcount enrollment in accordance with § 602.19(e) for an institution it accredits, or if the Department notifies the agency of such an increase at one of the agency's accredited institutions, the agency must, within 45 days of reporting the increase or receiving notice of the increase from the Department, as applicable, submit a report explaining—

(1) How the agency evaluates the capacity of the institutions or programs it accredits to accommodate significant growth in enrollment and to maintain educational quality;

(2) The specific circumstances regarding the growth at the institution(s) or programs(s) that triggered the review and the results of any evaluation conducted by the agency; and

(3) Any other information that the agency deems appropriate to demonstrate the effective application of the criteria for recognition or that the Department may require.

(e) *Consent to sharing of information.* By submitting an application for recognition, the agency authorizes Department staff throughout the application process and during any period of recognition—

(1) To observe its site visits to one or more of the institutions or programs it accredits or preaccredits, on an announced or unannounced basis;

(2) To visit locations where agency activities such as training, review and evaluation panel meetings, and decision meetings take place, on an announced or unannounced basis;

(3) To obtain copies of all documents the staff deems necessary to complete its review of the agency; and

(4) To gain access to agency records, personnel, and facilities.

(f) *Public availability of agency records obtained by the Department.* (1) The Secretary's processing and decision making on requests for public disclosure of agency materials reviewed under this part are governed by the Freedom of Information Act, 5 U.S.C. 552; the Trade Secrets Act, 18 U.S.C. 1905; the Privacy Act of 1974, as amended, 5 U.S.C 552a; the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1; and all other applicable laws. In recognition proceedings, agencies may—

(i) Redact information that would identify individuals or institutions that is not essential to the Department's review of the agency;

(ii) Make a good faith effort to designate all business information within agency submissions that the agency believes would be exempt from disclosure under exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). A blanket designation of all information contained within a submission, or of a category of documents, as meeting this exemption will not be considered a good faith effort and will be disregarded;

(iii) Identify any other material the agency believes would be exempt from public disclosure under FOIA, the factual basis for the request, and any legal basis the agency has identified for withholding the document from disclosure; and

(iv) Ensure documents submitted are only those required for Department review or as requested by Department officials.

(2) The Secretary processes FOIA requests in accordance with 34 CFR part 5 and makes all documents provided to the Advisory Committee available to the public.

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

§ 602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.

(a) After receipt of an agency's application for initial or continued recognition, or change in scope, or an agency's compliance report, or an agency's report submitted under § 602.31(d), Department staff publishes a notice of the agency's application or report in the **Federal Register** inviting the public to comment on the agency's compliance with the criteria for recognition and establishing a deadline for receipt of public comment.

(b) The Department staff analyzes the agency's application for initial or renewal of recognition, compliance report, or report submitted under § 602.31(d) to determine whether the agency satisfies the criteria for recognition, taking into account all available relevant information concerning the compliance of the agency with those criteria and in the agency's effectiveness in applying the criteria. The analysis of an application for recognition and, as appropriate, of a compliance report, or of a report required under § 602.31(d), includes—

(1) Observations from site visit(s), on an announced or unannounced basis, to the agency or to a location where agency activities such as training, review and evaluation panel meetings, and decision meetings take place and to one or more of the institutions or programs it accredits or preaccredits;

(2) Review of the public comments and other third-party information the Department staff receives by the established deadline, and the agency's responses to the third-party comments, as appropriate, as well as any other information Department staff assembles for purposes of evaluating the agency under this part; and

(3) Review of complaints or legal actions involving the agency.

(c) The Department staff analyzes the materials submitted in support of an application for expansion of scope to ensure that the agency has the requisite experience, policies that comply with subpart B of this part, capacity, and performance record to support the request.

(d) Department staff's evaluation of an agency 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 agency's standards, the effectiveness of the standards, and the agency's application of those standards.

(e) If, at any point in its evaluation of an agency seeking initial recognition, Department staff determines that the agency fails to demonstrate compliance with the basic eligibility requirements in §§ 602.10 through 602.13, the staff—

(1) Returns the agency's application and provides the agency with an explanation of the deficiencies that caused staff to take that action; and

(2) Recommends that the agency withdraw its application and reapply when the agency can demonstrate compliance.

(f) Except with respect to an application that has been returned or is withdrawn under paragraph (e) of this section, when Department staff completes its evaluation of the agency, the staff—

(1) Prepares a written draft analysis of the agency;

(2) Sends the draft analysis including any identified areas of non-compliance and a proposed recognition recommendation, and all supporting documentation, including all third-party comments the Department received by the established deadline, to the agency;

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation and third-party comments, specifying a deadline that provides at least 30 days for the agency's response;

(4) Reviews the response to the draft analysis the agency submits, if any, and prepares the written final analysis. The final analysis includes a recognition

recommendation to the senior Department official, as the Department staff deems appropriate, including, but not limited to, a recommendation to approve, deny, limit, suspend, or terminate recognition, require the submission of a compliance report and continue recognition pending a final decision on compliance, approve or deny a request for expansion of scope, or revise or affirm the scope of the agency; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and any other available information provided to the Advisory Committee under § 602.34(c).

(g) The agency may request that the Advisory Committee defer acting on an application at that Advisory Committee meeting if Department staff fails to provide the agency with the materials described, and within the timeframes provided, in paragraphs (f)(3) and (f)(5) of this section. If the Department staff's failure to send the materials in accordance with the timeframe described in paragraph (f)(3) or (f)(5) of this section is due to the failure of the agency to submit reports to the Department, other information the Secretary requested, or its response to the draft analysis, by the deadline established by the Secretary, the agency forfeits its right to request a deferral of its application.

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

§ 602.33 Procedures for review of agencies during the period of recognition.

(a) Department staff may review the compliance of a recognized agency with the criteria for recognition at any time—

(1) At the request of the Advisory Committee; or

(2) Based on any information that, as determined by Department staff, appears credible and raises issues relevant to recognition.

(b) The review may include, but need not be limited to, any of the activities described in § 602.32(b) and (d).

(c) If, in the course of the review, and after provision to the agency of the documentation concerning the inquiry and consultation with the agency, Department staff notes that one or more deficiencies may exist in the agency's compliance with the criteria for recognition or in the agency's effective application of those criteria, it—

(1) Prepares a written draft analysis of the agency's compliance with the criteria of concern. The draft analysis reflects the results of the review, and includes a recommendation regarding what action to take with respect to recognition. Possible recommendations include, but are not limited to, a recommendation to limit, suspend, or terminate recognition, or require the submission of a compliance report and to continue recognition pending a final decision on compliance;

(2) Sends the draft analysis including any identified areas of non-compliance, and a proposed recognition recommendation, and all supporting documentation to the agency; and

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation, specifying a deadline that provides at least 30 days for the agency's response.

(d) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has demonstrated compliance with the criteria for recognition, the staff notifies the agency in writing of the results of the review. If the review was requested by the Advisory Committee, staff also provides the Advisory Committee with the results of the review.

(e) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has not demonstrated compliance, the staff—

(1) Notifies the agency that the draft analysis will be finalized for presentation to the Advisory Committee;

(2) Publishes a notice in the **Federal Register** including, if practicable, an invitation to the public to comment on the agency's compliance with the criteria in question and establishing a deadline for receipt of public comment;

(3) Provides the agency with a copy of all public comments received and, if practicable, invites a written response from the agency;

(4) Finalizes the staff analysis as necessary to reflect its review of any agency response and any public comment received; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and a recognition recommendation and any other information provided to the Advisory Committee under § 602.34(c).

(f) The Advisory Committee reviews the matter in accordance with § 602.34.

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

Review by the National Advisory Committee on Institutional Quality and Integrity

§ 602.34 Advisory Committee meetings.

(a) Department staff submits a proposed schedule to the Chairperson of the Advisory Committee based on anticipated completion of staff analyses.

(b) The Chairperson of the Advisory Committee establishes an agenda for the next meeting and, in accordance with the Federal Advisory Committee Act, presents it to the Designated Federal Official for approval.

(c) Before the Advisory Committee meeting, Department staff provides the Advisory Committee with—

(1) The agency's application for recognition or for expansion of scope, the agency's compliance report, or the agency's report submitted under § 602.31(d), and supporting documentation;

(2) The final Department staff analysis of the agency developed in accordance with § 602.32 or § 602.33, and any supporting documentation;

(3) At the request of the agency, the agency's response to the draft analysis;

(4) Any written third-party comments the Department received about the agency on or before the established deadline;

(5) Any agency response to third-party comments; and

(6) Any other information Department staff relied upon in developing its analysis.

(d) At least 30 days before the Advisory Committee meeting, the Department publishes a notice of the meeting in the **Federal Register** inviting interested parties, including those who submitted third-party comments concerning the agency's compliance with the criteria for recognition, to make oral presentations before the Advisory Committee.

(e) The Advisory Committee considers the materials provided under paragraph (c) of this section in a public meeting and invites Department staff, the agency, and other interested parties to make oral presentations during the meeting. A transcript is made of all Advisory Committee meetings.

(f) The written motion adopted by the Advisory Committee regarding each agency's recognition will be made available during the Advisory Committee meeting. The Department will provide each agency, upon request, with a copy of the motion on recognition at the meeting. Each agency that was reviewed will be sent an electronic copy of the motion relative to that agency as soon as practicable after the meeting.

(g) After each meeting of the Advisory Committee at which a review of agencies occurs, the Advisory Committee forwards to the senior Department official its recommendation with respect to each agency, which may include, but is not limited to, a

recommendation to approve, deny, limit, suspend, or terminate recognition, to grant or deny a request for expansion of scope, to revise or affirm the scope of the agency, or to require the agency to submit a compliance report and to continue recognition pending a final decision on compliance.

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

§ 602.35 Responding to the Advisory Committee's recommendation.

(a) Within ten days following the Advisory Committee meeting, the agency and Department staff may submit written comments to the senior Department official on the Advisory Committee's recommendation. The agency must simultaneously submit a copy of its written comments, if any, to Department staff. Department staff must simultaneously submit a copy of its written comments, if any, to the agency.

(b) Comments must be limited to—

(1) Any Advisory Committee recommendation that the agency or Department staff believes is not supported by the record;

(2) Any incomplete Advisory Committee recommendation based on the agency's application; and

(3) The inclusion of any recommendation or draft proposed decision for the senior Department official's consideration.

(c)(1) Neither the Department staff nor the agency may submit additional documentary evidence with its comments unless the Advisory Committee's recognition recommendation proposes finding the agency noncompliant with, or ineffective in its application of, a criterion or criteria for recognition not identified in the final Department staff analysis provided to the Advisory Committee.

(2) Within ten days of receipt by the Department staff of an agency's comments or new evidence, if applicable, or of receipt by the agency of the Department staff's comments, Department staff, the agency, or both, as applicable, may submit a response to the senior Department official. Simultaneously with submission, the agency must provide a copy of any response to the Department staff. Simultaneously with submission, Department staff must provide a copy of any response to the agency.

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

Review and Decision by the Senior Department Official

§ 602.36 Senior Department official's decision.

(a) The senior Department official makes a decision regarding recognition of an agency based on the record compiled under §§ 602.32, 602.33, 602.34, and 602.35 including, as applicable, the following:

(1) The materials provided to the Advisory Committee under § 602.34(c).

(2) The transcript of the Advisory Committee meeting.

(3) The recommendation of the Advisory Committee.

(4) Written comments and responses submitted under § 602.35.

(5) New evidence submitted in accordance with § 602.35(c)(1).

(6) A communication from the Secretary referring an issue to the senior Department official's consideration under § 602.37(e).

(b) In the event that statutory authority or appropriations for the Advisory Committee ends, or there are fewer duly appointed Advisory Committee members than needed to constitute a quorum, and under extraordinary circumstances when there are serious concerns about an agency's compliance with subpart B of this part that require prompt attention, the senior Department official may make a decision in a recognition proceeding based on the record compiled under § 602.32 or § 602.33 after providing the agency with an opportunity to respond to the final staff analysis. Any decision made by the senior Department official absent a recommendation from the Advisory Committee may be appealed to the Secretary as provided in § 602.37.

(c) Following consideration of an agency's recognition under this section, the senior Department official issues a recognition decision.

(d) Except with respect to decisions made under paragraph (f) or (g) of this section and matters referred to the senior Department official under § 602.37(e) or (f), the senior Department official notifies the agency in writing of the senior Department official's decision regarding the agency's recognition within 90 days of the Advisory Committee meeting or conclusion of the review under paragraph (b) of this section.

(e) The senior Department official's decision may include, but is not limited to, approving, denying, limiting, suspending, or terminating recognition, granting or denying an application for an expansion of scope, revising or affirming the scope of the agency, or continuing recognition pending submission and review of a compliance report under §§ 602.32 and 602.34 and review of the report by the senior Department official under this section.

(1)(i) The senior Department official approves recognition if the agency complies with the criteria for recognition listed in subpart B of this part and if the agency effectively applies those criteria.

(ii) If the senior Department official approves recognition, the recognition decision defines the scope of recognition and the recognition period. The recognition period does not exceed five years, including any time during which recognition was continued to permit submission and review of a compliance report.

(iii) If the scope or period of recognition is less than that requested by the agency, the senior Department official explains the reasons for approving a lesser scope or recognition period.

(2)(i) Except as provided in paragraph (e)(3) of this section, if the agency either fails to comply with the criteria for recognition listed in subpart B of this part, or to apply those criteria effectively, the senior Department official denies, limits, suspends, or terminates recognition.

(ii) If the senior Department official denies, limits, suspends, or terminates recognition, the senior Department official specifies the reasons for this decision, including all criteria the agency fails to meet and all criteria the agency has failed to apply effectively.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, if a recognized agency fails to demonstrate compliance with or effective application of a criterion or criteria, but the senior Department official concludes that the agency will demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less, the senior Department official may continue the agency's recognition, pending submission by the agency of a compliance report, review of the report under §§ 602.32 and 602.34, and review of the report by the senior Department official under this section. In such a case, the senior Department official specifies the criteria the compliance report must address, and a time period, not longer than 12 months, during which the agency must achieve compliance and effectively apply the criteria. The compliance report documenting compliance and effective application of criteria is due not later than 30 days after the end of the period specified in the senior Department official's decision.

(ii) If the record includes a compliance report, and the senior Department official determines that an agency has not complied with the criteria for recognition, or has not effectively applied those criteria, during the time period specified by the senior Department official in accordance with paragraph (e)(3)(i) of this section, the senior Department official denies, limits, suspends, or terminates recognition, except, in extraordinary circumstances, upon a showing of good cause for an extension of time as determined by the senior Department official and detailed in the senior Department official's decision. If the senior Department official determines good cause for an extension has been shown, the senior Department official specifies the length of the extension and what the agency must do during it to merit a renewal of recognition.

(f) If the senior Department official determines, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application of, a criterion or criteria of recognition not identified earlier in the proceedings as an area of noncompliance, the senior Department official provides—

(1) The agency with an opportunity to submit a written response and documentary evidence addressing the finding; and

(2) The staff with an opportunity to present its analysis in writing.

(g) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the senior Department official's attention while a decision regarding the agency's recognition is pending before the senior Department official, and if the senior Department official concludes the recognition decision should not be made without consideration of the information, the senior Department official either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and consideration by the Advisory Committee under § 602.34; or

(2)(i) Provides the information to the agency and Department staff;

(ii) Permits the agency to respond to the senior Department official and the Department staff in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides Department staff with an opportunity to respond in writing to the agency's submission under paragraph (g)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on the record described in paragraph (a) of this section, as supplemented by the information provided under this paragraph.

(h) No agency may submit information to the senior Department official, or ask others to submit information on its behalf, for purposes of invoking paragraph (g) of this section. Before invoking paragraph (g) of this section, the senior Department official will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(i) If the senior Department official does not reach a final decision to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the senior Department official automatically extends the recognition period until a final decision is reached.

(j) Unless appealed in accordance with § 602.37, the senior Department official's decision is the final decision of the Secretary.

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

Appeal Rights and Procedures

§ 602.37 Appealing the senior Department official's decision to the Secretary.

(a) The agency may appeal the senior Department official's decision to the Secretary. Such appeal stays the decision of the senior Department official until final disposition of the appeal. If an agency wishes to appeal, the agency must—

(1) Notify the Secretary and the senior Department official in writing of its intent to appeal the decision of the senior Department official, no later than ten days after receipt of the decision;

(2) Submit its appeal to the Secretary in writing no later than 30 days after receipt of the decision; and

(3) Provide the senior Department official with a copy of the appeal at the same time it submits the appeal to the Secretary.

(b) The senior Department official may file a written response to the appeal. To do so, the senior Department official must—

(1) Submit a response to the Secretary no later than 30 days after receipt of a copy of the appeal; and

(2) Provide the agency with a copy of the senior Department official's response at the same time it is submitted to the Secretary.

(c) Neither the agency nor the senior Department official may include in its submission any new evidence it did not submit previously in the proceeding.

(d) On appeal, the Secretary makes a recognition decision, as described in § 602.36(e). If the decision requires a compliance report, the report is due within 30 days after the end of the period specified in the Secretary's decision. The Secretary renders a final decision after taking into account the senior Department official's decision, the agency's written submissions on appeal, the senior Department official's response to the appeal, if any, and the entire record before the senior Department official. The Secretary notifies the agency in writing of the Secretary's decision regarding the agency's recognition.

(e) The Secretary may determine, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application with respect to, a criterion or criteria for recognition not identified as an area of noncompliance earlier in the proceedings. In that case, the Secretary, without further consideration of the appeal, refers the matter to the senior Department official for consideration of the issue under § 602.36(f). After the senior Department official makes a decision, the agency may, if desired, appeal that decision to the Secretary.

(f) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the Secretary's attention while a decision regarding the agency's recognition is pending before the Secretary, and if the Secretary concludes the recognition decision should not be made without consideration of the information, the Secretary either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and review by the Advisory Committee under § 602.34; and consideration by the senior Department official under § 602.36; or

(2)(i) Provides the information to the agency and the senior Department official;

(ii) Permits the agency to respond to the Secretary and the senior Department official in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides the senior Department official with an opportunity to respond in writing to the agency's submission

under paragraph (f)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on all the materials described in paragraphs (d) and (f) of this section.

(g) No agency may submit information to the Secretary, or ask others to submit information on its behalf, for purposes of invoking paragraph (f) of this section. Before invoking paragraph (f) of this section, the Secretary will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(h) If the Secretary does not reach a final decision on appeal to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the Secretary automatically extends the recognition period until a final decision is reached.

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

§ 602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.

An agency may contest the Secretary's decision under this part in the Federal courts as a final decision in accordance with applicable Federal law. Unless otherwise directed by the court, a decision of the Secretary to deny, limit, suspend, or terminate the agency's recognition is not stayed during an appeal in the Federal courts.

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

Subpart D—[Removed]

■ 17. Subpart D, consisting of §§ 602.40 through 602.45, is removed.

Subpart E—[Redesignated as Subpart D]

■ 18. Subpart E, consisting of § 602.50, is redesignated as subpart D.

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