DEPARTMENT OF EDUCATION

34 CFR Parts 600, 602, 603, 668, 682, 685, 686, 690, and 691

[Docket ID ED–2010–OPE–0004]

RIN 1840–AD02

Program Integrity Issues

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to improve integrity in the programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA) by amending the regulations for Institutional Eligibility Under the HEA, the Secretary's Recognition of Accrediting Agencies, the Secretary's Recognition Procedures for State Agencies, the Student Assistance General Provisions, the Federal Family Education Loan (FFEL) Program, the William D. Ford Federal Direct Loan Program, the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program, the Federal Pell Grant Program, and the Academic Competitiveness Grant (AGC) and National Science and Mathematics Access to Retain Talent Grant (National Smart Grant) Programs.

DATES: We must receive your comments on or before August 2, 2010.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal.* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How To Use This Site."
- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Jessica Finkel, U.S. Department of Education, 1990 K Street, NW., room 8031, Washington, DC 20006–8502.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: For information related to gainful employment in a recognized occupation, John Kolotos. Telephone: (202) 502–7762 or via the Internet at: *John.Kolotos@ed.gov.*

For information related to the provisions related to the definition of credit hour, Marianna Deeken or Fred Sellers. Telephone: (206) 615–2583 or via the Internet at *Marianna.Deeken@ed.gov.* Telephone: (202) 502–7502 or via the Internet at: *Fred.Sellers@ed.gov.*

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For information related to the provisions on retaking coursework, Vanessa Freeman. Telephone: (202) 502–7523 or via the Internet at: *Vanessa.Freeman@ed.gov.*

For information related to the provisions for written agreements between institutions, Carney McCullough. Telephone: (202) 502–7639 or via the Internet at: *Carney.McCullough@ed.gov.*

For information on the provisions related to incentive compensation, Marty Guthrie. Telephone: (202) 219–7031 or via the Internet at: *Marty.Guthrie@ed.gov.*

For information related to the provisions on ability to benefit, Dan Klock. Telephone: (202) 377–4026 or via the Internet at *Dan.Klock@ed.gov.*

For information related to the provisions on misrepresentation, Vanessa Freeman. Telephone: (202) 502–7523 or via the Internet at: *Vanessa.Freeman@ed.gov.*

For information related to the provisions on satisfactory academic progress, Marianna Deeken. Telephone: (206) 615–2583 or via the Internet at: *Marianna.Deeken@ed.gov.*

For information related to the provisions on high school diplomas and verification of information on the Free Application for Federal Student Aid (FAFSA), Jacquelyn Butler. Telephone: (202) 502–7890, or via the Internet at: *Jacquelyn.Butler@ed.gov.*

For information related to the return of title IV, HEA funds calculation provisions for term-based modules or taking attendance, Jessica Finkel. Telephone: (202) 502–7647, or via the Internet at: *Jessica.Finkel@ed.gov.*

For information related to the provisions on timeliness and method of disbursement, John Kolotos. Telephone: (202) 502–7762, or via the Internet at: *John.Kolotos@ed.gov.*

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

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

As outlined in the section of this notice entitled *Negotiated Rulemaking,* significant public participation, through a series of three regional hearings and three negotiated rulemaking sessions, has occurred in developing this notice of proposed rulemaking (NPRM). In accordance with the requirements of the Administrative Procedure Act, the Department invites you to submit comments regarding these proposed regulations on or before August 2, 2010. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the programs.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 8031, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If

you want to schedule an appointment for this type of aid, please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT**.

Negotiated Rulemaking

Section 492 of the HEA requires the Secretary, before publishing any proposed regulations for programs authorized by title IV of the HEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from the public, including individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary must subject the proposed regulations to a negotiated rulemaking process. All proposed regulations that the Department publishes on which the negotiators reached consensus must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process can be found at: *http://www.ed.gov/policy/highered/leg/hea08/index.html.*

On September 9, 2009, the Department published a notice in the **Federal Register** (74 FR 46399) announcing our intent to establish two negotiated rulemaking committees to prepare proposed regulations. One committee would develop proposed regulations governing foreign schools, including the implementation of the changes made to the HEA by the Higher Education Opportunity Act of 2008 (HEOA), Public Law 110–315, that affect foreign schools. The proposed regulations governing foreign schools will be published in the **Federal Register** at a future date. A second committee would develop proposed regulations to improve integrity in the title IV, HEA programs. The notice requested nominations of individuals for membership on the committees who could represent the interests of key stakeholder constituencies on each committee.

Team I—Program Integrity Issues (Team I) met to develop proposed regulations during the months of November 2009 through January 2010.

The Department developed a list of proposed regulatory provisions, including provisions based on advice and recommendations submitted by individuals and organizations as testimony to the Department in a series of three public hearings held on:

- June 15, 2009 at Community College of Denver in Denver, CO.
- June 18, 2009 at University of Arkansas in Little Rock, AR.
- June 22, 2009 at Community College of Philadelphia in Philadelphia, PA.

In addition, the Department accepted written comments on possible regulatory provisions submitted directly to the Department by interested parties and organizations. A summary of all comments received orally and in writing is posted as background material in the docket for this NPRM. Transcripts of the regional meetings can be accessed at *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/negreg-summerfall.html#ph.*

Staff within the Department also identified issues for discussion and negotiation.

At its first meeting, Team I reached agreement on its protocols. These protocols provided that for each community identified as having interests that were significantly affected by the subject matter of the negotiations, the non-Federal negotiators would represent the organizations listed after their names in the protocols in the negotiated rulemaking process.

Team I included the following members:

Rich Williams, U.S. PIRG, and Angela Peoples (alternate), United States Student Association, representing students.

Margaret Reiter, attorney, and Deanne Loonin (alternate), National Consumer Law Center, representing consumer advocacy organizations.

Richard Heath, Anne Arundel Community College, and Joan Zanders (alternate), Northern Virginia Community College, representing two-year public institutions.

Phil Asbury, University of North Carolina, Chapel Hill, and Joe Pettibon (alternate), Texas A&M University, representing four-year public institutions.

Todd Jones, Association of Independent Colleges and Universities of Ohio, and Maureen Budetti (alternate), National Association of Independent Colleges and Universities, representing private, non-profit institutions.

Elaine Neely, Kaplan Higher Education Corp., and David Rhodes, (alternate), School of Visual Arts, representing private, for-profit institutions.

Terry Hartle, American Council on Education, and Bob Moran (alternate), American Association of State Colleges and Universities, representing college presidents.

David Hawkins, National Association for College Admission Counseling, and Amanda Modar (alternate), National Association for College Admission Counseling, representing admissions officers.

Susan Williams, Bridgeport University, and Anne Gross (alternate), National Association of College and University Business Officers, representing business officers.

Val Meyers, Michigan State University, and Joan Berkes (alternate), National Association of Student Financial Aid Administrators, representing financial aid administrators.

Barbara Brittingham, Commission on Institutions of Higher Education of the New England Association of Schools and Colleges, Sharon Tanner (1st alternate), National League for Nursing Accreditation Commission, and Ralph Wolf (2nd alternate), Western Association of Schools and Colleges, representing regional/programmatic accreditors.

Anthony Mirando, Nation Accrediting Commission of Cosmetology Arts and Sciences, and Michale McComis (alternate), Accrediting Commission of Career Schools and Colleges, representing national accreditors.

Jim Simpson, Florida State University, and Susan Lehr (alternate), Florida State University, representing work force development.

Carol Lindsey, Texas Guaranteed Student Loan Corp, and Janet Dodson (alternate), National Student Loan Program, representing the lending community.

Chris Young, Wonderlic, Inc., and Dr. David Waldschmidt (alternate), Wonderlic, Inc., representing test publishers.

Dr. Marshall Hill, Nebraska Coordinating Commission for Postsecondary Education, and Dr. Kathryn Dodge (alternate), New Hampshire Postsecondary Education Commission, representing State higher education officials.

Carney McCullough and Fred Sellers, U.S. Department of Education, representing the Federal Government.

These protocols also provided that, unless agreed to otherwise, consensus on all of the amendments in the proposed regulations had to be achieved for consensus to be reached on the entire NPRM. Consensus means that there must be no dissent by any member.

During the meetings, Team I reviewed and discussed drafts of proposed regulations. At the final meeting in January 2010, Team I did not reach consensus on the proposed regulations

in this document. With regard to gainful employment in a recognized occupation, this document addresses technical, reporting, and disclosure issues. The remaining issues under consideration that address the extent to which certain educational programs lead to gainful employment and the conditions under which those programs remain eligible for title IV, HEA program funds are not included in this NPRM.

Summary of Proposed Changes

These proposed regulations would address program integrity issues by:

- Requiring institutions to develop and follow procedures to evaluate the validity of a student's high school diploma if the institution or the Secretary has reason to believe that the diploma is not valid or was not obtained from an entity that provides secondary school education;
- Expanding eligibility for title IV, HEA program assistance to students who demonstrate they have the ability to benefit by satisfactorily completing six credits of college work, or the equivalent amounts of coursework, that are applicable toward a degree or certificate offered by an institution;
- Amending and adding definitions of terms related to ability to benefit testing, including "assessment center," "independent test administrator," "individual with a disability," "test," "test administrator," and "test publisher";
- Consolidating into a single regulatory provision the approval processes for ability to benefit tests developed by test publishers and States;
- Establishing requirements under which test publishers and States must provide descriptions of processes for identifying and handling test score abnormalities, ensuring the integrity of the testing environment, and certifying and decertifying test administrators;
- Requiring test publishers and States to describe any accommodations available for individuals with disabilities, as well as the process a test administrator would use to identify and report to the test publisher instances in which these accommodations were used;
- Revising the test approval procedures and criteria for ability to benefit tests, including procedures related to the approval of tests for speakers of foreign languages and individuals with disabilities;
- Revising the definitions and provisions that describe the activities that constitute substantial misrepresentation by an institution of the nature of its educational program, its financial charges, or the employability of its graduates;
- Removing the "safe harbor" provisions related to incentive compensation for any person or entity engaged in any student recruitment or admission activity, including making decisions regarding the award of title IV, HEA program assistance;
- Clarifying what is required for an institution of higher education, a proprietary institution of higher education, and a postsecondary vocational institution to be considered legally authorized by the State;
- Defining a *credit hour* and establishing procedures that certain institutional accrediting agencies must have in place to determine whether an institution's assignment of a credit hour is acceptable;
- Modifying provisions to clarify whether and when an institution must award student financial assistance based on clock or credit hours and the standards for credit-to-clock-hour conversions;
- Modifying the provisions related to written arrangements between two or more eligible institutions that are owned or controlled by the same person or entity so that the percentage of the educational program that may be provided by the institution that does not grant the degree or certificate under the arrangement may not exceed 50 percent;
- Prohibiting written arrangements between an eligible institution and an ineligible institution that has had its certification to participate in title IV, HEA programs revoked or its application for recertification denied;
- Expanding provisions related to the information that an institution with a written arrangement must disclose to a student enrolled in a program affected by the arrangement, including, for example, the portion of the educational program that the institution that grants the degree or certificate is not providing;
- Revising the definition of *unsubsidized student financial aid programs* to include TEACH Grants, Federal PLUS Loans, and Direct PLUS Loans;
- Codifying current policy that an institution must complete verification before the institution may exercise its professional judgment authority;
- Eliminating the 30 percent verification cap;
- Retaining the ability of institutions to select additional applicants for verification;
- Replacing the five verification items for all selected applicants with a targeted selection from items included in an annual **Federal Register** notice published by the Secretary;
- Allowing interim disbursements when changes to an applicant's FAFSA information would not change the amount that the student would receive under a title IV, HEA program;
- Codifying the Department's IRS Data Retrieval System Process, which allows an applicant to import income and other data from the IRS into an online FAFSA;
- Requiring the processing of all changes and corrections to an applicant's FAFSA information;
- Modifying the provisions related to institutional satisfactory academic progress policies and the impact these policies have on a student's eligibility for title IV, HEA program assistance;
- Expanding the definition of *full-time student* to allow, for a term-based program, repeated coursework taken in the program to count towards a full-time workload;
- Clarifying when a student is considered to have withdrawn from a payment period of enrollment for the purpose of calculating a return of title IV, HEA program funds;
- Clarifying the circumstances under which an institution is required to take attendance for the purpose of calculating a return of title IV, HEA program funds;
- Modifying the provisions for disbursing title IV, HEA program funds to ensure that certain students can obtain or purchase books and supplies by the seventh day of a payment period;
- Updating the definition of the term *recognized occupation* to reflect current usage; and
- Establishing requirements for institutions to submit information on program completers for programs that prepare students for gainful employment in recognized occupations.

Significant Proposed Regulations

We group major issues according to subject, with appropriate sections of the proposed regulations referenced in parentheses. We discuss other substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

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

Gainful Employment in a Recognized Occupation (§§ 600.2, 600.4, 600.5, 600.6, 668.6, and 668.8)

Statute: Sections 102(b) and (c) of the HEA define, in part, a proprietary institution and a postsecondary vocational institution, respectively, as

an institution that provides an eligible program of training that prepares students for gainful employment in a recognized occupation. Section 101(b)(1) of the HEA defines an institution of higher education, in part, as any institution that provides not less than a one-year program of training that prepares students for gainful employment in a recognized occupation.

One-Year Programs at Institutions of Higher Education

Current Regulations: § 600.4(a)(4)(iii) provides that a public or nonprofit institution may provide a training program of at least one academic year that leads to a certificate, degree, or other recognized educational credential and prepares students for gainful employment in a recognized occupation. In addition, § 668.8(c)(3) provides that an eligible program at an institution of higher education may be at least a one-academic-year training program that leads to a certificate, degree, or other recognized credential and prepares students for gainful employment in a recognized occupation.

Proposed Regulations: The proposed regulations would amend §§ 600.4(a)(4)(iii) and 668.8(c)(3) by removing the reference to degree programs.

Reasons: In keeping with the statute, we would clarify in proposed §§ 600.4(a)(4)(iii) and 668.8(c)(3) that only certificate or credentialed nondegree programs of at least one academic year, that are offered by a public or nonprofit institution of higher education, are programs that must prepare students for gainful employment in a recognized occupation.

Recognized Occupation

Current Regulations: Section 600.2 defines a *recognized occupation* as an occupation that is listed in an "occupational division" of the latest edition of the *Dictionary of Occupational Titles,* published by the U.S. Department of Labor, or an occupation determined to be a recognized occupation by the Secretary in consultation with the Secretary of Labor.

Proposed Regulations: Proposed § 600.2 would define *recognized occupation* as an occupation identified by a Standard Occupational Classification (SOC) code established by the Office of Management and Budget or an Occupational Information Network O* NET–SOC code established by the Department of Labor and available at *http://online.onetcenter.org* or its successor site.

Reasons: The definition of *recognized occupation* in proposed § 600.2 would simply replace an outdated reference to the *Dictionary of Occupational Titles* with current references to SOC codes established by the Office of Management and Budget or the Department of Labor.

Gainful Employment

Current Regulations: Sections 600.4(a)(4)(iii), 600.5(a)(5), and 600.6(a)(4) mirror the statutory provisions, and like the statute, do not define or further describe the meaning of the phrase "gainful employment."

Proposed Regulations: Under proposed § 668.6(a), an institution would annually submit information about students who complete a program that leads to gainful employment in a recognized occupation. That information would include, at a minimum, identifying information about each student who completed a program, the Classification of Instructional Program (CIP) code for that program, the date the student completed the program, and the amounts the student received from private educational loans and institutional financing plans.

In addition, under proposed § 668.6(b), an institution would be required to disclose on its Web site information about (1) the occupations that its programs prepare students to enter, along with links to occupational profiles on O*NET, (2) the on-time graduation rate of students entering a program, (3) the cost of each program, including costs for tuition and fees, room and board, and other institutional costs typically incurred by students enrolling in the program, (4) beginning no later than June 30, 2013, the placement rate for students completing each of those programs, as determined under § 668.8(g) or a State-sponsored workforce data system, and (5) the median loan debt incurred by students who completed each program in the preceding three years, identified separately as title IV, HEA loan debt and debt from private educational loans and institutional financing plans.

Reasons: The Department plans to use this information to continue to assess the outcomes of programs that lead to gainful employment in a recognized occupation. The proposed new requirement would enable the Department to further evaluate and monitor the outcomes of these programs. In addition, to better inform prospective students, proposed § 668.6(b) would require an institution to disclose on its Web site the cost, graduation and placement rates, job-related information for each of its programs, and debt levels of students who completed the program during the past three years. We seek comment on whether the proposed Web-based approach is the most appropriate way to ensure that prospective students obtain this information or whether we should consider other approaches. With regard to disclosing Federal and non-Federal loan debt, based on the information an institution would submit under proposed § 668.6(a), the Department would be able to provide the institution with the median title IV, HEA loan debt, by program, and the median debt from private loans and institutional financing plans by program. The institution would then disclose these amounts. While we believe that § 668.43 already requires an institution to disclose program cost information, we wish to make it an explicit requirement in this part of the regulations because our research showed that program cost information was not disclosed on the Web sites of many institutions.

Definition of a Credit Hour (§§ 600.2, 602.24, 603.24, and 668.8)

Statute: Section 481(a)(2) of the HEA defines an academic year for an undergraduate program, in part, as requiring a minimum of 24 semester or trimester credit hours or 36 quarter credit hours in a course of study that measures academic progress in credit hours or 900 clock hours in a course of study that measures academic progress in clock hours. Section 481(b) of the HEA defines an eligible program, in part, as a program of at least 600 clock hours, 16 semester hours, or 24 quarter hours or, in certain instances, a program of at least 300 clock hours, 8 semester hours, or 12 quarter hours. Sections 428(b)(1), 428B(a)(2), 428H(d)(1), 455(a)(1), and 484(b)(3) and (4) of the HEA specify that a student must be carrying at least one-half of the normal full-time work load for the student's course of study in order to qualify for any loan under parts B and D of title IV of the HEA. Section 401 of the HEA provides that a student's Federal Pell Grant must be adjusted based on the student's enrollment status and that a student must be enrolled at least half-time to be eligible for a second consecutive Federal Pell Grant in an award year. Section 496(a)(5)(H) of the HEA requires that an accrediting agency assess an institution's measure of program length. Section 487(c)(4) of the HEA requires that the Secretary publish a list of State agencies which the Secretary determines to be reliable authorities as to the quality of public

postsecondary vocational education in their respective States for the purpose of determining institutional eligibility for Federal student assistance programs.

Current Regulations: There is no definition of a credit hour in any current regulations for programs funded under the HEA; and the term is not defined in the regulations that set out the requirements for the Secretary's recognition of accrediting agencies or State agencies for the approval of public postsecondary vocational education. The regulations that address an institutional accrediting agency's, or State approval agency's, reviews and evaluations of an institution's assignment of credit hours are set out in 34 CFR part 602 for an accrediting agency and 34 CFR part 603 for a State approval agency.

In current § 668.8(k) and (l), the regulations provide the formula that certain undergraduate programs must use to convert the number of clock hours offered to the appropriate number of credit hours used for title IV, HEA aid calculations and the requirements for identifying the undergraduate programs subject to using the formula. For these programs, each semester or trimester hour must include at least 30 clock hours of instruction, and each quarter hour must include at least 20 hours of instruction. An institution must use the formula to determine if a program is eligible for title IV, HEA purposes unless (1) the institution offers an undergraduate program in credit hours that is at least two academic years in length and leads to an associate degree, a bachelor's degree, or a professional degree or (2) each course within the program is acceptable for full credit toward an associate degree, bachelor's degree, or professional degree offered by the institution, and the degree offered by the institution requires at least two academic years of study.

Proposed Regulations: Definition of a Credit Hour

The Department proposes to add to § 600.2 a definition of a *credit hour* that would measure credit hours in terms of the amount of time and work during which a student is engaged in academic activity using commonly accepted academic practice in higher education, and further would provide for institutionally established equivalencies as represented by learning outcomes and verified achievement.

Accrediting Agency Procedures

The Department proposes to amend current § 602.24 by adding a new paragraph (f). Proposed § 602.24(f) would describe the responsibilities of an accrediting agency to review and evaluate an institution's policies and procedures for the assignment of credit hours and the institution's application of its policies and procedures in assigning credit hours to its programs and courses. An accrediting agency would be required to make a reasonable determination of whether the institution's assignment of credit hours conforms to commonly accepted practice in higher education. The proposed regulations in § 602.24(f) also would provide that an accrediting agency may use sampling or other methods in its reviews of programs at institutions, must take such actions that it deems appropriate to address any deficiencies that it identifies, and must notify the Secretary promptly of any systemic noncompliance with the agency's policies or significant noncompliance regarding one or more programs at the institution.

State Approval Agency Procedures

The Department proposes to amend current § 603.24 by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c). For State agencies for the approval of public postsecondary education, proposed § 603.24(c) would provide for the same responsibilities as described for accrediting agencies regarding the review and evaluation of an institution's policies and procedures for the assignment of credit hours and the institution's application of its policies and procedures in assigning credit hours to its programs and courses.

Clock-to-Credit-Hour Conversion

Proposed § 668.8(l)(1) would revise the method of converting clock hours to credit hours to use a ratio of the minimum clock hours in an academic year to the minimum credit hours in an academic year, *i.e.,* 900 clock hours to 24 semester or trimester hours or 36 quarter hours. Thus, a semester or trimester hour would be based on at least 37.5 clock hours, and a quarter hour would be based on at least 25 clock hours. Proposed § 668.8(l)(2) creates an exception to the conversion ratio in proposed § 668.8(l)(1) if neither an institution's designated accrediting agency nor the relevant State licensing authority for participation in the title IV, HEA programs determines there are any deficiencies in the institution's policies, procedures, and practices for establishing the credit hours that the institution awards for programs and courses, as defined in proposed § 600.2. Under the exception provided by proposed § 668.8(l)(2), an institution may combine students' work outside of class with the clock-hours of instruction in order to meet or exceed the numeric requirements established in proposed § 668.8(l)(1). However, under proposed § 668.8(l)(2), the institution must use at least 30 clock hours for a semester or trimester hour or 20 clock hours for a quarter hour.

In determining whether there is outside work that a student must perform, the analysis must take into account differences in coursework and educational activities within the program. Some portions of a program may require student work outside of class that justifies the application of proposed § 668.8(l)(2). In addition, the application of proposed § 668.8(l)(2) may vary within a program depending on variances in required student work outside of class for different portions of the program. Other portions of the program may not have outside work, and proposed § 668.8(l)(1) must be applied. Of course, an institution applying only proposed § 668.8(l)(1) to a program eligible for conversion from clock hours to credit hours, without an analysis of the program's coursework, would be considered compliant with the requirements of proposed § 668.8(l).

Proposed § 668.8(k)(1)(ii) modifies a provision in current regulations to provide that a program is not subject to the conversion formula in § 668.8(l) where each course within the program is acceptable for full credit toward a degree that is offered by the institution and that this degree requires at least two academic years of study. Additionally, under proposed § 668.8(k)(1)(ii), the institution would be required to demonstrate that students enroll in, and graduate from, the degree program.

Proposed § 668.8(k)(2)(i) would provide that a program is considered to be a clock-hour program if the program must be measured in clock hours to receive Federal or State approval or licensure, or if completing clock hours is a requirement for graduates to apply for licensure or the authorization to practice the occupation that the student is intending to pursue. Under proposed § 668.8(k)(2)(ii) and (iii), the program is also considered to be offered in clock hours if the credit hours awarded for the program are not in compliance with the definition of a credit hour in proposed § 600.2, or if the institution does not provide the clock hours that are the basis for the credit hours awarded for the program or each course in the program and, except as provided in current § 668.4(e), require attendance in the clock hours that are the basis for the credit hours awarded. The proposed regulations on which tentative agreement was reached did not include

the provision in proposed § 668.8(k)(2)(iii) that, except as provided in current § 668.4(e), an institution must require attendance in the clock hours that are the basis for the credit hours awarded. However, during the negotiations we had previously proposed to include such a provision.

Proposed § 668.8(k)(3) would provide that proposed § 668.8(k)(2)(i) would not apply if a limited portion of the program includes a practicum, internship, or clinical experience component that must include a minimum number of clock hours due to a State or Federal approval or licensure requirement.

Reasons: Definition of a Credit Hour

A credit hour is a unit of measure that gives value to the level of instruction, academic rigor, and time requirements for a course taken at an educational institution. At its most basic, a credit hour is a proxy measure of a quantity of student learning. The credit hour was developed as part of a process to establish a standard measure of faculty workloads, costs of instruction, and rates of educational efficiencies as well as a measure of student work for transfer students. While the credit hour was developed to provide some uniform measure, it may not consistently relate to comparable measures of time or workload within institutions or between different types of institutions. Most postsecondary institutions do not have specific policies or criteria to assign credit hours to coursework in a uniform manner.

In keeping with the original purpose of providing a consistent measure of at least a minimum quantity of a student's academic engagement, the proposed definition of a *credit hour* will establish a basis for measuring eligibility for Federal funding. This standard measure will provide increased assurance that a credit hour has the necessary educational content to support the amounts of Federal funds that are awarded to participants in Federal funding programs and that students at different institutions are treated equitably in the awarding of those funds.

We recognize, however, that other measures of educational content are being developed by institutions and do not intend to limit the methods by which an institution may measure a student's work in his or her educational activities. We, therefore, are including in paragraph (3) of the proposed definition of a *credit hour* a provision that an institution may provide institutional equivalencies for the amount of work specified in paragraph (1) of the proposed definition as represented in intended learning outcomes and verified by evidence of their achievement. Further, the institution's equivalencies must be in accordance with any process or conditions required by an institution's designated accrediting agency for title IV, HEA program participation, because these agencies are well positioned to provide oversight in this area.

During the negotiated rulemaking sessions, a few of the non-Federal negotiators were opposed to any proposal to define a *credit hour* because they believed that a definition would impinge upon an institution's ability to create innovative courses and teaching methods. They also argued that the proposed definition was too restrictive and inhibited the academic freedom of schools. Other non-Federal negotiators agreed that a definition was necessary and did not believe the Department's proposed definition would adversely impact institutions. These other non-Federal negotiators agreed with our position that the proposed definition of a *credit hour* would provide sufficient flexibilities for institutions and supported keeping it in the proposed regulations.

One significant change is proposed in the regulations to address a concern raised during the negotiated rulemaking sessions regarding a definition of a *credit hour.* The change is to recognize in paragraph (3) of the proposed definition that an institution would be able to establish reasonable equivalent measures of a credit hour. As is also the case with paragraphs (1) and (2) of the proposed definition, the measures must be reasonable and in accordance with the requirements of the institution's designated accrediting agency, or State agency for the approval of public postsecondary vocational education, for title IV, HEA program participation as well as for participation in other HEA programs. This change further ensures that the definition will allow institutions to adopt alternative measures of student work.

The proposed definition of a *credit hour* does not change our policy that we provide funding based only on credit hours that are the direct result of postsecondary student work. Thus, we do not currently, nor do we propose to, provide funding for credits awarded based on Advanced Placement (AP) or International Baccalaureate (IB) programs, tests or testing out, life experience, or similar competency measures.

No agreement was reached to amend § 600.2 to include a definition of a *credit hour* due to the belief of some non-Federal negotiators that a definition would limit an institution's ability to use alternative measures of student work.

Accrediting Agency Procedures

Section 496(a)(5) of the HEA requires that, to be recognized by the Secretary, an accrediting agency must have standards to evaluate an institution's or program's "measures of program length and the objectives of the degrees or credentials offered." Thus, accrediting agencies are required to make a judgment about program length and the amount of credit an institution or program grants for course work. Accrediting agency standards related to program length differ significantly in their specificity and these standards generally do not define what a credit hour is. This lack of specificity in standards covering student achievement and program length has inherent limitations and may result in inconsistent treatment of Federal funds.

We believe that the lack of more direct accrediting agency oversight in the assignment of credits to coursework may result in some institutions not being able to demonstrate that there is sufficient course content to substantiate the credit hours for certain programs. Such abuse may be more likely due to the expanded availability to a student of two Federal Pell Grants in an award year. We believe that the potential for such abuse and the inconsistent treatment of Federal funds would be significantly alleviated by establishing the proposed definition of credit hour in § 600.2 and providing in proposed § 602.24(f) that accrediting agencies must review (1) an institution's policies and procedures for the assignment of credit hours in accordance with the proposed definition in § 600.2 and (2) the institution's application of its policies and procedures in assigning credit hours to its programs and courses.

The negotiators reached tentative agreement on adding proposed § 602.24(f).

State Agency Procedures for the Approval of Public Vocational Education

The regulations concerning the recognition of State agencies for the approval of public vocational education were not discussed during the negotiations. We believe that § 603.24 should be amended to make changes comparable to the proposed regulations for the recognition of accrediting agencies. We believe these proposed changes are needed for the same reasons as we are proposing to amend part 602. The changes are also necessary for purposes of determining equivalencies

to a credit hour under paragraph (3) of the proposed definition of a *credit hour* in § 600.2 as well as for § 668.8(l) regarding credit-to-clock-hour conversions.

Credit-to-Clock-Hour Conversion

Section 668.8(k) and (l) of the current regulations that provide conditions and formulas for the conversion of clock hours to credit hours for undergraduate programs were adopted prior to the statutory change in the definition of an academic year for clock-hour programs. Under section 481(b) of the HEA, an academic year for a program must now provide for a minimum of 26 weeks of instructional time in a clock-hour program as opposed to the 30 weeks of instructional time required for credit-hour programs. However, undergraduate programs continue to include 900 clock hours, 24 semester or trimester hours, or 36 quarter credits. We are proposing to update the formula to reflect the statute's treatment of 900 clock hours over 26 weeks of instructional time as reflecting no outside student work and the 900 clock hours being directly proportional to 24 semester hours or 36 quarter credits.

As a result, proposed § 668.8(l)(1) would revise the minimum general standard for converting clock hours to credit hours to reflect the ratio of the minimum clock hours in an academic year to the minimum credit hours in an academic year. As some non-Federal negotiators noted, portions of some clock-hour programs require student work outside of class. Proposed § 668.8(l)(2) would, therefore, provide an exception to the standard in proposed § 668.8(l)(1) for coursework in a program that qualifies for a lesser rate of conversion based on additional student work outside of class. For coursework that includes student work outside of class in a qualifying program, an institution would take into account the amount of outside coursework to determine the appropriate number of clock hours to convert to a credit hour, but may not use less than the current requirements of 30 clock hours for a semester or trimester hour or 20 clock hours for a quarter hour.

We believe that changes are needed to the conditions in current § 668.8(k)(1) for determining that a program is not subject to the conversion formula in § 668.8(l). We have identified potential abuses with the provision that an institution's program is not subject to the conversion formula in § 668.8(l) if each course within the program is acceptable for full credit toward a degree that is offered by the institution and requires at least two academic years of study. Some institutions appear to have established degree programs in which few if any students enroll or graduate but which are the basis for claiming that all courses of another nondegree program are acceptable for full credit in the degree program. To address this abuse, proposed § 668.8(k)(1)(ii) would require the institution to demonstrate that students enroll in, and graduate from, the degree program. Proposed § 668.8(k)(2)(i) would provide that a program must be considered a clock-hour program if the program must be measured in clock hours to receive Federal or State approval or licensure or completing clock hours is a requirement for graduates to apply for licensure or the authorization to practice the occupation that the student is intending to pursue. We believe such requirements show that the program is still fundamentally a clock-hour program and should not be treated as a credit-hour program for purposes of title IV, HEA program assistance. We also believe it is appropriate under proposed § 668.8(k)(2)(ii) and (iii) to require that a program must be considered to be offered in clock hours if an institution is failing either to award the credit hours that are in compliance with the definition of a credit hour in proposed § 600.2 or to ensure that students are attending at least the minimum number of clock hours that are the basis for the credit hours awarded for the program. A program that may qualify for conversion to credit hours is still fundamentally a clock-hour program that must meet additional requirements. If the provisions of proposed § 668.8(k)(1) and (2) are applicable, a program should not qualify for conversion to credit hours because the program's essential nature as a clock-hour program requires that it be measured in clock hours for other purposes or because it fails to be offered in a manner that supports the conversion.

In response to some non-Federal negotiators' concerns, proposed § 668.8(k)(3) would clarify the requirements in proposed § 668.8(k)(2)(i) by providing that proposed § 668.8(k)(2)(i) would not apply if a limited portion of a program such as a practicum, internship, or clinical experience component must be measured in clock hours due to a State or Federal approval or licensure requirement. We agree with the non-Federal negotiators that such a limited requirement should not be an impediment to the program qualifying for a clock-to-credit-hour conversion.

The negotiators reached tentative agreement on proposed § 668.8(l) and (k), except for proposed § 668.8(k)(2)(iii) which has been changed to provide that an institution must require attendance in the clock hours that are the basis for the credit hours awarded, except as provided in current § 668.4(e). We believe the change assures that the clock hours are being offered and that students are attending the clock hours that are the basis for the clock-to-credit-hour conversion.

State Authorization (§§ 600.4(a)(3), 600.5(a)(4), 600.6(a)(3), and 600.9)

Statute: Section 101(a)(2) of the HEA defines the term "institution of higher education" to mean, in part, an educational institution in any State that is legally authorized within the State to provide a program of education beyond secondary education. Section 102(a) of the HEA provides, by reference to section 101(a)(2) of the HEA, that a proprietary institution of higher education and a postsecondary vocational institution must be similarly authorized within a State.

Current Regulations: The regulations do not define or describe the statutory requirement that an institution must be legally authorized in a State.

Proposed Regulations: Under proposed § 600.9, an institution would be legally authorized by a State through a charter, license, approval, or other document issued by a State government agency or State entity that affirms or conveys the authority to the institution to operate educational programs beyond secondary education. An institution would also be considered legally authorized in a State if the institution were authorized to offer programs beyond secondary education by the Federal Government or an Indian Tribe as that term is described in 25 U.S.C. 1802(2) or if it were exempt from State authorization as a religious institution under the State constitution.

The Secretary would consider an institution to be legally authorized by a State if (1) the authorization is given to the institution specifically to offer programs beyond secondary education, (2) the authorization is subject to adverse action by the State, and (3) the State has a process to review and appropriately act on complaints concerning an institution and enforces applicable State laws.

References to § 600.9 would be added for clarity in §§ 600.4(a)(3), 600.5(a)(4), and 600.6(a)(3).

Reasons: The HEA requires institutions to have approval from the States where they operate to provide postsecondary educational programs. State oversight through obtaining approval to offer postsecondary

education and by State regulatory agency ongoing activities plays an important role in protecting students, although there may be a lot of variation in how those responsibilities are exercised. One indicator of the importance of State oversight has been seen in the movement of substandard institutions and diploma mills from State to State in response to changing requirements. These entities set up operation in States that may initially provide very little oversight and operate until a State strengthens its oversight of those entities in response to complaints from the public. In some cases, those entities simply move to another State that appears to offer little oversight and repeats the process.

The Department historically viewed the requirement for State authorization for entities to offer postsecondary education as minimal, and would deem an entity that had been exempted by its State from State oversight to have such approval so long as it was able to operate within the State. Thus, in some States an institution was considered to be legally authorized to offer postsecondary education based on such methods as a business license or establishment as an eleemosynary organization.

Upon further review, we believe the better approach is to view the State approval to offer postsecondary educational programs as a substantive requirement where the State is expected to take an active role in approving an institution and monitoring complaints from the public about its operations and responding appropriately. The weakness of the historical approach of not requiring active State approval and oversight may have contributed to the recent lapse in the existence of California's Bureau for Private Postsecondary and Vocational Education. The Bureau served as the State's oversight and regulatory agency for private proprietary postsecondary institutions until the State legislature eliminated the Bureau. We were advised that the Bureau was permitted to lapse because the State determined that doing so would not immediately harm the institutions that participate in the title IV, HEA programs. During the period when there was no State agency authorizing private postsecondary institutions, these institutions continued to participate in the title IV, HEA programs under some voluntary agreements while the State legislature worked on creating a new oversight agency. The proposed regulations, had they been in effect at that time, would have required that the State keep in place the prior oversight agency, or to designate a different State agency to perform the required State functions during the transition to a new State oversight agency. Otherwise, under the provisions of proposed § 600.9(b), the affected institutions would have ceased to be considered legally authorized by the State for Federal purposes when the prior agency's existence lapsed and would have ceased to be eligible institutions.

Additionally, we are concerned that some States are deferring all, or nearly all, of their oversight responsibilities to accrediting agencies for approval of educational institutions, or are providing exemptions for a subset of institutions for other reasons. Since accrediting agencies generally require that an institution be legally operating in the State, we are concerned that the checks and balances provided by the separate processes of accreditation and State legal authorization are being compromised.

We initially proposed that State legal authorization be based on a charter, license, or other document issued by an appropriate State government agency providing the authority to an institution to operate educational programs beyond secondary education and grant degrees within the jurisdiction of the State or other documentation, issued by an appropriate State government agency that authorizes, licenses, or otherwise approves the institution to establish and operate within the State nondegree programs that provide education and training beyond secondary education. We also provided that State legal authorization could include reciprocal agreements between appropriate State agencies. In addition, for institutions in a State to be legally authorized, the State would be expected to monitor (1) institutional academic quality, potentially relying on accrediting agencies recognized by the Secretary; (2) an institution's financial viability; and (3) compliance with applicable State laws with respect to consumer protection and other matters of State oversight.

In response to concerns from the non-Federal negotiators, we clarified in proposed § 600.9(a) that legal authorization could not only be provided by an appropriate State agency, but also another State entity, *e.g.,* a State legislature or State constitution. We removed the references to monitoring the quality of educational programs and financial responsibility. We accepted the position of some of the non-Federal negotiators who argued that these additional State requirements could unnecessarily duplicate Federal or accrediting agency actions. Similarly we accepted the position of some of the non-Federal negotiators that States could enter into reciprocal agreements on an as needed basis without regulations.

Also, in response to recommendations of the non-Federal negotiators, we added provisions to clarify that an institution would be considered to be legally authorized in a State if the institution is authorized to offer educational programs beyond secondary education by the Federal Government or, as defined in 25 U.S.C. 1802(2), an Indian tribe or if it is exempt from State authorization as a religious institution under the State constitution. In proposed § 600.9(b), we also further revised the bases under which we would consider an institution to be legally authorized by a State. We would require that the authorization must be specifically to offer programs beyond secondary education and may not be merely of the type required to do business in the State. We believe that this provision would remove any ambiguity regarding the type of authorization acceptable to establish institutional eligibility to participate in Federal programs. The regulations also require an institution's legal authorization to be subject to adverse action by the State, and that a State has a process to review and appropriately act on complaints concerning an institution, and to enforce applicable State laws. We believe these additional conditions are necessary to establish minimal State oversight for institutions to be considered legally authorized to offer postsecondary education for purposes of qualifying as an eligible institution for Federal programs.

The committee did not reach agreement on this issue. A few negotiators objected to allowing States to continue to rely on an institution's status with an outside entity, for example, accredited status with a nationally recognized accrediting agency, as a basis for State legal authorization and were also concerned that the proposed regulations would no longer have a requirement that a State review an institution's fiscal viability. The regulations do not prohibit a State from relying in part upon an accrediting agency, but the State is still required to perform certain functions itself. For example, an institution's authorization must be subject to adverse action by a State agency or other State entity, and the State must have a process for a State agency to review and appropriately act on complaints concerning an institution.

Part 668 Student Assistance General Provisions Coursework (§ 668.2)

Statute: None.

Current regulations: None

Proposed regulations: The proposed regulations would amend the definition of "full-time student" in § 668.2 to allow repeated coursework to count towards a student enrollment status in term-based programs.

Reasons: The current policy provides that a student enrolled in a term-based program may not be paid for repeating a course unless the student will receive credit for the coursework in addition to any credits previously earned. The non-Federal negotiators were concerned that institutions are unable to track this type of information without doing a program audit of each individual student. We agreed and proposed to amend the definition of full-time to provide that such credits would count toward enrollment status and be eligible for payment under the title IV, HEA programs.

The negotiators reached tentative agreement on this issue.

Written Arrangements (§§ 668.5 and 668.43)

Statute: None.

Current Regulations: Under current § 668.5(a), an eligible institution may enter into a written agreement with another eligible institution, or with a consortium of eligible institutions, to provide all or part of an educational program. The educational program is considered to be an eligible program if it meets the requirements of § 668.8. There is no requirement in either § 668.5 or § 668.43 of the current regulations that institutions provide information on written arrangements to enrolled or prospective students.

Proposed Regulations: The Department proposes to amend current § 668.5(a) by revising and redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2). Proposed § 668.5(a)(1) would be based on the language that is in current paragraph (a), but it would be modified to make it consistent with the definition of an "educational program" in 34 CFR 600.2. Proposed new § 668.5(a)(2) would specify that if a written arrangement is between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation, the institution that grants the degree or certificate must provide more than 50 percent of the educational program. These clarifications are also intended to ensure that the institution enrolling the student has all necessary approvals to offer an educational program in the format in which it is being provided, such as through distance education, when the other institution is providing instruction under a written agreement using that method of delivery. Proposed § 668.5(c)(1) would expand the list of conditions that would preclude an arrangement between an eligible institution and an ineligible institution. Proposed §§ 668.5(e) and 668.43 would require an institution that enters into a written arrangement to provide a description of the arrangement to enrolled and prospective students.

Reasons: Under the definition of an "educational program" in 34 CFR 600.2, if an institution does not provide any instruction itself, but merely gives credit for instruction provided by other institutions, it is not considered to provide an educational program. The change reflected in proposed § 668.5(a)(1) would eliminate the inconsistency in these two provisions by clarifying that an institution may provide part, but not all, of an educational program under a written arrangement.

Proposed § 668.5(a)(2) would be added to address concerns that may arise when two institutions under common ownership enter into written arrangements with each other. One concern, for example, is that such written agreements between institutions under common ownership could be used to circumvent regulations governing cohort default rates and "90–10" provisions, which limit the percentage of revenue for-profit institutions may receive from the Federal student financial assistance programs, by having one institution provide substantially all of a program while attributing the title IV revenue and cohort default rates to the other commonly-owned institution. In other situations, campus-based institutions have been used as "portals" to attract students for online institutions under common ownership where students may not have expected the program to be offered by a different institution.

During the negotiated rulemaking sessions, the Department initially proposed draft regulations that would have required accrediting or State agency review of any written arrangement between an eligible institution and another eligible institution or consortium of eligible institutions if the portion of the educational program provided by the other institution under the written arrangement were more than 50 percent. Under this initial proposal, the institution's accrediting agency, or State agency, as applicable, would have been required to make a determination that the arrangement met the agency's standards for written arrangements. This initial proposal was based on discussion at the first negotiated rulemaking session that suggested most accrediting agencies already review a significant portion of their institutions' written arrangements, even those between or among eligible institutions. Subsequently, several non-Federal negotiators explained that, contrary to the Department's initial understanding, this type of review of written arrangements was not common practice. Some of the non-Federal negotiators expressed concerns that the proposed changes would increase workload and costs as well as impede the development of innovative programs at institutions where there is no evidence of the problems the Department seeks to address. After hearing these concerns, the Department reconsidered its initial proposal and focused its proposed regulatory changes more narrowly on the types of institutions and situations where problems have been identified.

The Department subsequently proposed regulatory language that would limit the portion of an educational program that could be provided under a written arrangement between two eligible for-profit institutions under common ownership or control to 25 percent.

While some non-Federal negotiators expressed support for the 25 percent limitation, a number of them expressed concern that the 25 percent limitation was too low. For example, one non-Federal negotiator questioned the rationale for limiting the percentage of an educational program provided by two eligible institutions under a written arrangement to 25 percent when, under certain circumstances, current regulations permit an ineligible institution to provide up to 50 percent of an educational program. Another non-Federal negotiator said that an institution should be responsible for at least 50 percent of the courses in a student's major. During the discussions, several non-Federal negotiators supported an overall limitation of 50 percent. One non-Federal negotiator expressed the view that non-profit institutions want to "own" the degrees they confer, and if an institution provides less than 50 percent of an educational program, it does not own the degree. Other non-Federal negotiators argued that a limitation of 75 percent would be more appropriate.

Non-Federal negotiators also expressed concerns that, as proposed, this restriction would have an impact on students' academic opportunities and

would limit access to students attending certain institutions. Specifically, they explained that the proposed restrictions on the portion of the educational program that could be provided by the other eligible institution could unnecessarily limit the number of online courses students could take, or make it difficult for students in the military who are deployed, and want to take their remaining courses at an online institution, to finish their educational programs. Both Department officials and some of the non-Federal negotiators pointed out that these outcomes are avoidable if the students in these situations transferred to the institution that was providing the preponderance of courses.

Based on these discussions, the Department modified the proposed regulatory language to refer to eligible institutions that are owned or controlled by the same individual, partnership, or corporation, because this language would be parallel to the language in current § 668.5(c)(3)(ii)(B). Some non-Federal negotiators expressed concern that the phrase "owned or controlled by the same individual, partnership, or corporation" could be read to apply to Jesuit institutions or other institutions under the control of a religious organization, or to institutions in a public system under the control of a board of governors. The Federal negotiator explained that it is not the Department's intention for either public or private, non-profit institutions to be covered by the proposed language because these institutions are not owned or controlled by other entities, and generally act autonomously.

The proposed additions to § 668.5(c)(1) would make it clear that educational programs offered under written arrangements between an eligible institution and an ineligible institution would not be considered eligible programs if the ineligible institution had had its certification to participate in the title IV, HEA programs revoked (*see* proposed § 668.5(c)(1)(iii)), its application for re-certification to participate in the title IV, HEA programs denied (*see* proposed § 668.5(c)(1)(iv)), or its application for certification to participate in the title IV, HEA programs denied (*see* proposed § 668.5(c)(1)(v)). These additions are consistent with the existing reference in the regulations to institutions that have been terminated from the title IV, HEA programs.

Finally, there was considerable discussion during the negotiated rulemaking sessions about the Department's proposal to require that institutions make information about written arrangements available to students. Several non-Federal negotiators said that information should be made available to prospective students, as well as to enrolled students, so prospective students could know before applying to an educational program whether any part of the program would be provided under a written arrangement. For this reason, proposed § 668.5(e) would make clear that any eligible institution providing educational programs under a written arrangement is required to provide the information described in proposed § 668.43(a)(12) to both prospective and enrolled students.

The committee also discussed at length what content the proposed disclosures should include. Several non-Federal negotiators requested that institutions be required to disclose the locations of the other institutions or organizations at which a portion of the educational program would be provided. We agreed with these non-Federal negotiators and incorporated this disclosure requirement in proposed § 668.43(a)(12)(ii).

There was also widespread support for requiring the disclosure of any additional costs that students might incur as a result of enrolling in an educational program provided, in part, under a written arrangement. There was much discussion about which costs would need to be disclosed. One non-Federal negotiator requested that institutions only be required to provide "estimated" costs, given that in some situations, such as study abroad programs, costs might change due to variability in living accommodations, changes in airfare for programs offered at distant locations, etc. We agreed with these suggestions and clarified in proposed § 668.43(a)(12)(iv) that the required disclosures include estimated additional costs students may incur as the result of enrolling in an educational program that is provided, in part, under a written arrangement described in § 668.5.

In proposed § 668.43(a)(12)(iii), we would require institutions to disclose the method of delivery of the portion of the educational program that the institution that grants the degree or certificate is not providing so potential students are given accurate information. In response to a question raised at one of the negotiated rulemaking sessions, the Federal negotiator explained that the Department would expect an institution to disclose whether the instruction is offered on campus or on-line, or offered through a combination of methods.

During the discussions about the disclosure requirements in proposed §§ 668.5 and 668.43, there were a number of questions about what types of arrangements would be subject to these proposed requirements. The Department explained that the proposed disclosure requirements would apply to blanket, existing arrangements between or among institutions. Individual, student-initiated written arrangements would not be subject to the disclosure requirements in proposed §§ 668.5 and 668.43. Not only would such disclosures be impractical and excessively burdensome, but they would also be unnecessary: As a party to an individual, student-initiated written arrangement, the student would already have the information required to be disclosed under these proposed provisions. In addition, these proposed disclosure requirements would not apply to internships or externships because the Department does not consider these arrangements to be written arrangements under § 668.5. While it is reasonable to expect that institutions that offer or require internships and externships will provide students in affected programs with the types of information described in proposed § 668.43(a)(12), such programs would not be covered under this proposed requirement for institutional disclosure of written arrangements.

Some non-Federal negotiators contended that institutions should be required to display the information described in proposed § 668.43(a)(12) prominently on their Web sites. Other non-Federal negotiators did not support this idea, pointing out that § 668.43 contains a long list of disclosures, and to single out this one disclosure requirement for special treatment would suggest that it is more important than all the other institutional information disclosure requirements. They explained that this proposed requirement should be considered in the context of all the consumer disclosure requirements regarding information that students need to know when they are considering enrolling in an institution, and noted that from a practical standpoint, it is likely that institutions will post the required information on their Web sites. One non-Federal negotiator expressed the concern that there is already too much general information provided to students that they do not read, and suggested that institutions might find it most useful to include information on written arrangements in the context of individual programs of study.

While the Department wants to make sure students receive appropriate information so they can make informed decisions, the Department agrees with

the non-Federal negotiators who urged that institutions be given the discretion to determine the best way to disseminate the required information to their students.

The negotiators reached tentative agreement on this issue.

Incentive Compensation (§ 668.14(b))

Statute: Section 487(a)(20) of the HEA requires that the title IV, HEA program participation agreement prohibit an institution from making any commission, bonus, or other incentive payments based directly or indirectly on success in securing enrollments or financial aid to any persons or entities involved in student recruiting or admissions activities, or in making decisions about the award of student financial assistance. The statute states that this prohibition does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal financial assistance.

Current Regulations: Current § 668.14(b)(22)(i) incorporates the prohibition and exception reflected in section 487(a)(20) of the HEA. It prohibits an institution from making any commission, bonus, or other incentive payments based directly or indirectly on success in securing enrollments or financial aid to any persons or entities involved in student recruiting or admissions activities, or in making decisions about the award of student financial assistance. It also states that this restriction does not apply to the recruitment of foreign students living in foreign countries who are not eligible to receive Federal student aid.

Current § 668.14(b)(22)(ii) goes on to specify 12 "safe harbors"—12 activities and arrangements that an institution may carry out without violating the prohibition against incentive compensation reflected in section 487(a)(20) of the HEA and current § 668.14(b)(22)(i). The first safe harbor explains the conditions under which an institution may adjust compensation without that compensation being considered an incentive payment. The 12 safe harbors describe the conditions under which payments that could potentially be construed as based upon securing enrollments or financial aid are nonetheless not prohibited under section 487(a)(20) of the HEA and current § 668.14(b)(22)(i).

The payment or compensation plans covered by the safe harbors address the following subjects:

1. *Adjustments to employee compensation (current § 668.14(b)(22)(i)(A)).* Under this safe harbor, an institution may make up to two adjustments (upward or downward) to a covered employee's annual salary or fixed hourly wage rate within any 12-month period without the adjustment being considered an incentive payment, provided that no adjustment is based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. This safe harbor also permits one cost-of-living increase that is paid to all or substantially all of the institution's full-time employees.

2. *Enrollment in programs that are not eligible for title IV, HEA program funds (current § 668.14(b)(22)(i)(B)).* This safe harbor permits compensation to recruiters based upon enrollment of students who enroll in programs that are ineligible for title IV, HEA funds.

3. *Contracts with employers to provide training (current § 668.14(b)(22)(i)(C)).* This safe harbor addresses payments to recruiters who arrange contracts between an institution and an employer, where the employer pays the tuition and fees for its employees (either directly to the institution or by reimbursement to the employee).

4. *Profit-sharing bonus plans (current § 668.14(b)(22)(i)(D)).* Under this safe harbor, profit-sharing and bonus payments to all or substantially all of an institution's full-time employees are not considered incentive payments based on success in securing enrollments or awarding financial aid in violation of the prohibition in section 487(a)(20) of the HEA and current § 668.14(b)(22)(i). As long as the profit-sharing or bonus payments are substantially the same amount or the same percentage of salary or wages, and as long as the payments are made to all or substantially all of the institution's full-time professional and administrative staff, compensation paid as part of a profit-sharing or bonus plan is not considered a violation of the incentive payment prohibition.

5. *Compensation based upon program completion (current § 668.14(b)(22)(i)(E)).* This safe harbor permits compensation based upon students successfully completing their educational programs or one academic year of their educational programs, whichever is shorter.

6. *Pre-enrollment activities (current § 668.14(b)(22)(i)(F)).* This safe harbor states that clerical pre-enrollment activities, such as answering telephone calls, referring inquiries, or distributing institutional materials, are not considered recruitment or admission activities. Accordingly, under this safe harbor, an institution may make incentive payments to individuals whose responsibilities are limited to clerical pre-enrollment activities.

7. *Managerial and supervisory employees (current § 668.14(b)(22)(i)(G)).* This safe harbor states that the incentive payment prohibition in section 487(a)(20) of the HEA and current § 668.14(b)(22)(i) does not apply to managerial and supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities, or the awarding of title IV, HEA program funds.

8. *Token gifts (current § 668.14(b)(22)(i)(H)).* Under this safe harbor, an institution may provide a token gift not to exceed $100 to an alumnus or student provided that the gift is not in the form of money and no more than one gift is provided annually to an individual.

9. *Profit distributions (current § 668.14(b)(22)(i)(I)).* This safe harbor states that profit distributions to owners of the institution are not payments based on success in securing enrollments or awarding financial aid in violation of the prohibition in section 487(a)(20) of the HEA and current § 668.14(b)(22)(i) as long as the distribution represents a proportionate share of the profits based upon the individual's ownership interest.

10. *Internet-based activities (current § 668.14(b)(22)(i)(J)).* This safe harbor permits an institution to award incentive compensation for Internet-based recruitment and admission activities that provide information about the institution to prospective students, refer prospective students to the institution, or permit prospective students to apply for admission online.

11. *Payments to third parties for non-recruitment activities (current § 668.14(b)(22)(i)(K)).* This safe harbor states that the incentive compensation prohibition does not apply to payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, provided that none of the services involve recruiting or admission activities, or the awarding of title IV, HEA program funds.

12. *Payments to third parties for recruitment activities (current § 668.14(b)(22)(i)(L)).* Under this safe harbor, if an institution uses an outside entity to perform activities for it, including recruitment or admission activities, the institution may make incentive payments to the third party without violating the incentive payment prohibition in section 487(a)(20) of the HEA and current § 668.14(b)(22)(i) as long as the individuals performing the recruitment or admission activities are not compensated in a way that is

prohibited by section 487(a)(20) of the HEA and current § 668.14(b)(22)(i).

Proposed Regulations: The Department proposes to revise § 668.14(b)(22) to align it more closely with the statutory language from section 487(a)(20) of the HEA. Specifically, proposed § 668.14(b)(22)(i)(A) would restate the statutory provision in the HEA, which provides that to be eligible to participate in the Federal student financial aid programs authorized under title IV of the HEA, an institution must agree that it will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance. Proposed § 668.14(b)(22)(i)(B) would provide that the incentive compensation prohibition does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

The Department would delete the 12 safe harbors reflected in current § 668.14(b)(22)(ii). The Department would, however, clarify, in proposed § 668.14(b)(22)(ii), that eligible institutions and their contractors may make merit-based adjustments to employee compensation, provided that such adjustments are not based directly or indirectly upon success in securing enrollments or the award of financial aid.

Finally, in proposed § 668.14(b)(22)(iii), the Department would define the following key terms that would be used in proposed § 668.14(b)(22): *Commission, bonus, or other incentive payment, securing enrollments or the awards of financial aid,* and *enrollment.*

Proposed § 668.14(b)(22)(iii)(A) would define *commission, bonus, or other incentive payment* as a sum of money or something of value paid or given to a person or entity for services rendered.

Proposed § 668.14(b)(22)(iii)(B) would define *securing enrollments or the awards of financial aid* as activities that a person or entity engages in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid to students. Proposed § 668.14(b)(22)(iii)(B)(*1*) and (b)(22)(iii)(B)(*2*) would clarify that the term *securing enrollments or the awards of financial aid* includes recruitment contact in any form and excludes making a payment to a third party for student contact information for prospective students, respectively.

Proposed § 668.14(b)(22)(iii)(C) would define *enrollment* as the admission or matriculation of a student into an eligible institution.

Reasons: Consistent with comments made by a majority of the non-Federal negotiators, the Department believes that the language in section 487(a)(20) of the HEA is clear, and that the elimination of all of the regulatory safe harbors reflected in current § 668.14(b)(22)(ii) would best serve to effectuate congressional intent. The Department previously explained that it was adopting the safe harbors based on a "purposive reading of section 487(a)(20) of the HEA." 67 FR 51723 (August 8, 2002). Since that time, however, the Department's experience demonstrates that unscrupulous actors routinely rely upon these safe harbors to circumvent the intent of section 487(a)(20) of the HEA. As such, rather than serving to effectuate the goals intended by Congress through its adoption of section 487(a)(20) of the HEA, the safe harbors have served to obstruct those objectives. For example, the first safe harbor, which prohibits the payment of incentives based solely upon success in securing enrollments, has led institutions to establish, on paper, other factors that are purportedly used to evaluate student recruiters other than the sheer numbers of students enrolled. However, in practice, consideration of these factors has been minimal at best, or otherwise indiscernible. This has led the Department to expend vast resources evaluating the legitimacy of institutional compensation plans, and considerable time and effort has been lost by both the Department and institutions engaged in litigation. Moreover, the Department believes that students are frequently the victims of compensation plans that institutions have adopted within the ambit of the first safe harbor. When admissions personnel are compensated substantially, if not entirely, upon the numbers of students enrolled, the incentive to deceive or misrepresent the manner in which a particular educational program meets a student's need increases substantially. As a result, the Department believes that the existence of the safe harbors is a major impediment to ensuring that students are enrolled in educational programs that are meaningful to them. There was considerable discussion on this proposed approach during the negotiated rulemaking sessions.

At the outset of the discussions on incentive compensation during negotiated rulemaking, the Department reviewed each of the 12 safe harbors reflected in the current regulations and stated why the Department views them as either inappropriate or unnecessary:

1. *Adjustments to employee compensation.* The Department explained that this safe harbor has led to allegations in which institutions concede that their compensation structures include consideration of the number of enrolled students, but aver that they are not *solely* based upon such numbers. In some of these instances, the substantial weight of the evidence has suggested that the other factors purportedly analyzed are not truly considered, and that, in reality, the institution bases salaries exclusively upon the number of students enrolled. For this reason, the Department proposes to delete this safe harbor. After careful consideration, the Department has determined that removal of the safe harbor is preferable to trying to revise the safe harbor. For example, changing the word *solely* in this safe harbor to some other modifier, such as "primarily" or "substantially," would not correct the problem, as the evaluation of any alternative arrangement would merely shift to whether the compensation was "primarily" or "substantially" based upon enrollments.

2. *Compensation related to enrollment in programs that are not eligible for title IV, HEA program funds.* Section 487(a)(20) of the HEA provides that compensation may not be based upon success in securing enrollments whether the students receive title IV, HEA funds, or some other form of student financial assistance. This safe harbor provides an impetus to steer students away from title IV, HEA programs. The potential also exists for manipulation, as students who were initially enrolled in non-title IV, HEA eligible programs may then be re-enrolled in title IV, HEA eligible programs. As a result, the Department proposes to remove this safe harbor.

3. *Compensation related to contracts with employers to provide training.* Compensation permitted under this safe harbor includes compensation that is ultimately based upon success in securing enrollments, and is thus inconsistent with section 487(a)(20) of the HEA.

4. *Compensation related to profit-sharing bonus plans.* There is no statutory proscription upon offering employees either profit-sharing or a bonus; however, if either is based upon success in securing enrollments, it is not permitted. Therefore, this safe harbor is unnecessary.

5. *Compensation based on program completion.* The Department believes that this safe harbor permits compensation that is "indirectly" based

upon securing enrollments—that is, unless the student enrolls, the student cannot successfully complete an educational program. With the proliferation of short-time, accelerated programs, the potential exists for shorter and shorter programs, and increased efforts to rely upon this safe harbor to incentivize recruiters. Moreover, this safe harbor may lead to lowered or misrepresented admissions standards and program offerings, lowered academic progress standards, altered attendance records, and a lack of meaningful emphasis on retention. The Department has seen schools that have devised and operated grading policies that all but ensure that students who enroll will graduate, regardless of their academic performance. For these reasons, the Department believes it is appropriate to delete this safe harbor.

6. *Compensation related to pre-enrollment activities.* The Department does not believe that this safe harbor is appropriate. Individuals may not receive incentive compensation based on their success in soliciting students for interviews; soliciting students for interviews is a recruitment activity, not a pre-enrollment activity. In addition, because a recruiter's job description is to recruit, it would be very difficult for an institution to document that it was paying a bonus to a recruiter solely for clerical pre-enrollment activities. Such activities certainly contribute "indirectly," if not "directly," to the success in securing enrollments, and hence compensation based upon them is prohibited by the statute. Moreover, with the elimination of the safe harbor relating to adjustments to employee compensation, an unscrupulous actor could claim that the activities in which its recruiters engaged, and for which they were compensated, consisted of "clerical" or "pre-enrollment" activities, regardless of whether a student ultimately enrolled.

7. *Compensation related to managerial and supervisory employees.* The Department believes that this safe harbor provision is no longer appropriate because senior management may drive the organizational and operational culture at an institution, creating pressures for top, and even middle, management to secure increasing numbers of enrollments from their recruiters. As a result, these individuals should not be exempt from the ban on receiving incentive compensation.

8. *Compensation related to token gifts.* As at least one non-Federal negotiator noted, students oft-times do things with little reflection if it brings an immediate reward, and such things as a $100 gift card constitute a substantial incentive for many students. Further, the fair market value of an item might be considerably greater than its cost. A high value item for which the institution paid a minimal cost could not be considered a token gift. As a result, even the provision of token gifts to students and alumni is fraught with the potential for abuse, creating the need to remove this safe harbor, as well.

9. *Compensation based on profit distributions that are based on an individual's ownership interest.* Section 487(a)(20) of the HEA prohibits compensation, including profit distributions, that is based upon success in securing enrollments and the award of financial aid. It does not prohibit profit distributions based upon an individual's ownership interest. As a result, it is the Department's view that this safe harbor is unnecessary.

10. *Compensation related to Internet-based activities.* Technological advancements and developments in Internet-based activities since this safe harbor was adopted, and the frequency with which such activities are now relied upon, argue against the continued provision of this safe harbor. Moreover, with the elimination of the first safe harbor, it can be anticipated that an institution seeking to avoid compliance with section 487(a)(20) of the HEA will maximize its Internet-based recruitment activities. For this reason, the Department proposes to remove this safe harbor.

11. *Compensation to third parties for non-recruitment activities.* The Department believes that this safe harbor is no longer necessary. Proposed § 668.14(b)(22) states that a person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the awarding of title IV, HEA program funds may not be compensated directly or indirectly based upon the success in securing enrollments. Thus, there is no reason to provide any discussion of third-party activities as they relate to non-recruitment activities as a potential safe harbor.

12. *Compensation to third parties for recruitment activities.* This safe harbor expands the scope of the eleventh safe harbor to include "recruiting or admission activities," while providing the caveat that the compensation cannot be offered in an otherwise legally impermissible manner. As mentioned in regard to the eleventh safe harbor, section 487(a)(20) of the HEA expressly proscribes payments to "any persons or entities" based directly or indirectly on success in securing enrollments, so any further discussion of third party activities as they relate to recruitment activities is also unnecessary.

The Department believes that removal of these regulatory safe harbors is necessary to ensure that section 487(a)(20) of the HEA is properly applied. The Department has determined that these safe harbors do substantially more harm than good, and believes that institutions should not look to safe harbors to determine whether a payment complies with section 487(a)(20) of the HEA. Rather, the Department believes that institutions can readily determine if a payment or compensation is permissible under section 487(a)(20) of the HEA by analyzing—

(1) Whether it is a commission, bonus, or other incentive payment, defined as an award of a sum of money or something of value paid to or given to a person or entity for services rendered; and

(2) Whether the commission, bonus, or other incentive payment is provided to any person based directly or indirectly upon success in securing enrollments or the award of financial aid, which are defined as activities engaged in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid.

If the answer to each of these questions is yes, the commission, bonus, or incentive payment would not be permitted under the statute. Therefore, the Department proposes to simplify its regulations to better align them with section 487(a)(20) of the HEA.

Most non-Federal negotiators favored the Department's proposal to remove the current safe harbors because they believe that the regulatory safe harbors have led to inappropriate incentive compensation practices by institutions that are prohibited by the HEA. The majority of the non-Federal negotiators indicated strong support for the removal of these safe harbors, believing that doing so would more accurately reflect congressional intent and protect students from abusive recruitment practices that have directly resulted when institutions have sought to circumvent, if not directly flaunt, section 487(a)(20) of the HEA.

The non-Federal negotiator who opposed the Department's proposed removal of the safe harbors and their replacement with certain definitions argued that the safe harbors are needed to explain the scope of the prohibition in section 487(a)(20) of the HEA, which was perceived as being unclear. Without the safe harbors, it was argued, institutions would not have a clear sense of what practices are permitted

and, therefore, would be more likely to unintentionally violate the prohibition in section 487(a)(20) of the HEA and § 668.14(b)(22). However, any merit to this argument is belied by the ease of the application of the two-part test the Department has offered that will demonstrate whether a compensation plan or payment complies with the statute and its implementing regulations.

A sub-caucus of non-Federal negotiators worked between the second session of negotiated rulemaking and the third session of negotiated rulemaking to develop draft regulatory language that would retain, but narrow the scope of, the safe harbors in the current regulations. There was much discussion regarding the sub-caucus' proposed draft language, as well as one final counter-proposal brought to the negotiating table.

A number of specific concerns were raised during these discussions. First and foremost, negotiators wanted to understand what the likely impact would be if the safe harbors were removed from the regulations. They questioned whether all previously permitted actions would now be prohibited. The Department explained its position: That, going forward, under the proposed regulations, institutions would need to re-examine their practices to ensure that they comply with proposed § 668.14(b)(22). To the extent that a safe harbor created an exception to the statutory prohibition found in section 487(a)(20) of the HEA, its removal would establish that such an exception no longer exists, and that the action that had been permitted is now prohibited.

Several negotiators were concerned that under the Department's proposal, institutions would be prohibited from paying merit-based increases to their financial aid or admissions personnel. In particular, some negotiators supported the inclusion of language that would permit an institution to make merit-based adjustments based on an employee's performance in relation to an institution's goals, such as those for enrollment, completion, or graduation.

The Department's proposed regulations continue to authorize merit-based compensation for financial aid or admissions staff. An institution could use a variety of standard evaluative factors as the basis for such an increase; however, consistent with section 487(a)(20) of the HEA, under proposed § 668.14(b)(22), it would not be permitted to consider the employee's success in securing student enrollments or the award of financial aid or institutional goals based on that success among those factors. Further, an increase that is based either directly or indirectly on individual student numbers would be prohibited. The Department believes that the language in proposed § 668.14(b)(22)(ii) makes this clear.

One negotiator felt strongly that it was critical to use the word "solely," or some other modifier, to limit the prohibition in proposed § 668.14(b)(22)(i) (*i.e.,* "It will not provide any commission, bonus, or other incentive payment based solely upon success * * *" rather than "It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success"). This negotiator said that the use of the word solely, or some other modifier, would be consistent with the use of that term solely in the first safe harbor reflected in current § 668.14(b)(22)(ii)(A) (*i.e.,* " * * * is not based *solely* on the number of students recruited, admitted, enrolled, or awarded financial aid"). As discussed earlier in this preamble, given the Department's experience with how the first safe harbor in current § 668.14(b)(22) has been abused, the Department does not believe that such a construction is warranted. It is the Department's view that, consistent with section 487(a)(20) of the HEA, incentive payments should not be based in any part, directly or indirectly, on success in securing enrollments or the awards of financial aid.

In addition, some negotiators advocated for an institution's ability to pay bonuses on the basis of students who complete their programs of instruction, as currently provided for in the fifth safe harbor. They believed that this category of students (*i.e.,* students who complete their programs), is different from the category of students who enroll, for which compensation may not be based. The Department does not agree. As previously stated, the Department believes that the regulations must clearly reinforce the statutory provision and exclude the possibility of basing any portion of a bonus on success in securing student enrollments or financial aid awards.

Several negotiators requested that the Department define the term "bonus" as a way to help institutions understand what types of compensation are appropriate. Accordingly, in proposed § 668.14(b)(22)(iii)(A), the Department proposes to define the term *commission, bonus, or other incentive payment* as a sum of money or something of value paid to or given to a person or an entity for services rendered. Linked to the language in proposed § 668.14(b)(22)(i)(A), this definition is unambiguous in prohibiting payment of any money or item of value on the basis of direct or indirect success in securing enrollments or the award of financial aid.

Several non-Federal negotiators asked for clarification about the extent to which supervisors and upper level administrators would be covered by proposed § 668.14(b)(22). The Department's position is that section 487(a)(20) of the HEA is clear that the incentive compensation prohibition applies all the way to the top of an institution or organization. Therefore, individuals who are engaged in any student recruitment or admissions activity or in making decisions about the award of student financial aid are covered by this prohibition.

One negotiator asked the Department to clarify how the prohibition reflected in proposed § 668.14(b)(22) would work in the case of an institution that partners with other institutions or organizations to receive shared services, an approach that some institutions are turning to for economic reasons. As an example, a group of institutions might share a centralized campus security team because doing so could be less expensive than having each institution set up its own team. If institutions use this model of shared services for financial aid purposes and the payment for the shared services is volume-driven (*e.g.,* an institution is billed based on the number of student files that are processed), the negotiator asked if institutions would comply with proposed § 668.14(b)(22). The Department does not believe that the proposed language would automatically preclude an institution's use of this type of arrangement, provided that payment is not based on success in securing enrollments or the awards of financial aid. In the normal course, the contractor would be paid for services rendered without violating the proposed regulations.

Several negotiators were concerned about the impact of the proposed language on an institution's Internet-based activities. Negotiators asserted that the HEA permits advertising and marketing activities by a third party, as long as payment to the third party is based on those who "click" and is not based on the number of individuals who enroll. The Department agrees and does not believe that the proposed regulatory language would prohibit such click-through payments.

The issue of token gifts prompted some discussion. Several negotiators asked the Department to clarify whether an institution that offers some type of payment to current students in exchange for their contact list would

violate proposed § 668.14(b)(22). The Department believes that this type of activity is permitted as long as the student is not paid or given an item of value on the basis of the number of students who apply or enroll. Most negotiators agreed with this position.

Finally, several non-Federal negotiators asked whether the Department would offer private letter guidance on conduct that may violate proposed § 668.14(b)(22). Accordingly, the Department believes the proposed language is clear and reflective of section 487(a)(20) of the HEA. The Department believes it will appropriately guide institutions as they evaluate compensation issues. To the extent that ongoing questions arise on a particular aspect of the regulations, the Department will respond appropriately. This response may include a clarification in a Department publication, such as the Federal Student Aid Handbook or a Dear Colleague Letter. The Department believes that rather than focusing clarifying guidance on the situation at a particular institution, any illuminating statements must be broadly applicable and distributed widely to all participating institutions. As a result, the Department does not intend to provide private guidance regarding particular compensation structures in the future and will enforce the law as written.

Negotiators did not reach agreement on this issue.

Satisfactory Academic Progress (§§ 668.16(e), 668.32(f), 668.34)

Statute: Section 484(a)(2) of the HEA requires that a student make satisfactory progress in the student's course of study in order to be eligible to receive title IV, HEA program funds. Section 484(c) of the HEA provides that a student is making satisfactory progress if the institution reviews the progress of the student at the end of each academic year, or its equivalent, and the student has a cumulative C average, or its equivalent, or academic standing consistent with the requirements for graduation, as determined by the institution, at the end of the student's second academic year. Section 484(c)(2) of the HEA provides that a student who has failed to maintain satisfactory progress and, subsequent to that failure, has academic standing consistent with the requirements for graduation, as determined by the institution, may again be determined eligible for assistance under title IV, HEA programs. Section 484(c)(3) of the HEA allows an institution to waive the satisfactory progress provisions for undue hardship based on the death of a relative of the student, the personal injury or illness of the student, or special circumstances as determined by the institution.

Current Regulations: Three sections in current regulations contain satisfactory academic progress requirements. Current § 668.16(e) specifies that for an institution to be considered administratively capable, it must, for the purpose of determining student eligibility, establish, publish and apply reasonable standards for measuring whether a student is maintaining satisfactory progress in his or her educational program.

Under current § 668.16(e), a satisfactory academic progress policy is considered reasonable if the standards are the same as or stricter than the institution's standards for students enrolled in the same educational program who are not receiving title IV, HEA program funds and contain both qualitative (grade-based) and quantitative (time-related) standards. Under current § 668.16(e)(3), the institution must apply the standards consistently to all students within each category of students, *e.g.,* full-time, part-time, undergraduate, and graduate students, and each educational program.

The policy must provide that the institution checks both qualitative and quantitative components of the standards at the end of each increment, which may not be longer than one half of the educational program or one academic year, whichever is less.

Current § 668.16(e)(5) and (e)(6) require that a satisfactory academic policy provide specific procedures under which a student may appeal a determination that the student is not making satisfactory academic progress and specific procedures for a student to re-establish that the student is making satisfactory academic progress.

Current § 668.32 contains general student eligibility requirements. Current paragraph (f) of this section specifies that to be eligible to receive title IV, HEA program assistance, a student must maintain satisfactory progress in his or her course of study under the institution's published satisfactory progress standards. These standards must comply with the provisions of § 668.16(e) and, if applicable, § 668.34.

Current § 668.34 specifies that a student who is enrolled in a program of study that is longer than two academic years must, at the end of the second year, have a grade point average (GPA) of at least a "C" or its equivalent, or have academic standing that is consistent with the institution's graduation requirements. Under current § 668.34(c), an institution may find that a student is making satisfactory academic progress, even if the student does not meet these requirements, if the student's failure to meet these requirements is based upon the death of a relative of the student, an injury or illness of the student, or other special circumstances. Current § 668.34(e) requires an institution to review a student's academic progress at the end of each year, at a minimum.

Proposed regulations: The proposed regulations would restructure the satisfactory academic progress requirements. Proposed § 668.16(e) (Standards of administrative capability) would be revised to include only the requirement that an institution establish, publish, and apply satisfactory academic progress standards that meet the requirements of § 668.34. The remainder of current § 668.16(e) would be moved to proposed § 668.34 such that it, alone, describes all of the required elements of a satisfactory academic progress policy as well as how an institution would implement such a policy. The references in paragraph § 668.32(e) would be updated to conform the section with the changes proposed to §§ 668.16(e) and 668.32.

Proposed § 668.34(a) would specify the elements an institution's satisfactory academic policy must contain to be considered a reasonable policy. Under the proposed regulations, institutions would continue to have flexibility in establishing their own policies; institutions that choose to measure satisfactory academic progress more frequently than at the minimum required intervals would have additional flexibility (*see* proposed § 668.34(a)(3)).

All of the policy elements in the current regulations under §§ 668.16(e) and 668.34 would be combined in proposed § 668.34. In addition, proposed § 668.34(a)(5) would make explicit the requirement that institutions specify the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, and provide for measurement of a student's pace at each evaluation. Under proposed § 668.34(a)(6), institutional policies would need to describe how a student's GPA and pace of completion are affected by transfers of credit from other institutions. This provision would also require institutions to count credit hours from another institution that are accepted toward a student's educational program as both attempted and completed hours.

Proposed § 668.34(a)(7) would provide that, except as permitted in § 668.34(c) and (d), the policy requires that, at the time of each evaluation, if

the student is not making satisfactory academic progress, the student is no longer eligible to receive title IV, HEA assistance.

Proposed § 668.34(a)(8) would require institutions that use "financial aid warning" and "financial aid probation" statuses (concepts that would be defined in proposed § 668.34(b)) in connection with satisfactory academic progress evaluations to describe these statuses and how they are used in their satisfactory academic progress policies. Proposed § 668.34(a)(8)(i) would specify that a student on financial aid warning may continue to receive assistance under the title IV, HEA programs for one payment period despite a determination that the student is not making satisfactory academic progress. Financial aid warning status may be assigned without an appeal or other action by the student. Proposed § 668.34(a)(8)(ii) would make clear that an institution with a satisfactory academic progress policy that includes the use of the financial aid probation status could require that a student on financial aid probation fulfill specific terms and conditions, such as taking a reduced course load or enrolling in specific courses.

Proposed § 668.34(a)(9) would require an institution that permits a student to appeal a determination that the student is not making satisfactory academic progress to describe the appeal process in its policy. The policy would need to contain specified elements. Proposed § 668.34(a)(9)(i) would require an institution to describe how a student may re-establish his or her eligibility to receive assistance under the title IV, HEA programs. Under proposed § 668.34(a)(9)(ii), a student would be permitted to file an appeal based on the death of a relative, an injury or illness of the student, or other special circumstances. Under proposed § 668.34(a)(9)(iii), a student would be required to submit, as part of the appeal, information regarding why the student failed to make satisfactory academic progress, and what has changed in the student's situation that would allow the student to demonstrate satisfactory academic progress at the next evaluation.

Proposed § 668.34(a)(10) would require the satisfactory academic progress policy of an institution that does not permit students to appeal a determination that they are not making satisfactory academic progress to describe how a student may regain eligibility for assistance under the title IV, HEA programs.

Proposed § 668.34(a)(11) would require that an institution's policy provide for notification to students of the results of an evaluation that impacts the student's eligibility for title IV, HEA program funds.

In proposed § 668.34(b), we would define several important terms that are used in this section:

We would define the term *appeal* as a process by which a student who is not meeting the institution's standards petitions the institution for reconsideration of the student's eligibility for title IV, HEA program funds.

The term *financial aid probation* would be defined as a status assigned by an institution to a student who fails to make satisfactory academic progress and who has appealed and has had eligibility for aid reinstated.

The term *financial aid warning* would be defined as a status assigned to a student who fails to make satisfactory academic progress at an institution that evaluates academic progress at the end of each payment period.

We would add a definition of the term *maximum timeframe,* which would be based entirely on the description of maximum timeframe in current § 668.16(e)(2)(ii).

Proposed § 668.34(c) and (d) would specify that an institution's policy may provide for disbursement of title IV, HEA program funds to a student who has not met an institution's satisfactory academic standards in certain circumstances.

Proposed § 668.34(c) would permit an institution that measures satisfactory academic progress at the end of each payment period to have a policy that would permit a student who is not making satisfactory academic progress to be placed automatically on financial aid warning, a newly defined term.

Finally, under proposed § 668.34(d), at an institution that measures satisfactory academic progress annually, or less frequently than at the end of each payment period, a student who has been determined not to be making satisfactory academic progress would be able to receive title IV, HEA program funds only after filing an appeal and meeting one of two conditions: (1) The institution has determined that the student should be able to meet satisfactory progress standards after the subsequent payment period, or (2) the institution develops an academic plan with the student that, if followed, will ensure that the student is able to meet the institution's satisfactory academic progress standards by a specific point in time.

Reasons: Recent questions from institutions and reviews of institutional satisfactory academic progress policies have raised concerns about the effectiveness of institutions' satisfactory academic policies, even those that comply with the Department's current regulatory criteria. For example, it has become evident that the use of automatic probationary periods has resulted in some students receiving title IV, HEA aid for as long as 24 months even though they are not meeting the institution's satisfactory academic progress standards. Moreover, it is also clear that institutions use a variety of terms—warning, probation, amnesty—to describe situations in which a student is not making satisfactory academic progress, but nevertheless has been determined eligible to receive assistance under the title IV, HEA programs. Repeated uses of these statuses, or use of a combination of these statuses, applied sequentially, may lead to prolonged periods during which students who are not making satisfactory academic progress nevertheless continue to receive title IV, HEA program funds.

The proposed changes to §§ 668.16(e), 668.32, and 668.34 are designed to implement a more structured, comprehensive, and consistent approach to the development and implementation of institutional satisfactory progress policies.

During the discussions at the negotiated rulemaking sessions, the Department explained the problems it has identified and solicited information on current institutional policies and recommendations from the non-Federal negotiators on ways to amend the current regulations that would curtail abuses while retaining flexibility for institutions. The Department used this information in developing the proposed regulations.

In the following paragraphs, we describe the Department's rationale for the specific substantive changes proposed to the satisfactory academic progress regulations.

First we propose to expand the elements required for an institution's satisfactory academic progress policy to include a description and specific treatment of transfer credits, a description of financial aid warning and probationary statuses (if applicable), a requirement to notify students of the results of a satisfactory progress review that impacts their eligibility for title IV, HEA program assistance, specific information required for appeals (if the institution permits appeals), and if an institution does not permit appeals, how students may re-establish eligibility for title IV, HEA program funds. Having a clear understanding of an institution's satisfactory progress policy will help

students understand the institution's academic expectations and will increase the likelihood of their academic success.

We also propose to make changes to the regulatory language concerning the frequency with which an institution measures the satisfactory academic progress of its students. During negotiated rulemaking, several of the non-Federal negotiators stressed the importance of early intervention in helping students meet their educational goals. The Department agrees with this approach; however, because section 484(c) of the HEA requires institutions to evaluate a student's progress at the end of each academic year or the equivalent, the Department is limited in its ability to have institutions evaluate students' progress more frequently (for example, at the end of each payment period). To encourage institutions to evaluate a student's academic progress more frequently, the Department proposes regulatory language that would offer additional flexibility to institutions that measure satisfactory academic progress at the end of each payment period. Proposed § 668.34(c) would permit institutions that review student progress at the end of each payment period to place students on financial aid warning for one payment period, which would encourage institutions to provide additional support to students in a timely manner and would help students be successful.

We would define the term *financial aid warning* (as well as the term *financial aid probation*) in proposed § 668.34(b) to promote consistent application of these types of designations among institutions that use these designations in connection with their satisfactory academic progress reviews. The term *financial aid warning* would be defined as a status conferred automatically and without action by a student, while the term *financial aid probation* would be defined as a status conferred after a student has submitted an appeal that has been granted. The financial aid warning designation would be available only at an institution that measures satisfactory academic progress at the end of each payment period. Defining each status would help all institutions to clearly distinguish when a student may continue to receive title IV, HEA funds and under what conditions. By defining these terms to describe the eligibility of the student to receive future disbursements, we can help ensure that students are treated consistently and equitably regardless of the institution they attend.

We also would add some regulatory language to ensure that institutional satisfactory academic progress policies specify the circumstances under which a student may appeal a determination that the student is not making satisfactory academic progress and is not eligible to receive title IV, HEA funds for the subsequent term. The proposed regulations would not require institutions to permit students to appeal, but they would specify that students may appeal only under certain circumstances. Several non-Federal negotiators asserted that their institutions had established the practice of granting appeals only to students who could explain how the circumstances that had caused their academic problems had changed. These negotiators explained that in their experience, if the root problem was not addressed successfully, the student was just setting himself or herself up for failure the next term. These non-Federal negotiators made a compelling argument for this approach; therefore, we have incorporated it in proposed § 668.34(c)(8)(ii) (*i.e.,* the student must submit information regarding why the student failed to make satisfactory academic progress and what has changed in the student's situation that will allow the student to demonstrate satisfactory academic progress in the next evaluation).

There was also discussion during the negotiated rulemaking sessions regarding what aspect of failure to meet satisfactory academic progress standards a student could appeal. The non-Federal negotiators generally agreed that failure to meet both the qualitative and quantitative standards may be appealed under current regulations, and that this should be true under the proposed regulations as well. The Department agrees. There was also discussion about whether failure to meet the maximum timeframe has been subject to appeal in the past, and whether it would be permitted under the proposed regulations. Under the current regulations, a student can appeal his or her failure to complete his program in the maximum timeframe. The Department believes a student should continue to be able to appeal a determination that the student has failed or will fail to meet the maximum timeframe requirements. We note that the proposed regulations provide flexibility to institutions to help address the needs of a student who is likely to exceed the maximum timeframe. An institution could work with the student to develop an academic plan that would require the student to meet the institution's graduation requirements by a specific point in time.

Some non-Federal negotiators asked whether the proposed regulations would permit institutions to have satisfactory academic policies that provide for academic amnesty. One of the examples given was of an individual who had an unsuccessful academic career 10 years ago and now wants to reenroll. The Department's position is that in such a situation, it would be appropriate for the institution to require the individual to submit an appeal that explains the change in circumstances from when the student failed to make satisfactory academic progress 10 years ago. Under proposed § 668.34(d), an institution's satisfactory academic progress policy could provide for such students to submit an appeal and develop an academic plan with the institution that would specify milestones the student would be expected to meet. As in other situations where a student has had academic difficulty and been placed on financial aid probation, the institution would have the option of placing certain restrictions on the student, such as limiting the number of hours taken or specifying a certain sequence of courses.

We propose to require institutions that do not permit students to appeal a determination that they are not making satisfactory academic progress to inform students how they may re-establish eligibility. This regulatory provision would be consistent with the language in section 484(c)(2) of the HEA, which provides that a student who has failed to maintain satisfactory progress and, subsequent to that failure, has academic standing consistent with the requirements for graduation, as determined by the institution, may again be determined eligible for assistance under title IV, HEA programs.

Throughout the discussions during the negotiated rulemaking sessions, non-Federal negotiators raised questions about whether the statutory requirement that an institute review a student's academic progress at the end of each academic year or its equivalent is tied to the student's academic year, the award year, the calendar year, or the institution's defined academic year. It became apparent that most institutions that review student progress annually, review all students at a specific point in time, such as at the end of the spring term or spring payment period. The Department agrees that this is an appropriate and reasonable institutional policy for an institution that reviews academic progress annually.

Finally, there was some discussion during the negotiated rulemaking sessions about whether a student's work completed during a summer term is subject to evaluation. The Department's position is that any evaluations of satisfactory academic progress,

regardless of the frequency with which they are conducted, must include all work completed by the student since the last review. The Department welcomes comments as to the clarity of the proposed language in this regard.

Evaluating the Validity of High School Diplomas (§ 668.16(p))

Standards of Administrative Capability (§ 668.16(p))

Statute: None.

Current Regulations: The current regulations do not define the term "high school diploma" or otherwise include provisions regarding the evaluation of the validity of a student's high school diploma. While the term *recognized equivalent of a high school diploma* is defined in 34 CFR 600.2 (Definitions), the term "high school diploma" is not defined anywhere in the HEA or its implementing regulations. The current regulations do, however, refer to high school diplomas in the context of determining institutional eligibility as well as student eligibility for the title IV, HEA programs.

First, 34 CFR 600.4(a)(2) (Institutions of higher education) requires an institution of higher education participating in the Federal student aid programs to admit as regular students only individuals who have obtained a high school diploma or its recognized equivalent, or who are beyond the age of compulsory school attendance in the State in which the institution is located.

In order to be eligible to receive title IV, HEA aid, current § 668.32(e) (Student eligibility) requires a student to have a high school diploma or its recognized equivalent, have completed secondary school in a home school setting, or pass an independently administered examination approved by the Secretary.

Proposed Regulations: Under proposed § 668.16(p), an institution would be required to develop and follow procedures to evaluate the validity of a student's high school completion if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

Reasons: We propose adding paragraph (p) to § 668.16 to provide that it is the institution's responsibility to evaluate the validity of the diploma if either the institution or the Secretary believes that a closer examination of the diploma is warranted. This proposed change is designed to ensure that students who report having high school diplomas and obtain title IV, HEA aid in fact have valid high school diplomas. The language reflected in this proposed provision is also intended to address the Government Accountability Office recommendation raised in its August 17, 2009 report that the Secretary should provide institutions of higher education with information and guidance on determining the validity of high school diplomas for use in gaining access to Federal student aid.

During the negotiated rulemaking sessions, we initially proposed draft regulatory language that would have required institutions to evaluate the credentials of secondary schools for purposes of determining whether high school diplomas issued from the schools were valid. As part of this evaluation, institutions would have been required to maintain three listings of secondary schools (schools that are acceptable, schools that are unacceptable, and schools that require further evaluation) based on regulatory criteria for determining the acceptability of their credential for title IV, HEA program purposes.

Many non-Federal negotiators expressed concern over this proposed draft regulatory language. Several non-Federal negotiators stated that K–12 issues, including defining high school diploma, should be handled at the State level. Some non-Federal negotiators also objected to requiring institutions to research the legitimacy of the high school diploma a student presents and to maintain lists of secondary schools based on this research. They argued that these activities would be unduly burdensome. Instead, many non-Federal negotiators argued that the Department should assume responsibility for maintaining a centralized list of secondary schools that institutions could use to determine whether a student's high school diploma was valid.

Based on concerns raised by the non-Federal negotiators, the Department agreed to establish and maintain a list of secondary schools. We believe that such a solution moves us appropriately toward our goal of uncovering questionable high school diplomas, while imposing a minimal burden on institutions.

In furtherance of this approach, the Department has begun the process of adding two questions to the FAFSA for the 2011–2012 award year:

(1) What is the name of the secondary school or entity that provided the student's secondary school program of study?

(2) What is the State that awarded the student's high school diploma?

The Department intends to use the information it collects from students in response to these questions to help identify whether each student has a valid high school diploma. If, in response to these questions on the FAFSA, a student lists a secondary school or entity that does not match the list of secondary schools maintained by the Department, or if the student does not provide the name of the secondary school or entity or the State that issued the diploma, the Department may select the student's FAFSA for further review by the institution to determine if the student has a valid high school diploma before the student can receive any title IV, HEA aid. Therefore, in cases where the student is selected for review because the Secretary questions the validity of his or her high school diploma, institutions are expected to determine the validity of the high school diploma. Under proposed § 668.16(p), institutions also would be responsible for determining the validity of a high school diploma if the institution has reason to believe that the diploma is invalid or was not obtained from an entity that provides secondary school education. To determine the validity of a student's high school diploma, an institution would need to follow the procedures it develops to evaluate the validity of diplomas. These procedures could include, for example, obtaining a copy of the student's diploma.

We intend to provide more specific guidance to institutions on developing and following procedures for evaluating the validity of high school diplomas through the Federal Student Aid Handbook or through other means. This guidance will address such issues as what procedures an institution might use to determine the validity of a high school diploma.

A non-Federal negotiator expressed concern that the proposed regulations do not go far enough to address fraud committed at an institution. This negotiator suggested that the proposed regulations should be further modified to indicate that officials at an institution should be aware and held accountable for fraudulent activities committed at the institution. We did not accept this suggestion because the Department has other avenues to address fraudulent activities. We noted that the Department has successfully litigated cases where institutions are held responsible for regulatory violations of its employees.

We were able to reach tentative agreement on this issue.

Return of Title IV, HEA Program Funds (§§ 668.22(a), 668.22(b), and 668.22(f))

Treatment of Title IV, HEA Program Funds When a Student Withdraws From Term-Based Programs With Modules or Compressed Courses (§ 668.22(a) and (f))

Statute: None.

Current Regulations: In accordance with § 668.22, when a recipient of title IV, HEA aid withdraws from an institution, the institution must determine the amount of title IV, HEA aid that the student earned for the period the student attended. For term-based programs, a student is paid aid for each term. The regulations address the institution's and the student's responsibilities when a student does not finish the term (*i.e.,* withdraws from all courses in the term) and specifies how to calculate how much aid the student earned for attending part of the term prior to withdrawing. The regulations do not, however, specifically address the treatment of term-based programs, in which courses are less than the length of the term, under the return of title IV funds calculation. In Dear Colleague Letter GEN–00–24, published in December 2000, the Department established the policy that a student who completes only one module or compressed course, within a term in which he or she is expected to continue attendance in additional coursework, is not considered to have withdrawn under the return calculation.

Proposed Regulations: The proposed changes to § 668.22(a)(2) would clarify when a student is considered to have withdrawn from a payment period or period of enrollment. In the case of a program that is measured in credit hours, the student would be considered to have withdrawn if he or she does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing. In the case of a program that is measured in clock hours, the student would be considered to have withdrawn if he or she does not complete all of the clock hours in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing.

The proposed change to § 668.22(f)(2)(i) would clarify that, for credit hour programs, in calculating the percentage of the payment period or period of enrollment completed, it is necessary to take into account the total number of calendar days that the student was scheduled to complete prior to withdrawing without regard to any course completed by the student that is less than the length of the term.

These proposed regulations would affect all programs with courses that are less than the length of a term, including, for example, a semester-based program that has a summer nonstandard term with two consecutive six-week sessions within the term.

Reasons: The Department proposes these changes to ensure more equitable treatment between students who withdraw from programs that are measured in credit hours, regardless of whether those programs span the full length of the term, or are programs with modules or compressed courses.

Under the guidance provided in Dear Colleague Letter GEN–00–24, we have equated completing one compressed course or module with completing one course taken over the span of the term. Under this guidance, a student who was scheduled to take several modules or compressed courses in a term but dropped out after completing only one course (for example, a 5-week course in a 15-week term) was not viewed as having withdrawn from the term. Accordingly, while we required an institution to recalculate the student's Federal Pell Grant payment as a result of any reduction in enrollment status under § 690.80(b)(2)(ii) when the student did not begin attendance in subsequent classes in the term, we did not require the school to perform a return calculation under § 668.22.

Based on this guidance, a student who completed only a one- or two-week course in a 15-week term and then ceased attendance for the term would NOT be considered to have withdrawn from the term under the return of title IV requirements. The institution or student or both would keep aid intended for a 15-week period of time when the student only attended the term for as little as one week.

For a number of reasons, we have reconsidered our prior guidance. First, this change would provide a more equitable treatment of students who are attending for comparable periods of time during a semester because a student's aid is based on, and intended to cover, in whole or in part, not only tuition and fees for the term, but the student's living expenses for the term. Title IV, HEA aid is provided for the entire term, and section 484B of the HEA provides that these same amounts are earned on a prorata basis for the first 60 percent of the term. Second, a student who only attends one module or compressed course and then ceases to be enrolled without attending other modules or compressed courses he or she is scheduled to attend in the term is withdrawing before completing the term, and the portion of the term completed should be considered to determine how much of the title IV, HEA aid the student earned. Third, the prior guidance has resulted in abusive cases where institutions have created term-based programs with a very short initial module or course of as little as one week in length so that institutions can keep all of the title IV, HEA aid for students who withdraw after that point.

During the negotiations, the non-Federal negotiators raised concerns about the proposed approach, believing that it would unfairly penalize students. The negotiators also raised concerns about the possibility of additional burden from a significant increase in the number of return to title IV funds calculations that an institution might have to perform, as well as about the inability of many institutions to track the number of students who are taking these types of compressed courses.

The non-Federal negotiators presented three options to address their concerns by limiting the applicability of the proposed treatment based upon the relative amounts of the modules that students completed before withdrawing. The first option was to exclude students who completed the same enrollment status for which they were originally paid title IV, HEA aid. The second option suggested by the non-Federal negotiators was to exclude students who completed 50 percent of the credits that were awarded and 50 percent of the projected enrollment time. The third option was to only apply the proposed regulations to compressed coursework that was shorter than a "to-be-determined" percent of the payment period; the non-Federal negotiators did not reach agreement as to what the appropriate percentage should be.

We appreciate the concerns of the non-Federal negotiators, but we do not agree with the proposed alternatives. By recognizing that students who are taking module classes are expected to earn their title IV, HEA aid over time on a prorata basis, those students are subject to those requirements up to the point where they complete more than 60 percent of the period. We continue to believe that the proposed changes are necessary to ensure the equitable application of these provisions for all students, regardless of the academic calendar of the programs that students are attending.

Withdrawal Date for a Student Who Withdraws From an Institution That Is Required To Take Attendance (§ 668.22(b))

Statute: Section 484B(c)(1) of the HEA requires institutions and students to return unearned portions of title IV,

HEA grant or loan assistance (other than funds received under the Federal Work-Study Program) when a student withdraws during a payment period or period of enrollment. The statute defines the term the "day the student withdrew" differently for institutions that are required to take attendance and for those not required to take attendance. For an institution that is required to take attendance, the "day the student withdrew" is determined by the institution from its attendance records. For an institution that is not required to take attendance, the "day the student withdrew" is the date that the institution determines that (1) the student began the withdrawal process prescribed by the institution; (2) the student otherwise provided official notification to the institution of the intent to withdraw; or (3) in the case of a student who does not begin the withdrawal process or otherwise notify the institution of the intent to withdraw, the date that is the midpoint of the payment period for which title IV, HEA program funds were disbursed or a later date documented by the institution.

Current regulations: Section 668.22(b)(3) provides the requirements for determining whether an institution is required to take attendance for an educational program. Under § 668.22(b)(3), an institution is required to take attendance if an outside entity (such as the institution's accrediting agency or a State agency) requires that the institution take attendance, as determined by the entity. In this case, the student's withdrawal date is the last date of academic attendance, as determined by the institution from its attendance records.

Proposed regulations: The proposed revisions to § 668.22(b)(3) would clarify the programs for which institutions are required to take attendance. An institution would be required to take attendance if an outside entity or the institution itself has a requirement that its instructors take attendance, or if the institution or an outside entity has a requirement that can only be met by taking attendance or a comparable process, including, but not limited to, requiring that students in a program demonstrate attendance in the classes of that program, or a portion of that program. In addition, the proposed regulations would remove the provisions in § 668.22(b)(3)(i) and (ii) that it is the entity that determines whether there is a requirement to take attendance since the new provision looks at the substance of the information being collected rather than the characterization of that information or process by the entity.

Proposed § 668.22(b)(3)(ii) would clarify that if an institution is required to take attendance by an outside entity or requires its instructors to take attendance for only some of its student, then it must use its attendance records to determine a withdrawal date for those students.

Proposed § 668.22(b)(3)(iii) would incorporate in the regulations current nonregulatory guidance regarding an institution that is required to take attendance, or requires that attendance be taken, for a limited period of time, such as for the first two weeks of courses or until a "census date." These proposed provisions would specify that an institution must use its attendance records to determine a withdrawal date for a student who withdraws during that limited period. A student in attendance at the end of that limited period who subsequently stops attending during the payment period would be treated as a student for whom the institution was not required to take attendance.

Proposed § 668.22(b)(3)(iv) would also incorporate in the regulations current nonregulatory guidance that if an institution is required to take attendance, or requires that attendance be taken, on a specified date to meet a census reporting requirement, the institution is not considered to take attendance.

Reasons: These proposed changes would provide a more accurate determination of how much title IV, HEA aid a student earned who withdrew from an institution during a period when an instructor or other institution employee or procedure was required to monitor student attendance. The non-Federal negotiators had a number of concerns with respect to our proposals regarding whether an institution is required to take attendance and regarding the proposed requirement that these institutions must use their records in determining a student's withdrawal date in a return to title IV calculation. The non-Federal negotiators pointed out that having to determine a more exact date of withdrawal, as opposed to assuming a 50 percent point, would be more burdensome. They also noted that attendance does not necessarily accurately reflect academic activity, and also stated that they cannot ensure that faculty members will keep accurate and up-to-date attendance records. While we can appreciate these concerns, we continue to believe that the best date available should be used to determine the amount of time that a student was in attendance. Using the best date available would support the fair treatment of students and avoid the potential for fraud and abuse of Federal funds.

Proposed § 668.22(b)(3)(iii) would address instances where institutions take attendance for the period of time between the beginning of classes and the deadline for adding or dropping classes. Where a student withdraws and an institution's records show that the student stopped attending during that period, that is the best information available for determining how much aid the student earned. This proposed regulation reflects current guidance about whether such institutions were viewed as being required to take attendance for this limited period, and this change in the text will help clarify that requirement. The non-Federal negotiators expressed concern that students who appear to have stopped attending during a census period may have subsequently attended other classes before withdrawing. Institutions have the option under § 668.22(c)(3) to use a student's participation in an academically related activity to show that the student continued to be enrolled to a point where the institution was no longer required to take attendance.

Proposed § 668.22(b)(3)(iv) also would incorporate in the regulations our current nonregulatory guidance that an institution is not required to use attendance records for return of title IV, HEA aid purposes if it is only required to take attendance on a specific date. We would welcome comments on whether this proposed regulation should be further clarified to specify that it applies only for one calendar date, or, for one class that meets during a small range of dates, for example, for one day for any class that met during a particular week, rather than "a specific date."

Verification and Updating of Student Aid Application Information (Subpart E of Part 668)

Application Information

Current subpart E of part 668 governs the verification and updating of the FAFSA information used to calculate an applicant's Expected Family Contribution (EFC) for purposes of determining an applicant's need for student financial assistance under title IV of the HEA. In general, financial need is defined as the difference between the applicant's cost of attendance (COA) and EFC (*see* section 471 of the HEA). Based on the need analysis formula established in part F of the HEA, the EFC is the amount that an applicant and the applicant's family can reasonably be expected to contribute toward the

applicant's cost of attendance at an institution of higher education.

These proposed regulations would implement statutory changes made to part F of the HEA by the HEOA and further align these regulations with enhancements that have been made to the Federal Student Aid (FSA) application processing system. In the following paragraphs we describe the substantive changes we propose to make to subpart E of part 668 and the reasons for the changes. These proposed changes include—

- Revising the subpart E heading to reflect that an applicant and an institution have updating responsibilities in addition to completing specific verification responsibilities;
- Removing, redefining, and adding definitions;
- Codifying current policy that an institution must complete verification before exercising any authority under professional judgment;
- Removing the 30 percent cap on the number of applicants selected by the Secretary that an institution must verify in order to move towards a more targeted verification system;
- Restructuring the exclusions from verification section;
- Requiring any changes to a student's dependency status be updated throughout the award year, including changes resulting from a change in the student's marital status;
- Updating the section heading under § 668.56 and replacing the five items that an institution currently is required to verify for all applicants selected for verification with a targeted verification process that is specific to each applicant selected as described in a **Federal Register** notice published annually by the Secretary;
- Codifying the Department's Internal Revenue Service (IRS) Data Retrieval Process, which allows an applicant to import income and other data from the IRS into an online FAFSA;
- Updating the IRS deadline granted for extension filers;
- Clarifying when an institution is required to reverify the adjusted gross income (AGI) and taxes paid by an applicant and his or her spouse or parents for individuals with an IRS tax filing extension;
- Expanding the information a tax preparer must provide on the copy of the filer's return that has been signed by the preparer;
- Describing in an annual **Federal Register** notice other documentation that an applicant must provide for the information that is selected for verification;
- Allowing interim disbursements when changes to an applicant's FAFSA information would not change the amount the applicant would receive under title IV, HEA;
- Requiring all corrections to be submitted to the Secretary for reprocessing;
- Removing all allowable tolerances;
- Applying the cash management procedures for proceeds received from a Subsidized Stafford Loan or Direct Subsidized Loan on behalf of an applicant; and
- Describing the liability to an institution that disburses title IV, HEA aid to an applicant without receiving a corrected Student Aid Report (SAR) or Institutional Student Information Record (ISIR) within an established deadline.

Tentative agreement was reached on these proposed regulations during the negotiated rulemaking.

General (§ 668.51)

Statute: Section 487(a)(5) of the HEA provides that an institution may participate in a title IV, HEA program if the institution enters into a written program participation agreement with the Secretary. A program participation agreement conditions the initial and continued participation of an eligible institution in any title IV, HEA program upon compliance with the provisions of part 668, the individual program regulations, and any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet.

Current Regulations: Current § 668.51(a) describes the scope and purpose of subpart E of part 668. Current § 668.51(b) requires that if the Secretary or an institution requests documents or information from an applicant under this subpart, the applicant must provide the specified documents or information. Under current § 668.51(c), institutions participating in the Federal Stafford Loan Program that are not located in a State are exempted from the provisions of subpart E of part 668.

Proposed Regulations: Proposed § 668.51 would remain largely unchanged from current § 668.51. We propose to revise § 668.51(a) to refer to "student financial assistance under the subsidized student financial assistance programs" rather than to "student financial assistance in connection with the calculation of their expected family contributions (EFC) for the Federal Pell Grant, ACG, National SMART Grant, campus-based, Federal Stafford Loan, Federal Direct Stafford/Ford Loan programs." In addition, in paragraph (c) of proposed § 668.51, we would refer to "participating institutions" rather than "institutions participating in the Federal Stafford Loan Program."

Reasons: Throughout the proposed regulations, including in this proposed § 668.51, we propose to remove all the program names and regulatory citations for the ACG and National SMART Grant programs because the authority to make grants under these programs will expire at the end of the 2010–2011 award year, before these proposed regulations become effective. In making this change, we also determined that it would be appropriate to refer to the title IV, HEA programs affected by this subpart more generally as "subsidized student financial assistance programs" and "unsubsidized student financial assistance programs," as appropriate. We would define these terms in proposed § 668.52.

Definitions (§ 668.52)

Statute: In 2008, the HEOA amended the definition of the term *total income* in section 480(a) of the HEA to provide that, when calculating total income, the Secretary may use income and other data from the second preceding tax year to carry out the FAFSA simplification efforts used for the estimation and determination of financial aid eligibility. This provision also allows the sharing of data between the IRS and the Secretary with the consent of the taxpayer as discussed later under proposed § 668.57.

Current Regulations: Current § 668.52 includes definitions of key terms used in this subpart including *base year, edits, institutional student information record,* and *student aid application.*

Proposed Regulations: Proposed § 668.52 would (1) remove the definitions of *base year, edits,* and *student aid application;* (2) revise the definition for *institutional student information record (ISIR);* and (3) add definitions for the terms *Free Application for Federal Student Aid (FAFSA), specified year, Student Aid Report (SAR), subsidized student financial assistance programs,* and *unsubsidized student financial assistance programs.*

Reasons: We propose to delete the definitions of the terms *base year, edits,* and *student aid application* because these terms would no longer be used in these proposed regulations.

We propose to define the term *Free Application for Federal Student Aid (FAFSA)* and to use this term "FAFSA information"—rather than application—throughout subpart E of part 668 in order to clarify that the information we

seek to verify includes not only the information provided in the initial FAFSA form submitted by an applicant, but also any subsequent transactions sent to the Secretary for processing that originated from the information reported on the initial FAFSA (*i.e.,* corrections).

We propose to revise the definition of the term *institutional student information record (ISIR)* to make it consistent with the definition of ISIR in 34 CFR 690.2(c) of the Federal Pell Grant Program regulations. By establishing this definition in this subpart, we would make the term generally applicable to all title IV, HEA programs that are subject to the requirements in subpart E of part 668.

We propose to define the term *specified year* to assist in the implementation of section 480(a) of the HEA, which gives the Secretary the option of using income and other data from the second preceding tax year to calculate the statutorily defined EFC that determines the applicant's eligibility for, and amount of, Federal aid. While the Department does not plan to exercise this option for the 2011–2012 award year, we believe it is appropriate to modify the regulations at this time to allow for this flexibility in the future.

Under the current process for completing the FAFSA, an applicant, the parents of a dependent applicant, or the spouse of an applicant are required to use base year income and tax information to respond to questions used to calculate the statutorily defined EFC that determines the applicant's eligibility for, and amount of, Federal aid *i.e.,* grants, loans and work-study assistance. Under the new flexibility offered to the Secretary in section 480(a) of the HEA, applicants could use income and other data from the second preceding tax year—rather than only the base year. For example, an applicant completing the FAFSA for the 2013–2014 award year could use income and other related data pertaining to January 1, 2011–December 31, 2011 (the second preceding tax year) in addition to the data the Secretary currently collects from the base year (January 1, 2012–December 31, 2012).

Allowing the use of data from an earlier tax year would help with the significant calendar difference between when an applicant may file a FAFSA and when the data is available from the filed income tax return. This is because the FAFSA application process begins on January 1, and it is unlikely that tax return information would be available for the majority of financial aid applicants who complete their FAFSA in the weeks, and in some cases months, before the general tax-filing deadline of April 15. The proposed definition of *specified year* would allow the Department to use a single term that, depending on the context in which it is used, means (1) the base year (*i.e.,* the calendar year preceding the first calendar year of an award year) or (2) the year before the base year.

We propose to add a definition of the term *Student Aid Report (SAR)* and simplify the repeated references to it in these proposed regulations.

We propose to add definitions for the terms *subsidized student financial assistance programs* and *unsubsidized student financial assistance programs* to group similar title IV, HEA programs together (*i.e.,* subsidized programs versus unsubsidized programs). By doing so, we would simplify the repeated references to the numerous affected programs in these proposed regulations.

Policies and Procedures—Professional Judgment (§ 668.53(c))

Statute: Section 479A of the HEA specifically gives the financial aid administrator the authority to use professional judgment to make adjustments to the cost of attendance or to the values of the items used in calculating the EFC to reflect a student's special circumstances.

Current Regulations: Current § 668.53 requires institutions to establish and use written policies and procedures for verifying information contained in the FAFSA. Current § 668.53(a)(1) through (5) describes the items that must be included in the policies and procedures. Current § 668.53(b) requires that an institution's procedures provide that the institution furnish to each application selected for verification an explanation of the documentation needed to satisfy the verification requirements and the applicant's responsibilities with respect to the verification of applicant information.

Proposed Regulations: Except for minor technical and conforming changes, proposed § 668.53(a) and (b) would remain largely unchanged from current § 668.53(a) and (b). We propose to add paragraph (c) to this section. Under proposed § 668.53(c), an institution's written policies and procedures for verifying information contained in a FAFSA must provide that verification for an application selected for verification is completed prior to the institution exercising professional judgment authority as permitted under section 479A of the HEA to make changes to the applicant's COA or to the value of the data items used to calculate the EFC.

Reasons: Proposed § 668.53(c) would codify as a requirement the Department's longstanding policy that an institution must complete verification before exercising professional judgment under section 479A of the HEA.

Selection of FAFSA Information for Verification (§ 668.54)

Statute: None.

Current Regulations: Current § 668.54(a) provides that an institution is not required to verify the information from more than 30 percent of its applicants for title IV, HEA assistance in any award year. Under current § 668.54(a)(2)(ii), an institution may only include those applicants selected for verification by the Secretary in its calculation of the 30 percent total number of applicants. Under current § 668.54(a)(3), if an institution has reason to believe that any information on an application used to calculate an EFC is inaccurate, it must require the applicant to verify the information that it has reason to believe is inaccurate.

Except for information already verified under a previous application, if an applicant is selected for verification, each additional application he or she submits for the award year must also be verified (*see* current § 668.54(a)(4)).

Current § 668.54(a)(5) provides that an institution or the Secretary may require an applicant to verify any data elements that the institution or the Secretary specifies.

Under current § 668.54(b)(1), the Secretary excludes an applicant who dies during the award year from verification.

In addition, under current § 668.54(b)(2), the Secretary excludes the following categories of applicants from verification if the institution has no reason to believe that the information reported by the applicant is incorrect:

- An applicant or his or her parents who are legal residents of the Commonwealth of the Northern Mariana Islands, Guam, or American Samoa; or a citizen of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau (current § 668.54(b)(2)(i)).
- An applicant who is incarcerated (current § 668.54(b)(2)(ii)).
- A dependent applicant whose parents are residing in a country other than the United States and cannot be contacted by normal means of communication (current § 668.54(b)(2)(iii)).
- An applicant who is a recent immigrant (current § 668.54(b)(2)(iv)).

• An applicant whose parents' address is unknown and cannot be obtained by the applicant (current § 668.54(b)(2)(v)).

• A dependent applicant, both of whose parents are deceased or are physically or mentally incapacitated (current § 668.54(b)(2)(vi)).

• An applicant who does not receive assistance for reasons other than his or her failure to verify the information on the application (current § 668.54(b)(2)(vii)).

• An applicant who previously completed verification at another institution (current § 668.54(b)(2)(viii)).

Finally, under current § 668.54(b)(3), the Secretary excludes the following categories of applicants from verification:

• An applicant whose spouse is deceased (current § 668.54(b)(3)(i)).

• An applicant whose spouse is mentally or physically incapacitated (current § 668.54(b)(3)(ii)).

• An applicant whose spouse is residing in a country other than the United States and cannot be contacted by normal means of communication (current § 668.54(b)(3)(iii)).

• An applicant whose spouse cannot be located because his or her address is unknown and cannot be obtained by the applicant (current § 668.54(b)(3)(iv)).

Proposed Regulations: The Department proposes to require an institution to verify an applicant's FAFSA information for all applicants that are selected for verification by the Secretary (*see* proposed § 668.54(a)). Under proposed § 668.56(a), the Secretary would publish an annual **Federal Register** notice that would describe the information that an institution and an applicant may be required to verify for those applicants selected for verification. In proposed § 668.54(a)(2), we would retain the provisions requiring an institution to verify the accuracy of FAFSA information it has reason to believe is inaccurate. In proposed § 668.54(a)(3), we would continue to provide institutions with the flexibility to verify any FAFSA information that an institution specifies.

Under § 668.54(b), we would restructure the exclusions from verification to make clear the provisions that are applicable to all applicants, and those that are specific to dependent or independent applicants. We also would remove the following categories of applicants from the list of verification exclusions:

• An applicant or his or her parents who are legal residents of the Commonwealth of the Northern Mariana Islands, Guam, or American Samoa; or a citizen of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau.

• An applicant who is incarcerated.

• An applicant who is a recent immigrant.

• A dependent applicant, both of whose parents are deceased or are physically incapacitated.

• An independent applicant's spouse who is physically incapacitated.

Proposed § 668.54(b)(2) and (b)(3) would list the circumstances under which the parents' or spouse's information is not subject to verification unless the institution has reason to believe the parents' or spouse's information reported by the applicant is incorrect.

Reasons: The proposed changes to § 668.54 are needed to align this section of the regulations with modifications that the Department proposes to make to the verification selection process. Specifically, the Department proposes to remove the 30 percent limitation of the total number of applicants selected for verification and target the selection criteria based on the most error prone data items that are specific to each applicant selected.

Based on years of data analysis compiled from random samples of FAFSA submissions and the IRS Statistical Study and Quality Assurance Program analysis, we have made improvements to the verification process that will better identify and select those applicants whose FAFSA information is most error prone. For this reason, we propose to remove the 30 percent limitation on the number of applicants an institution is required to verify.

During negotiated rulemaking, some non-Federal negotiators expressed concern that the removal of the 30 percent limitation on the number of applicants an institution is required to verify would significantly increase an institution's workload. Other non-Federal negotiators stated that many institutions currently verify 100 percent of those applicants the Department selects for verification.

Although some institutions may experience an increase in the number of applicants that are selected for verification under the new process, institutions would no longer be required to verify all five items for each applicant selected. Instead the information that an institution would be required to verify would be specific to each applicant selected (*see* proposed § 668.56(b)). For example, one applicant may be required to verify the five items required under the current regulations (because the Secretary includes them in the **Federal Register** notice published under § 668.56(a) and specifies that those items must be verified for that one applicant) while another applicant may only be required to verify AGI and household size (because the Secretary includes these two items in the **Federal Register** notice published under § 668.56(a) and specifies that these are the only items that must be verified for this applicant).

Moreover, we expect information obtained through the IRS Data Retrieval process to significantly reduce institutional burden as discussed later under proposed § 668.57. For example, if one of the items selected for verification for an applicant includes data that the applicant imported from the IRS, we likely would not require the institution to verify that item.

We are proposing to restructure paragraph (b) to clarify under what circumstances an institution is not required to verify the FAFSA information of: (1) the applicant; (2) the parents of a dependent applicant; or (3) the spouse of an independent applicant. In instances where FAFSA information from the parents or a spouse is not required, we would still expect an institution to verify any information that would be applicable to the applicant.

We are also proposing to modify a number of exclusions that are included in the current regulations. Previously, if the parent of a dependent student, or the spouse of an independent student, could not be located because their address was unknown, verification was not required. Given the shift to routinely contacting people using e-mail and cell phone numbers, lack of a physical mailing address no longer precludes contact and communication. We believe it would be more appropriate to provide an exclusion from verification only in circumstances where the parents or spouse cannot be located because their contact information is unknown. We are also proposing to eliminate the provision that a dependent student need not provide parental information if both parents are deceased or are physically incapacitated. If both parents are deceased, the student would be an independent student, not a dependent student. Parents who are physically incapacitated, but not mentally incapacitated, should be able to provide the documentation required for verification under most circumstances.

Updating Information—Changes in Dependency Status (§ 668.55(c))

Statute: None.

Current Regulations: Current § 668.55 describes the information in an application that applicants must update

when there is a change and when and how these changes must be made.

Under current § 668.55(a)(2), an institution need not require an applicant to verify information in the applicant's FAFSA if the applicant previously submitted a FAFSA for that award year, the applicant updated the FAFSA information, and no change in the information has taken place since the last update.

Current § 668.55(a)(3) requires applicants to update their dependency status on the FAFSA at any time the status changes throughout the award year, except when the change in dependency status results from a change in the student's marital status.

Under current § 668.55(b), updating the family household size and number of family members enrolled in college is required for students selected for verification and is updated as of the time verification is completed.

Current § 668.55(c) describes an institution's responsibilities when an applicant has received Federal financial assistance for an award year, the applicant submits another application for Federal financial assistance, and the applicant is required to update household size or the number of household family members attending postsecondary educational institutions on the subsequent application.

Current § 668.55(d) provides that if an applicant's dependency status changes after the applicant applies to have his or her EFC calculated for an award year, the applicant must file a new application for that award year reflecting the applicant's new dependency status regardless of whether the applicant is selected for verification.

Proposed Regulations: We propose to revise § 668.55 to require an applicant to update all changes in dependency status that occur throughout the award year, including changes resulting from a change in the applicant's marital status, regardless of whether the applicant is selected for verification. With this proposed change, which would be reflected in proposed paragraph (c) of § 668.55, we would make a number of other changes to this section to remove language that implements the marital status exception in the current regulations, including removing current § 668.55(a)(3) and revising § 668.55(b).

We would remove current § 668.55(c).

Reasons: We propose to simplify § 668.55 and to make the updating requirement for dependency status consistent with the other changes we propose to make to § 668.58(a)(3)(i) and § 668.59(a). We believe these changes would help ensure that the amount of assistance received by an applicant is based on the best available information.

During negotiated rulemaking, there was much discussion about identifying in the regulations a specific time by which an institution would need to require an applicant to update his or her family household size, number of family members enrolled in college, and dependency status in the applicant's FAFSA. Non-Federal negotiators wanted the updating requirements to be date specific because of concerns that institutions would be continually revising an applicant's aid package throughout the award year. To address these concerns, we considered a number of alternatives:

- *Allow updating up to the beginning of the award year (i.e., July 1, 2011 for the 2011–2012 award year).* We have not adopted this alternative in the proposed regulations because this date would not take into account those applicants who apply later in the processing year.
- *Require updating by the later of July 1 or the date of verification, after which updating would become optional.* We have not adopted this alternative in the proposed regulations because it would not allow a student who transfers to an institution after this deadline to update his or her application information to reflect his or her current status unless the institution selects the student for verification.
- *Allow updating until the end of the first payment period.* We have not adopted this alternative in the proposed regulations because it would result in inconsistent treatment between students at institutions that have open enrollment with multiple start dates and students at institutions whose enrollment is based on a traditional calendar.

Other time periods considered included allowing updating half way through the award year, throughout the award year, up to the first day of an applicant's enrollment at an institution, through an institution's academic year, or by the end of the calendar year similar to the precedent set by the IRS for changes to income tax data. After considerable discussion, we determined that no single date would be ideal for all situations.

Therefore, we propose no substantive change to the current requirement, reflected in § 668.55(b), that if an applicant is selected for verification, the applicant must update information as to the family household size and the number of family members enrolled in postsecondary institutions at the time of verification.

We propose to eliminate the marital status exception and to require all applicants to update changes to dependency status that occur throughout the award year regardless of whether the applicant was selected for verification to provide more accurate information for determining an applicant's need for assistance. It is important to note that the applicant is responsible for notifying an institution when there is a change that affects his or her dependency status and not the responsibility of the institution to initiate the updating of this data item. However, an institution must resolve discrepancies in the information that the institution receives from different sources with respect to a student's application for financial aid under the title IV, HEA programs in accordance with § 668.16(f).

Finally, we propose to delete current § 668.55(c) to remove an obsolete process that required applicants to complete a correction application if his or her dependency status changes.

Information To Be Verified (§ 668.56)

Statute: None.

Current Regulations: Under current § 668.56 an institution must require an applicant selected for verification to submit acceptable documentation to verify or update the following items, if applicable, used to determine the applicant's EFC:

- Adjusted gross income (AGI);
- U.S. income tax paid;
- Number of family members in the household;
- Number of family members in the household enrolled at least half-time in postsecondary educational institutions; and
- Untaxed income and benefits.

Current § 668.56(b) through (e) provides a number of exclusions from verification of the number of family members in the household, the number of family members enrolled in college and untaxed income and benefits under certain circumstances.

Proposed Regulations: The Department proposes to amend the section heading for § 668.56 by replacing the term "Items" with the term "Information".

We also propose to eliminate from the regulations the five items that an institution currently is required to verify for all applicants selected for verification. Instead, pursuant to proposed § 668.56(a), for each award year, the Secretary would specify in a **Federal Register** notice the FAFSA information and documentation that an institution and an applicant may be required to verify. The Department would then specify on an individual student's SAR and ISIR what

information must be verified for that applicant.

We would also remove current § 668.56(c) through (e).

Reasons: Due to several statutory changes that remove untaxed income and benefits items from the FAFSA and need analysis formula and with the importing of data as part of the IRS Data Retrieval process, we believe it is no longer necessary to require all selected applicants to verify AGI, U.S. taxes paid, the number of family members in the household size, number of family members enrolled in college, and untaxed income and benefits. Therefore, in § 668.56, we propose to remove the list of items to be verified as well as the exclusions from verification contained in current § 668.56(b) through (e). Instead, we propose to target verification based on the most error prone data items that are specific to each applicant selected.

During negotiated rulemaking, the non-Federal negotiators supported this targeted approach of selecting specific items for verification. In particular, they stated that including dependency status as a verifiable item would help alleviate the difficulties institutions experience with inappropriate designations of dependency status.

In implementing this proposed section, we expect that the **Federal Register** notice may, at least initially, include the five items included for verification under current § 668.56 as well as other items the Department deems necessary to ensure the accuracy of the data being reported. With this approach, not all applicants selected for verification would have to verify all the information identified in the notice. For each applicant, the Department would identify on an applicant's SAR or ISIR the specific FAFSA information that requires further review applicable to that applicant.

We intend to publish the **Federal Register** notice described in proposed § 668.56 as early as possible to give institutions sufficient time to make any system changes that may be necessary to verify the information the Secretary may require under the notice. (Note that the notice referred to under proposed § 668.56 is not the same notice referred to under proposed § 668.60(c)(1).)

Acceptable Documentation (§ 668.57(a)(2), (a)(4)(ii)(A), (a)(5), (a)(7), and (d))

Statute: Section 484(q) of the HEA gives the Secretary authority, in cooperation with the Secretary of Treasury, to obtain from the IRS the AGI, Federal income taxes paid, filing status, and exemptions reported on the Federal income tax return by an applicant, or any other individual whose financial information is required on the FAFSA. Under this provision of the HEA, as a condition of a student receiving title IV, HEA assistance, the Secretary may require an applicant, the parents of a dependent applicant, or the spouse of an applicant to provide consent in order for the IRS to disclose the necessary information.

Current Regulations: Current § 668.57 specifies the documentation an institution must obtain from an applicant to verify an applicant's household size, number of family members enrolled in college, AGI, U.S. income tax paid, and certain untaxed income and benefits.

Current § 668.57(a) describes the documentation that an institution must require an applicant selected for verification to provide to verify the AGI, income earned from work, and U.S. income tax paid listed on the applicant's FAFSA.

Under current § 668.57(a)(2), if the applicant selected for verification does not have a copy of his or her tax return, an institution may require an applicant to submit a copy of an IRS form which lists tax account information.

As alternate documentation to verify an applicant's AGI, income earned from work or taxes paid, the applicant may provide the institution with a copy of IRS Form 4868 that was filed with the IRS for the base year requesting an extension to file income tax return, or a copy of the extension beyond the automatic four-month extension granted to the applicant by the IRS (*see* current § 668.57(a)(4)(ii)(A)). Once the return is filed, the applicant must provide the institution with a copy of the tax return pursuant to current § 668.57(a)(5). When the institution receives a copy of the tax return that was filed, the institution could, but is not required to, re-verify the applicant's AGI and taxes paid. Under current § 668.60, if the tax return was not collected, the institution and the student are liable for any funds disbursed.

Under current § 668.57(a)(7), an institution may accept the tax preparer's signature or stamp instead of the filer's signature on the tax return.

Current § 668.57(b) describes the documentation that an institution must require an applicant selected for verification to provide to verify the number of family household members that is listed on the applicant's FAFSA.

Current § 668.57(c) describes the documentation that an institution must require an applicant selected for verification to provide to verify the number of family household members enrolled in postsecondary institutions that is listed on the applicant's FAFSA.

Current § 668.57(d) describes the documentation that an institution must require an applicant selected for verification to provide to verify any untaxed income and benefits listed on the applicant's FAFSA.

Proposed Regulations: We propose to make a number of technical and conforming changes throughout § 668.57. We also propose to make the following substantive changes:

Proposed § 668.57(a)(2) would allow an institution to accept, in lieu of an income tax return or an IRS form that lists tax account information, the electronic importation of data obtained from the IRS into an applicant's online FAFSA.

We also propose to amend § 668.57(a)(4)(ii)(A) to accurately reflect that, upon application, the IRS grants a six-month extension beyond the April 15 deadline rather than the four-month extension currently stated in the regulations.

Under proposed § 668.57(a)(5), an institution may require an applicant who has been granted an extension to file his or her income tax return to provide a copy of that tax return once it has been filed. If the institution requires the applicant to submit the tax return, it must reverify the AGI and taxes paid of the applicant and his or her spouse or parents when the institution receives the return.

Proposed § 668.57(a)(7) would clarify that an applicant's income tax return that is signed by the preparer or stamped with the preparer's name and address must also include the preparer's Social Security Number, Employer Identification Number or the Preparer Tax Identification Number.

Proposed § 668.57(b) and (c) would remain substantively unchanged.

We would delete current § 668.57(d) regarding acceptable documentation for untaxed income and benefits and replace it with new proposed § 668.57(d). This new section would provide that if an applicant is selected to verify other information specified in an annual **Federal Register** notice, the applicant must provide the documentation specified for that information in the **Federal Register** notice.

Reasons: Generally, our proposed changes to § 668.57 are intended to implement section 484(q) of the HEA, update and clarify the language to ensure that it accurately reflects the IRS documentation and processes to which it refers and is consistent with the other changes we propose to make to subpart E of part 668.

Our goal with the implementation of the IRS Data Retrieval Process in proposed § 668.57(a)(2) is to relieve burden on institutions by no longer requiring verification of the information that is imported from the IRS to populate a student's online FAFSA or requiring institutions to collect the documentation for those items. For instance, an institution would no longer be required to verify an applicant's and his or her family's AGI and taxes paid or collect income tax returns for students who import that data from the IRS.

Under current § 668.57(a)(5), an institution that requires an applicant who was granted an extension to file his or her income tax return to submit to the institution his or her completed return once it was filed, has the option of re-verifying the AGI and taxes paid by the applicant and his or her spouse or parents when the institution receives the copy of the return. Under these proposed regulations, if an institution requires an applicant that is granted an extension to file his or her income tax return to submit a copy of the return that was filed, the institution must act on the return received by re-verifying the AGI and taxes paid by the applicant and his or her spouse or parents.

During the negotiated rulemaking sessions, we initially proposed removing current § 668.57(a)(7), which allows a tax preparer to sign an applicant's income tax return. Some non-Federal negotiators indicated that administrative burden would be reduced if an institution could continue to accept a tax preparer's signature or stamp in lieu of the filer's signature on the tax return. Based on concerns raised by the non-Federal negotiators, we agreed to retain this provision in the proposed regulations, but to clarify that an applicant's income tax return must include the preparer's Social Security Number, Employer Identification Number or the Preparer Tax Identification Number in addition to his or her signature or a stamp of the preparer's name and address.

Except for minor technical and conforming changes, proposed § 668.57(b) and (c) would remain largely unchanged from current § 668.57(b) and (c).

We would delete current § 668.57(d) regarding acceptable documentation for untaxed income and benefits because several statutory changes would eliminate any consideration of untaxed income and benefits from the need analysis formula to determine an applicant's eligibility for assistance under the title IV, HEA programs. Instead, we would require an applicant selected to verify other information specified in an annual **Federal Register** notice to provide the documentation identified as acceptable in the **Federal Register** notice. We propose to add this paragraph to allow the Secretary the flexibility to identify in an annual **Federal Register** notice other documentation that can be used to verify FAFSA information.

Interim Disbursements (§ 668.58(a)(3))

Statute: None.

Current Regulations: Current § 668.58 sets out the conditions under which an institution may, but is not required to, disburse title IV, HEA program funds to an applicant before the applicant completes verification.

Under current § 668.58(a)(2)(ii)(A), if an institution does not have reason to believe that an applicant's FAFSA information is inaccurate, it may choose to disburse only one disbursement of title IV, HEA program funds to the applicant before he or she completes verification.

Proposed Regulations: Proposed § 668.58 would largely reflect the substance of current § 668.58 except that we would make a number of technical and conforming changes throughout the section and we would add a new paragraph (a)(3). Under proposed § 668.58(a)(3), an institution would be allowed to disburse title IV, HEA program funds after verification is completed but before receiving the corrected SAR or ISIR if the changes to an applicant's FAFSA information would not change the amount the applicant would receive under a title IV, HEA program. If an institution chooses to make a disbursement before receiving the corrected SAR or ISIR, it must ensure that all corrections are submitted to the Department to avoid any liability for a disbursement made without receiving a corrected SAR or ISIR within the established deadline as discussed under proposed § 668.61(c).

Reasons: During the negotiated rulemaking sessions, some non-Federal negotiators expressed concern that applicants would be harmed if their disbursements were delayed until the institution received a corrected SAR or ISIR. To address these concerns, we propose to add paragraph (a)(3) to § 668.58. This new provision would permit institutions to make interim disbursements of title IV, HEA program funds prior to receiving an applicant's corrected SAR or ISIR within the established deadline date. By adding this provision, we would increase institutional flexibility in disbursing title IV, HEA program funds.

Consequences of a Change in an Applicant's FAFSA Information (§ 668.59)

Statute: None.

Current Regulations: For the Federal Pell Grant, Academic Competitiveness Grant (ACG) and National Science and Mathematics Access to Retain Talent Grant (National SMART Grant) programs, if the information on an application changes as a result of verification, the institution must require the applicant to resubmit his or her application information to the Department for corrections (*see* current § 668.59(a)(1)).

Under current § 668.59(a)(2), an institution is not required to make an applicant resubmit his or her application information if the errors are nondollar items used to calculate the applicant's EFC or the errors in the dollar amount are within a $400 tolerance.

Current § 668.59(b) provides that if an institution does not recalculate an applicant's EFC under the provisions of § 668.59(a), the institution must disburse the applicant's Federal Pell Grant, ACG, or National SMART Grant award based on the applicant's original EFC.

If an institution recalculates an applicant's EFC because of a change in application information resulting from verification, the institution must require the applicant to resubmit his or her application to the Secretary; recalculate the applicant's Federal Pell Grant, ACG, and National SMART Grant award based on the EFC on the corrected SAR or ISIR and disburse any additional funds, if additional funds are payable, once the applicant provides the institution with the corrected SAR or ISIR.

If an institution determines, after verification, that the change in application information increases the applicant's award, the institution may disburse the applicant's Federal Pell Grant, ACG, and National SMART Grant based on the original EFC without requiring the applicant to resubmit his or her application information and disburse any additional funds under the increased award reflecting the new EFC if the institution receives the corrected SAR or ISIR, except as provided under current § 668.60(b).

For the campus-based, Federal Stafford Loan and Federal Direct Stafford Loan programs, if the information on an application changes as a result of verification, the institution must recalculate the applicant's EFC, and adjust the applicant's financial aid package to reflect the new EFC if the

new EFC results in an over award of campus-based funds or decreases the applicant's recommended loan amount (*see* current § 668.59(c)(1)). Under current § 668.59(c)(2), an institution is not required to recalculate an applicant's EFC or adjust his or her aid package if the errors are nondollar items used to calculate the applicant's EFC; or the errors in the dollar amount is within a $400 tolerance.

Under current § 668.59(d), if the institution selects an applicant for verification for an award year who previously received a Subsidized Stafford Loan or Direct Subsidized Loan for that award year, and as a result of verification the loan amount is reduced, the institution must eliminate the amount in excess of the student's need by returning funds to the lender or by reducing or cancelling subsequent disbursements.

An institution must forward the applicant's name, social security number, and other relevant information to the Department if the applicant received funds based on information that may be incorrect and the institution has made a reasonable effort to resolve the alleged discrepancy (*see* current § 668.59(e)).

Proposed Regulations: We propose to revise § 668.59 by removing all allowable tolerances and requiring instead that an institution submit to the Department all changes to an applicant's FAFSA information resulting from verification for those applicants receiving assistance under any of the subsidized student financial assistance programs (*see* proposed § 668.59(a)).

Under proposed § 668.59(b), for the Federal Pell Grant program, once the applicant provides the institution with the corrected SAR or ISIR, the institution would be required to recalculate the applicant's Federal Pell Grant and disburse any additional funds, if additional funds are payable. If the applicant's Federal Pell Grant would be reduced as a result of verification, the institution would be required to eliminate any overpayment by adjusting subsequent disbursements or reimbursing the program account by requiring the applicant to return the overpayment or making restitution from its own funds (*see* proposed § 668.59(b)(2)(ii)).

Proposed § 668.59(c) would provide that, for the subsidized student financial assistance programs, excluding the Federal Pell Grant Program, if an applicant's FAFSA information changes as a result of verification, the institution must recalculate the applicant's EFC and adjust the applicant's financial aid package on the basis of the EFC on the corrected SAR or ISIR.

With the exception of minor technical edits, proposed § 668.59(d), which describes the consequences of a change in an applicant's FAFSA information, would be substantively the same as current § 668.59(d).

Finally, we would remove current § 668.59(e), the provision that requires an institution to refer to the Department unresolved disputes over the accuracy of information provided by the applicant if the applicant received funds on the basis of that information.

Reasons: Some non-Federal negotiators objected to the Department's proposal to require that all corrections to an applicant's FAFSA information be submitted to the Department for reprocessing. They argued that this approach would increase burden on both institutions and applicants with minimum impact on an applicant's EFC and the amount of assistance the applicant is eligible to receive. They recommended that the Department require the submission of corrections only for applicants receiving a Federal Pell Grant or if the corrections would change an applicant's EFC. They did not object to removal of the tolerances. Negotiators who offered their views indicated they did not use the tolerances.

The Department believes that allowing any errors in financial and nonfinancial information would undermine our efforts to make decisions based on the best available information. We believe that requiring all changes to an applicant's FAFSA data to be submitted to the Department will enhance particularly our ability to identify error-prone applications. We removed the tolerances because a change in an applicant's FAFSA information could have a major impact on an applicant's EFC, which would either reduce or increase an applicant's Federal student aid awards. Taken together, the removal of the tolerances and the requirement to report any errors in FAFSA data would ensure that the Department can rely on accurate data for applicant selection, EFC calculation, cross-year edits, and data analysis and would make certain that applicants receive the Federal student aid funds for which they are eligible.

Although proposed § 668.59(a) would require an institution to submit only changes affecting students receiving subsidized student financial assistance, institutions are encouraged to submit all changes in any student's FAFSA information because those changes could impact the type of aid for which a student qualifies. For example, an applicant who was initially eligible only for unsubsidized assistance may qualify for subsidized assistance based on corrected FAFSA information.

Proposed § 668.59(b) would require an institution to recalculate the applicant's Federal Pell Grant award based on the EFC on the corrected SAR or ISIR and to disburse any additional funds only after receiving a corrected SAR or ISIR. This requirement would ensure that if the amount of the applicant's Federal Pell Grant increases as a result of verification, the applicant would receive any additional funds only after providing the institution with a corrected SAR or ISIR. If the Federal Pell Grant award decreased as a result of verification, the institution would be required to apply the procedures specified in § 668.61(a) to eliminate any overpayment. We are proposing changes to the current regulatory requirements to ensure that all applicants receive the Federal Pell Grant funds for which the applicants are eligible and to ensure that the Department's database reflects the information upon which any disbursements are based.

Under § 668.59(c), the current exceptions to the requirement to recalculate an applicant's EFC and adjust subsidized financial aid awards other than Pell—for nondollar items and tolerance of net income changes under $400—would be eliminated to ensure that all applicants receive the amounts for which they are eligible and that the Department's database reflects the information upon which any disbursements are based.

Finally, we propose to remove current § 668.59(e) because it refers to an obsolete operational unit in the Department that resolved verification discrepancies reported by an institution.

Deadlines for Submitting Documentation and the Consequences of Failing To Provide Documentation (§§ 668.60(b)(1)(ii), (b)(3) (c)(1), and (d))

Statute: None.

Current Regulations: Current § 668.60 contains the regulatory requirements concerning the deadlines for submitting documentation when a student is selected for verification and the consequences of failing to provide documentation.

Current § 668.60(b)(1)(ii) provides that if an applicant fails to provide the requested documentation within a reasonable time period established by the institution or the Secretary, the institution must return to the lender or Secretary, as applicable, any Federal Stafford Loan or Direct Subsidized Loan proceeds that otherwise would be payable to the applicant.

Current § 668.60(b)(3) provides that an institution may not withhold any Federal Stafford Loan proceeds from an applicant for more than 45 days for an applicant that fails to provide the requested documents for verification within the time period established by the institution. Under this provision, if the applicant does not complete verification within 45 days, the institution must return the proceeds to the lender.

Current § 668.60(c)(1) grants an extension of the submission deadline for students who must resubmit a verified SAR or ISIR when the SAR or ISIR must be corrected. Under this provision, when an extension is granted, the student is paid from the original SAR or ISIR or the corrected SAR or ISIR depending upon which SAR or ISIR yields the lower award.

Current § 668.60(d) provides that the Secretary may determine not to process any subsequent application for Federal Pell Grant, ACG, or National SMART Grant program assistance, and an institution, if directed by the Secretary, may not process any subsequent application for campus-based, Federal Direct Stafford/Ford Loan, or Federal Stafford Loan program assistance of an applicant who has been requested to provide documentation until the applicant provides the documentation or the Secretary decides that there is no longer a need for the documentation.

Proposed Regulations: Proposed § 668.60 would largely retain the substance of current § 668.60. In addition to minor clarifying changes, we propose to remove paragraphs (b)(1)(ii) and (b)(3) of § 668.60.

We would replace current § 668.60(b)(3) with a provision that would require an institution to follow the cash management procedures under § 668.166(a) or § 668.166(b), or under § 668.167(c), (which incorporates the provisions of § 668.167(b) by reference), if the institution has received proceeds from a Subsidized Stafford Loan and Direct Subsidized Loan and an applicant does not complete verification within the time period specified. A description of these cash management procedures follows.

Under § 668.166(a), any proceeds from a Direct Subsidized Loan that an institution has not disbursed to students by the end of the third business day following the date the institution received those funds is considered excess cash. Under § 668.166(b), an institution is allowed to maintain excess cash for seven days in an amount not to exceed one percent of the total amount of funds it drew down in the previous year. In instances where the Department finds that an institution maintains excess cash for an amount or time period greater than that allowed, an institution may be subject to adverse actions (*e.g.,* reimbursing the Secretary the cost incurred for providing the excess cash to the institution, or providing funds to the institution under the reimbursement or cash monitoring payment method) (*see* § 668.166(c)).

For Subsidized Stafford Loans, § 668.167(b)(1) requires an institution to return to a lender loan proceeds if the institution does not disburse the funds to a student or parent within (a) 10 business days following the date the institution receives the loan funds if the institution receives the funds by EFT and master check on or after July 1, 1997 but before July 1, 1999; (b) 3 business days following the date the institution receives the loan funds if the institution receives the funds by EFT and master check on or after July 1, 1999; or (c) 30 days after the institution receives the loan funds by check. For funds that are not disbursed within the specified timeframe, § 668.167(b)(2) requires the institution to return the funds to the lender no later than 10 business days after the last day those funds are required to be disbursed. If the borrower establishes eligibility before the institution returns the loan funds to the lender, the institution may disburse those funds to the borrower (*see* § 668.167(b)(3)).

In proposed § 668.60(c)(1), we would remove the language that requires a student to receive the lowest amount of a Federal Pell Grant if the student submits a valid SAR or valid ISIR after verification while the student was no longer enrolled.

Proposed § 668.60(d) and (e) contain only editorial changes from the corresponding current regulations.

Reasons: We propose to remove paragraph (b)(1)(ii) of § 668.60. This paragraph refers to an outdated process that prohibits an institution from certifying the student's loan application or processing a check, and requires the check payable to the student to be returned to the lender for any student who does not provide the required verification information within the required reasonable time.

The proposed changes to § 668.60(b)(3) are needed to update these regulations to be consistent with the Department's current cash management policy.

In proposed § 668.60(c)(1), we would remove the limit placed on students that complete verification while no longer enrolled at an institution. We made this change because students should be permitted to receive the correct amount of Federal Pell Grant regardless of when they complete verification.

Recovery of Funds (§ 668.61(c))

Statute: None.

Current Regulations: Current § 668.61 describes the institution's obligation to recover funds if the institution discovers, as a result of the verification process, that an applicant received or would receive more financial aid than the applicant was eligible to receive.

Proposed Regulations: Proposed § 668.61 would retain the substance from current § 668.61, except that we would add a paragraph (c) that would require an institution to reimburse the program account using its own funds if it disbursed subsidized student financial assistance to an applicant without receiving his or her corrected SAR or ISIR within the established deadlines under § 668.60.

Reasons: We propose this change to § 668.61 to clarify what would happen if institutions did not submit corrections and to emphasize the liability an institution could face if subsidized student financial assistance is disbursed under § 668.58(a)(3) (interim disbursements) and the institution does not receive a corrected SAR or ISIR by the deadline date established in the notice of deadline dates for receipt of applications, reports, and other records published annually pursuant to § 668.60.

Some non-Federal negotiators argued that the proposed requirement to make institutions liable for funds disbursed in accordance with § 668.58(a)(3) is unreasonable given that the interim disbursement would not result in an applicant receiving an overpayment of title IV, HEA program funds.

Section 668.58(a)(3) was added at the request of non-Federal negotiators who wanted institutions to have the flexibility to disburse title IV, HEA program funds to students without having to wait for a corrected SAR or ISIR when a student's award did not change after completing verification. Under this provision, the disbursement would be allowed if the institution ensured that all corrections were submitted to the Department for reprocessing.

Therefore, we believe it is appropriate to hold institutions liable for disbursing aid if corrections are not submitted to the Department in a timely manner to allow the institution to receive the corrected SAR or ISIR within the deadlines established in § 668.60. This provision would also help in our efforts to obtain accurate information for data analysis and identification of error prone applications.

Moreover, an institution is not required to make an interim disbursement of title IV, HEA program funds to an applicant. However, if an institution exercises this option, it assumes liability for the funds disbursed.

Misrepresentation (Subpart F of Part 668)

Statute: Section 487 of the HEA provides that institutions participating in the title IV, HEA programs shall not engage in substantial misrepresentation of the nature of the institution's educational program, its financial charges, or the employability of its graduates.

General

Current regulations: Current subpart F of part 668 sets forth the types of consumer information statements and communications by an eligible entity that constitute misrepresentation. The regulations prohibit any substantial misrepresentation made by an institution regarding the nature of its educational program, its financial charges, or the employability of its graduates.

Proposed regulations: In the following paragraphs, we explain in detail the changes we propose to make to subpart F of part 668.

Reasons: We propose to make changes to subpart F of part 668 to strengthen the Department's regulatory enforcement authority against eligible institutions that engage in substantial misrepresentations. The Department oft-times receives complaints from students who allege that they were the victims of false promises and other forms of deception when they were considering their postsecondary educational opportunities. We believe that helping students to make sound decisions regarding their educational pursuits is essential to maintaining the integrity of the title IV, HEA programs.

For these reasons, we propose to revise subpart F of part 668 by making changes based on information the Department has received and comments from participants in the negotiated rulemaking meetings.

Scope and Special Definitions (§ 668.71)

Current regulations: Current § 668.71(a) describes the scope of subpart F of part 668 as establishing the standards and rules by which the Secretary may initiate a proceeding under subpart G of part 688 against an otherwise eligible institution for any substantial misrepresentation made by that institution regarding the nature of its educational program, its financial charges, or the employability of its graduates.

Current § 668.71(b) provides definitions for the terms *misrepresentation, prospective students,* and *substantial misrepresentation.*

Proposed regulations: We propose to restructure § 668.71 so that paragraph (a) describes the actions the Secretary may take if the Secretary determines that an eligible institution has engaged in substantial misrepresentation.

Paragraph (b) of proposed § 668.71 would—

- Describe generally what types of activities constitute substantial misrepresentation;
- Provide that an eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement, makes a substantial misrepresentation regarding the eligible institution, including about the nature of its educational program, its financial changes, or the employability of its graduates; and
- Clarify that substantial misrepresentations are prohibited in all forms.

Current § 668.71(b) would be redesignated as proposed § 668.71(c) and we would make a number of revisions to the definition of the term *misrepresentation:*

- We would clarify that a misrepresentation is any false, erroneous, or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary.
- Within this definition, we would also define what we mean by the term "misleading statement;" we would clarify that a misleading statement includes any statement (which is any communication made in writing, visually, orally, or through other means) that has the capacity, likelihood, or tendency to deceive or confuse.
- Finally, we would retain the express reference in the definition of *misrepresentation* to the dissemination of a student endorsement or testimonial that a student gives under duress. We would expand this language to also refer to the dissemination of a student endorsement or testimonial that a student gives because the institution required the student to make such an endorsement or testimonial to participate in a program.

Reasons: We propose to restructure § 668.71 to lay out more clearly the scope of subpart F of part 668.

In new paragraph (b) of proposed § 668.71, we would clarify that an eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement, makes a substantial misrepresentation regarding the eligible institution. We believe it is appropriate to hold the eligible institution accountable in these instances because the integrity of the title IV, HEA programs requires that institutions are responsible for the actions of their representatives and agents.

Proposed § 668.71(b) would also state that substantial misrepresentations are prohibited in all forms, including those made in any advertising, promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution. We propose to add this language because of the importance of these materials and activities in communicating to students and prospective students information regarding the nature of the institution's educational programs, its financial charges, and the employment opportunities available to the institution's graduates.

In the revised definition of the term *misrepresentation,* we would again state that a misrepresentation is any false, erroneous, or misleading statement made not only by the eligible institution, but also any false, erroneous, or misleading statement made by one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement. As discussed earlier in this preamble, we believe that it is appropriate to hold eligible institutions accountable for misrepresentations made by representatives and agents to ensure program integrity.

We propose to broaden the definition of misrepresentation to include false, erroneous, or misleading statements made directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. We propose to broaden the concept of misrepresentation to include both direct and indirect false, erroneous or misleading statements because students, prospective students, members of the public, and others can be significantly

harmed by indirect false, erroneous, or misleading statements. For example, an institution could be deemed to engage in misrepresentation if it falsely advertised an exceptional placement rate. Further, the institution could also be deemed to engage in misrepresentation if an individual heard an advertisement containing the false placement rate and relayed the information to a potential student. In this example, the potential student received the information indirectly but the information could still have the capacity, likelihood, or tendency to deceive or confuse.

In an effort to give the field more guidance on what the Department means by misrepresentation, we propose to provide more detail in the definition. Because the definition of *misrepresentation* turns on the meaning of the term a "statement", we would clarify that a misleading statement includes any statement (which is any communication made in writing, visually, orally, or through other means) that has the capacity, likelihood, or tendency to deceive or confuse. We believe that fleshing out the definition of *misrepresentation* would help institutions determine whether statements they (or their representatives or any ineligible institution, organization, or person with whom they have an agreement) make constitute a misrepresentation under subpart F of part 668. Moreover, by providing more detail in the definition of *misrepresentation,* we believe that the regulations would be clearer as to the difference between misrepresentations, on the one hand, and substantial misrepresentations, on the other. This subpart would prohibit substantial misrepresentations only and those would continue to be defined as any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

Finally, we would add language to the definition of misrepresentation regarding the dissemination of a student endorsement or testimonial that a student gives because the institution required the student to make such an endorsement or testimonial to participate in a program. We propose to add this language because we are concerned about the potential of such testimonials to mislead students or prospective students.

Nature of Educational Program (§ 668.72)

Current regulations: Current § 668.72 describes the types of false, erroneous, or misleading statements about an institution's educational program that would be prohibited as misrepresentations under subpart F of part 668.

Proposed Regulations: Proposed § 668.72 would retain the list of the types of misrepresentation regarding the nature of an institution's educational program that is included in current § 668.72, but would expand this list. First, in proposed § 668.72(a), we would expand the types of programmatic false statements that would be prohibited as misrepresentations under this section. Specifically, false, erroneous, or misleading statements about programmatic and specialized accreditation—not only institutional accreditation—would be expressly covered as misrepresentations.

Second, in proposed § 668.72(b)(2), we propose to add language on the conditions under which an institution will accept credits earned at another institution.

Third, in proposed § 668.72(c), we would revise the language regarding misrepresentations about whether successful completion of a course of instruction qualifies a student to receive a local, State, or Federal license or a non-governmental certification required as a precondition for employment, or to perform the functions required of an employee in the occupation for which the program is represented to prepare students. We would broaden this language to clarify that a prohibited misrepresentation includes false, erroneous, or misleading statements regarding whether completion of a given course of study will qualify a student "to apply to take or to take an examination required to receive" a needed license or certification as a precondition of employment in an occupation for which the program is represented to prepare its students (rather than only qualifying a student to receive such a license or certification).

In addition, we would refine the language in § 668.72(c)(2) to clarify that institutions must not make false, erroneous, or misleading statements regarding whether completion of a given course of study will qualify a student to perform certain functions in the State in which the program or institution is located, or to meet additional conditions that the institution knows, or reasonably should know, are generally needed to secure employment in a recognized occupation for which the program is represented to prepare students.

Finally, we would add to the list of the types of misrepresentations regarding the nature of an institution's educational program, any misrepresentation regarding:

- The requirements for successfully completing the course of study or program and the circumstances that would constitute grounds for terminating the student's enrollment (*see* proposed § 668.72(d)).
- Whether the institution's courses have been the subject of unsolicited testimonials or endorsements by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, or others; or governmental officials for governmental employment (*see* proposed § 668.72(e)).
- The subject matter, content of the course of study, or any other fact related to the degree, diploma, certificate of completion, or any similar document that the student is to be, or is, awarded upon completion of the course of study (*see* proposed § 668.72(m)).
- Whether the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has been authorized by the appropriate State educational agency. This type of misrepresentation includes, in the case of a degree that has not been authorized by the appropriate State educational agency, any failure by an eligible institution to disclose this fact in any advertising or promotional materials that reference such degree (*see* proposed § 668.72(n)).

Reasons: The Department believes it is critical that potential students have a clear understanding about any educational program in which they may enroll. Each institution has a responsibility to provide complete and accurate information about the programs it offers. For this reason, we are proposing numerous changes to § 668.72. Many of these proposed changes are based on discussions during the negotiated rulemaking sessions and the concerns raised by non-Federal negotiators during those discussions.

Several non-Federal negotiators believed that institutions should make potential or current students aware of institutional accreditation or any specific programs at the institution that have accreditation before students enroll in the program. Some negotiators also argued that an institution's failure to disclose a lack of accreditation should constitute misrepresentation under § 668.72. The Department agrees that students need accurate information about the types, sources, nature, and extent of institutional, programmatic or specialized accreditation an institution or program has. Proposed § 668.72(a) would expressly prohibit institutions from making false, erroneous, or

misleading statements concerning these matters.

Some non-Federal negotiators expressed concern that students should understand the conditions under which their transfer credits would count towards a degree program before they left another program or institution. The Department agrees and proposes to add § 668.72(b)(2) to expressly prohibit misrepresentations about the conditions under which an institution will accept credits earned at another institution.

Some non-Federal negotiators expressed concern about the extent of information that institutions "reasonably" should know. For example, they argued that it is unrealistic to expect institutions to have knowledge about each State's licensure requirements.

The Department agrees. Proposed § 668.72(c)(2), therefore, would specifically refer to licensure and certification information for the State in which the program or institution is located, as well as conditions generally needed to secure employment in a particular occupation.

We would add proposed § 668.72(d), regarding misrepresentations concerning the requirements for successfully completing the course of instruction and the circumstances that would constitute grounds for terminating the student's enrollment, because potential and current students need to be able to make informed decisions regarding course completion and situations that may lead to their inability to complete the program of instruction they choose to pursue.

In proposed § 668.72(e), we would expressly include as prohibited any misrepresentations regarding whether an institution's courses have been the subject of unsolicited testimonials or endorsements because potential and current students should not be mislead into pursuing a particular program of instruction based upon purported (but not actual) recommendations and endorsements.

We would add proposed § 668.72(m) and (n), regarding misrepresentations concerning any fact related to the degree, diploma, certificate of completion, or similar document to be awarded to a student upon course completion, as well as whether the academic, professional, or occupational degree that the institution confers upon completion has been authorized by the appropriate State educational agency. We propose adding these provisions because potential and current students need to know the truth regarding the credential they will receive before committing to attend a particular postsecondary institution.

Nature of Financial Charges (§ 668.73)

Current regulations: Current § 668.73 describes prohibited false, erroneous, or misleading statements related to the cost of the program and financial aid that is available to potential and current students.

Proposed regulations: Proposed § 668.73 would retain the list of the types of misrepresentation regarding the nature of an institution's financial charges that are in current § 668.73, but also would add the following:

- Misrepresentation regarding the cost of the program and the institution's refund policy if the student does not complete the program (*see* proposed § 668.73(c)).
- Misrepresentation regarding the availability or nature of any financial assistance offered to students, including a student's loan repayment responsibility, regardless of program completion or subsequent employment (*see* proposed § 668.73(d)).
- Misrepresentation regarding a student's right to apply for or reject any particular type of financial aid or other assistance (*see* proposed § 668.73(e)).

Reasons: Several non-Federal negotiators expressed concern about whether students clearly understand the cost of their educational program. Other non-Federal negotiators emphasized the difficulty of estimating program costs and cautioned the Department against making the regulations too specific in this regard. The Department agrees it is a serious problem if students who enroll in a program do not have the necessary information about the cost of the program or the institution's refund policy. For this reason, the Department proposes to add proposed § 668.73(c) to highlight that misrepresentations about the cost of an institution's program or its refund policy are prohibited.

In addition, some non-Federal negotiators pointed out as a significant problem the fact that some students do not understand the financial aid options available to them when they enroll in a program. Others expressed concern that students may feel pressure to apply for credit financing to pay for the cost of their educational program.

The Department strongly believes that students, potential students, and parents must have relevant information to make informed decisions about the type of financial aid that is available to the student. By prohibiting institutions from making misrepresentations regarding the availability or nature of the financial aid offered to students, as well as a student's right to reject any particular type of financial aid (*see* proposed § 668.73(d) and (e), respectively), the Department seeks to ensure that students are provided with the accurate information they need to make informed choices about the type of financial aid they use to fund their education.

Employability of Graduates (§ 668.74)

Current regulations: Current § 668.74 lists what constitutes misrepresentation by an institution regarding the employability of its graduates.

Proposed regulations: Proposed § 668.74 would retain the list of the types of misrepresentation regarding the employability of graduates that is in current § 668.74. In addition to the types of misrepresentations already included in the regulations, we would add the following:

- Misrepresentations relating to the institution's knowledge about the current or likely future conditions, compensation, or employment opportunities for its graduates (*see* proposed § 668.74(c)).
- Misrepresentations relating to whether employment is being offered by the institution or that a talent hunt or contest is being conducted (*see* proposed § 668.74(d)).
- Misrepresentations relating to other requirements that are generally needed in order to be employed in certain fields (*see* proposed § 668.74(f)).

Reasons: During the negotiated rulemaking sessions, the non-Federal negotiators appeared to be in agreement that students should be fully informed about their likely employment options once they complete a course of study. Several non-Federal negotiators, however, expressed concern about how best to address this issue in the regulations. In particular, given the uncertainty of the economic climate, they were concerned about the possibility of having an enforcement action brought against them even in instances when they provided students and the public with the best available information about likely employment options, which, in retrospect, were overly optimistic. The Department believes that proposed § 668.74 appropriately highlights the types of information about employability that institutions need to monitor carefully when advertising or otherwise promoting their educational programs. Institutions must disclose clear information about the employability of graduates from a program, including likely compensation, and other requirements necessary to perform the job for which the educational program prepares students, to help give students the knowledge they need to make

informed decisions about potential career paths.

Relationship With the Department of Education (§ 668.75)

Current regulations: Current § 668.75 describes the Department's procedures for reviewing allegations or complaints regarding misrepresentation claims.

Proposed regulations: We are proposing to delete current § 668.75 (Procedures) and replace it with new § 668.75 (Relationship with the Department of Education). Proposed § 668.75 would prohibit an institution, its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement from making statements that suggest the U.S. Department of Education approves or endorses the quality of an institution's educational program simply because the institution is eligible to participate in the title IV, HEA programs.

Reasons: We propose to remove current § 668.75 because these procedures have not been used to take enforcement actions against institutions for making substantial misrepresentations. Instead, when the Department determines that there has been a misrepresentation by an institution, its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement, the Department has used its other administrative remedies to take the appropriate actions against the institution without relying upon the procedures described in current § 668.75. Proposed § 668.71(a) addresses the types of actions the Department anticipates it may take in response to a violation of subpart F of part 668.

We propose to add new § 668.75 because the Secretary has been made aware of instances where institutions have misled the public by mentioning the U.S. Department of Education in their advertising in a manner that implies that the Department endorses the quality of these institutions' educational programs. The Department does not approve of this behavior and considers it to be a misrepresentation. For this reason, the proposed regulations would expressly forbid this type of activity.

Ability To Benefit (668.32 and Subpart J of Part 668)

Statute: Section 484(d) of the HEA describes the circumstances under which a student who does not have a high school diploma or the equivalent may establish eligibility for title IV, HEA program funds. Under this provision, a student who does not have a high school diploma or the equivalent may establish eligibility for title IV, HEA program funds by: (1) Taking an ability to benefit (ATB) test approved by the Secretary; (2) being enrolled in an institution that participates in an approved State process; or (3) by completing a secondary school education in a home school setting that is treated as a home school or private school under State law. In 2008, this section of the HEA was amended by adding section 484(d)(4), which provides that a student shall be determined by an institution of higher education as having the ability to benefit from the education or training offered by the institution of higher education upon satisfactory completion of six credit hours or the equivalent coursework that are applicable toward a degree or certificate offered by the institution.

Student Eligibility (§ 668.32(e))

Current Regulations: Paragraph (e) of current § 668.32 provides that, in order to be eligible for title IV, HEA program funds, a student must: (1) Have a high school diploma or its recognized equivalent; (2) have obtained a passing score on an ATB test administered in accordance with subpart J of part 668; (3) have been enrolled in an eligible institution that participates in a State process approved by the Secretary under subpart J of part 668; or (4) have been home-schooled and have obtained a secondary school completion credential for home school or, if State law does not require a home-schooled student to obtain such a credential, have completed a secondary school education in a home school setting that qualifies as an exemption from compulsory attendance requirements under State law.

Proposed Regulations: We propose to revise § 668.32(e) by adding new paragraph (e)(4) to provide that a student is eligible to receive title IV, HEA program assistance if the student has been determined by the institution to have the ability to benefit from the education or training offered by the institution based on the satisfactory completion of 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution.

Reasons: We propose to add new paragraph (e)(4) to § 668.32 to incorporate the new method for students to show that they have the ability to benefit, which was added to the section 484(d) of the HEA in 2008. Under this new statutory provision, students who satisfactorily complete six credits of college work, or the equivalent amounts of coursework, that are applicable to a degree or certificate offered by the school qualify to receive title IV, HEA program funds. In proposing regulations to implement this statutory change, the Department took into consideration extensive discussions at the negotiated rulemaking sessions.

The Department explained during negotiated rulemaking that its proposal was based on the statutory language that students would need to earn six credit hours or the equivalent. The statute does not distinguish among semester, trimester or quarter hours, nor does it suggest an equivalent number of clock hours. Under the proposed regulations and the statute, all credit hour students, whether earning semester, trimester, or quarter hours would need to be enrolled for six hours—the number of hours that would be equivalent to enrollment on a half-time basis for one term. A student who completed 6 semester hours, 6 trimester hours, or 225 clock hours would be completing one quarter of an academic year. The Federal negotiator noted the apparent inconsistency between the statutory language regarding the new ATB provision, which requires satisfactory completion of six credit hours or the equivalent coursework, and the definition of an "academic year", which is defined as a period of time during which a full-time undergraduate student is expected to complete 24 semester or trimester hours, 36 quarter hours, or 900 clock hours. Several non-Federal negotiators expressed their belief that completion of six hours of program leading to a certificate or degree was a much better indicator of an individual's ability to benefit from a program than passing an ATB test.

Some of the discussion at the negotiated rulemaking sessions focused on whether a student should be required to complete the specified credit hours or clock hours in the program in which the student planned to enroll and for which the student applied to receive title IV, HEA program funds. The Department noted that the provision was based on an experimental site program which tested and established the effectiveness of permitting students to display the ability to benefit based on successful completion of six semester hours in any program leading to a degree or certificate. One non-Federal negotiator expressed concern that unless the hours completed were in the intended program, the coursework might not be rigorous enough, and the provision would not be effective as a means of demonstrating the student's ability to

benefit from the program in which they intend to enroll. Several non-Federal negotiators voiced their view that the statutory language did not impose that kind of limitation. They pointed out that students often start a program and change their mind; therefore, the simplest approach to the provision would be the best. The Department agrees, but expects that the credit hours completed would be part of an eligible program offered by the institution and would show that the student has the ability to benefit from the postsecondary educational program in which the student is enrolled or intends to enroll.

One non-Federal negotiator expressed concern that some institutions might reduce or waive tuition for the portion of the program required to demonstrate the ability to benefit, while not requiring the student to complete coursework at a sufficiently challenging level, thereby nullifying the impact of the provision and setting a student up for failure. Other non-Federal negotiators pointed out that if an institution did not waive or reduce tuition, a student who did not yet qualify for aid might be forced to take out a high interest private loan to pay for the initial 6 credit hours or 225 clock hours needed to establish student eligibility.

In response to a question regarding whether the option to demonstrate the ability to benefit from the educational or training program by passing an approved test or successfully completing six credit hours or the equivalent was at the discretion of the student or the institution, the Department noted that the provision relates to establishing eligibility for assistance under the title IV, HEA programs. It is a financial aid requirement, not an admissions requirement. An institution may have a policy that it does not admit any students who do not have a high school diploma or the equivalent. There is no requirement that an institution determine a student's eligibility for title IV, HEA program funds on the basis of either passing an ATB test or successfully completing coursework.

There was considerable discussion during the negotiated rulemaking sessions regarding whether a student who established student eligibility under one of the ATB provisions could be paid for the payment period in which eligibility was established. The Department's position is that a student who establishes eligibility for title IV, HEA program funds by passing an ATB test during a payment period may be paid for the entire payment period. However, if a student establishes title IV, HEA eligibility by completing six credit hours, or the equivalent, eligibility is not established until after the end of the payment period, and the student may not be paid for the payment period during which the student took the requisite coursework. Furthermore, to establish eligibility under the new ATB provision, a student in a credit hour program must earn six credit hours; a student who enrolls in six credit hours but receives a failing grade for one or more of those credits has not successfully completed six credit hours. Similarly, a student in a clock hour program must have attended 225 clock hours and been graded on those 225 clock hours to establish eligibility.

Scope (§ 668.141)

Current Regulations: Current § 668.141 describes the scope of subpart J of part 668 of the current regulations. Current subpart J sets forth: (1) The provisions under which a student who does not have a high school diploma or the equivalent may establish eligibility for title IV, HEA program funds either by taking an ATB test approved by the Secretary or by being enrolled in an institution that participates in an approved State process; and (2) the criteria and procedures for approval of ATB tests, the requirements for independent administration of approved tests, the requirements for maintaining the Secretary's approval of ATB tests, and the procedures for the Secretary's approval of alternate State processes.

Proposed Regulations: Section 668.141 would be revised to reference the new requirements that we propose to add to subpart J of part 668. Specifically, we would redesignate current paragraph (b)(4) of § 668.141 as paragraph (b)(6) and add new paragraphs (b)(4) and (b)(5). Proposed § 668.141(b)(4) would reference the information on test anomaly studies that the test publishers and States must submit as part of their test submission, and proposed § 668.141(b)(5) would reference the proposed requirements that test publishers and States have a process to identify and follow up on test score irregularities, take corrective action when irregularities have occurred, and report the names of decertified test administrators to the Secretary.

Reason: These proposed changes to § 668.141 would align the description of the subpart's scope with the substantive changes the Department proposes to make to this subpart. These proposed changes are discussed in more detail in the following sections.

Special Definitions (§ 668.142)

Definition of Assessment Center

Current regulations: Current § 668.142 contains a definition of the term *assessment center.*

Proposed regulations: The proposed definition of assessment center would largely track the current definition of that term. We propose only to clarify in the definition that an assessment center uses test administrators who, by definition, have been certified by the test publisher or State to administer ATB tests approved by the Secretary under this subpart.

Reasons: We propose to require, as part of this definition, that the individuals who administer ATB tests in assessment centers be certified by the test publisher, or the State, as appropriate. Test publishers have indicated that they have encountered situations at assessment centers where there has been high staff turnover, and individuals giving tests are not familiar with the requirements and procedures. The Department solicits comments on whether it would be appropriate or advisable to permit specified test administrators in the assessment center to train other individuals at that assessment center to administer ATB tests.

Definition of Independent Test Administrator

Current regulations: None.

Proposed regulations: We propose to add a definition of the term *independent test administrator* to § 668.142. Under this proposed definition, an independent test administrator would be a test administrator who administers tests at a location other than an assessment center and who—

(1) Has no current or prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test, and has no controlling interest in any other institution;

(2) Is not a current or former employee of or consultant to the institution, its affiliates, or its parent corporation, a person in control of another institution, or a member of the family of any of these individuals;

(3) Is not a current or former member of the board of directors, a current or former employee of or a consultant to a member of the board of directors, chief executive officer, chief financial officer of the institution, its affiliates, or its parent corporation or of any other institution, or a member of the family of any of these individuals; and

(4) Is not a current or former student of the institution.

This definition would be based largely on the description of prohibited relationships of independent test administrators contained in current § 668.151(b)(2).

Reasons: The proposed regulations would distinguish between "test administrators," defined in § 668.142, and "independent test administrators." For this reason, the Department proposes to add a definition of the term *independent test administrator* and, as discussed later in this preamble, to revise the current definition of *test administrator.*

The concept of an independent test administrator is not new. Current § 668.151(b)(2) describes the circumstances under which a test given by a test administrator is considered to be "independently administered". We used much of this language in crafting the definition of the term *independent test administrator.*

During the negotiated rulemaking discussions, some of the non-Federal negotiators expressed confusion about the difference between test administrators and independent test administrators. They suggested adding language to make it clear that an independent test administrator is a test administrator who "administers tests at a location other than an assessment center" in addition to meeting the other requirements. We agreed with this recommendation. Therefore, the proposed regulations would specify, as part of the definition of *independent test administrator,* that an independent test administrator is a test administrator who administers tests at a location other than at an assessment center.

Definition of Individual With a Disability

Current regulations: Current § 668.142 contains a definition of the term *disabled student.*

Proposed regulations: Proposed § 668.142 would replace the term "disabled student" with the term "individual with a disability." We would largely retain the current definition, except we would make clear that the term refers to a person (not only a student) who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Reasons: The Department proposes to use the term *individual with a disability,* rather than *disabled student,* because that is the term more commonly used in the disability community and is consistent with the usage of the term by other programs administered by the Department. In addition, this proposed revision would clarify that the defined term applies to individuals who are not yet students as well as to individuals who are already enrolled in institutions participating in the title IV, HEA programs.

Definition of Test

Current regulations: None.

Proposed regulations: We propose to add a definition of the term *test* to § 668.142. Under this proposed definition, a *test* would be a standardized test, assessment or instrument that has formal protocols regarding the administration of the test that include the use of parallel, equated forms, testing conditions, time allowed for the test, and standardized scoring. The definition also would clarify that tests are not limited to traditional paper and pencil (or computer-administered) instruments for which forms are constructed prior to administration to examinees and that tests may include adaptive instruments that use computerized algorithms for selecting and administering items in real time provided that, for such instruments, the size of the item pool and the method of item selection ensures negligible overlap in items across retests.

Reasons: We propose to add a definition of the term *test* to § 668.142 because, as one non-Federal negotiator pointed out during our discussions, our current ATB regulations define the terms *test item, test administrator* and *test publisher,* but do not define the term *test.* The proposed definition is based on the definition of *test* in 34 CFR 462.4 of the Department's Measuring Educational Gain in the National Reporting System for Adult Education regulations.

Definition of Test Administrator

Current regulations: Current § 668.142 defines a *test administrator* as an individual who may give tests under subpart J of part 668.

Proposed regulations: We propose to revise the definition of the term *test administrator* to mean an individual who (1) is certified by the test publisher or the State to administer tests approved under subpart J of part 668 and to protect the test and test results from improper disclosure or release, and (2) is not compensated on the basis of test outcomes.

Reasons: We propose to revise this definition to clarify that a test administrator must be certified by the test publisher or the State, and that a test administrator is responsible for keeping both the tests and the test results secure from improper disclosure or release. The proposed definition would also clarify that a test administrator may not be compensated on the basis of test outcomes. The non-Federal negotiators were generally in favor of including this additional clarity in the definition.

Definition of Test Publisher

Current regulations: Current § 668.142 defines a *test publisher* as an individual, organization, or agency that owns a registered copyright of a test, or is licensed by the copyright holder to sell or distribute a test.

Proposed regulations: We propose to revise the definition of a *test publisher* by providing that a test publisher may be authorized by the copyright holder to represent the copyright holder's interest regarding the test, rather than specifying that the individual or organization must be licensed the right to sell or distribute the test by the copyright holder.

Reasons: One non-Federal negotiator recommended making this revision to the definition of *test publisher.* This non-Federal negotiator explained that this definitional change is appropriate because the term test publisher should include agencies or organizations that may represent the copyright holder's interest in the test, but may not be licensed by the copyright holder. The Department agrees.

Approval of State Tests or Assessments (§ 668.143)

Current regulations: Current § 668.143 describes the procedures for the Secretary's approval of State tests or assessments.

Proposed regulations: We propose to move the requirements governing the submission of tests by States in current § 668.143 to proposed § 668.144 (Application for test approval). With this change, we would reserve § 668.143 for future use.

Reason: We propose to combine the requirements from current §§ 668.143 and 668.144 into a single section because the test publisher and State submission processes have common elements. To the extent we propose to make changes to the submission requirements for States (and test publishers), we discuss those changes in the discussion relating to proposed § 668.144.

Application for Test Approval (§ 668.144)

Current regulations: Current § 668.144 describes the approval process for tests submitted by test publishers. The current regulations do not require test publishers to describe their process for

certifying test administrators, their test anomaly analysis, or the types of accommodations available for individuals with disabilities. In current regulations, the requirements for approval of State tests or assessments are contained in a separate section, § 668.143.

Proposed regulations: We propose to clarify and expand the requirements in current §§ 668.143 and 668.144 and include all of the requirements for test approval in one section, proposed § 668.144. Paragraphs (a) and (b) of proposed § 668.144 would describe the general requirement for test publishers and States to submit to the Secretary any test they wish to have approved under subpart J of part 668. Paragraph (c) of proposed § 668.144 would describe the information that a test publisher must include with its application for approval of a test. Paragraph (d) of proposed § 668.144 would describe the information a State must include with its application when it submits a test to the Secretary for approval.

In proposed § 668.144(c), we would largely retain the test publisher application requirements contained in current § 668.144(c). In addition to making some minor technical changes to these requirements, we would revise paragraphs (c)(8) and (c)(11)(iv)(B). Under proposed paragraph (c)(8), test publishers would be required to provide documentation of periodic reviews of the content and specifications of all tests submitted to the Secretary for approval (not just tests first published five years before submission), to ensure that the tests reflect secondary school level verbal and quantitative skills.

Under the revisions reflected in proposed § 668.144(c)(11)(iv)(B), a test publisher would be required to include, in its technical manual, evidence that the test was normed using a contemporary sample that is representative of the population of persons who have earned a high school diploma in the United States instead of a contemporary population representative of persons who are beyond the usual age of compulsory school attendance in the United States.

We would remove paragraph (c)(14), which required a test publisher to include, for performance-based tests or tests containing performance-based sections, a description of the training or certification required of test administrators and scorers by the test publishers.

We would then redesignate paragraphs (c)(15) and (c)(16) of § 668.144 as proposed paragraphs (c)(14) and (c)(15) and add new proposed paragraphs (c)(16) through (c)(18). Proposed § 668.144(c)(16) would require test publishers to include in their applications a description of their test administrator certification process. In proposed § 668.144(c)(17), we would require test publishers to include in their applications a description of the test anomaly analysis the test publisher will conduct and submit to the Secretary. Finally, proposed § 668.144(c)(18) would require test publishers to include in their applications a description of the types of accommodations available for individuals with disabilities, including a description of the process used to identify and report when accommodations for individuals with disabilities were provided.

Proposed § 668.144(d) would be added to describe what States must include in their test submissions to the Secretary. While this provision would replace the content in current § 668.143, its language would be revised to be parallel, where appropriate, to the test publisher submission requirements in current § 668.144. In addition to paralleling most of the current requirements for test publisher test submissions, proposed § 668.144(d) would also include the new requirements proposed to be added to the test publisher submissions. A description of those new provisions follows:

Both test publishers and States would be required to submit a description of their test administrator certification process that indicates how the test publisher or State, as applicable, will determine that a test administrator has the necessary training, knowledge, skills, and integrity to test students in accordance with the test publisher's requirements and how the test publisher or the State will determine that the test administrator has the ability and facilities to keep its test secure against disclosure or release (*see* proposed § 668.144(c)(16) (test publishers) and § 668.144(d)(7) (States)).

The proposed regulations would require both test publishers and States to submit a description of the test anomaly analysis they will conduct. This analysis would need to include a description of how they will identify potential test irregularities and make a determination that test irregularities have occurred; an explanation of corrective action to be taken in the event of test irregularities; and information on when and how the Secretary, test administrator, and institutions will be notified if a test administrator is decertified (*see* proposed § 668.144(c)(17) (test publishers) and § 668.144(d)(8) (States)).

Under proposed § 668.144(c)(18) and (d)(9) respectively, both test publishers and States would be required to describe any accessible technologies that are available to individuals with disabilities, and the process for a test administrator to identify and report to the test publisher when accommodations for individuals with disabilities were provided.

Reasons: Because many of the requirements for approval of tests, whether submitted by test publishers or States, are parallel, the non-Federal negotiators suggested, and the Department agreed, that it would be appropriate to combine State submission requirements, currently addressed in § 668.143, and the test publisher submission requirements, currently addressed in § 668.144 in a single regulatory provision. For this reason, we combined and, where appropriate, standardized the language for the submission requirements for both States and test publishers in proposed § 668.144.

We propose to make a number of changes to the test publisher submission requirements, reflected in § 668.144(c). First, we propose to revise § 668.144(c)(8) because we believe it is important for test publishers to periodically review the content and specifications of all tests (not only those tests first published five years before submission) to ensure that they reflect secondary school level verbal and quantitative skills. In addition, we propose to revise § 668.144(c)(11)(iv)(B) to require that a test publisher's technical manual, which must be submitted as part of its test submission, include evidence demonstrating that the test was normed using a sample that is representative of the population of persons who have earned a high school diploma in the United States. We propose this change because the purpose of this subpart is to implement the statutory provisions that provide an alternative means for students who do not have a high school diploma or the equivalent to establish eligibility for the title IV, HEA programs. To determine the ability of such students to benefit from a postsecondary education or training program, passing scores on ATB tests should be based only on the scores of test takers who have a high school diploma, not the scores of test takers who are beyond the age of compulsory attendance but who may not have completed high school.

We also propose to delete the requirements relating to performance-based tests or tests containing

performance-based sections, reflected in current § 668.144(c)(14), because no performance-based tests have ever been submitted to the Secretary for approval and, therefore, we believe the provision is unnecessary.

Finally, we are proposing to add three requirements to both the test publisher and State test submission requirements.

First, we propose to include, in proposed § 668.144(c)(16) and (d)(7), a requirement that test publishers and States, respectively, describe their test administrator certification process, including how they will determine that a test administrator has the necessary training, knowledge, skills, and integrity to test students. We believe that it is important for test publishers and States to provide this information with their test submissions to demonstrate that adequate screening procedures are used. Throughout the negotiated rulemaking discussions on the ATB provisions, one of the non-Federal negotiators voiced the belief that test publishers should be required to determine the "integrity" of the test administrators they certify. Other non-Federal negotiators questioned how test publishers or States would evaluate a test administrator's integrity and expressed concern that if such a requirement were in the regulations, it would be too prescriptive. We have included in proposed § 668.144(c)(16)(i) and (d)(7)(i) a requirement that test publishers and States describe how they will determine that a test administrator has the integrity necessary to administer tests. The Department does not intend to impose unnecessary or ill-defined burdens; therefore, we are specifically soliciting feedback on the proposal to require test publishers and States to describe how they will determine that test administrators have integrity, in addition to the training, skills, and knowledge necessary to administer tests.

Second, we propose to include, in proposed § 668.144(c)(17) and (d)(8), a requirement that test publishers and States submit a description of the test anomaly analysis they will conduct and how they will identify potential test irregularities and make a determination that test irregularities have occurred. We propose these requirements to promote some transparency in the screening process that is being used.

Third, we propose to include, in proposed § 668.144(c)(18) and (d)(9), a requirement that test publishers and States describe the types of accommodations available for individuals with disabilities and the process for identifying and reporting to the test publisher or the State when accommodations for individuals with disabilities were provided. This additional information is necessary for scoring and norming purposes.

Test Approval Procedures (§ 668.145)

Current regulations: Current § 668.145 describes both procedures for the review of tests submitted by test publishers and the circumstances under which the Secretary's approval may be withdrawn.

Proposed regulations: We propose to revise § 668.145 to extend the test approval procedures to tests submitted by States. We would make a number of non-substantive technical changes to this section as well.

Proposed § 668.145(c)(1) would specify that the approval of a test begins five years from the date the notice of approval for the test is published in the **Federal Register.** Under proposed § 668.145(d)(1), test approval could be revoked if a test publisher or State violated any terms of the agreement described in § 668.150 or if the test publisher or State substantially changed the test and did not resubmit the test, as revised, for approval. Proposed § 668.145(d)(2) would provide that revocation would become effective 120 days from the date the notice of revocation was published in the **Federal Register** or an earlier date specified by the Secretary in a notice published in the **Federal Register.**

Reasons: Consistent with the changes reflected in proposed § 668.144, we would amend § 668.145 to make the test approval procedures applicable to States as well as to test publishers, where appropriate. In proposed § 668.144(c)(1), we would specify that the approval period, not to exceed five years, would start on the date the notice of approval is published in the **Federal Register**. We propose to provide that the approval period commences on this date, rather than on the date the Secretary provides written notice to the test publisher of approval, because the public will be able to determine the effective date from the notice and that might be relevant information for institutions.

One of the non-Federal negotiators suggested expanding the reasons for revocation to include substantially changing a test without resubmitting it to the Department. The Department agreed. For this reason, we would add language to proposed § 668.145(d)(1) to provide that test approval could be revoked if a test publisher or State substantially changed the test and did not resubmit the test, as revised, for approval.

Finally, in proposed § 668.145(d)(2), we would provide that a revocation of test approval would become effective 120 days after the date the notice of revocation is published in the **Federal Register** or an earlier date specified by the Secretary in a notice published in the **Federal Register**. We propose this change to ensure that the public has access to this information.

Criteria for Approving Tests (§ 668.146)

Current regulations: Current § 668.146 sets forth the criteria the Secretary uses to evaluate and approve tests submitted under subpart J of part 668. Under this provision, in order for a test to be approved, a test publisher must provide specified information and norm the test with groups of sufficient size to produce defensible standard errors of the mean, with groups not composed disproportionately of any race or gender, and with a contemporary population representative of persons who are beyond the usual age of compulsory school attendance in the United States.

Proposed regulations: We propose to revise § 668.146 to provide that the criteria for approving tests apply to tests submitted by States as well as test publishers. In addition, we propose to make a number of small technical and conforming changes to this section. Finally, in proposed § 668.146(c)(4)(ii), we require that States and test publishers norm their tests with a contemporary sample that is representative of the population of persons who have earned a high school diploma in the United States.

Reasons: Consistent with the changes we propose to make to § 668.144, we propose to amend § 668.145 to ensure that the criteria for approving tests apply to States as well as to test publishers, where appropriate.

We propose to amend § 668.146(c)(4)(ii) to ensure that tests are being normed with a contemporary sample of persons who have earned a high school diploma in the United States, rather than persons who are beyond the usual age of compulsory school attendance in the United States. The purpose of this subpart is to implement the statutory provisions that provide an alternative means for students who do not have a high school diploma or the equivalent to establish eligibility for the title IV, HEA programs. Therefore, to determine the ability of such students to benefit from a postsecondary education or training program, pass scores should be based only on the scores of test takers who have a high school diploma, not the scores of test takers who are beyond the age of compulsory attendance but who may not have completed high school.

Passing Scores (§ 668.147)

Current regulations: Under current § 668.147, the Secretary specifies that the passing score on each approved test is one standard deviation below the mean for students with high school diplomas who have taken the test within three years before the test was submitted for approval.

Proposed regulations: Proposed § 668.147 would specify that passing scores are based on the mean score of a sample of individuals who have taken the test during the three years before it was submitted. The sample would need to be representative of the population of high school graduates in the United States.

Reasons: The proposed changes to § 668.147 would specify that the passing score is based on the mean score of a sample of high school graduates who have taken the test. This change would make it clear that a sample of test takers would be used, and that the test takers whose scores are used need not be students.

Additional Criteria for the Approval of Certain Tests (§ 668.148)

Current regulations: Current § 668.148 specifies additional criteria for approval of tests that are performance-based, developed for non-native speakers of English, modified for use for persons with disabilities, and computer-based.

Proposed regulations: Proposed § 668.148 would largely track current § 668.148. In addition to making technical updates and conforming changes (*e.g.,* updating references to documents incorporated by reference and updating defined terms to use those terms proposed in this document), we propose to remove the criteria for approval of performance-based tests, reflected in current § 668.148(a)(1). We also propose to revise the regulatory provision relating to tests developed for non-native speakers of English who are enrolled in a program that is taught in their native language to provide that if the test is in a language other than Spanish, it must be accompanied by a recommendation for a provisional passing score based upon performance of a sample of test takers representative of non-English speaking individuals who speak a language other than Spanish and who have a high school diploma. The sample upon which the recommended provisional passing score would be based would need to be large enough to produce stable norms. In addition, we would provide, in proposed § 668.148(b)(2), that the recommended passing scores for tests designed solely to measure the English language competence of non-native speakers of English would need to be based on the mean score of test takers beyond the age of compulsory school attendance who completed (rather than entered) specified programs.

Reasons: We propose to remove the regulatory provision related to performance-based tests because, as mentioned earlier in this preamble discussion, no performance-based tests have ever been submitted to the Secretary for approval.

The change proposed in the regulatory provision relating to tests developed for non-native speakers of English who are enrolled in a program that is taught in their native language (other than Spanish) is intended to provide that the provisional passing scores are based on a sample of test takers whose native language is not Spanish and who have a high school diploma. This is parallel to the proposed change in § 668.144(c)(11)(iv)(B).

Finally, the change reflected in proposed § 668.148(b)(2), which would require basing recommendations for passing scores for tests to measure English language competence on scores of test takers that have completed, rather than entered, specified educational and training programs, is designed to be consistent with changes throughout these proposed regulations. The Department specifically seeks input on the possible impact of this change due to the potential for unintended consequences.

Special Provisions for the Approval of Assessment Procedures for Individuals With Disabilities (§ 668.149)

Current regulations: Current § 668.149 (Special provisions for the approval of assessment procedures for special populations for whom no tests are reasonably available) describes the special procedures that apply when testing persons with disabilities and students whose native language is not English and who are not fluent in English under subpart J of part 668.

Proposed regulations: We propose to restructure § 668.149 to focus only on the special provisions for the approval of assessment procedures for individuals with disabilities. We would remove current § 668.149(b), which describes the procedures for automatic test approval for tests provided in a student's native language for students whose native language is not English.

Reasons: We propose to revise § 668.149 to make clear the respective responsibilities of test publishers (or States, where appropriate) and test administrators when using special assessment procedures for individuals with disabilities.

We expect test administrators who administer tests under this section to ensure there is documentation of the test-taker's need for a modified test and to comply with the provisions of § 668.149(c)(2). We would encourage a test administrator to coordinate with the institution's disability support services center, or other institutional or State staff who have knowledge of an individual's need for a modified test to ensure that an appropriate test is given.

We propose to remove the regulatory language concerning the use of foreign language tests, because historically there have been no submissions of foreign language tests for approval. Moreover, pursuant to the current regulations, because there are no currently approved foreign language tests, any foreign language test that has not been rejected by the Secretary is considered automatically to be approved even if it has not been submitted to the Secretary for approval. Under the current regulatory framework, therefore, test publishers and States lack an incentive to submit tests in foreign languages for the Secretary's approval. Continuing under the current regulations in § 668.149(b) would allow test publishers and States to circumvent the ATB test approval process; therefore, we propose its removal. With the removal of "Students whose native language is not English" from § 668.149(b), foreign language tests would be required to be submitted through the established test approval procedures in §§ 668.145 and 668.148.

During the negotiated rulemaking discussions, some of the non-Federal negotiators thought it might be advisable to have a transition period before removing the special provisions in current § 668.149(b). In light of this suggestion, the Department is soliciting comments on whether a transition period is necessary and, if one is necessary, how long should it be.

Agreement Between the Secretary and a Test Publisher or a State (§ 668.150)

Current regulations: The current regulations require test publishers to enter into an agreement with the Secretary before an institution may use the test publisher's test to determine a student's eligibility for title IV, HEA program funds. Current § 668.150(b) describes the specific provisions that must be included in the agreement. Current § 668.150(c) contains the regulations governing the Secretary's termination of an agreement.

Proposed regulations: Proposed § 668.150 would provide that States, as

well as test publishers, must enter into agreements with the Secretary in order to have their tests approved.

We would also revise this section to require both test publishers and States to comply with a number of new requirements that would be added to the agreement with the Secretary. These requirements would include:

- Requiring the test administrators that they certify to provide them with certain information about whether they have been decertified (*see* proposed § 668.150(b)(2)).
- Certifying only test administrators who have not been decertified within the last three years (*see* proposed § 668.150(b)(3)(iii)).
- Re-evaluating the qualifications of a test administrator who has been decertified by another test publisher or State (*see* proposed § 668.150(b)(5)).
- Immediately notifying the test administrator, the Secretary, and institutions when the test administrator is decertified (*see* proposed § 668.150(b)(6)).
- Reviewing test results of tests administered by a decertified test administrator and immediately notifying affected institutions and students (*see* proposed § 668.150(b)(7)).
- Providing copies of test anomaly analysis every 18 months instead of every 3 years (*see* proposed § 668.150(b)(13)).
- Providing access to test records or other documents related to an audit, investigation, or program review of an institution, the test publisher, or a test administrator (*see* proposed § 668.150(b)(14)).
- Reporting to the Secretary any credible information indicating that a test has been compromised (*see* proposed § 668.150(b)(15)).
- Reporting to the Office of Inspector General of the Department of Education any credible information indicating that a test administrator or institution may have engaged in fraud or other criminal misconduct (*see* proposed § 668.150(b)(16)).
- Requiring a test administrator who provides a test to an individual with a disability who requires an accommodation in the test's administration to report to the test publisher or the State the nature of the disability and the accommodations that were provided (*see* proposed § 668.150(b)(17)).

Reasons: Many of the requirements we propose to add to the required provisions in agreements between the Secretary and test publishers (and, under the proposed regulations, States) are based on recommendations the Department received from the Government Accountability Office (GAO). GAO issued a report in August 2009 that cited the Department for weak oversight of the ATB test requirements; in its report, GAO provided recommendations to the Department to strengthen controls over the ATB testing process and to amend the ATB regulations. Specifically, the GAO identified the following problems with the current regulations:

- Current regulations require test publishers to conduct test score analyses only every three years. This means it is possible for test administrators who are administering tests improperly to go undetected for up to three years.
- While the current regulations require that test publishers decertify test administrators who fail to administer tests properly, they do not require test publishers to report to the Department on implementation of their decertification process.
- Current regulations do not specifically require test publishers to follow up on test score irregularities or report any corrective actions to the Department. Therefore, the Department has no way of knowing whether actual violations occurred or how the test publishers dealt with any violations they identified.

In response to the first problem identified by GAO, we propose to require, in proposed § 668.150(b)(13), that test publishers conduct test score analyses every 18 months, instead of every 3 years. This change would reduce the possibility that test administrators who are administering tests improperly would go undetected. The Department initially proposed that test anomaly analysis be submitted 18 months after test approval, then annually thereafter. However, after hearing the discussion of the benefits and drawbacks of more frequent analysis, the Department agrees that receiving test score analyses every 18 months after approval would address its concerns.

The second problem identified by GAO was that current regulations do not require test publishers to report to the Department on implementation of their decertification process. The Department seeks to address this problem in proposed § 668.150(b)(6), which would require test publishers and States to immediately notify the test administrator, the Secretary, and the institutions where the test administrator previously administered approved tests, when the test publisher or the State decertifies a test administrator.

The decertification of test administrators and the draft regulatory language the Department offered to address this problem generated a considerable amount of discussion during the negotiated rulemaking sessions. The Department initially proposed draft regulatory language that would require test publishers and States to review the tests results of the tests administered by a decertified test administrator and determine which tests were invalid. During the discussion at negotiated rulemaking, it became clear that the focus of the proposed regulations should be on a determination of whether the tests were administered improperly, rather than on a determination of whether the tests were invalid. For this reason, proposed § 668.150(b)(7)(i) would require test publishers and States to review the test results of tests administered by decertified test administrators to determine which tests may have been administered improperly. Proposed § 668.150(b)(7)(ii) would require that test publishers and States immediately notify the affected institutions and students when they determine that tests were improperly administered. The Department is committed to providing guidance to test publishers, States, and institutions regarding how to handle situations where tests have been determined to be improperly administered and to working with the test publishers and the States on notification letters to institutions and students.

Some non-Federal negotiators said it was important for all students who had been given an ATB test by a decertified test administrator to be notified. Other non-Federal negotiators believed this was not necessary. The Department solicits comments on whether notification to all potentially affected institutions, students, or prospective students should take place when a test administrator is decertified, regardless of whether there has been a determination that the tests given to those students or prospective students were improperly administered.

Some non-Federal negotiators expressed the opinion that once a test administrator was decertified, he or she should not be able to be recertified, and that the Department should keep a list of decertified test administrators. The discussion of this topic at negotiated rulemaking caused the Department to examine options for the appropriate length of time for decertification, the impact of a decertification by one test publisher or State on the certification of that test administrator by other test publishers or States, and the extent of notifications.

The Department's position is that the decertification process should not be any more complicated than necessary. As there is no provision for a third party to appeal a decertification, we do not believe it is appropriate for a test administrator who is decertified by one test publisher to be decertified forever—without the ability to be certified by any test publisher again.

Therefore, we propose a number of regulatory changes to ensure that States and test publishers have rigorous certification and decertification processes. Specifically, we would require, at the front end of the certification process, that a test publisher (or State) obtain a statement from potential test administrators indicating that they are not currently decertified and agreeing that they will notify the test publisher or State if they become decertified by another entity (*see* proposed § 668.150(b)(2)). We would then provide, under proposed § 668.150(b)(3)(iii), that a decertified test administrator would not be able to get a new certification again until three years after his or her decertification. We believe that these provisions would address the potential problem of having a decertified test administrator obtain certification from another test publisher and getting certified.

In the case of a test administrator who has been certified by more than one test publisher (or State) but then is decertified by one test publisher (or State), we would not require the immediate and automatic decertification of the test administrator by other test publishers (or States). Instead, as reflected in proposed § 668.150(b)(5), we would require that other test publishers re-evaluate the qualifications of the test administrator to determine whether it is appropriate to continue the test administrator's certification.

The Department is proposing this approach to avoid the problem of one entity's actions having an inappropriate negative impact on another entity. It is conceivable that the cause for decertification by one test publisher or State would be unlikely to arise at a different test publisher or State because of different procedures. Also, in the context of test publishers, this approach would avoid the potential for one test publisher being able to affect the services of a competitor.

The third problem identified by GAO (*i.e.,* the fact that the current regulations do not require any follow-up on test score irregularities or corrective action) is addressed by a number of proposed provisions. In addition to proposed § 668.150(b)(7), which we discussed earlier, § 668.150(b)(15) would require that a test publisher or State immediately report to the Secretary any credible information indicating that a test has been compromised. Proposed paragraph (b)(16) of § 668.150 would require that test publishers and States immediately report to the Department's Office of Inspector General any credible information indicating that a test administrator or institution may have engaged in fraud or other criminal misconduct.

Finally, in proposed § 668.150(b)(17), we would require that test administrators notify test publishers (and States) if they provide any accommodations to individuals with disabilities. We believe that adding this requirement is appropriate because it would allow test publishers and States to take this information into account when norming tests in the future.

Administration of Tests (§ 668.151)

Current regulations: Current § 668.151 requires institutions to select a test administrator to give approved tests and to use results from an approved test publisher or assessment center. This provision also describes the conditions under which a test is considered to be independently administered.

Proposed regulations: Proposed § 668.151(a) would largely mirror the language in current § 668.151(a), except that, in paragraph (a)(1), we would remove the reference to tests approved under § 668.143 and we would refer to "test administrator", rather than "certified test administrator." As discussed elsewhere in this preamble, we have moved much of the language from current § 668.151(b) to the definition of the term *independent test administrator* in proposed § 668.142. As revised, proposed § 668.151(b)(1) would retain the current provision that the Secretary considers a test to be independently administered if it is given at an assessment center by a test administrator who is an employee of the center. In proposed § 668.151(b)(2), we would add language to provide that the Secretary also considers a test to be independently administered if it is given by an independent test administrator (defined in § 668.142) who maintains tests at a secure location and submits the test for scoring by the test publisher or the State or, for a computer-based test, a record of the test scores, within two business days of administering the test.

Proposed § 668.151(c) and (d) would largely track current § 668.151(c) and (d) except that we would update these paragraphs so that they would apply to both States and test publishers. In addition, we would revise proposed § 668.151(d)(3) to ensure that it is consistent with the changes reflected in proposed § 668.151(b)(2) and § 668.152(b)(2). We are proposing to remove § 668.152(d)(6) because the requirement is covered in proposed § 668.150(b)(14).

Finally, in proposed § 668.151(g)(4), we would require institutions to keep a record of each individual who took an ATB test and the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State. If the individual who took the test has a disability and is unable to be evaluated by the use of an approved ATB test, or requested or required a testing accommodation, the institution would be required, under proposed § 668.151(g)(5), to maintain documentation of the individual's disability and of the testing arrangements provided.

We would also make minor technical and conforming changes throughout this section.

Reasons: The minor changes reflected in proposed § 668.151(a) would be made to make the provision consistent with other changes in the proposed regulations. Specifically, we remove the reference to § 668.143 because we are not including that provision in the proposed regulations, and we refer to "test administrator" because, by definition, a test administrator must be certified (*see* proposed definition of *test administrator* in § 668.142).

In proposed § 668.151(b)(2), we would add a requirement to address the need to maintain tests in a secure location. This topic generated a great deal of discussion during the negotiated rulemaking sessions. After the second negotiated rulemaking session, the Department proposed draft language that would have required test publishers to maintain tests at a secure location, somewhere other than at the institution at which the tests are being administered.

Those non-Federal negotiators who had expressed the belief that tests should not be kept at an institution, unless the institution had an assessment center, were supportive of this proposal. Some of the other non-Federal negotiators identified a number of potential problems with this proposal. For example, they explained that it is common practice for test publishers to ship cartons of tests to the institutions where the tests will be administered, whether the tests are being administered at a test assessment center or by an independent test administrator. In addition, we were informed that many, if not most tests approved for ATB are

used for placement and other purposes and not used solely for the determination of individuals' eligibility for title IV, HEA programs. Some non-Federal negotiators noted that, in fact, it is also possible that tests may be far more secure if they are located at an institution where the facilities are monitored. Independent test administrators may not have access to secure locations apart from the institutions at which they give tests. For this reason, some non-Federal negotiators urged the Department not to require that tests be maintained in a secure location other than the institution at which they would be administered.

The language in proposed § 668.151(b)(2) is consistent with the Department's position that all ATB tests must be kept at a secure location. However, we also understand that if some of the tests are used for multiple purposes, it is difficult to prohibit the delivery of these tests to an institution. Therefore, the Department is specifically soliciting comments regarding proposed § 668.151(b)(2) and on other ways the Department can ensure that tests can be kept secure. Specifically, what does it mean to keep tests at a secure location? Does it mean a locked facility to which only the test administrator has a key? Should the focus be on maintaining a chain of custody, with adequate safeguards, rather than on the location itself? Is there a way to maintain inventory that would address the test security issue? As test publishers have a vested interest in keeping their tests secure, the Department is particularly interested in recommendations regarding how best to address the security issue in regulations.

With regard to the changes reflected in proposed § 668.151(g), we would be adding to the information that an institution must record. The added information that the institution would be required to maintain for each individual who took an ATB test would include: (1) the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State; and (2) if the individual who took the test has a disability and is unable to be evaluated by the use of an approved ATB test or the individual requested or required a testing accommodation, documentation of the individual's disability and of the testing arrangements that is provided in accordance with § 668.153(b). This proposed provision is intended to encompass documentation of accommodations provided through the use of accessible technologies, as described in § 668.144(c)(18) and(d)(9), as well as other accommodations requested or required by the individual with a disability in accordance with § 668.153(b). Requiring the name, address and any assigned identifier for each test administered would enable the test publisher or State to identify all tests administered by a test administrator and facilitate the notification of test takers should the test publisher or the State determine that the test was improperly administered. Requiring documentation of disabilities that necessitate testing accommodation, and of the testing arrangements provided, would provide important information for two reasons. First, collection of the information would help emphasize that testing accommodations may be provided only to individuals with documentation of a disability who require testing accommodations. We would encourage test administrators to work with an institution's disability support services center, or other institutional or State staff who have knowledge and experience in providing appropriate testing accommodations to individuals with disabilities to ensure that appropriate testing accommodations are provided and are appropriately documented. Second, providing such information to the test publisher or State would let those entities know that testing accommodations were provided, so that entity can make a determination regarding whether to include the score with scores of other test takers, for whom no testing accommodations were provided, for evaluative or norming purposes in the future.

Administration of Tests by Assessment Centers (§ 668.152)

Current regulations: Under current § 668.152(a), assessment centers are required to follow the requirements for administering tests specified in § 668.151(d). If the assessment center scores tests, it must send copies of completed tests, or a report listing all test-takers' scores, to the test publisher on an annual basis (*see* current § 668.152(b)).

Proposed regulations: Proposed § 668.152(a) would clarify that assessment centers are also required to comply with the provisions of § 688.153 (Administration of tests for individuals whose native language is not English or for individuals with disabilities), if applicable.

Under proposed § 668.152(b)(2), assessment centers that score tests would be required to provide copies of completed tests or lists of test-takers' scores to the test publisher or the State, as applicable, on a weekly basis. Under proposed § 668.152(b)(2)(i) and (b)(2)(ii), copies of completed tests or reports listing test-takers' scores would be required to include the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State.

Reasons: In proposed § 668.152(a), we would clarify that assessment centers are also required to comply with the provisions of § 668.153. With respect to individuals whose native language is not English, the test assessment center would be required to use the appropriate test, depending on the type of program in which an individual plans to enroll, and whether the classes are conducted in English or in the individual's native language. With respect to individuals with disabilities, the assessment center would be required to maintain documentation of an individual's disability, and would be required to ensure that there is documentation that an individual with a disability requires accommodations, such as extra time or a quiet room, for taking an approved test. Under current regulations, the presumption is that assessment centers comply with the provisions of § 668.153, but the proposed regulations would make the requirement explicit so there is no misunderstanding.

In proposed § 668.152(b)(2), we would require assessment centers that score tests to provide on a weekly basis (rather than an annual basis) the test publisher, or the State, as applicable, with all copies of the completed tests and a report listing, among other things, all test-takers' scores and institutions to which the scores were sent. We would also revise this section to require assessment centers to record the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher and to maintain this information in the copies of the completed tests or a report listing all test-takers' scores and institutions to which the scores were sent. These changes would enable the test publisher or State to identify all tests administered by a test administrator and to facilitate the notification of test takers should the test publisher or the State determine that the test was improperly administered.

We also propose minor technical and conforming changes throughout this section.

Administration of Tests for Individuals Whose Native Language Is Not English or for Individuals With Disabilities (§ 668.153)

Current regulations: Current § 668.153 describes the requirements governing the administration of tests for students whose native language is not English or for persons with disabilities.

Current § 668.153(a) specifies the requirements that apply to the tests that must be used for students whose native language is not English and those requirements differ depending on whether the student is enrolled in (1) a program conducted entirely in his or her native language, (2) a program that is taught in English with an English as a Second Language (ESL) component; or (3) a program that is taught in English without an ESL component, or the student does not enroll in the ESL component if the institution offers such a component.

Current § 668.153(b) specifies the requirements that apply to the tests that must be used for students with a documented impairment. Under this provision, an institution must use a test described in § 668.148(a)(3) or § 668.149(a) for students with a documented impairment. The institution must document that a student is disabled and unable to be evaluated by the use of a conventional test.

Proposed regulations: In addition to reflecting a number of technical and conforming changes, proposed § 668.153 would clarify that this section applies to individuals whose native language is not English or individuals with disabilities who are enrolled or who plan to enroll at an institution (*i.e.,* not only students).

Proposed § 668.153(a)(1) and (a)(3) would remain largely unchanged from the current regulations. Under proposed § 668.153(a)(2), an individual whose native language is not English who is enrolled or plans to enroll in a program taught in English with an ESL component would now be required to take an English language proficiency assessment approved under § 668.148(b) and, before beginning the portion of the program taught in English, a test approved under § 668.146.

Proposed § 668.153(b) would be revised by removing references to an individual's impairment and, in its place, using the term *individual with a disability,* which would be defined in proposed § 668.142. The substantive changes reflected in paragraph (b) of proposed § 668.153 relate to the documentation necessary to support the determination that an individual has a disability and requires accommodations for taking an approved test. If an individual with a disability requires accommodations—such as extra time or a quiet room—for taking an approved test, or is unable to be evaluated by the use of an approved ATB test, the test administrator would be required to ensure that there is documentation to support the alternative arrangements. Proposed § 668.153(b)(4), which lists potential sources of such documentation, would be expanded to include a record of the disability from a local or State educational agency, or other government agency, such as the Social Security Administration or a vocational rehabilitation agency that identifies the disability and may include a diagnosis as well as recommended testing accommodations.

Reasons: We propose to refer to "individuals who are enrolled, or who plan to enroll", instead of "students who are enrolled", throughout this section because it is common for individuals to take ATB tests prior to enrollment.

We propose to make the changes reflected in proposed § 668.153(a)(2) to address a problem with the current regulations, which require non-native English speakers who enroll in a program that is taught in English and that has an ESL component to take either an ESL test or an ATB test in the student's native language. Testing such an individual in his or her native language does not demonstrate that the individual has the ability to benefit from a program taught in English. Rather, for these individuals, it is necessary first to determine how proficient they are in English. Therefore, proposed § 668.153(a)(2) would require individuals who wish to enroll in such a program to first take an English language proficiency assessment to determine appropriate placement in the ESL component. Before such students could begin a program taught in English, they would be required to take a regular ATB test in English.

Finally, we would revise § 668.153(b)(3) to require that test administrators ensure that there is adequate documentation to support determinations that a test-taker is an individual with a disability and requires accommodations for taking an approved test or is unable to be evaluated by the use of an approved ATB test. The examples of documentation that would be added to § 668.153(b)(4) are provided to assist institutions in understanding what kinds of documentation are appropriate for supporting a determination that an individual has a disability and requires accommodations for taking an approved test.

Institutional Accountability (§ 668.154)

Current regulations: Current § 668.154 limits institutional liability for title IV, HEA program funds disbursed to a student whose eligibility is determined under subpart J of part 668 only if the institution used a test administrator who: (1) was not independent of the institution at the time the test was given, (2) compromised the testing process, or (3) was unable to demonstrate that the student received a passing score on an approved test.

Proposed regulations: Proposed § 668.154 would largely track current § 668.154, except that it would provide for institutional liability if institutions used a test that was not administered independently in accordance with § 668.151(b). In addition, in proposed § 668.154(b), we would clarify that an institution would be liable if it or an employee of the institution compromised the test in any way.

Reasons: We propose to amend § 668.154(a) to provide that an institution would be liable if the institution used a test that was not administered independently, in accordance with § 668.151(b). In making this change, we would clarify that ATB tests must be administered independently, whether in an assessment center or by an independent test administrator in order to preserve the integrity of the testing process.

In addition, we propose to provide that an institution would be held responsible if either the institution or an employee of the institution compromises the testing process to promote accountability.

Transitional Rule for the 1996–97 Award Year (§ 668.155)

Current regulations: Current § 668.155 contains a transitional rule for the 1996–97 award year.

Proposed regulations: The proposed regulations would remove current § 668.155 and reserve that section for future use.

Reason: We propose to remove the transitional rule for 1996–97 because it is outdated.

Approved State Process (§ 668.156)

Current regulations: Current § 668.156 provides the requirements for the Department's approval of a State process that serves as an alternative to the requirement for passage of a test approved under subpart J of part 668.

Proposed regulations: Proposed § 668.156 would remain largely unchanged from current § 668.156. The one change, in proposed § 668.156(e), would specify that an approved State

process would become effective on the date the Secretary approves the process or six months after the State submits the process for approval if the Secretary neither approves nor disapproves the process.

Reason: The change clarifies that the effective date of a State process is the date the process has been deemed to be approved. We made this change to clarify what the effective date of a process is when the Secretary affirmatively approves it.

Disbursements (§§ 668.164(i), 685.102(b), 685.301(e), 686.2(b), and 686.37(b))

Provisions for Books and Supplies

Statute: Section 401(e) of the HEA provides that an institution may credit a student's account with Federal Pell Grant funds to pay for the cost of tuition and fees, and for institutionally owned housing, room, and board. For other goods and services provided by the institution, the student may elect to have his or her account credited with Federal Pell Grant funds to pay those costs. In all other respects, section 401(e) provides that payments of Federal Pell Grant funds are made in accordance with regulations promulgated by the Secretary. The HEA does not address the issue of crediting student accounts for the other title IV, HEA programs.

Current regulations: Section 668.164(b) provides that an institution must disburse title IV, HEA program funds (except for FWS funds) on a payment period basis. Section 668.164(d) reflects the statutory requirements for crediting a student's account with Federal Pell Grant funds, but provides that those requirements also apply to ACG, National SMART Grant, TEACH Grant, FSEOG, Federal Perkins Loan, Direct Loan, and FFEL program funds. In addition, §§ 686.33(a), 690.76(a), and 691.76(a), provide that for each payment period, an institution may pay Federal Pell Grants, ACGs, National SMART Grants, and TEACH Grants to a student in a time and manner that best meets the student's needs.

Proposed regulations: Under proposed § 668.164(i), an institution would provide a way for a Federal Pell Grant eligible student to obtain or purchase required books and supplies by the seventh day of a payment period under certain conditions. An institution would have to comply with this requirement only if, 10 days before the beginning of the payment period, the institution could disburse the title IV, HEA program funds for which the student is eligible, and presuming that those funds were disbursed, the student would have a credit balance under § 668.164(e). The amount the institution would provide to the student for books and supplies would be the lesser of the presumed credit balance or the amount needed by the student, as determined by the institution. In determining the amount needed by the student, the institution may use the actual costs of books and supplies or the allowance for books and supplies used in the student's cost of attendance for the payment period.

Reasons: Although the current regulations permit institutions to disburse Federal Pell Grant and other title IV, HEA program funds in a manner that best meets the needs of students, we have identified situations where low-cost institutions delay disbursing funds for an extended time, or make partial disbursements to cover costs for only tuition and fees. As a result of these practices, students either have to pay for books and supplies that would otherwise be paid by title IV, HEA program funds by obtaining loans, or do without the books and supplies needed at the beginning of the term or enrollment period until the institution makes the funds available. The proposed regulations would reduce these disbursement delays at some institutions and enable students to obtain their books and supplies in a timely manner.

During the negotiated rulemaking sessions, some of the non-Federal negotiators stated that many institutions advance funds (institutional funds or title IV, HEA program funds) or issue vouchers, or other credit vehicles, that students use to obtain books and supplies. The negotiators noted that if a student to whom the institution provided the advance or voucher does not begin classes, the institution risks losing the amount advanced. For example, if the institution advanced Federal Pell Grant funds to a student, *e.g.,* made a disbursement directly to the student, and the institution could not show that the student began attendance in the payment period, under § 668.21(a)(1) the institution would be liable and would have to return those funds. For this reason, some of the non-Federal negotiators argued that in exchange for requiring an institution to advance funds or issue vouchers early in the payment period, and before the institution could establish that the student began attendance, the student should be liable under § 668.21 for returning the funds.

In response to these concerns and suggestions, the Department put forward draft proposed regulations shifting the liability to students, but that draft was rejected by other non-Federal negotiators for two reasons. First, these negotiators believed that a student should not be responsible for repaying a debt under the title IV, HEA programs because a student could be precluded from enrolling again at a postsecondary institution if the student did not repay the debt or make satisfactory arrangements to repay it. Second, some of the non-Federal negotiators were aware of predatory practices at some institutions where students were promised an advance of funds simply for enrolling in programs at those institutions, and these negotiators believed that shifting the liability to students would exacerbate these practices.

Some of the non-Federal negotiators noted that some public institutions must request funds from a State office (unlike other institutions that have direct control of funds) and cautioned against adopting any regulations that would make it administratively difficult, if not impossible, for these institutions to comply with disbursement timelines. These non-Federal negotiators suggested that an advance or voucher for books and supplies could be issued early in the payment period only if the institution determined that the student was eligible and otherwise qualified for title IV, HEA program funds before the beginning of the payment period, and this suggestion is reflected in the proposed regulation.

The committee agreed to adopt proposed § 668.164(i), believing it provided an appropriate balance between the need for students to be able to purchase or obtain books and supplies early in the payment period and the administrative needs of institutions.

Reporting Disbursements, Adjustments, and Cancellations

Statute: None.

Current regulations: Sections 685.301(e) and 686.37(a) require an institution to submit a record to the Department for the initial disbursement of a Direct Loan or TEACH Grant no later than 30 days following the date of that disbursement. In addition, an institution must submit subsequent records for disbursements, adjustments, and cancellations of these program funds no later than 30 days following the date of those actions. However, § 690.83(a)(2) of the Federal Pell Grant regulations provides that an institution submits Payment Data in accordance with procedures established by the

Secretary through publication in the **Federal Register.**

Proposed regulations: The proposed regulations in §§ 685.301(e) and 686.37(b) would adopt the current Federal Pell Grant reporting requirements. Also, the definition of the term "Payment Data" would be added to the Direct Loan and TEACH Grant program regulations in §§ 685.102(b) and 686.2(b), respectively.

Reasons: The proposed regulations would harmonize the reporting requirements for the Federal Pell Grant, TEACH Grant, and Direct Loan programs and provide flexibility to the Secretary to modify the requirements to take advantage of changing technology and improved business processes.

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 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, we have determined this proposed regulatory action will have an annual effect on the economy of more than $100 million. Therefore, this action is "economically significant" and subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, we have assessed the potential costs and benefits—both quantitative and qualitative—of this regulatory action and have determined that the benefits justify the costs.

Need for Federal Regulatory Action

These proposed regulations are needed to implement provisions of the HEA, as amended by the HEOA, particularly related to programs that prepare students for gainful employment, incentive compensation, satisfactory academic progress policies, and verification of information on student aid applications which require the development of new or revised policies and disclosures for institutions participating in Federal student assistance programs. These regulations also would implement changes made by the HEOA to provisions related to ability to benefit options.

Many regulatory provisions were included in this NPRM because of the length of time since they had been updated or the provisions' relationship to significant developments, such as the Department's FAFSA simplification initiative. In the following areas, the Secretary has exercised limited discretion in including topics in these proposed regulations:

Definition of High School Diploma (§ 668.16(p)): The proposed regulations would require institutions to demonstrate the capability to adequately administer the program by developing and following procedures to evaluate the validity of a student's high school completion. A high school diploma is an essential factor in determining an institution's participation in or a student's eligibility for assistance under the title IV, HEA programs, but the term is not defined anywhere in the HEA or its implementing regulations. Under proposed § 668.16(p), institutions would have to verify a student's high school completion if the institution or the Secretary has reason to believe a student's diploma is not valid or is not from an entity that provides secondary school education. This proposed provision is not intended to create a requirement to collect high school diplomas from all students. Rather, it allows operational flexibility so institutions can choose the best approach to make inquiries when warranted. To assist in this process, the Department is working to implement changes in the FAFSA. Specifically, beginning in 2011–2012, students will be required to list the name of their secondary school and the State that issued their diploma when completing their FAFSA. In addition, the Department plans to issue guidance to institutions on developing and following procedures for evaluating the validity of high school diplomas through the Federal Student Aid Handbook or other means.

Ability to Benefit (§§ 668.32 and 668.141 through 668.156): Students without a high school diploma or its equivalent may become eligible for title IV, HEA program funds if they can prove their ability to benefit from the planned education by taking Department-approved ability to benefit tests or completing college coursework. The current regulations specify the criteria and procedures for approval of ATB tests, the requirements for independent administration of approved tests, the requirements for maintaining the Secretary's approval of ATB tests, and the procedures for the Secretary's approval of alternate State processes.

As discussed in the ability to benefit section of this NPRM, the proposed regulations would update the procedures and requirements related to the administration and suitability of ability to benefit tests to ensure the security of the test, perform an analysis of test irregularities, take corrective action when test irregularities occur, report the names of decertified test administrators to the Secretary, and to handle testing of non-native speakers of English and individuals with disabilities. Several defined terms would be modified or added to clarify the regulations, including the terms *assessment center, independent test administrator, test, test administrator,* and *test publisher.*

The proposed regulations related to application for test approval would consolidate requirements for test publishers and States submitting tests for approval because the processes have common elements. Under the proposed regulations, test publishers and States would be required to show that their tests are normed using a contemporary sample that is representative of people with a high school diploma instead of people beyond the age of compulsory school attendance. They would be required to submit a description of their test administrator certification process that indicates how they will determine that a test administrator has the necessary training, knowledge, skills, and integrity to test students in accordance with requirements. Finally, they would be required to describe how they will determine that the test administrator has the ability and facilities to keep their tests secure against disclosure or release.

In addition, the proposed regulations would implement a new ability to benefit option added by the HEOA that allows students to satisfactorily complete six credit hours or 225 clock hours of college work applicable to a degree or certificate offered by the institution to prove ability to benefit. As described in the *Reasons* section related to this provision, the Department took into consideration extensive discussions at the negotiated rulemaking sessions in

developing this proposed regulatory provision. One issue discussed was whether the hours needed to be earned need to be within the program in which the student planned to enroll and for which the student applied to receive title IV, HEA program funds. Some negotiators believed that, if the coursework were not earned in the program the student planned to enroll, it might not be rigorous enough, and the provision would not be effective as a means of demonstrating the student's ability to benefit from the program in which they intend to enroll. The Department agreed with other non-Federal negotiators, who contended that the statutory language did not impose this kind of limitation and that students often change their mind as to the specific program of enrollment so the simplest approach to the provision would be best. The Department also noted that the proposed provision would be a financial aid requirement, not an admissions criterion, and that an institution could have a policy that it does not admit any students who do not have a high school diploma or the equivalent.

Finally, the negotiators questioned whether a student who established student eligibility under one of the ATB provisions could be paid for the payment period in which eligibility was established. The Department's position is that a student who establishes eligibility by passing an ATB test during a payment period may be paid for the entire payment period, but that a student who establishes eligibility through coursework may not be paid for the payment period during which the student took the requisite coursework because eligibility would not be established until the payment period was over.

Misrepresentation of Information to Students and Prospective Students (§§ 668.71 through 668.75): The Secretary recognizes that choosing a college or job training program is an increasingly important and high-stakes decision for students, and the availability of accurate information about institutions is crucial. Section 487 of the HEA and current regulations prohibit any substantial misrepresentation made by an institution regarding the nature of its educational program, its financial charges, or the employability of its graduates.

The Department proposes to strengthen regulatory enforcement authority against eligible institutions that engage in substantial misrepresentations. The proposed regulations would restructure § 668.71 so that paragraph (a) describes the actions the Secretary may take if the Secretary determines that an eligible institution has engaged in substantial misrepresentation. These actions would include revocation of the participation agreement, limitations on title IV, HEA participation, denial of participation applications, or initiation of proceedings against the institution.

The proposed regulations would provide additional guidance to institutions to ensure that marketing materials and statements are an accurate representation of the institution. The proposed definition of *misrepresentation* would restate the current definition of the term (*i.e.,* that misrepresentation is any false, erroneous, or misleading statement made not only by the eligible institution), but it would also clarify that the term includes any false, erroneous, or misleading statement made by one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement. Moreover, we would clarify in the definition of *misrepresentation* that it may be made directly or indirectly to a student or a member of the public in written, oral, visual, or other form.

The proposed amendments in subpart F of part 668 would add further detail to the categories of misrepresentation described in the current regulations prohibiting misrepresentation. In proposed § 668.72, which describe the types of false, erroneous, or misleading statements about an institution's educational program that would be prohibited as misrepresentations, we would expand the list of prohibited misrepresentations to include false, erroneous, or misleading statements relating to the following: Institutional, programmatic, or specialized accreditation; conditions for acceptance of transfer credits; whether completion of a course of instruction qualifies students to take licensing examinations or meet other additional conditions required for employment in the field for which the program is represented to prepare students; requirements to complete the course of study and conditions that would lead to termination of enrollment; the availability of unsolicited testimonials or endorsements; the subject matter, content of the course of study, and facts about the degree, certificate, or other completion document; and whether the degree to be given has been authorized by the appropriate State educational agency.

Current § 668.73 describes prohibited false, erroneous, or misleading statements related to the cost of the program and financial aid that is available to students. Proposed § 668.73 would expand the categories to include the cost of the program and the institution's refund policy if a student does not complete the program; the availability of any financial assistance offered to students, including a student's loan repayment responsibility regardless of program completion or subsequent employment; and the student's right to apply for or reject any particular type of financial aid or other assistance. The Department agreed with non-Federal negotiators that students who enroll in a program should have specific knowledge of the cost of the program, its refund policy, and financial aid options.

Current § 668.73 describes what constitutes misrepresentation related to the employability of an institution's graduates and these prohibitions would be retained. Proposed § 668.73 would prohibit false statements regarding an institution's knowledge of current or likely future conditions, compensation, or employment opportunities for its graduates. Misrepresentations relating to whether employment is being offered by the institution or that a talent hunt or contest is being conducted would also be prohibited. In addition, institutions would be prohibited from making false statements about other requirements that are generally needed in order to be employed in certain fields. Negotiators acknowledged that students need to be informed about employment prospects when considering postsecondary program options, but were concerned about the ability to provide accurate information given the economic environment and timeframes involved.

Current § 668.75 describes the Department's procedures for reviewing allegations or complaints regarding misrepresentation claims. The Department proposes removing § 668.75 as these procedures have not been used to take enforcement actions against institutions for making substantial misrepresentations. The Department has used its other administrative remedies to take the appropriate actions against institutions found to have engaged in misrepresentation. The proposed regulations would create a new § 668.75 that would prohibit an institution from suggesting that its participation in title IV, HEA programs represents a Departmental endorsement of the quality of its educational programs.

Incentive Compensation (§ 668.14(b)): Section 487(a)(20) of the HEA requires that the title IV, HEA program participation agreement prohibit an institution from making any

commission, bonus, or other incentive payments based directly or indirectly on success in securing enrollments or financial aid to any persons or entities involved in student recruiting or admissions activities, or in making decisions about the award of student financial assistance. This statutory prohibition does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal financial assistance. Current regulations to implement HEA Section 487(a)(20) specify twelve types of activities and arrangements that do not violate the prohibition on incentive payments to an institution's employees based on success in securing enrollments. The first safe harbor explains the conditions under which an institution may adjust compensation without that compensation being considered an incentive payment. The twelve safe harbors describe the conditions under which payments that could potentially be construed as based upon securing enrollments or financial aid are nonetheless not covered by the statutory prohibition. As described in greater detail in the *Reasons* section related to this provision, the safe harbors under the existing regulations dealt with adjustments to employee compensation, enrollments in programs not eligible for title IV, HEA program funds, contracts to provide training, profit-sharing bonus plans, compensation based upon program completion, pre-enrollment activities, managerial and supervisory employees, token gifts, profit distributions, Internet-based activities, and payments to third parties.

The proposed regulations would eliminate these safe harbors in response to student and advisor complaints about aggressive sales tactics from some institutions, institutions' concerns that a lack of clear guidance made it difficult to be confident of compliance, and the Department's experience that unscrupulous actors routinely rely on the safe harbors to circumvent the intent of section 487(a)(20) of the HEA. The regulations proposed by the Department would eliminate the safe harbors and prohibit incentive compensation linked to enrollments for employees engaged in recruitment, admissions, or financial aid activities. Institutions would be able to make merit-based adjustments that are not based on securing enrollments or the award of financial aid. The clarifying remarks about the current safe harbors in the preamble to this NPRM describe the potential for non-compliant conduct to be protected by the safe harbors. The proposed regulations would require institutions to focus on two questions when evaluating employee bonus or incentive payments: (1) Whether the payment is based on success in securing enrollments; and (2) whether the payment is an award of a sum of money. If the answer to each question is yes, the incentive or bonus payment would not be permitted. Non-Federal negotiators who agreed with the Department supported the elimination of the safe harbors as a way to reduce non-compliance and to make the regulations more consistent with the statute. Other non-Federal negotiators objected that the safe harbors were needed to explain an unclear law and to provide boundaries so institutions do not unintentionally run afoul of the regulations. As discussed in the *Regulatory Alternatives Considered* section below, negotiations about incentive compensation and safe harbors did not lead to agreement.

State Authorization as a Component of Institutional Eligibility (§§ 600.4(a)(3), 600.5(a)(4), 600.6(a)(3), and 600.9): To participate in the title IV, HEA student aid programs, an institution must be legally authorized to provide a postsecondary educational program within the State in which it is located. Current regulations do not define or describe the statutory requirement that an institution must be legally authorized in a State. State legal authorization can be granted through a charter, license, or other written document issued by an appropriate agency or State official and may be provided by a licensing board or educational agency. Some States have deferred approval of educational institutions to accrediting agencies or have exempted from State authorization requirements a subset of institutions. Since accrediting agencies generally require that an institution be legally operating in the State, the Department was concerned that the checks and balances provided by the separate processes of accreditation and State legal authorization were being undermined. The different requirements for authorization as an educational institution allow some institutions to move from State to State for less oversight. There was also concern over the Department's existing policy that an institution was authorized by a State by virtue of the State's decision not to have any oversight over the institution. As discussed in the *Reasons* section related to this provision, the recent lapse in the existence of California's Bureau for Private Postsecondary and Vocational Education exemplified the weakness of this policy in ensuring appropriate oversight of Federal programs.

The proposed regulations would clarify what constitutes State authorization for participation in title IV, HEA programs. According to the Department's proposal, legal authorization is represented by a charter, license, or other document from a State agency or State entity that specifically grants the authority to operate postsecondary educational programs, including those leading to a degree or certificate. The State authorization must be subject to adverse action by the State and the State must have a process to review and act on complaints about an institution. An institution would also be considered legally authorized in a State if the institution were authorized to offer programs beyond secondary education by the Federal Government or an Indian Tribe as that term is described in 25 U.S.C. 1802(2) or if it were exempt from State authorization as a religious institution under the State constitution. The proposed regulations also would require a State to notify students of the contact information for filing complaints with an institution's accreditor and State licensing agency.

Gainful Employment (§§ 600.2, 600.4, 600.5, 600.6, 668.6, and 668.8): The Department intends to begin collecting information on completers of programs that, by law, must lead to gainful employment in a recognized occupation. The proposed new requirement would enable the Department to further evaluate and monitor the outcomes of these programs.

Under proposed § 668.6(a), an institution would annually submit information about students who complete a program that leads to gainful employment in a recognized occupation. That information would include, at a minimum, identifying information about each student who completed a program, the CIP code for that program, the date the student completed the program, and the amounts the student received from private educational loans and institutional financing plans. In addition, under proposed § 668.6(b), an institution would be required to disclose on its Web site information about (1) the occupations that its programs prepare students to enter, along with links to occupational profiles on O*NET, (2) the on-time graduation rate of students entering a program, (3) the cost of each program, including costs for tuition and fees, room and board, and other institutional costs typically incurred by students enrolling in the program, such as books and supplies, (4) beginning no later than

June 30, 2013, the placement rate for students completing each of those programs, as determined under § 668.8(g) or a State-sponsored workforce data system; and (5) the median loan debt incurred by students who completed each program in the preceding three years, identified separately as title IV, HEA loan debt and debt from private educational loans and institutional financing plans.

Definition of a Credit Hour (§§ 600.2, 602.24, 603.24, and 668.8): Credit hours are used to measure degree completion and award title IV, HEA aid, but under current regulations there is no commonly accepted definition of a credit hour. The increased availability of weekend, evening, and distance education programs complicates the measurement of credit hours by seat time in the definitions and conversion formulas existing under current regulations. In current § 668.8(k) and (l), the regulations provide the formula that certain undergraduate programs must use to convert the number of clock hours offered to the appropriate number of credit hours, with each semester or trimester hour requiring at least 30 clock hours of instruction, and each quarter hour requiring at least 20 hours of instruction. An institution must use the formula to determine if a program is eligible for title IV, HEA purposes unless (1) the institution offers an undergraduate program in credit hours that is at least two academic years in length and leads to an associate degree, a bachelor's degree, or a professional degree or (2) each course within the program is acceptable for full credit toward an associate degree, bachelor's degree, or professional degree offered by the institution, and the degree offered by the institution requires at least two academic years of study.

The proposed regulations would add a definition of a credit hour, amend accrediting agency procedures for reviewing the assignment of credit hours, and revise the clock-to-credit hour conversion formulas. Under the proposed regulations, a credit hour is defined as a unit measuring the amount of work consisting of one hour of classroom or direct faculty instruction and at least two hours of student work outside the classroom over a set period of time. The required time period is fifteen weeks for a semester or trimester credit hour, ten to twelve weeks for a quarter hour of credit, and the equivalent amount of work for a different amount of time. For other activities that grant credit such as internships, studio work, and laboratory work, the institution must require at least a comparable amount of work to award credit hours. For programs for which the provisions above are not appropriate, the institution must establish reasonable equivalencies as represented by learning outcomes for the amount of work required in the definition of a credit hour.

The credit hour was developed as part of a process to establish a standard measure of faculty workloads, costs of instruction, and rates of educational efficiencies as well as a measure of student work for transfer students. A standard measure will provide increased assurance that a credit hour has the necessary educational content to support the amounts of Federal funds that are awarded to participants in Federal funding programs and that students at different institutions are treated equitably in the awarding of those funds. During the negotiated rulemaking sessions, a few of the non-Federal negotiators were opposed to any proposal to define a credit hour because they believed that a definition would impinge upon an institution's ability to create innovative courses and teaching methods. Other non-Federal negotiators agreed with the Department that the proposed definition of a credit hour would provide sufficient flexibilities for institutions and supported keeping it in the proposed regulations. In response to these concerns, the proposed regulations were changed to allow institutions to establish reasonable equivalent measures of a credit hour in accordance with its accrediting agency's requirements and adopt alternative measures of student work. The proposed definition of a credit hour does not change the policy providing funding based only on credit hours that are the direct result of postsecondary student work and not Advanced Placement (AP) or International Baccalaureate (IB) programs, tests or testing out, life experience, or similar competency measures. No agreement was reached on this issue due to the belief of some non-Federal negotiators that a definition would limit an institution's ability to use alternative measures of student work.

In addition, the proposed regulations require accrediting agencies to review an institution's assignment of credit hours and determine that they comply with accepted practice in higher education. Accrediting agencies may use sampling or other methods in reviews of programs at institutions. The accrediting agency must take actions to address deficiencies identified in such a review and must inform the Secretary if it finds systemic noncompliance or significant noncompliance in one or more programs at an institution.

Finally, the proposed regulations would revise the clock-to-credit hour conversion process. Proposed § 668.8(l)(1) would modify existing clock hour to credit hour conversion formulas so a semester or trimester credit hour must include at least 37.5 clock hours of instruction and a quarter hour must include at least 25 clock hours of instruction. If an institution's process for determining credit hours has not been found deficient by the accrediting or State licensing agency, then the minimum clock hours of instruction can be reduced to 30 for semester and trimester programs and 20 for quarter programs as long as the combined instruction and work outside the class meets the longer requirements described above. With respect to the definition of an eligible program in § 668.8, the proposed regulations require that institutions demonstrate that students enroll in and graduate from the degree program. The proposed regulations also require a program to use clock hours when accrediting agencies determine that an institution's policies and procedures about credit hours are deficient or when completing clock hours is required for graduates to apply for a license or authorization to practice their intended occupation.

Written Agreements between Institutions of Higher Education (§§ 668.5 and 668.43): Under current regulations, two or more institutions may enter into agreements for students to continue receiving title IV, HEA funds when studying away from their "home" institution. These agreements fit into three categories: (1) consortium agreements between eligible institutions; (2) contractual agreements between an eligible institution and an ineligible institution; and (3) study abroad arrangements, which may involve a consortium or contractual agreement between two or more institutions. There is no requirement in either § 668.5 or 668.43 of the current regulations that institutions provide information on written arrangements to enrolled or prospective students.

The proposed regulations would address issues related to written agreements between institutions with common ownership, restrict agreements with ineligible institutions, and expand student notification requirements related to written agreements. The proposed regulations would redefine the home institution from the one that enrolls the student to the one that grants the degree or certificate. Proposed § 668.5(a)(2) would specify that if the institutions involved in a written agreement are controlled by the same individual, partnership, or corporation,

the institution that grants the degree must provide more than 50 percent of the educational program. This would address concerns that such agreements could be used to circumvent regulations governing cohort default rates and "90–10" provisions. For contractual agreements between an eligible institution and an ineligible institution, the proposed regulations would add a restriction that the ineligible institution has not had its certification to participate in title IV, HEA programs revoked or had its application for re-certification denied. The proposed regulations also would limit the portion of the education program that the ineligible institution could provide to less than 50 percent. The proposed regulations would also require institutions to provide information about written agreements to students. This information would need to include the portion of the program the home institution is not providing, estimated additional costs that would be incurred, the method of delivery for the portion of education outside the home institution, and the name and locations of the other institutions. During negotiations, the Department explained that the proposed disclosure requirements would apply to blanket, existing arrangements between or among institutions and not to individual, student-initiated written arrangements, or internships and externships.

Verification of Information Included on Student Aid Applications (§§ 668.52 through 668.61): Under current regulations, institutions are required to verify the application information of up to 30 percent of Federal financial aid applicants selected by the Secretary in a given award year. Institutions have expressed concern that this verification process is overly complicated and invasive for applicants' families.

Current subpart E of part 668 governs the verification and updating of the FAFSA information used to calculate an applicant's expected family contribution (EFC) as part of the determination of an applicant's need for student financial assistance. These proposed regulations would implement statutory changes to Part F of the HEA made by the HEOA and further align these regulations with enhancements that have been made to the application processing system. Based on the Department's review of current policies and procedures, the changes reflected in these proposed regulations would remove obsolete definitions, procedures, and references to programs and would include: (1) Describing institutional and applicant responsibilities for updating FAFSA information; (2) removing and refining definitions related to the FAFSA application; (3) codifying current policy that an institution must complete verification before exercising any authority under professional judgment; (4) removing the 30 percent cap on the number of applicants selected by the Secretary that an institution must verify in order to move towards a more targeted verification system; (5) restructuring the exclusions from verification section; (6) requiring any changes to a student's dependency status be updated throughout the award year, including changes in marital status; (7) replacing the five items that an institution currently verifies with a targeted verification process that is specific to each applicant selected as described in a **Federal Register** notice published annually by the Secretary; (8) codifying the Department's IRS Data Retrieval Process, which allows an applicant to import income and other data from the IRS into an online FAFSA; (9) updating the IRS deadline granted for extension filers; (10) clarifying when an institution is required to reverify the AGI and taxes paid by an applicant and his or her spouse or parents for individuals with an IRS tax filing extension; (11) expanding the information a tax preparer must provide on the copy of the filer's return that has been signed by the preparer; (12) describing in an annual **Federal Register** notice other documentation that an applicant must provide for the information that is selected for verification; (13) allowing interim disbursements when changes to an applicant's FAFSA information would not change the amount the applicant would receive under a title IV, HEA; (14) requiring all corrections to be submitted to the Secretary for reprocessing; (15) removing all allowable tolerances; (16) applying the cash management procedures for proceeds received from a Subsidized Stafford Loan or Direct Subsidized Loan on behalf of an applicant; and (17) describing the liability of an institution that disburses title IV, HEA aid to an applicant without receiving a corrected SAR or ISIR within an established deadline.

The proposed verification regulations would align the verification process with the effort to simplify the FAFSA and make it flexible enough to accommodate future changes while still ensuring that students who receive Federal aid funds are eligible. Institutions would be required to establish procedures that are consistent with these provisions. For example, an institution would be required to complete an applicant's verification before it could exercise its authority to change the applicant's cost of attendance or data items to calculate the expected family contribution. Applicants may be excluded from verification if they do not receive aid under title IV, HEA programs for reasons outside of verification questions, only receive unsubsidized aid, or transfer from another institution where verification was already performed as proven by a letter with ISIR number from that institution. The specific items to be verified under the proposed regulations would be published by the Secretary in the **Federal Register** for each award year. The regulations would also allow for information to be verified as having come from the IRS instead of requiring an applicant's tax form.

Satisfactory Academic Progress (§§ 668.16(e), 668.32(f), 668.34): To be eligible for Federal financial aid under title IV of the HEA, students must make satisfactory academic progress ("SAP") and institutions must have a published policy to monitor that progress. As detailed in the *Satisfactory Academic Progress* section of this preamble, the SAP policy must include grade-based and time-related standards, must apply consistently to students within categories, must be as strict for title IV, HEA aid recipients as for non-recipients in the same educational program, must describe the circumstances under which a student may appeal a determination that the student is not making satisfactory academic progress, and must require an institution to review a student's academic progress at the end of each year, at a minimum. The proposed regulations would restructure the satisfactory academic progress requirements so that § 668.16(e) would be revised to include only the requirement that an institution establish, publish, and apply satisfactory academic progress standards. The remainder of § 668.16(e) would be moved to proposed § 668.34 so that that provision would contain all of the required elements of a satisfactory academic progress policy as well as how an institution would implement such a policy.

All of the policy elements in the current regulations under §§ 668.16(e) and 668.34 would be combined in proposed § 668.34. The timing provisions would maintain the maximum timeframe of 150 percent of the published length of the educational program whether measured in credit hours or clock hours (reflected in current § 668.16(e)(2)(ii)(A)). SAP

policies would need to describe how the institution treats withdrawals, course repetitions, and transfers from another institution. For educational programs greater than two academic years, students must have a GPA of "C" or its equivalent at the end of the second year or have academic standing that is consistent with the institution's graduation requirements. The proposed regulations would not require institutions to permit students to appeal. An institution that permits appeals, however, would be required to describe the appeals process in its satisfactory academic progress policy. Under proposed § 668.34(a)(9)(ii), a student would be permitted to file an appeal based on the death of a relative, an injury or illness of the student, or other special circumstances. Under proposed § 668.34(a)(9)(iii), a student would be required to submit, as part of the appeal, information regarding why the student failed to make satisfactory academic progress, and what has changed in the student's situation that would allow the student to demonstrate satisfactory academic progress at the next evaluation. If an institution does not permit appeals, the satisfactory academic policy must describe how a student may regain eligibility for assistance under the title IV, HEA programs. Proposed § 668.34(a)(11) would require that an institution's policy provide for notification to students of the results of an evaluation that impacts the student's eligibility for title IV, HEA program funds.

Proposed § 668.34(a)(8) would require institutions that use "financial aid warning" and "financial aid probation" statuses in connection with satisfactory academic progress evaluations to describe these statuses and how they are used in their satisfactory academic progress policies. The term *financial aid warning* would be defined as a status conferred automatically and without action by a student, while the term *financial aid probation* would be defined as a status conferred after a student has submitted an appeal that has been granted. In order to encourage institutions to provide additional support to students in a timely manner, the proposed regulations would permit institutions that review student progress at the end of each payment period to place students on financial aid warning for one payment period. Proposed § 668.34(a)(8)(ii) would make clear that an institution with a satisfactory academic progress policy that includes the use of the financial aid probation status could require that a student on financial aid probation fulfill specific terms and conditions, such as taking a reduced course load or enrolling in specific courses.

Recent questions from institutions and reviews of institutional satisfactory academic progress policies have suggested that it is possible for an institution to have a policy that meets all of the current regulatory criteria, but due to use of automatic probationary periods, permits students to receive aid for as long as 24 months even though they are not meeting the institution's satisfactory progress standards. The proposed regulations are designed to implement a more structured, comprehensive, and consistent approach to development and implementation of institutional satisfactory progress policies.

Retaking Coursework (§ 668.2): The proposed regulations would amend the definition of "full-time student" in § 668.2 to allow repeated coursework to count towards a student's enrollment status in term-based programs. Currently, students in term-based credit hour programs may get paid for retaking courses as long as the credits are in addition to and not a replacement for previously earned credits, and the student meets the institution's overall satisfactory academic progress standards. Non-Federal negotiators expressed concern that institutions were unable to track this information without a burdensome program audit of each individual student. The Department agreed and proposed to amend the definition of full-time to allow such credits to count toward enrollment status and eligibility for payment under the title IV, HEA programs. Tentative agreement was reached on this issue.

Return of Title IV, HEA Program Funds: Term-based Programs with Modules or Compressed Courses (§ 668.22(a) and (f)): Current regulations related to the return of title IV, HEA program funds when a student withdraws do not address the issue of student withdrawals from programs with courses in modules or compressed courses. Under current regulations, when a student withdraws from an institution, the institution must determine the amount of title IV, HEA aid the student has earned for the period the student attended. For term based programs with several courses offered concurrently for the length of the term, the student may remain in one course and not be considered as withdrawn. Department policy equates the completion of one course or module, within a term in which a student is expected to continue attendance in additional coursework, to the completion of one traditional course in a program with courses taken concurrently over the full term. As a result of this policy, a student who attends a week or two of a fifteen week term and completes a module will not be determined to have withdrawn, so the student or the institution can keep aid intended to cover fifteen weeks.

The proposed regulations offer an opportunity to review this policy. Under the proposed regulations, students would be considered withdrawn as follows: In programs measured in credit hours, if the student does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing. For credit hour programs, the calculation of the percentage of the payment period or period of enrollment completed would take into account the total number of calendar days that the student was scheduled to complete prior to withdrawing without regard to any course completed by the student that is less than the length of the term. In the case of a program that is measured in clock hours, the student would be considered to have withdrawn if he or she does not complete all of the clock hours in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing.

Return of Title IV, HEA Program Funds: Taking Attendance (§ 668.22(b)): In order to implement provisions related to the return of funds when a student withdraws, institutions must be able to determine the date a student is considered to have withdrawn. Current regulations specify distinctions between institutions required to take attendance by an outside agency and those institutions that are not required to take attendance. For institutions required to take attendance, the date of withdrawal is determined from attendance records. For other institutions, the date of withdrawal may be the date the student initiated the withdrawal process, the date the student provided official notice of intent to withdraw, the midpoint of the payment period if the student gave no notice of withdrawal, or, in lieu of the above, the last day of the student's attendance at an academically-related activity. The lack of precision for a withdrawal date for these institutions potentially allows the abuse of Federal funds.

The proposed regulations would require that if an institution has attendance records, as required by an outside entity or the institution itself, the attendance records should be used for the withdrawal date. Current nonregulatory guidance regarding an institution that is required to take

attendance, or requires that attendance be taken, for a limited period of time, such as for the first two weeks of courses or up until a "census date" would be incorporated. These proposed provisions would specify that an institution must use its attendance records to determine a withdrawal date for a student who withdraws during that limited period, and a student who subsequently stops attending during the payment period would be treated as a student for whom the institution was not required to take attendance. The proposed regulations would also incorporate current guidance that if an institution is required to take attendance, or requires that attendance be taken, on a specified date to meet a census reporting requirement, the institution is not considered to take attendance.

Non-Federal negotiators pointed out that having to determine a more exact date of withdrawal, as opposed to assuming a 50 percent point, would be more burdensome. They also noted that attendance does not necessarily accurately reflect academic activity, and also stated that they cannot ensure that faculty members will keep accurate and up-to-date attendance records. The Department recognizes these concerns, but maintains that the best date available should be used to determine the amount of time that a student was in attendance to support the fair treatment of students and avoid the potential for fraud and abuse of Federal funds.

Disbursements of Title IV, HEA Program Funds (§ 668.164(i)): As described in the preamble to this NPRM, current regulations provide that an institution must disburse title IV, HEA program funds (except for FWS funds) on a payment period basis and establish requirements for crediting a student's account with Federal Pell Grant funds. Those requirements also apply to ACG, National SMART Grant, TEACH Grant, FSEOG, Federal Perkins Loan, Direct Loan, and FFEL program funds. Current regulations permit institutions to disburse Pell Grants in a manner that best meets the needs of the student, and the proposed regulations would add provisions to specifically limit delays in disbursements.

Students who do not receive Pell Grants in a timely manner may resort to taking loans or using personal funds, go without needed items such as books, or withdraw from school for financial reasons. The proposed regulations will require institutions to provide a way for a Federal Pell Grant eligible student to obtain or purchase required books and supplies by the seventh day of a payment period under certain conditions. The proposed regulations would limit the required early payment of anticipated credit balances to Federal Pell Grant-eligible students who have met all disbursement requirements 10 days before the first day of class for the payment period, and apply only if the student will have a title IV, HEA credit balance. The proposed language gives institutions the flexibility to determine the method by which they provide funds to students, which can include a book voucher or crediting books to the student's institutional account. The proposed regulations would not change existing liability if the student never begins attendance in any classes, leaving it with the institutions and not the students.

The following section addresses the alternatives that the Secretary considered in developing these proposed regulations. These alternatives are also discussed in more detail in the *Reasons* sections of this preamble related to the specific regulatory provisions.

Regulatory Alternatives Considered

Definition of High School Diploma (§ 668.16(p)): Initially, the Secretary proposed regulatory language that that would have required institutions to maintain three listings of secondary schools (schools that are acceptable, schools that are unacceptable, and schools that require further evaluation) based on regulatory criteria for determining the acceptability of their credential for title IV, HEA program purposes. Non-Federal negotiators objected that K–12 issues should be handled at the State level and that requiring institutions to maintain such lists was too great an administrative burden. Based on these concerns, the Department agreed to assume responsibility for establishing and maintaining a list of valid secondary schools, and tentative agreement was reached on this provision.

Incentive Compensation (§ 668.14(b)): As discussed in the *Incentive Compensation* section of the preamble, non-Federal negotiators proposed and counter-proposed draft regulatory language related to incentive compensation for the Department to consider. In turn, the Department addressed some of the isues raised in the negotiations. For example, the Department made clear that any individuals who are engaged in any student recruitment or admissions activity or in making decisions about the award of student financial aid—including those in supervisory positions—would be impacted by these proposed provisions. Moreover, the Department clarified that the following activities would not necessarily be prohibited under the proposed regulations: the use of volume-driven shared services, contracts for financial aid services based on a headcount basis, third party Internet marketing activities paid based on clicks and not enrollments, and token gifts for contacts not linked to enrollments.

The Department agreed to include a definition of the term *commission, bonus, or other incentive payment* in the proposed § 668.14(b)(22)(iii)(A) that is unambiguous in prohibiting payment of any money or item of value on the basis of direct or indirect success in securing enrollments or the award of financial aid.

Several negotiators were concerned that under the proposed regulations, institutions would be prohibited from paying merit-based increases to their financial aid or admissions personnel. The Department contends that an institution could use a variety of standard evaluative factors as the basis for such an increase; however, it would not be permitted to consider the employee's success in securing student enrollments or the award of financial aid or related institutional goals based on that success among those factors. One negotiator felt strongly that it was critical to use the word "solely," or some other modifier, to limit the prohibition in proposed § 668.14(b)(22)(i). This negotiator said that the use of the word solely, or some other modifier, would be consistent with the use of that term solely in the first safe harbor reflected in current § 668.14(b)(22)(ii)(A). As discussed earlier in this preamble, given the Department's experience with how the first safe harbor in current § 668.14(b)(22) has been abused, the Department does not believe that such a construction is warranted. In addition, some negotiators advocated strongly for an institution's ability to pay bonuses on the basis of students who complete their program. The Department believes that these regulations must clearly reinforce the statutory provision and exclude the possibility of basing any portion of an adjustment on success in securing student enrollments or financial aid awards. No agreement was reached on incentive compensation.

State Authorization as a Component of Institutional Eligibility (§§ 600.4(a)(3), 600.5(a)(4), 600.6(a)(3), and 600.9): The Department clarified aspects of this provision in response to concerns expressed by non-Federal negotiators. Federal or Indian Tribe authorization was included, and the ability of State entities other than State Agencies such

as State legislatures and State Constitutions to grant authorization was made explicit. Provisions concerning monitoring the quality of educational programs and financial responsibility were removed as unnecessarily duplicative of Federal or accrediting agency actions. The *Reasons* section of the preamble details the development of this provision. Some negotiators remained concerned that these proposed regulations would allow States to continue to rely on an institution's status with an outside entity for State legal authorization and that there would no longer be a requirement that a State review an institution's fiscal viability. No agreement was reached on this provision.

Written Agreements between Institutions of Higher Education (§§ 668.5 and 668.43): During negotiated rulemaking, the Department's initial proposal was to require accrediting or State agency review of written agreements between institutions of higher education if the portion of an educational program provided under the written arrangement with another eligible institution, or with a consortium of eligible institutions, were more than 50 percent. Subsequently, several non-Federal negotiators explained that, contrary to the Department's initial understanding, it was not common practice for accrediting agencies to review a significant portion of written arrangements, even those between or among eligible institutions. After hearing concerns about increased workloads and impeded development of innovative programs, the Department agreed to reconsider its draft regulatory language and to focus the proposed changes more narrowly on the types of institutions and situations where problems had been identified. The Department subsequently proposed limiting the portion of an educational program that could be provided under a written arrangement between two eligible for-profit institutions under common ownership or control to 25 percent. After negotiations about the appropriate percentage and the institutions to which it should apply, the Department agreed to revise the proposed language to refer to eligible institutions that are owned or controlled by the same individual, partnership or corporation and to specify that the institution that grants the degree or certificate must provide 50 percent or more of the educational program. When presenting this draft regulatory language to the negotiated rulemaking committee, the Federal negotiator explained that it is not the Department's intention for either public or private, non-profit institutions to be covered by the proposed language as such institutions are not owned or controlled by other entities and generally act autonomously.

Return of Title IV, HEA Program Funds: Term-based Programs with Modules or Compressed Courses (§ 668.22(a) and (f)): During the negotiation sessions, non-Federal negotiators expressed concern that the proposed regulations would penalize students and burden institutions with a significant increase in the number of return to title IV, HEA funds calculations. The non-Federal negotiators presented three options to address their concerns. The first option was to exclude students who completed the same enrollment status for which they were originally paid title IV, HEA aid. The second option was to exclude students who completed 50 percent of the credits that were awarded and 50 percent of the projected enrollment time. The third option was to only apply the proposed regulations to compressed coursework that was shorter than a "to-be-determined" percent of the payment period; the non-Federal negotiators did not reach agreement as to what the appropriate percentage should be. The Department appreciates the concerns expressed by the non-Federal negotiators, but continues to believe that the proposed changes are necessary to ensure the equitable application of these provisions for all students, regardless of the academic calendar of the programs that students are attending.

Disbursements of Title IV, HEA Program Funds (§ 668.164(i)): Some non-Federal negotiators stated that many institutions advance funds or issue vouchers that students use to obtain books and supplies, and that under current regulations, the institution risks losing the amount advanced if the student does not begin classes. For this reason, these non-Federal negotiators argued that in exchange for requiring an institution to advance funds or issue vouchers early in the payment period before the institution could establish student attendance, the student should be liable for returning the funds. In response to this concern, the Department drafted regulatory language to shift liability for this debt to students, but the proposal was rejected. Other negotiators objected that student liability for this debt might preclude reenrollment or exacerbate predatory practices at some institutions where students were promised an advance of funds simply for enrolling in programs. As a result of these negotiations, the proposed regulations keep liability at the institutional level.

Benefits

Benefits provided in these proposed regulations include updated administrative procedures for the Federal student aid programs; a definition and process to determine the validity of a student's high school diploma; enhanced reliability and security of ATB tests; an additional option for students to prove ability to benefit by successfully completing college coursework; increased clarity about incentive compensation for employees at institutions of higher education; reporting of information on program completers for programs leading to gainful employment, including costs, debt levels, graduation rates, and placement rates; the establishment of minimum standards for credit hours; greater transparency for borrowers participating in the programs offered under written agreements between institutions; greater detail about misrepresentation in marketing and recruitment materials; a more structured and consistent approach to the development and implementation of satisfactory academic progress policies; updated and simplified procedures for verifying FAFSA applicant information; updated regulations related to the return of title IV, HEA funds when a student withdraws; harmonization of Direct Loan and Teach Grant disbursement procedures with other title IV, HEA programs; and revised disbursement requirements to ensure Federal Pell Grant recipients can access funds in a timely manner. It is difficult to quantify benefits related to the new institutional and other third-party requirements, as there is little specific data available on the effect of the provisions on borrowers, institutions, or the Federal taxpayer. The Department is interested in receiving comments or data that would support a more rigorous analysis of the impact of these provisions.

As discussed in greater detail under *Net Budget Impacts,* these proposed provisions result in net costs to the government of $0.0 million over 2011–2015.

Costs

Several of the proposed regulations would require regulated entities to develop new disclosures and other materials, as well as accompanying dissemination processes. Institutions would also be required to update existing policies and procedures related to satisfactory academic progress. Other proposed regulations generally would require discrete changes in specific parameters associated with existing requirements—such as changes to title

IV, HEA disbursement procedures, updated processes for verification of FAFSA application information, clearer standards for the return of title IV, HEA program funds following a student's withdrawal, and updated definitions and processes for confirming the validity of a high school diploma —rather than wholly new requirements. Accordingly, entities wishing to continue to participate in the title IV, HEA programs have already absorbed many of the administrative costs related to implementing these proposed regulations. Marginal costs over this baseline are primarily due to new procedures that, while possibly significant in some cases, are an unavoidable cost of continued program participation.

The Department would welcome comment on the analysis presented here. We also welcome analyses that others have done on this proposal which we will consider as we assess the impact of the proposed regulation as we prepare to publish it in final form later this year.

In assessing the potential impact of these proposed regulations, the Department recognizes that certain provisions are likely to increase workload for some program participants. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of this preamble. Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. In total, these proposed changes are estimated to increase burden on entities participating in the Federal Student Assistance programs by 5,756,506 hours. Of this increased burden, 3,596,111 hours are associated with institutions, 9,454 hours with ATB test publishers and ATB test administrators. An additional 2,150,941 hours are associated with borrowers, generally reflecting the time required to read new disclosures or submit required information.

As detailed in the *Paperwork Reduction Act of 1995* section of this NPRM, the additional paperwork burden is attributable to several provisions, with the greatest additional burden coming from the revised FAFSA verification process. Of the 3.6 million hours of additional burden associated with institutions, 1.8 million relate to FAFSA verification. While the average number of items to be verified is expected to decrease, the growth in the number of applicants and the requirement to submit all changes to the Department is estimated to increase overall burden. Other paperwork burden increases include 729,725 hours related to academic reviews and development of academic plans under proposed § 668.34, 425,075 hours related to calculation of unearned amounts when a student withdraws under proposed § 668.22, 289,005 hours associated with updating marital and dependency status under proposed § 668.55, 105,377 hours related to the gainful employment reporting and disclosure provisions in proposed § 668.6, 48,391 hours related to ATB test administration and reporting under proposed §§ 668.151 and 668.152, 67,870 hours associated with disclosure of information about an institution's written agreements in proposed § 668.43, 54,337 hours related to disbursement of funds to Pell Grant recipients for books and supplies under proposed § 668.164, 21,982 hours related to the development of a high school diploma validation process and the validation of questionable diplomas under proposed § 668.16, and 18,349 hours related to clock hour to credit hour conversion and the inclusion of outside work for program eligibility under proposed § 668.8. For ATB test publishers and administrators, the increased burden of 9,454 hours comes from the reporting, recordkeeping, test anomaly analysis and other requirements in proposed §§ 668.144, 668.150, and 668.151. The increased burden on students is concentrated in the FAFSA verification and status updating processes with 1,604,800 hours under proposed §§ 668.55, 668.56, and 668.59, with additional burden associated with the withdrawal process under § 668.22 and satisfactory academic progress policies under § 668.34.

Thus, for the specific information collections listed in the Paperwork Reduction Act section of this notice, the total cost estimates are as follows: For Information Collection 1845–0041, the total cost will be $65,913,938, for Information Collection 1845–NEW2, the total cost attributable to these regulatory changes will be $18,750,120, for Information Collection 1845–0022, the total cost will be $13,900,328, for Information Collection 1845–NEW1, the total cost attributable to the regulatory changes will be $2,182,885, for Information Collection 1845–0049, the total cost will be $1,097,588, and for Information Collection 1845–NEW3, the total cost attributable to these regulatory changes will be $1,012,461.

The monetized cost of this additional burden, using wage data developed using Bureau of Labor Statistics available at *http://www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is $102,677,320, of which $67.23 million is associated with institutions, $0.18 million with ATB test publishers and administrators, and $35.28 million with borrowers. For institutions, test publishers, and test administrators, an hourly rate of $18.63 was used to monetize the burden of these provisions. This was a blended rate based on wages of $15.51 for office and administrative staff and $36.33 for managers, assuming that office staff would perform 85 percent of the work affected by these regulations. For the gainful employment provision, an hourly rate of $20.71 was used to reflect increased management time to establish new data collection procedures associated with that provision. For students, the first quarter 2010 median weekly earnings for full-time wage and salary workers were used. This was weighted to reflect the age profile of the student loan portfolio, with half at the $457 per week of the 20 to 24 age bracket and half at the $691 per week of the 25 to 34 year old bracket. This resulted in a $16.40 hourly wage rate to use in monetizing the burden on students.

Given the limited data available, the Department is particularly interested in comments and supporting information related to possible burden stemming from any additional workload expected under the proposed regulations. Estimates included in this NPRM will be reevaluated based on any information received during the public comment period.

Net Budget Impacts

The proposed regulations are estimated to have a net budget impact of $0.0 million over FY 2011–2015. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. (A cohort reflects all loans originated in a given fiscal year.)

These estimates were developed using the Office of Management and Budget's (OMB) Credit Subsidy Calculator. (This calculator will also be used for re-estimates of prior-year costs, which will be performed each year beginning in FY 2009). The OMB calculator takes projected future cash flows from the Department's student loan cost estimation model and produces discounted subsidy rates reflecting the net present value of all future Federal costs associated with awards made in a given fiscal year. Values are calculated using a "basket of zeros" methodology under which each cash flow is

discounted using the interest rate of a zero-coupon Treasury bond with the same maturity as that cash flow. To ensure comparability across programs, this methodology is incorporated into the calculator and used government-wide to develop estimates of the Federal cost of credit programs. Accordingly, the Department believes it is the appropriate methodology to use in developing estimates for these proposed regulations. That said, however, in developing the following Accounting Statement, the Department consulted with OMB on how to integrate our discounting methodology with the discounting methodology traditionally used in developing regulatory impact analyses.

Absent evidence on the impact of these proposed regulations on student behavior, budget cost estimates were based on behavior as reflected in various Department data sets and longitudinal surveys listed under *Assumptions, Limitations, and Data Sources.* Program cost estimates were generated by running projected cash flows related to each provision through the Department's student loan cost estimation model. Student loan cost estimates are developed across five risk categories: Two-year proprietary institutions, two-year public and private not-for-profit institutions, freshman and sophomores at four-year institutions, juniors and seniors at four-year institutions, and graduate students. Risk categories have separate assumptions based on the historical pattern of behavior—for example, the likelihood of default or the likelihood to use statutory deferment or discharge benefits—of borrowers in each category.

The Department estimates no budgetary impact for most of the proposed regulations included in this NPRM as there is no data indicating that the provisions will have any impact on the volume or composition of Federal student aid programs.

Assumptions, Limitations, and Data Sources

Impact estimates provided in the preceding section reflect a baseline in which the changes implemented in these proposed regulations do not exist. Costs have been quantified for five years. In general, these estimates should be considered preliminary; they will be reevaluated in light of any comments or information received by the Department prior to the publication of the final regulations. The final regulations will incorporate this information in a revised analysis.

In developing these estimates, a wide range of data sources were used, including data from the National Student Loan Data System; operational and financial data from Department of Education systems, including especially the Fiscal Operations Report and Application to Participate (FISAP); and data from a range of surveys conducted by the National Center for Education Statistics such as the 2008 National Postsecondary Student Aid Survey, the 1994 National Education Longitudinal Study, and the 1996 Beginning Postsecondary Student Survey. Data from other sources, such as the U.S. Census Bureau, were also used. Data on administrative burden at participating schools, accreditors, test administrators, and third-party servicers are extremely limited; accordingly, as noted earlier in this discussion, the Department is particularly interested in receiving comments in this area.

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

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in Table 2, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in Federal student aid payments as a result of these proposed regulations. Expenditures are classified as transfers from the Federal government to student loan borrowers.

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

Category	Transfers
Annualized Monetized Transfers	$0
From Whom To Whom?	Federal Government to Student Loan Borrowers.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, *etc.*) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 601.30.)
- Could the description of the proposed regulations in the "Supplementary Information" section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, *see* the instructions in the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would affect institutions that participate in title IV, HEA programs, ATB test publishers, and individual students and loan borrowers. The U.S. Small Business Administration Size Standards define for-profit institutions as "small businesses" if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000, and defines non-profit institutions as small organizations if they are independently owned and operated and not dominant in their field of operation, or as small entities if they are institutions controlled by governmental entities with populations below 50,000.

Data from the Integrated Postsecondary Education Data System (IPEDS) indicate that roughly 4,379 institutions participating in the Federal student assistance programs meet the definition of "small entities." The following table provides the distribution of institutions and students by revenue category and institutional control.

Revenue category	Public		Private NFP		Proprietary		Tribal	
	No. of schools	No. of students	No. of schools	No. of students	No. of schools	No. of students	No. of schools	No. of students
$0 to $500,000	43	2,124	103	13,208	510	38,774	.....	.....
$500,000 to $1 million	44	7,182	81	9,806	438	61,906	1	137
$1 million to $3 million	98	29,332	243	65,614	745	217,715	3	555
$3 million to $5 million	75	65,442	138	60,923	303	182,362	.....	.....
$5 million to $7 million	49	73,798	99	62,776	224	185,705	5	2,525
$7 million to $10 million	78	129,079	110	84,659	228	235,888	9	4,935
$10 million and above	*1,585*	*18,480,000*	*1,067*	*4,312,010*	*383*	*1,793,951*	*14*	*18,065*
Total	1,972	18,786,957	1,841	4,608,996	2,831	2,716,301	32	26,217

Approximately two-thirds of these institutions are for-profit schools subject to the disclosure and reporting requirements related to programs leading to gainful employment described in this NPRM. Other affected small institutions include small community colleges and tribally controlled schools. For these institutions, the new disclosure and administrative requirements imposed under the proposed regulations could impose some new costs as described below. The impact of the proposed regulations on individuals is not subject to the Regulatory Flexibility Act.

As discussed in the preamble to this NPRM, the proposed program integrity regulations are being developed to update administrative procedures for the Federal student aid programs and to ensure that funds are provided to students at eligible programs and institutions. Many of the provisions addressed in this NPRM modify existing regulations and requirements. For example, the proposed regulations on FAFSA verification would change the number of items to be verified but would not require the creation of a new process. The following table summarizes the estimated total hours, costs, and requirements applicable to small entities from these provisions.

	Reg. section	OMB Control No.	Hours	Costs
	668.6	1845–NEW1	82,637	1,711,818
Annual submission of private loan, CIP, and identifying data for completers by program	668.6(a)	.....	34,999	725,001
Report CIP codes for all attendees	.....	.....	37,138	769,317
Disclose occupational information, graduation rates, program placement rates, and program costs	668.6(b)	.....	10,500	217,500
	668.8	1845–0022	12,035	224,250
Determine if program is affected, evaluate amount of outside student work that should be included, and perform credit to clock hour conversion	.....	.....	.....	.....
	668.16	1845–0022	14,418	268,650
Develop a high school diploma validity process	668.16(p)	.....	13,106	244,208
Verify questionable diplomas	668.16(p)	.....	1,312	24,443
	668.22	1845–0022	278,807	5,195,005
Establish withdrawal date and calculate percentage of payment period or period of enrollment completed	.....	.....	.....	.....
	668.34	1845–NEW2	478,627	8,918,250
Review proposed regulations and implement changes to ensure compliance	668.34(a)	.....	11,234	209,316
Perform academic reviews at the end of each payment period	668.34(c)	.....	137,282	2,557,972
Develop academic plan for students who do not achieve satisfactory academic progress when reviewed at end of payment period	668.34(c)	.....	120,123	2,238,249
Perform academic reviews at institutions that do so annually	668.34(d)	.....	111,994	2,086,777
Develop academic plan for students who do not achieve satisfactory academic progress when reviewed annually	668.34(d)	.....	97,995	1,825,936
	668.43	1845–NEW2	44,516	829,465
Disclose information about written agreements	.....	.....	43,930	818,552
Make contact information for filing complaints to accreditor and State approval or licensing agency available to enrolled and prospective students	668.43(b)	.....	586	10,914
	668.55	1845–0041	189,558	3,532,041
Update household size throughout award year	.....	.....	170,603	3,178,843
Update marital status throughout award year	.....	.....	18,956	353,198
	668.57	1845–0041	401,411	7,479,487
Review verification responses for acceptable documentation	.....	.....	.....	.....
	668.59	1845–0041	802,822	14,958,975
Removes tolerances and requires institutions to report all changes to applicants' FAFSA information resulting from verification	.....	.....	.....	.....
Recalculate applicant's EFC if information changes from verification	.....	.....	.....	.....
	668.151	1845–0049	28,313	527,548
Keep records of individuals who take ATB tests and details about the administrator	668.151(g)(4)	.....	25,279	471,024
Keep documentation of individual's disability and testing arrangements provided	668.151(g)(5)	.....	3,034	56,524

	Reg. section	OMB Control No.	Hours	Costs
Maintain the scored ATB tests and collect and submit copies of completed ATB tests or a listing to the test publisher or State weekly	668.152	1845–0049	3,427	63,857
Provide a way for Pell Grant recipients to obtain or purchase required books and supplies by the 7th day of a payment period under certain conditions	668.164	1845–NEW3	35,640	664,073

To assess overall burden imposed on institutions meeting the definition of small entities, the Department developed a methodology using IPEDS data and the percentage of institutions with revenues below $7 million and all non-profit institutions, allocating approximately 66 percent of the paperwork burden to small institutions. Using this methodology, the Department estimates that the proposed regulations would increase total burden hours for these schools by 2.37 million, or roughly 541 hours per institution. Monetized using salary data from the Bureau of Labor Statistics, this burden is $44.4 million and $10,133, respectively. If calculated using the distribution of students from 2007–08, the share of the burden allocated to small institutions would be much lower at approximately 21 percent, resulting in an estimated burden of 186 hours and $3,510 per institution. Even the more conservative estimate of $10,133 represents 1 percent or less of the midpoint revenue for all but the lowest revenue category, for which it is 4 percent of midpoint revenue.

For institutions, an hourly rate of $18.63 was used to monetize the burden of these provisions. This was a blended rate based on wages of $15.51 for office and administrative staff and $36.33 for managers, assuming that office staff would perform 85 percent of the work affected by these regulations. For the gainful employment provision, an hourly rate of $20.71 was used to reflect increased management time to establish new data collection procedures associated with that provision. These rates are the same as those used for all institutions in the costs section of this analysis, reflecting the fact that the primary cost of meeting the paperwork burden is in additional labor and wages at small institutions should not be systematically higher than those at all institutions. The Department welcomes comments from institutions regarding the costs of meeting the additional burdens described in the *Paperwork Reduction Act* section of this NPRM.

Where possible, the Department has allowed institutions flexibility to establish processes to comply that fit the institution's administrative capabilities. For example, the requirement to distribute funds to Pell Grant recipients for books and supplies within 7 days of the start of the payment period allows institutions to use book vouchers or a credit to the student's account. The Department has also tried to allow more time to establish procedures for new data collections, such as the placement rate information required in the data collection related to gainful employment. While these timing provisions are available to all institutions, they should help small institutions have time for the necessary adjustments. Granting such extensions to all institutions is simpler to administer and provides additional certainty to institutions that will not have to anticipate if their revenues will fall below the small business threshold to get more time for compliance. Approximately 60 percent of the paperwork burden associated with these regulations comes in OMB 1845–0041 from updating FAFSA application information and reporting all changes resulting from verification. These updated requirements will help ensure eligible students receive aid. As detailed in the *Paperwork Reduction Act* section of this NPRM, the increase in burden associated with the FAFSA acceptable documentation provision is largely driven by the increase in student applicants since the burden was last calculated. The number of verifications is estimated to have increased from 3.0 million in 2002–03 to 5.1 million in 2008–09. Without the regulatory change estimated to reduce the number of items to be verified, the paperwork burden on small institutions in OMB 1845–0041 would increase by an additional 267,607 hours. Based on these estimates, the Department believes the proposed new requirements do not impose significant new costs on these institutions.

No alternative provisions were considered that would target small institutions with exemptions or additional time for compliance. Additional time or flexibility was granted to all institutions based on the nature of the provision and the data requested. The Secretary invites comments from small institutions and other affected entities as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

Paperwork Reduction Act of 1995

Sections 668.6, 668.8, 668.16, 668.22, 668.34, 668.43, 668.55, 668.56, 668.57, 668.59, 668.144, 668.150, 668.151, 668.152, and 668.164 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 668.6—Gainful Employment

The proposed regulations would impose new requirements on certain programs that by law must, for purposes of the title IV, HEA programs, prepare students for gainful employment in a recognized occupation. For public and private nonprofit institutions, a program that does not lead to a degree would be subject to the eligibility requirement that the program lead to gainful employment in a recognized occupation, while a program leading to a degree, including a two-academic-year program fully transferrable to a baccalaureate degree, would not be subject to this eligibility requirement. For proprietary institutions, all eligible degree and nondegree programs would be required to lead to gainful employment in a recognized occupation, except for a liberal arts baccalaureate program under section 102(b)(1)(A)(ii) of the HEA.

The institution would be required under proposed § 668.6(a) to submit annually, information that would include, at a minimum, identifying information about each student who completed a program, the CIP code for that program, the date the student completed the program, and the amounts the student received from private educational loans and institutional financing plans. We estimate that it will take the affected 2,086 proprietary institutions, on average, 10 hours to meet these reporting requirements for their

occupational training programs for a total estimated increase in burden of 20,860 hours. We estimate that it will take the affected 238 private non-profit institutions, on average, 10 hours to meet these reporting requirements for their occupational training programs for a total estimated increase in burden of 2,380 hours. We estimate that it will take the affected 2,139 public institutions, on average, 10 hours to meet these reporting requirements for their occupational training programs for a total estimated increase in burden of 21,390 hours.

Collectively, we estimate that burden for institutions to meet these proposed reporting requirements in accordance with procedures established by the Secretary would increase by 44,630 hours in OMB Control Number 1845–NEW1.

We estimate that over the first three-year reporting period that there would be 591,966 graduates from these occupational training programs. We estimate that the proposed reporting for an estimated 278,224 graduates from proprietary institutions would average 5 minutes (.08 hours) per graduate, increasing burden by 22,258 hours. We estimate that the proposed reporting for the estimated 29,598 graduates from private non-profit institutions would average 5 minutes (.08 hours) per graduate, increasing burden by 2,368 hours. We estimate that the proposed reporting for 284,144 graduates from public institutions would average 5 minutes (.08 hours) per graduate, increasing burden by 22,732 hours.

Collectively, burden associated with the proposed disclosures (including the reporting of Department provided median loan debt information) for each graduate would increase for institutions by 47,358 hours in OMB Control Number 1845–NEW1.

Finally, under proposed § 668.6(b) an institution would be required to disclose on its Web site information about (1) the occupations that its programs prepare students to enter, along with links to occupational profiles on O*NET, (2) the on-time graduation rate of students entering a program, (3) the cost of each program, including costs for tuition and fees, room and board; other institutional costs typically incurred by students enrolling in the program, such as books and supplies, (4) beginning no later than June 30, 2013, the placement rate for students completing each of these programs, as determined under § 668.8(g) or a State-sponsored workforce data system, and (5) the median loan debt incurred by students who completed each program in the preceding three years, identified separately as title IV, HEA loan debt and debt from private educational loans and institutional financing plans.

We estimate that, on average, institutions would take 3 hours per institution to obtain the required disclosure information and to provide that information on the institution's Web sites. We estimate that 2,086 proprietary institutions would take 3 hours per institution to collect and post the proposed disclosures which would increase burden by 6,258 hours. We estimate that 238 private non-profit institutions would take 3 hours per institution to collect and post the proposed disclosures which would increase burden by 714 hours. We estimate that 2,139 public institutions would take 3 hours per institution to collect and post the proposed disclosures which would increase burden by 6,417 hours.

Collectively, we estimate that these proposed disclosures would result in an increase in burden to institutions by 13,389 hours in OMB Control Number 1845–NEW1.

In total, the proposed regulatory changes reflected in § 668.6 would increase burden by a total of 105,377 hours in OMB Control Number 1845–NEW1.

Section 668.8—Eligible Program

Under proposed § 668.8(l)(1), we would revise the method of converting clock hours to credit hours to use a ratio of the minimum clock hours in an academic year to the minimum credit hours in an academic year, *i.e.,* 900 clock hours to 24 semester or trimester hours or 36 quarter hours. Thus, a semester or trimester hour would be based on at least 37.5 clock hours, and a quarter hour would be based on at least 25 clock hours. Proposed § 668.8(l)(2) would create an exception to the conversion ratio in proposed § 668.8(l)(1) if neither an institution's designated accrediting agency nor the relevant State licensing authority for participation in the title IV, HEA programs determines there are any deficiencies in the institution's policies, procedures, and practices for establishing the credit hours that the institution awards for programs and courses, as defined in proposed § 600.2. Under the exception provided by proposed § 668.8(l)(2), an institution would be permitted to combine students' work outside of class with the clock-hours of instruction in order to meet or exceed the numeric requirements established in proposed § 668.8(l)(1). However, under proposed § 668.8(l)(2), the institution would need to use at least 30 clock hours for a semester or trimester hour or 20 clock hours for a quarter hour.

In determining whether there is outside work that a student must perform, the analysis would need to take into account differences in coursework and educational activities within the program. Some portions of a program may require student work outside of class that justifies the application of proposed § 668.8(l)(2). In addition, the application of proposed § 668.8(l)(2) could vary within a program depending on variances in required student work outside of class for different portions of the program. Other portions of the program may not have outside work, and proposed § 668.8(l)(1) would need to be applied. Of course, an institution applying only proposed § 668.8(l)(1) to a program eligible for conversion from clock hours to credit hours, without an analysis of the program's coursework, would be considered compliant with the requirements of proposed § 668.8(l).

Proposed § 668.8(k)(1)(ii) would modify a provision in current regulations to provide that a program is not subject to the conversion formula in § 668.8(l) where each course within the program is acceptable for full credit toward a degree that is offered by the institution and that this degree requires at least two academic years of study. Additionally, under proposed § 668.8(k)(1)(ii), the institution would be required to demonstrate that students enroll in, and graduate from, the degree program.

Proposed § 668.8(k)(2)(i) would provide that a program is considered to be a clock-hour program if the program must be measured in clock hours to receive Federal or State approval or licensure, or if completing clock hours is a requirement for graduates to apply for licensure or the authorization to practice the occupation that the student is intending to pursue. Under proposed § 668.8(k)(2)(ii) and (iii), the program would also be considered to be offered in clock hours if the credit hours awarded for the program are not in compliance with the definition of a *credit hour* in proposed § 600.2, or if the institution does not provide the clock hours that are the basis for the credit hours awarded for the program or each course in the program and, except as provided in current § 668.4(e), requires attendance in the clock hours that are the basis for the credit hours awarded. The proposed regulations on which tentative agreement was reached would not include the provision in proposed § 668.8(k)(2)(iii) that, except as provided in current § 668.4(e), an institution must require attendance in the clock hours

that are the basis for the credit hours awarded.

Proposed § 668.8(k)(3) would provide that proposed § 668.8(k)(2)(i) would not apply if a limited portion of the program includes a practicum, internship, or clinical experience component that must include a minimum number of clock hours due to a State or Federal approval or licensure requirement.

We estimate that on average, for each affected program it would take 30 minutes for an institution to make the determination of whether the program is an affected program, to evaluate the amount of outside student work that should be included as proposed and to perform the clock hour to credit hour conversion. We further estimate that of the 4,587 institutions of higher education with less than 2-year programs, that on average, each institution has approximately 8 non-degree programs of study for a total of 36,696 affected programs. We estimate that there are 16,513 affected programs at proprietary institutions times .5 hours which would increase burden by 8,257 hours. We estimate that there are 1,835 affected programs at private non-profit institutions times .5 hours which would increase burden by 918 hours. We estimate that there are 18,348 affected programs at public institutions times .5 hours which would increase burden by 9,174 hours.

Collectively, the proposed regulatory changes reflected in § 668.8 would increase burden by 18,349 hours in OMB Control Number 1845–0022.

Section 668.16—Standards of Administrative Capability

Under the proposed regulations, the elements of the institution's satisfactory academic progress plan would be moved from current § 668.16(e) to proposed § 668.34. We would also update these provisions. As a result, the estimated burden upon institutions associated with measuring academic progress currently in OMB Control Number 1845–0022 of 21,000 hours would be administratively removed from this collection and transferred to OMB Control Number 1845–NEW2.

Under proposed § 668.16(p), an institution would be required to develop and follow procedures to evaluate the validity of a student's high school completion if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education. The burden associated with this proposed requirement would be mitigated by the fact that many institutions already have processes in place to collect high school diplomas and make determinations about their validity.

We estimate that burden would increase for each institution by 3.5 hours for the development of a high school diploma validity process. We estimate that 2,086 proprietary institutions would on average take 3.5 hours to develop the proposed procedures to evaluate the validity of high school completions which would increase burden by 7,301 hours. We estimate that 1,731 private non-profit institutions would on average take 3.5 hours to develop the proposed procedures to evaluate the validity of high school completion which would increase burden by 6,059 hours. We estimate that 1,892 public institutions would on average take 3.5 hours to develop the proposed procedures to evaluate the validity of high school completion which would increase burden by 6,622 hours.

Additionally, we estimate that the validity of approximately 4,000 high school diplomas per year would be questioned and, therefore, require additional verification that is estimated to take .5 hours per questionable diploma. We estimate that proprietary institutions would have 2,000 questionable diplomas times .5 hours per diploma equals 1,000 hours of increased burden. We estimate that private non-profit institutions would have 600 questionable diplomas times .5 hours per diploma equals 300 hours of increased burden. We estimate that public institutions would have 1,400 questionable diplomas times .5 hours per diploma equals 700 hours of increased burden.

Collectively, the proposed regulatory changes reflected in § 668.16 would increase burden by 21,982 hours in OMB Control Number 1845–0022.

Section 668.22—Treatment of Title IV, HEA Program Funds When a Student Withdraws

The proposed changes to § 668.22(a)(2) would clarify when a student is considered to have withdrawn from a payment period or period of enrollment. In the case of a program that is measured in credit hours, the student would be considered to have withdrawn if he or she does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing. In the case of a program that is measured in clock hours, the student would be considered to have withdrawn if he or she does not complete all of the clock hours in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing.

The proposed change to § 668.22(f)(2)(i) would clarify that, for credit hour programs, in calculating the percentage of the payment period or period of enrollment completed, it is necessary to take into account the total number of calendar days that the student was scheduled to complete prior to withdrawing without regard to any course completed by the student that is less than the length of the term.

These proposed regulations would affect all programs with courses that are less than the length of a term, including, for example, a semester-based program that has a summer nonstandard term with two consecutive six-week sessions within the term.

We estimate that approximately 425,075 students in term-based programs with modules or compressed courses will withdraw prior to completing more than 60 percent of their program of study. We estimate that on average, the burden per individual student who withdraws prior to the 60 percent point of their term-based program to be 45 minutes (.75 hours) per affected individual which would increase burden for the estimated 425,075 students by 318,806 hours in OMB Control Number 1845–0022. Of these 425,075 withdrawals, we estimate that 50 percent of the withdrawals (212,538) would occur at proprietary institutions and would increase burden by 1 hour per withdrawal increasing burden by 212,538 hours. We estimate that 10 percent of the withdrawals (42,508) would occur at private non-profit institutions and would increase burden by 1 hour per withdrawal increasing burden by 42,508 hours. We estimate that 40 percent of the withdrawals (170,029) would occur at public institutions and would increase burden by 1 hour per withdrawal increasing burden by 170,029 hours. Collectively, we estimate that burden will increase by 743,881 hours in OMB Control Number 1845–0022, of which 318,806 hours is for individuals and 425,075 hours is for institutions.

Section 668.34—Satisfactory Progress

The proposed regulations would restructure the satisfactory academic progress requirements. Proposed § 668.16(e) (Standards of administrative capability) would be revised to include only the requirement that an institution establish, publish, and apply satisfactory academic progress standards that meet the requirements of § 668.34. The remainder of current § 668.16(e) would be moved to proposed § 668.34 such that it, alone, would describe all of

the required elements of a satisfactory academic progress policy as well as how an institution would implement such a policy. The references in paragraph § 668.32(e) would be updated to conform the section with the changes proposed to §§ 668.16(e) and 668.32.

Proposed § 668.34(a) would specify the elements an institution's satisfactory academic policy must contain to be considered a reasonable policy. Under the proposed regulations, institutions would continue to have flexibility in establishing their own policies; institutions that choose to measure satisfactory academic progress more frequently than at the minimum required intervals would have additional flexibility (*see* proposed § 668.34(a)(3)).

All of the policy elements in the current regulations under § 668.16(e) and § 668.34 would be combined in proposed § 668.34. In addition, proposed § 668.34(a)(5) would make explicit the requirement that institutions specify the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, and provide for measurement of a student's pace at each evaluation. Under proposed § 668.34(a)(6), institutional policies would need to describe how a student's GPA and pace of completion are affected by transfers of credit from other institutions. This provision would also require institutions to count credit hours from another institution that are accepted toward a student's educational program as both attempted and completed hours.

Proposed § 668.34(a)(7) would provide that, except as permitted in § 668.34(c) and (d), the policy requires that, at the time of each evaluation, if the student is not making satisfactory academic progress, the student is no longer eligible to receive the title IV, HEA assistance.

Proposed § 668.34(a)(8) would require institutions that use "financial aid warning" and "financial aid probation" statuses (concepts that would be defined in proposed § 668.34(b)) in connection with satisfactory academic progress evaluations to describe these statuses and how they are used in their satisfactory academic progress policies. Proposed § 668.34(a)(8)(i) would specify that a student on financial aid warning may continue to receive assistance under the title IV, HEA programs for one payment period despite a determination that the student is not making satisfactory academic progress. Financial aid warning status may be assigned without an appeal or other action by the student. Proposed § 668.34(a)(8)(ii) would make clear that an institution with a satisfactory academic progress policy that includes the use of the financial aid probation status could require that a student on financial aid probation fulfill specific terms and conditions, such as taking a reduced course load or enrolling in specific courses.

Proposed § 668.34(a)(9) would require an institution that permits a student to appeal a determination that the student is not making satisfactory academic progress to describe the appeal process in its policy. The policy would need to contain specified elements. Proposed § 668.34(a)(9)(i) would require an institution to describe how a student may re-establish his or her eligibility to receive assistance under the title IV, HEA programs. Under proposed § 668.34(a)(9)(ii), a student would be permitted to file an appeal based on the death of a relative, an injury or illness of the student, or other special circumstances. Under proposed § 668.34(a)(9)(iii), a student would be required to submit, as part of the appeal, information regarding why the student failed to make satisfactory academic progress, and what has changed in the student's situation that would allow the student to demonstrate satisfactory academic progress at the next evaluation.

Proposed § 668.34(a)(10) would require the satisfactory academic progress policy of an institution that does not permit students to appeal a determination that they are not making satisfactory academic progress to describe how a student may regain eligibility for assistance under the title IV, HEA programs.

Proposed § 668.34(a)(11) would require that an institution's policy provide for notification to students of the results of an evaluation that impacts the student's eligibility for title IV, HEA program funds.

We estimate that, on average, institutions would take 3 hours per institution to review the proposed regulations in § 668.34(a) and implement any proposed changes to insure compliance. We estimate that 2,086 proprietary institutions would take 3 hours per institution to review and implement the proposed regulations increasing burden by 6,258 hours. We estimate that 1,731 private non-profit institutions would take 3 hours per institution to review and implement the proposed regulations increasing burden by 5,193 hours. We estimate that 1,892 public institutions would take 3 hours per institution to review and implement the proposed regulations increasing burden by 5,676 hours. Collectively, the proposed regulatory changes reflected in § 668.34(a) would increase burden by 17,127 hours.

Proposed § 668.34(c) and (d) would specify that an institution's policy may provide for disbursement of title IV, HEA program funds to a student who has not met an institution's satisfactory academic standards in certain circumstances. Of the 17 million applicants in 2008–2009, we estimate that 90 percent (or 15,300,000 individuals) would begin attendance. We estimate that of the 15,300,000 individuals that begin attendance, that 90 percent (or 13,770,000 individuals) would persist at least through the end of the initial payment period and therefore the institution would evaluate the student's satisfactory academic progress consistent with the provision of proposed § 668.34. We estimate that 38 percent of the institutions would evaluate their students at the end of each payment period under proposed § 668.34(c), therefore 13,770,000 individuals times 38 percent equals 5,232,600 individuals that would be evaluated more than annually. We estimate that 62 percent of institutions would evaluate their students once per academic year under proposed § 668.34(d), therefore, 13,770,000 individuals times 62 percent equals 8,537,400 individuals that would be evaluated annually.

Proposed § 668.34(c) would permit an institution that measures satisfactory academic progress at the end of each payment period to have a policy that would permit a student who is not making satisfactory academic progress to be placed automatically on financial aid warning, a newly defined term. We estimate as a result, the burden associated with an academic progress measurement at the end of each payment period, and when required, developing an academic plan for the student, would increase burden. We estimate that proprietary institutions, which comprise 37 percent of the total number of institutions of higher education, times 5,232,600 individuals equals 1,936,062 individuals at proprietary institutions that would require an academic review more than once per academic year. 1,936,062 times an average of 2 reviews per academic year, equals 3,872,124 satisfactory academic progress reviews. Since these academic progress reviews are generally highly automated, we estimate that, on average, each review will take 1.2 minutes (.02 hours) and will increase burden by 77,442 hours. We estimate that private non-profit institutions, which comprise 30 percent of the total

number of institutions of higher education, times 5,232,600 individuals equals 1,569,780 individuals at private non-profit institutions that would require an academic review. 1,569,780 times an average of 2 reviews per academic year, equals 3,139,560 satisfactory academic progress reviews. Since these academic progress reviews are generally highly automated, we estimate that, on average, each review will take 1.2 minutes (.02 hours) and will increase burden by 62,791 hours. We estimate that public institutions, which comprise 33 percent of the total number of institutions of higher education, times 5,232,600 individuals equals 1,726,758 individuals at public institutions that would require an academic review. 1,726,758 times an average of 2 reviews per academic year, equals 3,453,516 satisfactory academic progress reviews. Since these academic progress reviews are generally highly automated, we estimate that, on average, each review will take 1.2 minutes (.02 hours) and will increase burden by 69,070 hours.

Collectively, we estimate that the burden for institutions would increase by 209,303 hours, in OMB Control Number 1845–NEW2.

As a result of the proposed satisfactory academic progress reviews conducted by the institutions, we estimate that 7 percent of the 5,232,600 enrolled students (at institutions that review academic progress more often than annually) or 366,282 would not successfully achieve satisfactory academic progress and therefore the institution would work with each student to develop an academic plan which would increase burden for the individual and the institutions. We estimate that under proposed § 668.34(c), that 366,282 students would, on average, take 10 minutes (.17 hours) to establish an academic plan and re-evaluate the plan a second time within the academic year (2 times per academic year), increasing burden to individuals by 124,536 hours.

We estimate that proprietary institutions, which comprise 37 percent of the total number of institutions of higher education, times 5,232,600 individuals equals 1,936,062 individuals at proprietary institutions that would require the development of an academic plan as a result of not progressing academically. 1,936,062 individuals times 7 percent (we estimate who would not academically progress), equals 135,524 individuals who would need to work with their institutions to develop an academic plan. We estimate that each academic plan would take, on average, 15 minutes (.25 hours) of staff time at two times within the academic year, increasing burden by 67,762 hours.

We estimate that private non-profit institutions, which comprise 30 percent of the total number of institutions of higher education, times 5,232,600 individuals equals 1,569,780 individuals at private non-profit institutions that would require the development of an academic plan as a result of not progressing academically. 1,569,780 individuals times 7 percent (we estimate who would not academically progress), equals 109,885 individuals who would need to work with their institutions to develop an academic plan. We estimate that each academic plan would take, on average, 15 minutes (.25 hours) of staff time at two times within the academic year, increasing burden by 54,943 hours.

We estimate that public institutions, which comprise 33 percent of the total number of institutions of higher education, times 5,232,600 individuals equals 1,726,758 individuals at public institutions that would require the development of an academic plan as a result of not progressing academically. 1,726,758 individuals times 7 percent (we estimate who would not academically progress), equals 120,873 individuals who would need to work with their institutions to develop an academic plan. We estimate that each academic plan would take, on average, 15 minutes (.25 hours) of staff time at two times within the academic year, increasing burden by 60,437 hours.

Collectively, we estimate that the burden for institutions would increase by 183,142 hours, in OMB Control Number 1845–NEW2.

Under proposed § 668.34(d), at an institution that measures satisfactory academic progress annually, or less frequently than at the end of each payment period, a student who has been determined not to be making satisfactory academic progress would be able to receive title IV, HEA program funds only after filing an appeal and meeting one of two conditions: (1) the institution has determined that the student should be able to meet satisfactory progress standards after the subsequent payment period, or (2) the institution develops an academic plan with the student that, if followed, will ensure that the student is able to meet the institution's satisfactory academic progress standards by a specific point in time.

Because the proposed regulations would transfer the elements of an institution's satisfactory academic policy from § 668.16(e) to § 668.34, we are transferring the current burden estimate of 21,000 hours from the current OMB Control Number 1845–0022 to OMB Control Number 1845–NEW2.

We estimate that proprietary institutions, which comprise 37 percent of the total number of institutions of higher education, times 8,537,400 individuals equals 3,158,838 individuals at proprietary institutions that would require an academic review. Since the academic progress reviews are generally highly automated, we estimate that, on average, each review will take 1.2 minutes (.02 hours) and will increase burden by 63,177 hours. We estimate that private non-profit institutions, which comprise 30 percent of the total number of institutions of higher education, times 8,537,400 individuals equals 2,561,220 individuals at private non-profit institutions that would require an academic review. Since the academic progress reviews are generally highly automated, we estimate that, on average, each review will take 1.2 minutes (.02 hours) and will increase burden by 51,224 hours. We estimate that public institutions, which comprise 33 percent of the total number of institutions of higher education, times 8,537,400 individuals equals 2,817,342 individuals at public institutions that would require an academic review. Since the academic progress reviews are generally highly automated, we estimate that, on average, each review will take 1.2 minutes (.02 hours) and will increase burden by 56,347 hours.

Collectively, we estimate that the burden for institutions would increase by 170,748 hours, in OMB Control Number 1845–NEW2.

As a result of the proposed satisfactory academic progress reviews conducted by the institutions, we estimate that 7 percent of the 8,537,400 enrolled students (at institutions that review academic progress annually) or 597,618 would not successfully achieve satisfactory academic progress and therefore the institution would work with each student to develop an academic plan which would increase burden for the individual and the institutions. We estimate that under proposed § 668.34(d), that 597,618 students would, on average, take 10 minutes (.17 hours) to establish an academic plan, increasing burden to individuals by 101,595 hours.

We estimate that proprietary institutions, which comprise 37 percent of the total number of institutions of higher education, times 8,537,400 individuals equals 3,158,838 individuals at proprietary institutions that would require the development of an academic plan as a result of not

progressing academically. 3,158,838 individuals times 7 percent (we estimate who would not academically progress), equals 211,119 individuals who would need to work with their institutions to develop an academic plan. We estimate that each academic plan would take, on average, 15 minutes (.25 hours) of staff time, increasing burden by 55,280 hours.

We estimate that private non-profit institutions, which comprise 30 percent of the total number of institutions of higher education, times 8,537,400 individuals equals 2,561,220 individuals at private non-profit institutions that would require the development of an academic plan as a result of not progressing academically. 2,561,220 individuals times 7 percent (we estimate who would not academically progress), equals 179,285 individuals who would need to work with their institutions to develop an academic plan. We estimate that each academic plan would take, on average, 15 minutes (.25 hours) of staff time, increasing burden by 44,821 hours.

We estimate that public institutions, which comprise 33 percent of the total number of institutions of higher education, times 8,537,400 individuals equals 2,817,342 individuals at public institutions that would require the development of an academic plan as a result of not progressing academically. 2,817,342 individuals times 7 percent (we estimate who would not academically progress), equals 197,214 individuals who would need to work with their institutions to develop an academic plan. We estimate that each academic plan would take, on average, 15 minutes (.25 hours) of staff time, increasing burden by 49,304 hours.

Collectively, we estimate that the burden for institutions would increase by 149,405 hours, in OMB Control Number 1845–NEW2.

In total, the proposed regulatory changes reflected in § 668.34 would increase burden by a total of 955,855 hours in OMB Control Number 1845–NEW2; however when the 21,000 hours of burden currently in OMB 1845–0022 are administratively transferred from OMB 1845–0022 to OMB 1845–NEW2, the grand total of burden hours under this section would increase to 976,855 in OMB 1845–NEW2.

Section 668.43—Institutional Information

The Department proposes to revise current § 668.5(a) by revising and redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2). Proposed § 668.5(a)(1) would be based on the language that is in current paragraph (a), but it would be modified to make it consistent with the definition of an "educational program" in 34 CFR 600.2. Proposed new § 668.5(a)(2) would specify that if a written arrangement is between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation, the institution that grants the degree or certificate must provide more than 50 percent of the educational program. These clarifications are also intended to ensure that the institution enrolling the student has all necessary approvals to offer an educational program in the format in which it is being provided, such as through distance education when the other institution is providing instruction under a written agreement using that method of delivery. Proposed § 668.5(c)(1) would expand the list of conditions that would preclude an arrangement between an eligible institution and an ineligible institution. Proposed §§ 668.5(e) and 668.43 would require an institution that enters into a written arrangement to provide a description of the arrangement to enrolled and prospective students.

We estimate that 104 proprietary institutions would enter into an average of 1 written arrangement per institution and that, on average, the burden associated with the proposed collection of information about written agreements and its disclosure would take 30 minutes (.5 hours) per arrangement, increasing burden by 52 hours. We estimate that 1,731 private non-profit institutions would enter into an average of 50 written arrangements per institution and that, on average, the burden associated with the proposed collection of information about written agreements and its disclosure would take 30 minutes (.5 hours) per arrangement, increasing burden by 43,275 hours. We estimate that 1,892 public institutions would enter into an average of 25 written arrangements per institution and that, on average, the burden associated with the proposed collection of information about written agreements and its disclosure would take 30 minutes (.5 hours) per arrangement, increasing burden by 23,650 hours.

Collectively, we estimate that burden would increase for institutions in their reporting of the details of written agreements by 66,977 hours in OMB Control Number 1845–0022.

Currently, the Department requires that an institution must make available for review to any enrolled or prospective student upon request, a copy of the documents describing the institution's accreditation and its State, Federal, or tribal approval or licensing. The Department proposes in § 668.43(b) that the institution must also provide its students or prospective students with contact information for filing complaints with its accreditor and State approval or licensing entity.

We estimate that of the 2,086 proprietary institutions that 1,919 (or 92 percent) would have to begin providing contact information for filing complaints with accreditors, approval or licensing agencies. We estimate that the other 8 percent are already providing this information. We estimate that on average, this disclosure would take 10 minutes (.17 hours) per disclosure and increase burden to proprietary institutions by 326 hours. We estimate that of the 1,731 private non-profit institutions that 1,593 (or 92 percent) would have to begin providing contact information for filing complaints with accreditors, approval or licensing agencies. We estimate that the other 8 percent are already providing this information. We estimate that on average, this disclosure would take 10 minutes (.17 hours) per disclosure and increase burden to private non-profit institutions by 271 hours. We estimate that of the 1,892 public institutions that 1,740 (or 92 percent) would have to begin providing contact information for filing complaints with accreditors, approval or licensing agencies. We estimate that the other 8 percent are already providing this information. We estimate that on average, this disclosure would take 10 minutes (.17 hours) per disclosure and increase burden to proprietary institutions by 296 hours.

Collectively, we estimate that burden would increase for institutions in their reporting of the contact information for filing complaints to accreditors and approval or licensing agencies by 893 hours in OMB Control Number 1845–0022.

In total, the proposed regulatory changes reflected in § 668.43 would increase burden by 67,870 hours in OMB Control Number 1845–0022.

Section 668.55—Updating Information

Proposed § 668.55 would require an applicant to update all changes in dependency status that occur throughout the award year, including changes in the applicant's household size and the number of those household members attending postsecondary educational institutions. We estimate that 1,530,000 individuals would update their household size or the number of household members attending postsecondary educational institutions and that, on average, reporting would take 5 minutes (.08

hours) per individual, increasing burden by 122,400 hours.

We estimate that proprietary institutions would receive updated household size or the updated number of household members attending postsecondary educational institutions from 566,100 applicants. We estimate that each updated record would take 10 minutes (.17 hours) to review each updated record thereby increasing burden by 96,237 hours. We estimate that private non-profit institutions would receive updated household size or the updated number of household members attending postsecondary educational institutions from 459,000 applicants. We estimate that each updated record would take 10 minutes (.17 hours) to review each updated record thereby increasing burden by 78,030 hours. We estimate that public institutions would receive updated household size or the updated number of household members attending postsecondary educational institutions from 504,900 applicants. We estimate that each updated record would take 10 minutes (.17 hours) to review each updated record thereby increasing burden by 85,833 hours.

Collectively, we estimate that burden would increase for individuals and institutions in their reporting updated household size and the updated number of household members attending postsecondary educational institutions by 382,500 hours in OMB Control Number 1845–0041, of which 122,400 hours is for individuals and 260,100 hours is for institutions.

The Department also proposes changes resulting from a change in the applicant's marital status, regardless of whether the applicant is selected for verification. We estimate that 170,000 individuals would update their marital status and that on average that reporting would take 5 minutes (.08 hours) per individual, increasing burden by 13,600 hours.

We estimate that proprietary institutions would receive updated marital status information from 62,900 applicants. We estimate that each updated record would take 10 minutes (.17 hours) to review each updated record thereby increasing burden by 10,693 hours. We estimate that private non-profit institutions would receive updated marital status information from 51,000 applicants. We estimate that each updated record would take 10 minutes (.17 hours) to review each updated record thereby increasing burden by 8,670 hours. We estimate that public institutions would receive updated marital status information from 56,100 applicants. We estimate that each updated record would take 10 minutes (.17 hours) to review each updated record thereby increasing burden by 9,537 hours.

Collectively, we estimate that burden would increase for individuals and institutions in their reporting updated marital status information by 42,500 hours in OMB Control Number 1845–0041.

Proposed § 668.55 would also include a number of other changes to remove language that implements the marital status exception in the current regulations, including removing current § 668.55(a)(3) and revising § 668.55(b).

In total, the proposed regulatory changes reflected in § 668.55 would increase burden by 425,005 hours in OMB Control Number 1845–0041.

Section 668.56—Information To Be Verified

The Department proposes to eliminate from the regulations the five items that an institution currently is required to verify for all applicants selected for verification. Instead, pursuant to proposed § 668.56(a), for each award year, the Secretary would specify in a **Federal Register** notice the FAFSA information and documentation that an institution and an applicant may be required to verify. The Department would then specify on an individual student's SAR and ISIR what information must be verified for that applicant.

Currently under OMB Control Number 1845–0041, there are 1,022,384 hours of burden associated with the verification regulations of which 1,010,072 hours of burden are a result of the data gathering and submission by each individual applicant selected for verification. This estimate was based upon the number of applicants in the 2002–2003 award year. Since then, the number of applicants has grown significantly to 17.4 million applicants for the 2008–2009 award year, of which we would project 5.1 million individual applicants to be selected for verification.

The projected number of items to be verified under the proposed regulations is expected to be reduced from the current five required data elements to an average of three items per individual. This projected reduction in items to be verified would result in a reduction of burden per individual applicant. Also, as a result of collecting information to verify applicant data on this smaller average number of data elements (three items instead of five items), the average amount of time for the individual applicant to review verification form instructions, gather the data, respond on a form and submit a form and the supporting data would decrease from the current average of 12 minutes (.20 hours) per individual to 7 minutes (.12 hours), thus further reducing burden on the individual applicant.

For example, when we consider the estimated 5.1 million 2008–2009 applicants selected for verification at an average of 12 minutes (.20 hours) to collect and submit information, including supporting documentation for the five required data elements (which is the estimated amount of time that is associated with the requirements in current § 668.56(a)), the requirements in that section would yield a total burden of 1,020,000 hours added to OMB Control Number 1845–0041. However, under proposed § 668.56(b), where the number of verification data elements would be reduced to an average of three, the estimated 5.1 million individuals selected for verification multiplied by the reduced average of 7 minutes (.12 hours) would yield an increase of 612,000 hours in burden. Therefore, with the proposed changes to this section, we would expect the burden to be 408,000 hours less than under the current regulations.

As a result, for OMB reporting purposes, we estimate that the individuals, as a group, would have an increase in burden by 612,000 hours in OMB Control Number 1845–0041 (rather than 1,020,000 hours).

Section 668.57—Acceptable Documentation

We propose to make a number of technical and conforming changes throughout § 668.57. We also propose to make the following substantive changes described in this section.

Proposed § 668.57(a)(2) would allow an institution to accept, in lieu of an income tax return or an IRS form that lists tax account information, the electronic importation of data obtained from the IRS into an applicant's online FAFSA.

We also propose to amend § 668.57(a)(4)(ii)(A) to accurately reflect that, upon application, the IRS grants a six-month extension beyond the April 15 deadline rather than the four-month extension currently stated in the regulations.

Under proposed § 668.57(a)(5), an institution may require an applicant who has been granted an extension to file his or her income tax return to provide a copy of that tax return once it has been filed. If the institution requires the applicant to submit the tax return, under this proposed provision, it would need to re-verify the AGI and taxes paid of the applicant and his or

her spouse or parents when the institution receives the return.

Proposed § 668.57(a)(7) would clarify that an applicant's income tax return that is signed by the preparer or stamped with the preparer's name and address must also include the preparer's Social Security number, Employer Identification Number or the Preparer Tax Identification Number.

Proposed § 668.57(b) and (c) would remain substantively unchanged.

We would delete current § 668.57(d) regarding acceptable documentation for untaxed income and benefits and replace it with new proposed § 668.57(d). This new section would provide that, if an applicant is selected to verify other information specified in an annual **Federal Register** notice, the applicant must provide the documentation specified for that information in the **Federal Register** notice.

Currently under OMB Control Number 1845–0041, there are 1,022,384 hours of burden associated with the verification regulations, of which 12,312 hours are attributable to institutions of higher education to establish their verification policies and procedures. Under proposed § 668.57, we estimate that, on average, institutions will take 7 minutes (.12 hours) per applicant selected for verification to review and take appropriate action based upon the information provided by the applicant, which in some cases may mean correcting applicant data or having the applicant correct his or her data. Under current § 668.57, when we consider the significant increase to 17.4 million applicants in the 2008–2009 award year, of which 5.1 million would be selected for verification at an average of 12 minutes (.20 hours) per verification response received from applicants by the institutions for review, the total increase in burden would have been 1,020,000 additional hours. However, under proposed § 668.57, both the average number of items to be verified would be reduced from five items to three items, as well as the average amount of time to review would decrease from 12 minutes (.20 hours) to 7 minutes (.12 hours). Therefore, under the proposed regulations, the burden to institutions would be 612,000 burden hours (that is, 5.1 million multiplied by 7 minutes (.12 hours))—rather than 1,020,000 burden hours (*i.e.,* 5.1 million applicants multiplied by 12 minutes (.20 hours)). Thus, as compared to the burden under the current regulations, using the number of applicants from 2008–2009—17.4 million—there would be 408,000 fewer burden hours for institutions.

We estimate that for 2,086 proprietary institutions times 7 minutes (.12 hours) equals 226,440 hours of increased burden. We estimate that for 1,731 private non-profit institutions times 7 minutes (.12 hours) equals 183,600 hours of increased burden. We estimate that for 1,892 public institutions times 7 minutes (.12 hours) equals 201,960 hours of increased burden.

As a result, for OMB reporting purposes, collectively there would be a projected increase of 612,000 hours of burden for institutions in OMB Control Number 1845–0041.

Section 668.59—Consequences of a Change in FAFSA Information

We propose to amend § 668.59 by removing all allowable tolerances and requiring instead that an institution submit to the Department all changes to an applicant's FAFSA information resulting from verification for those applicants receiving assistance under any of the subsidized student financial assistance programs (*see* proposed § 668.59(a)).

Under proposed § 668.59(b), for the Federal Pell Grant program, once the applicant provides the institution with the corrected SAR or ISIR, the institution would be required to recalculate the applicant's Federal Pell Grant and disburse any additional funds, if additional funds are payable. If the applicant's Federal Pell Grant would be reduced as a result of verification, the institution would be required to eliminate any overpayment by adjusting subsequent disbursements or reimbursing the program account by requiring the applicant to return the overpayment or making restitution from its own funds (*see* proposed § 668.59(b)(2)(ii)).

Proposed § 668.59(c) would provide that, for the subsidized student financial assistance programs, excluding the Federal Pell Grant Program, if an applicant's FAFSA information changes as a result of verification, the institution must recalculate the applicant's EFC and adjust the applicant's financial aid package on the basis of the EFC on the corrected SAR or ISIR.

With the exception of minor technical edits, proposed § 668.59(d), which describes the consequences of a change in an applicant's FAFSA information, would be substantively the same as current § 668.59(d).

Finally, we would remove current § 668.59(e), the provision that requires an institution to refer to the Department unresolved disputes over the accuracy of information provided by the applicant if the applicant received funds on the basis of that information.

As proposed, both individuals (students) and institutions would be making corrections to FAFSA information as a result of the verification process. We estimate that 30 percent of the 17,000,000 applicants or 5,100,000 individuals (students) would be selected for verification. Of those 5,100,000 individuals, students would submit, on average, 1.4 changes in FAFSA information as a result of verification for 7,140,000 changes which would take an average of 7 minutes (.12 hours) per change, increasing burden to individuals by 856,800 hours.

We estimate that of the 5,100,000 individuals selected for verification, that institutions would submit, on average 2.0 changes per individual in FAFSA information as a result of verification for 10,200,000 changes. We estimate that 3,774,000 changes to FAFSA information as a result of verification would occur at proprietary institutions which would take an average of 7 minutes (.12 hours) per change, increasing burden by 452,880 hours. We estimate that 3,060,000 changes to FAFSA information as a result of verification would occur at private non-profit institutions which would take an average of 7 minutes (.12 hours) per change, increasing burden by 367,200 hours. We estimate that 3,366,000 changes to FAFSA information as a result of verification would occur at public institutions which would take an average of 7 minutes (.12 hours) per change, increasing burden by 403,920 hours.

Collectively, the proposed regulatory changes reflected in § 668.59 would increase for individuals and institutions by 2,080,800 hours in OMB Control Number 1845–0041.

Section 668.144—Application for Test Approval

We propose to clarify and expand the requirements in current §§ 668.143 and 668.144 and to include all of the requirements for test approval in one section, proposed § 668.144. Paragraphs (a) and (b) of proposed § 668.144 would describe the general requirement for test publishers and States to submit to the Secretary any test they wish to have approved under subpart J of part 668. Paragraph (c) of proposed § 668.144 would describe the information that a test publisher must include with its application for approval of a test. Paragraph (d) of proposed § 668.144 would describe the information a State must include with its application when it submits a test to the Secretary for approval.

Proposed § 668.144(c)(16) would require test publishers to include in

their applications a description of their test administrator certification process. In proposed § 668.144(c)(17), we would require test publishers to include in their applications, a description of the test anomaly analysis the test publisher will conduct and submit to the Secretary. Finally, proposed § 668.144(c)(18) would require test publishers to include in their applications a description of the types of accommodations available for individuals with disabilities, including a description of the process used to identify and report when accommodations for individuals with disabilities were provided.

Proposed § 668.144(d) would be added to describe what States must include in their test submissions to the Secretary. While this provision would replace the content in current § 668.143, its language would be revised to be parallel, where appropriate, to the test publisher submission requirements in current § 668.144. In addition to paralleling most of the current requirements for test publisher test submissions, proposed § 668.144(d) would also include the new requirements proposed to be added to the test publisher submissions. A description of those new provisions follows:

Both test publishers and States would be required to submit a description of their test administrator certification process that indicates how the test publisher or State, as applicable, will determine that a test administrator has the necessary training, knowledge, skills, and integrity to test students in accordance with requirements and how the test publisher or the State will determine that the test administrator has the ability and facilities to keep its test secure against disclosure or release (*see* proposed § 668.144(c)(16) (test publishers) and § 668.144(d)(7) (States)).

We estimate that test publishers and States would, on average, take 2.5 hours to develop its process to establish that a test administrator has the necessary training, knowledge, skills and integrity to administer ability-to-benefit (ATB) tests and report that process to the Secretary. We estimate that the burden associated with 8 ATB tests would increase for the proprietary test publishers by 20 hours.

The proposed regulations would require both test publishers and States to submit a description of the test anomaly analysis they will conduct that includes how they will identify potential test irregularities and make a determination that test irregularities have occurred; an explanation of corrective action to be taken in the event of test irregularities; and information on when and how the Secretary, test administrator, and institutions will be notified if a test administrator is decertified (*see* proposed § 668.144(c)(17) (test publishers) and § 668.144(d)(8) (States)). We estimate that test publishers and States would, on average, take 75 hours to develop its test anomaly process, to establish its test anomaly analysis (where it explains its test irregularity detection process including its decertification of test administrator process) and to establish its reporting process to the Secretary. We estimate that the burden associated with 8 ATB tests would increase for the proprietary test publishers by 600 hours.

Under proposed § 668.144(c)(18) and (d)(9) respectively, both test publishers and States would be required to describe the types of accommodations available for individuals with disabilities, and the process for a test administrator to identify and report to the test publisher when accommodations for individuals with disabilities were provided. We estimate that test publishers and States would, on average, take 1 hour to develop and describe to the Secretary the types of accommodations available to individuals with disabilities, to describe the process the test administrator would use to support the identification of the disability and to develop the process to report when accommodations would be used. We estimate that the burden associated with 8 ATB tests would increase for the proprietary test publishers by 8 hours.

Collectively, the proposed regulatory changes in § 668.144 would increase burden for test publishers by 628 hours in OMB 1845–0049.

Section 668.150—Agreement Between the Secretary and a Test-Publisher or a State

Proposed § 668.150 would provide that States, as well as test publishers, must enter into agreements with the Secretary in order to have their tests approved.

We would also revise this section to require both test publishers and States to comply with a number of new requirements that would be added to the agreement with the Secretary. These requirements would include:

- Requiring the test administrators that they certify to provide them with certain information about whether they have been decertified (*see* proposed § 668.150(b)(2)). We estimate that 3,774 individuals (test administrators) would take, on average, 10 minutes (.17 hours) to access, read, complete and submit the written certification to a test publisher or State, which would increase burden by 642 hours.
- We estimate that it would take each test publisher or State 1 hour per test submission to develop its process to obtain a certification statement from each prospective test administrator, which would increase burden by 8 hours. We estimate that the review of the submitted written certifications by the test publishers or States for the 3,774 test administrators would take, on average, 5 minutes (.08 hours) per certification form, which would increase burden by 302 hours. Immediately notifying the test administrator, the Secretary, and institutions when the test administrator is decertified (*see* proposed § 668.150(b)(6)). We estimate that 1 percent of the 3,774 test administrators would be decertified. We estimate that it would take test publishers and States, on average, 1 hour per decertification to provide all of the proposed notifications, which would increase burden for proprietary test publishers by 38 hours. Reviewing test results of tests administered by a decertified test administrator and immediately notifying affected institutions and students (*see* proposed § 668.150(b)(7)). We estimate that 481,763 ATB tests would be taken for title IV, HEA purposes annually. Of the annual total of ATB tests provided, we estimate that 1 percent will be improperly administered and that 4,818 individuals would be contacted, which would take, on average, 15 minutes (.25 hours) per individual. We estimate that burden would increase by 1,205 hours. We estimate that it would take test publishers and States, on average, 5 hours per ATB test submitted, to develop the process to determine when ATB tests have been improperly administered, which for 8 approved ATB tests would increase burden by 40 hours. We estimate that test publishers and States would, on average, take 20 minutes (.33 hours) for each of the 4,818 estimated improperly administered ATB tests to make the proposed notifications to institutions, students and prospective students, which would increase burden by 1,590 hours. Reporting to the Secretary if a test publisher or the State certifies a previously decertified test administrator after the three-year decertification period (*see* proposed § 668.150(b)(8)). We estimate that of the 3,774 test administrators that 1 percent or 38 test administrators would be decertified. Of the 38 decertified test administrators, we estimate that 2 percent or 1 previously de-certified test administrator would be re-certified after

a three-year period and therefore reported to the Secretary. We estimate the burden for test publishers for this reporting would be 1 hour. We project that it will be very rare that a decertified test administrator will seek re-certification after the three-year decertification period.

• Providing copies of test anomaly analysis every 18 months instead of every 3 years (*see* proposed § 668.150(b)(13)). We estimate that it would take test publishers or States, on average, 75 hours to conduct its test anomaly analysis and report the results to the Secretary every 18 months as proposed. We estimate the burden on test publishers for the submission of the 8 test anomaly analysis every 18 months would be 600 hours.

• Reporting to the Secretary any credible information indicating that a test has been compromised (*see* proposed § 668.150(b)(15)). We estimate that 481,763 ATB tests for title IV, HEA purposes would be given on an annual basis. Of that total number ATB tests provided, we estimate that 482 ATB tests will be compromised. On average, we estimate that test publishers would take 1 hour per test to collect the credible information to make the determination that a test would be compromised and report it to the Secretary. We estimate that burden would increase by 482 hours. Reporting to the Office of Inspector General of the Department of Education any credible information indicating that a test administrator or institution may have engaged in fraud or other criminal misconduct (*see* proposed § 668.150(b)(16)). We estimate that 481,763 ATB tests for title IV, HEA purposes would be given on an annual basis. Of that total number ATB tests provided, we estimate that 482 ATB tests will be compromised. On average, we estimate that test publishers would take 1 hour per test to collect the credible information to make the determination that a test would be compromised and report it to the U.S. Department of Education's Office of the Inspector General. We estimate that burden would increase by 482 hours.

• Requiring a test administrator who provides a test to an individual with a disability who requires an accommodation in the test's administration to report to the test publisher or the State the nature of the disability and the accommodations that were provided (*see* proposed § 668.150(b)(17)). Census data indicate that 12 percent of the U.S. population is severely disabled. We estimate that 12 percent of the ATB test population (481,763 ATB test takers) or 57,812 of the ATB test takers would be individuals with disabilities that would need accommodations for the ATB test. We estimate that it would take 5 minutes (.08 hours) to report the nature of the disability and any accommodation that the test administrator made for the test taker, increasing burden by 4,625 hours.

We estimate that, on average, test publishers and States would take 2 hours per ATB test to develop the process for having test administrators report the nature of the test taker's disability and any accommodations provided, times 8 tests would increase burden for proprietary ATB test publishers by 16 hours.

Collectively, the proposed changes reflected in § 668.150 would increase burden by 10,031 hours in OMB Control Number 1845–0049.

Section 668.151—Administration of Tests

Proposed § 668.151(g)(4), would require institutions to keep a record of each individual who took an ATB test and the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State.

We estimate that 481,763 ATB tests for title IV, HEA purposes would be given on an annual basis. We estimate that proprietary institutions would provide 36 percent of those ATB tests or 173,445 tests and that, on average, the amount of time to record the test takers name and address as well as the test administrators identifiers would be 5 minutes (.08 hours) per test, increasing burden by 13,876 hours. We estimate that private non-profit institutions would provide 31 percent of those ATB tests or 149,347 tests and that, on average, the amount of time to record the test takers name and address as well as the test administrators identifiers would be 5 minutes (.08 hours) per test, increasing burden by 11,948 hours. We estimate that public institutions would provide 33 percent of those ATB tests or 158,962 tests and that, on average, the amount of time to record the test takers name and address as well as the test administrators identifiers would be 5 minutes (.08 hours) per test, increasing burden by 12,717 hours.

• If the individual who took the test has a disability and is unable to be evaluated by the use of an approved ATB test, or the individual requested or required a testing accommodation, the institution would be required, under proposed § 668.151(g)(5), to maintain documentation of the individual's disability and of the testing arrangements provided. Census data indicate that 12 percent of the U.S. population is severely disabled. We estimate that 12 percent of the ATB test population (481,763 ATB test takers) or 57,812 of the ATB test takers would be individuals with disabilities that would need accommodations for the ATB test. We estimate that it would take 5 minutes (.08 hours) to collect and maintain documentation of the individual's disability and of the testing accommodations provided to the test taker. We estimate that proprietary institutions will provide 36 percent or 20,812 tests times 5 minutes (.08 hours), increasing burden by 1,665 hours. We estimate that private non-profit institutions will provide 31 percent or 17,922 tests times 5 minutes (.08 hours), increasing burden by 1,434 hours. We estimate that public institutions will provide 33 percent or 19,078 tests times 5 minutes (.08 hours), increasing burden by 1,526 hours. Collectively, the proposed regulatory changes reflected in § 668.151 would increase burden by 43,166 hours in OMB Control Number 1845–0049.

Section 668.152—Administration of Tests by Assessment Centers

Proposed § 668.152(a) would clarify that assessment centers are also required to comply with the provisions of § 688.153 (Administration of tests for individuals whose native language is not English or for individuals with disabilities), if applicable.

Under proposed § 668.152(b)(2), assessment centers that score tests would be required to provide copies of completed tests or lists of test-takers' scores to the test publisher or the State, as applicable, on a weekly basis. Under proposed § 668.152(b)(2)(i) and (b)(2)(ii), copies of completed tests or reports listing test-takers' scores would be required to include the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State.

We estimate that of the 3,774 ATB test administrators approximately one-third (.3328 times 3,774) or 1,256 of the ATB test administrators are at test assessment centers. Of the 1,256 test assessment centers, we estimate that 18 percent or 226 test assessment centers are at private non-profit institutions and 82 percent or 1,030 test assessment centers are at public institutions. We estimate that 92 percent of the ATB tests provided at test assessment centers are scored by the test administrators and therefore, under the proposed regulations, the institution would be required to maintain the scored ATB

tests, to collect and submit copies of the completed ATB tests or a listing to the test publisher or State on a weekly basis, while the other 8 percent will not be impacted by these proposed regulations. We estimate that, on average, it would take 5 minutes (.08 hours) per week for the test assessment center (institution) to collect and submit the proposed information on a weekly basis. For 226 test assessment centers at private non-profit institutions times 5 minutes (.08 hours) times 52 weeks per year equals 940 hours of increased burden. For the 1,030 test assessment centers at public institutions times 5 minutes (.08 hours) times 52 weeks per year equals 4,285 hours of increased burden.

Collectively, the proposed regulatory changes reflected in § 668.152 would increase burden by 5,225 hours in OMB Control Number 1845–0049.

Section 668.164—Disbursing Funds

Under proposed § 668.164(i), an institution would provide a way for a Federal Pell Grant eligible student to obtain or purchase required books and supplies by the seventh day of a payment period under certain conditions. An institution would have to comply with this requirement only if, 10 days before the beginning of the payment period, the institution could disburse the title IV, HEA program funds for which the student is eligible, and presuming that those funds were disbursed, the student would have a title IV, HEA credit balance under § 668.164(e). The amount the institution would provide to the student for books and supplies would be the lesser of the presumed credit balance or the amount needed by the student, as determined by the institution. In determining the amount needed by the student, the institution could use the actual costs of books and supplies or the allowance for books and supplies used in the student's cost of attendance for the payment period.

We estimate that of the 6,321,678 Federal Pell Grant recipients in the 2008–2009 award year, that approximately 30 percent or 1,896,503 would have or did have a title IV, HEA credit balance. Of that number of Federal Pell Grant recipients, we estimate that 25 percent or 474,126 Federal Pell Grant recipients would have a presumed credit balance 10 days prior to the beginning of the payment period, and as proposed, that the institution would have to provide a way for those recipients to either obtain or purchase their books and supplies within 7 days of the beginning of the payment period. We estimate that the 2,063 proprietary institutions participating in the Federal Pell Grant program would take, on average 3 hours per institution to analyze and make programming change needed to identify these recipients with presumed credit balances, increasing burden by 6,189 hours. Additionally, we estimate that proprietary institutions would be required to disburse the presumed credit balance to 38 percent of the 474,126 at proprietary institutions (180,168 recipients) which on average, would take 5 minutes (.08 hours) per recipient, increasing burden by 14,414 hours. We estimate that the 1,523 private non-profit institutions participating in the Federal Pell Grant program would take, on average 3 hours per institution to analyze and make programming change needed to identify these recipients with presumed credit balances, increasing burden by 4,569 hours. Additionally, we estimate that private non-profit institutions would be required to disburse the presumed credit balance to 28 percent of the 474,126 at proprietary institutions (132,755 recipients) which on average, would take 5 minutes (.08 hours) per recipient, increasing burden by 10,620 hours. We estimate that the 1,883 public institutions participating in the Federal Pell Grant program would take, on average 3 hours per institution to analyze and make programming change needed to identify these recipients with presumed credit balances, increasing burden by 5,469 hours. Additionally, we estimate that proprietary institutions would be required to disburse the presumed credit balance to 34 percent of the 474,126 at proprietary institutions (161,203 recipients) which on average, would take 5 minutes (.08 hours) per recipient, increasing burden by 12,896 hours.

Collectively, the proposed regulatory changes reflected in § 668.164 would increase burden by 54,337 hours in OMB Control Number 1845–NEW3.

Collection of Information

Regulatory section	Information collection	Collection
668.6	This proposed regulatory section would require institutions to submit annually information that would include identifying information about each student who completed a program that prepares a student for gainful employment, the CIP code for that program, the date the student completed the program, and the amounts the student received from private educational loans and institutional financing programs. Institutions would have to disclose on their Web site information about the occupations that its programs prepare students to enter, information from DOL's O-Net data about the job tasks and expected salaries. In addition, the institution would also have to report the costs for tuition and fees, room and board, and other associated institutional costs typically incurred by students enrolling in these programs; graduation rates; placement rates; and median debt rate information about title IV, HEA loans and private loan as provided by the Department to the institution.	OMB 1845–NEW1. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden increases by 105,377 hours.
668.8	This proposed regulatory section provides for a new conversion ratio when converting clock hours to credit hours. As proposed, this section would include an exemption for affected institutions if the accrediting agency, or the State approval agency finds that there are no deficiencies in the institutions policies and procedures for these conversions. Under the exception, the institution would use a lower ratio and could consider student's outside work in the total hours being converted to credit hours. Burden would increase for proprietary, not-for profit and public institutions when they measure whether certain programs when converted from clock hours to credit hours have sufficient credit hours to receive title VI, HEA funds.	OMB 1845–0022. The burden increases by 18,349 hours.

Regulatory section	Information collection	Collection
668.16	This proposed regulatory section would be streamlined by moving most of the elements of satisfactory academic progress (SAP) from this section to proposed § 668.34. Under this proposal, the required elements of SAP would be expanded to provide greater institutional flexibility Burden would increase for proprietary, not-for profit and public institutions to develop a high school diploma validity process and would increase when certain diplomas are verified.	OMB 1845–0022 and OMB 1845–NEW2. The burden hours attributable to SAP in OMB 1845–0022 would be administratively transferred to OMB 1845–NEW2. Additionally, the burden increases by 21,982 hours in OMB 1845–0022.
668.22	This proposed regulatory section would consider a student to have withdrawn if the student does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing. Burden would increase for individuals, proprietary, not-for profit and public institutions when students in term-based programs with modules or compressed courses withdraw before completing more than 60 percent of the payment period or period of enrollment for which a calculation would be performed to determine the earned and unearned portions of title IV, HEA program assistance.	OMB 1845–0022. The burden increases by 743,881 hours.
668.34	This proposed regulatory section would restructure and expand the satisfactory academic progress requirements by allowing for more frequent measuring of SAP. Burden would increase for individuals and proprietary, not-for profit and public institutions for institutions to measure academic progress and when academic plans or alternatives would be provided to students who do not meet the institution's academic standards.	OMB 1845–NEW2. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden increases by 976,855 hours.
668.43	This proposed regulatory section would require that for institutions that enter into written arrangements with other institutions to provide for a portion of its programs' training by the institution that is not providing the degree or certificate, the institution providing the degree or certificate must provide a variety of disclosures to enrolled and prospective students about the written arrangements. Burden would increase for proprietary, not-for profit and public institutions for reporting the details of written arrangements with other institutions offering a portion of a student's program of study.	OMB 1845–0022. The burden increases by 67,870 hours.
668.55	This proposed regulatory provision would require that all updated applicant data information as a result of verification be reported to the Secretary via the Central Processing System. This also would cover changes made as a result of a dependent student becoming married during the award year, such change in status due to marriage had previously been prohibited.	OMB 1845–0041. The burden increases by 425,005 hours.
668.56	This proposed regulation changes from the current five mandatory items included in the verification process to a more flexible list of items that will be selected on an individualized basis. For example, there is no need to verify data that can be obtained directly from the IRS. Burden would increase for individuals; however, the average number of data elements to be verified is expected to be reduced.	OMB 1845–0041. The burden increases by 612,000 hours.
668.57	This proposed regulatory provision would modify the requirements related to acceptable documentation required as a part of the verification process. It would allow for the importation of data obtained directly from the IRS that has been unchanged and would provide other flexibilities that would reduce burden; however, due to the large increase in applicants, there would be an overall increase in burden.	OMB 1845–0041. The burden increases by 612,000 hours.
668.59	This proposed provision would eliminate all allowable tolerances and require an institution to submit to the Department all changes to an applicant's FAFSA as a result of verification. Burden would increase for proprietary, not-for profit and public institutions that would recalculate title IV, HEA awards as a result of data changes due to verification.	OMB 1845–0041. The burden increases by 2,080,800 hours.
668.144	This proposed regulatory section would amend and expand the required elements that a test publisher or a State must submit to the Secretary for approval.	OMB 1845–0049. The burden increases by 628 hours.
668.150	This proposed provision would amend and expand the provisions of the agreement between the Secretary and the ability to benefit test (ATB) publishers or a State. The expanded requirements would include requiring test administrators to certify that they have not been decertified, notification requirements when a test administrator is decertified, and providing test anomaly studies every eighteen months rather than every 36 months. Burden would increase for individuals, proprietary, not-for profit and public institutions for the collection and maintenance of certifications, for required notifications, and for submission of test anomaly studies.	OMB 1845–0049. The burden increases by 10,031 hours.
668.151	This proposed provision would require independent test administrators to submit completed tests for scoring to the test publisher or the State in no more than two business days following the test. Institutions would be required to maintain a record of each individual who takes an ATB test and information about the test administrator. When the test taker has a disability, it would be the institution's responsibility to maintain documentation of the individual's disability and any accommodation provided the individual.	OMB 1845–0049. The burden increases by 43,166 hours.
668.152	This proposed provision would require that test assessment centers provide either copies of the completed tests or lists of the test takers' scores, including the test administrator's name, address, and any other test administrator identifier to the test publisher or State, as applicable, on a weekly basis.	OMB 1845–0049. The burden increases by 5,225 hours.

Regulatory section	Information collection	Collection
668.164	This proposed provision would require that institutions provide a way for Federal Pell Grant program recipients to obtain or purchase books and supplies by the seventh day of the payment period if certain conditions are met and a credit balance or projected credit balance exists. Burden would increase for proprietary, not-for profit and public institutions to identify and notify Pell recipients with a presumed credit balance about ways to obtain or purchase books and supplies.	OMB 1845–NEW3. This would be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment. The burden increases by 54,337 hours.

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by e-mail to *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble.

We consider your comments on these proposed collections of information in—

• Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;

• Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;

• Enhancing the quality, usefulness, and clarify of the information we collect; and

• Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

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

Intergovernmental Review

These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance: 84.007 FSEOG; 84.032 Federal Family Education Loan Program; 84.033 Federal Work-Study Program; 84.037 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 LEAP; 84.268 William D. Ford Federal Direct Loan Program; 84.376 ACG/SMART; 84.379 TEACH Grant Program)

List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 602

Colleges and universities, Reporting and recordkeeping requirements.

34 CFR Part 603

Colleges and universities, Vocational education.

34 CFR Part 668

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

34 CFR Part 682

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

34 CFR Part 685

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

34 CFR Part 686

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

34 CFR Part 690

Colleges and universities, Education of disadvantaged, Grant programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 691

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

Dated: June 8, 2010.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600, 602, 603, 668, 682, 685, 686, 690, and 691 of title 34 of the Code of Federal Regulations as previously amended in the **Federal Register** on October 27, 2009 (74 FR 55414) and October 29, 2009 (74 FR 55902) 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. Adding, in alphabetical order, the definition of a *Credit hour.*

B. Revising the definition of *Recognized occupation.*

The addition and revision read as follows:

§ 600.2 Definitions.

* * * * *

Credit hour: Except as provided in 34 CFR 668.8(k) and (l), a credit hour is—

(1) One hour of classroom or direct faculty instruction and a minimum of two hours of out of class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different amount of time;

(2) At least an equivalent amount of work as required in paragraph (1) of this definition for other academic activities as established by the institution including laboratory work, internships, practica, studio work, and other academic work leading to the award of credit hours; or

(3) Institutionally established reasonable equivalencies for the amount of work required in paragraph (1) of this definition for the credit hours awarded, including as represented in intended learning outcomes and verified by evidence of student achievement.

* * * * *

Recognized occupation: An occupation that is—

(1) Identified by a Standard Occupational Classification (SOC) code established by the Office of Management and Budget or an Occupational Information Network O* NET–SOC code established by the Department of Labor and available at *http://online.onetcenter.org* or its successor site; or

(2) Determined by the Secretary in consultation with the Secretary of Labor to be a recognized occupation.

* * * * *

3. Section 600.4 is amended by:

A. In paragraph (a)(3), adding the words, "in accordance with § 600.9" immediately after the word "located".

B. In paragraph (a)(4)(i)(C), removing the word "and" that appears after the punctuation ";".

C. Adding paragraph (a)(4)(iii).

The addition reads as follows:

§ 600.4 Institution of higher education.

(a) * * *

(4) * * *

(iii) That is at least a one academic year training program that leads to a certificate, or other nondegree recognized credential, and prepares students for gainful employment in a recognized occupation; and

* * * * *

§ 600.5 [Amended]

4. Section 600.5(a)(4) is amended by adding the words, "in accordance with § 600.9" immediately after the word "located".

§ 600.6 [Amended]

5. Section 600.6(a)(3) is amended by adding the words, "in accordance with § 600.9" immediately after the word "located".

6. Section 600.9 is added to subpart A to read as follows:

§ 600.9 State authorization.

(a)(1) An institution described under §§ 600.4, 600.5, and 600.6 is legally authorized by a State through a charter, license, approval, or other document issued by an appropriate State government agency or State entity that affirms or conveys the authority to the institution to operate educational programs beyond secondary education, including programs leading to a degree or certificate.

(2) An institution is considered to meet the provisions of paragraph (a)(1) of this section if the institution is authorized to offer educational programs beyond secondary education by the Federal Government or, as defined in 25 U.S.C. 1802(2), an Indian tribe.

(3) An institution is considered to be legally authorized to offer educational programs beyond secondary education if it is exempt from State authorization as a religious institution under the State constitution.

(b) The Secretary considers an institution to be legally authorized by a State under paragraph (a)(1) of this section if—

(1) The authorization is given to the institution specifically to offer programs beyond secondary education but not if the authorization is merely of the type required to do business in the State or to operate as an eleemosynary organization;

(2) The authorization provided to the institution is subject to adverse action by the State; and

(3) The State has a process to review and appropriately act on complaints concerning an institution and enforces applicable State laws.

(Authority: 20 U.S.C. 1001 and 1002)

PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

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

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

8. Section 602.24 is amended by adding a new paragraph (f) to read as follows:

§ 602.24 Additional procedures certain institutional accreditors must have.

* * * * *

(f) *Credit-hour policies.* The accrediting agency, as part of its review of an institution for initial accreditation or preaccreditation or renewal of accreditation, must conduct an effective review and evaluation of the reliability and accuracy of the institution's assignment of credit hours.

(1) The accrediting agency meets this requirement if—

(i) It reviews the institution's—

(A) Policies and procedures for determining the credit hours, as defined in 34 CFR 600.2, that the institution awards for courses and programs; and

(B) The application of the institution's policies and procedures to its programs and coursework; and

(ii) Makes a reasonable determination of whether the institution's assignment of credit hours conforms to commonly accepted practice in higher education.

(2) In reviewing and evaluating an institution's policies and procedures for determining credit hour assignments, an accrediting agency may use sampling or other methods in the evaluation, sufficient to comply with paragraph (f)(1)(i)(B) of this section.

(3) The accrediting agency must take such actions that it deems appropriate to address any deficiencies that it identifies at an institution as part of its reviews and evaluations under paragraph (f)(1)(i) and (ii) of this section, as it does in relation to other deficiencies it may identify, subject to the requirements of this part.

(4) If, following the institutional review process under this paragraph (f), the agency finds systemic noncompliance with the agency's policies or significant noncompliance regarding one or more programs at the institution, the agency must promptly notify the Secretary.

* * * * *

PART 603—SECRETARY'S RECOGNITION PROCEDURES FOR STATE AGENCIES

9. The authority citation for part 603 is revised to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1094(c)(4); 42 U.S.C. 293a(b), 38 U.S.C. 3675, unless otherwise noted.

10. Section 603.24 is amended by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

§ 603.24 Criteria for State agencies.

* * * * *

(c) *Credit-hour policies.* The State agency, as part of its review of an institution for initial approval or renewal of approval, must conduct an effective review and evaluation of the reliability and accuracy of the institution's assignment of credit hours.

(1) The State agency meets this requirement if—

(i) It reviews the institution's—

(A) Policies and procedures for determining the credit hours, as defined in 34 CFR 600.2, that the institution awards for courses and programs; and

(B) The application of the institution's policies and procedures to its programs and coursework; and

(ii) Makes a reasonable determination of whether the institution's assignment of credit hours conforms to commonly accepted practice in higher education.

(2) In reviewing and evaluating an institution's policies and procedures for determining credit hour assignments, a State agency may use sampling or other methods in the evaluation, sufficient to comply with paragraph (c)(1)(i)(B) of this section.

(3) The State agency must take such actions that it deems appropriate to address any deficiencies that it identifies at an institution as part of its reviews and evaluations under paragraph (c)(1)(i) and (ii) of this section, as it does in relation to other deficiencies it may identify, subject to the requirements of this part.

(4) If, following the institutional review process under this paragraph (c), the agency finds systemic noncompliance with the agency's policies or significant noncompliance regarding one or more programs at the institution, the agency must promptly notify the Secretary.

* * * * *

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

Authority: 20 U.S.C. 1001, 1002, 1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, and 1099c–1, unless otherwise noted.

§ 668.2 [Amended]

12. Section 668.2 is amended by:

A. In paragraph (a), adding, in alphabetical order, the term "Credit hour".

B. In paragraph (b), in the definition of *Full-time student,* adding the words, "including for a term-based program, repeating any coursework previously taken in the program" immediately before the period in the second sentence.

13. Section 668.5 is amended by:

A. Revising paragraph (a).

B. Revising paragraph (c)(1).

C. In paragraph (c)(2), adding the words "offered by the institution that grants the degree or certificate" after the word "program".

D. In paragraph (c)(3)(i), removing the words "not more than" and adding the words "or less" after the word "percent".

E. In paragraph (c)(3)(ii)(A), removing the words "not more" and adding, in their place, the word "less".

F. Adding new paragraph (e).

The addition and revisions read as follows:

§ 668.5 Written arrangements to provide educational programs.

(a) *Written arrangements between eligible institutions.* (1) Except as provided in paragraph (a)(2) of this section, if an eligible institution enters into a written arrangement with another eligible institution, or with a consortium of eligible institutions, under which the other eligible institution or consortium provides part of the educational program to students enrolled in the first institution, the Secretary considers that educational program to be an eligible program if the educational program offered by the institution that grants the degree or certificate otherwise satisfies the requirements of § 668.8.

(2) If the written arrangement is between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation, the Secretary considers the educational program to be an eligible program if—

(i) The educational program offered by the institution that grants the degree or certificate otherwise satisfies the requirements of § 668.8; and

(ii) The institution that grants the degree or certificate provides more than 50 percent of the educational program.

* * * * *

(c) * * *

(1) The ineligible institution or organization has not—

(i) Had its eligibility to participate in the title IV, HEA programs terminated by the Secretary;

(ii) Voluntarily withdrawn from participation in the title IV, HEA programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution's State licensing agency, accrediting agency, guarantor, or by the Secretary;

(iii) Had its certification to participate in the title IV, HEA programs revoked by the Secretary;

(iv) Had its application for re-certification to participate in the title IV, HEA programs denied by the Secretary; or

(v) Had its application for certification to participate in the title IV, HEA programs denied by the Secretary;

* * * * *

(e) *Information made available to students.* If an institution enters into a written arrangement described in paragraph (a), (b), or (c) of this section, the institution must provide the information described in § 668.43(a)(12) to enrolled and prospective students.

* * * * *

14. Section 668.6 is added to subpart A to read as follows:

§ 668.6 Reporting and disclosure requirements for programs that prepare students for gainful employment in a recognized occupation.

(a) *Reporting requirements.* In accordance with procedures established by the Secretary, an institution must report annually for each student who completes a program under § 668.8(c)(3) or (d), information that includes—

(1) Information needed to identify the student;

(2) The Classification of Instructional Program (CIP) code of the program the student completed;

(3) The date the student completed the program; and

(4) The amounts the student received from private educational loans and institutional financing plans.

(b) *Disclosures.* For each program offered by an institution under this section, on its Web site the institution must provide prospective students with—

(1) The occupations (by names and SOC codes) that the program prepares students to enter, along with links to occupational profiles on O*NET or its successor site;

(2) The on-time graduation rate for students entering the program;

(3) The cost of the program, including tuition and fees, room and board, and other institutional costs that a typical student would incur for enrolling in the program;

(4) Beginning no later than June 30, 2013, the placement rate for students completing the program, as determined under § 668.8(g) or a State-sponsored workforce data system; and

(5) The median loan debt incurred by students who completed the program during the preceding three years. The institution must identify separately the median loan debt from title IV, HEA program loans, and the median loan debt from private educational loans and institutional financing plans.

(Approved by the Office of Management and Budget under control number 1845–NEW1)

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

15. Section 668.8 is amended by:

A. Revising paragraph (c)(3).

B. In paragraph (d)(2)(iii), adding the words, "as provided under § 668.6" immediately after the word "occupation."

C. In paragraph (d)(3)(iii), adding the words, "as provided under § 668.6" immediately after the word "occupation."

D. Revising paragraphs (k) and (l).

The revisions read as follows:

§ 668.8 Eligible program.

* * * * *

(c) * * *

(3) Be at least a one-academic-year training program that leads to a certificate, or other nondegree recognized credential, and prepares students for gainful employment in a recognized occupation.

* * * * *

(k) *Undergraduate educational program in credit hours.* (1) Except as provided in paragraph (k)(2) of this section, if an institution offers an undergraduate educational program in credit hours, the institution must use the formula contained in paragraph (l) of this section to determine whether that program satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for purposes of the title IV, HEA programs, unless—

(i) The program is at least two academic years in length and provides an associate degree, a bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or

(ii) Each course within the program is acceptable for full credit toward that institution's associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary provided that—

(A) The institution's degree requires at least two academic years of study; and

(B) The institution demonstrates that students enroll in, and graduate from, the degree program.

(2) A program is considered to be a clock-hour program for purposes of the title IV, HEA programs if—

(i) Except as provided in paragraph (k)(3) of this section, a program is required to measure student progress in clock hours when—

(A) Receiving Federal or State approval or licensure to offer the program; or

(B) Completing clock hours is a requirement for graduates to apply for licensure or the authorization to practice the occupation that the student is intending to pursue;

(ii) The credit hours awarded for the program are not in compliance with the definition of a credit hour in 34 CFR 600.2; or

(iii) The institution does not provide the clock hours that are the basis for the credit hours awarded for the program or each course in the program and, except as provided in § 668.4(e), requires attendance in the clock hours that are the basis for the credit hours awarded.

(3) The requirements of paragraph (k)(2)(i) of this section do not apply to a program if there is a State or Federal approval or licensure requirement that a limited component of the program must include a practicum, internship, or clinical experience component of the program that must include a minimum number of clock hours.

(l) *Formula.* (1) Except as provided in paragraph (l)(2) of this section, for purposes of determining whether a program described in paragraph (k) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and of determining the number of credit hours in that educational program with regard to the title IV, HEA programs—

(i) A semester hour must include at least 37.5 clock hours of instruction;

(ii) A trimester hour must include at least 37.5 clock hours of instruction; and

(iii) A quarter hour must include at least 25 clock hours of instruction.

(2) The institution's conversions to establish a minimum number of clock hours of instruction per credit may be less than those specified in paragraph (l)(1) of this section, if neither the institution's designated accrediting agency nor the relevant State licensing authority for participation in the title IV, HEA programs has identified any deficiencies with the institution's policies and procedures, or their implementation, for determining the credit hours, as defined in 34 CFR 600.2, that the institution awards for programs and courses, in accordance with 34 CFR 602.24(f), or, if applicable, 34 CFR 603.24(c), so long as—

(i) The institution's student work outside of class combined with the clock-hours of instruction meet or exceed the numeric requirements in paragraph (l)(1) of this section; and

(ii)(A) A semester hour must include at least 30 clock hours of instruction;

(B) A trimester hour must include at least 30 clock hours of instruction; and

(C) A quarter hour must include at least 20 hours of instruction.

* * * * *

16. Section 668.14 is amended by revising paragraph (b)(22) to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(22)(i)(A) It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the awarding of title IV, HEA program funds.

(B) The restrictions in paragraph (b)(22) of this section do not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

(ii) Eligible institutions, organizations that are contractors to eligible institutions, and other entities may make merit-based adjustments to employee compensation provided that such adjustments are not based directly or indirectly upon success in securing enrollments or the award of financial aid.

(iii) As used in paragraph (b)(22) of this section,

(A) *Commission, bonus, or other incentive payment* means a sum of money or something of value paid to or given to a person or an entity for services rendered.

(B) *Securing enrollments or the awards of financial aid* means activities that a person or entity engages in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid to students.

(*1*) These activities include recruitment contact in any form with a prospective student, such as preadmission or advising activities, scheduling an appointment to visit the enrollment office, attendance at such appointment, or signing an enrollment agreement or financial aid application.

(*2*) These activities do not include making a payment to a third party for the provision of student contact information for prospective students provided that such payment is not based on the number of students who apply or enroll.

(C) *Enrollment* means the admission or matriculation of a student into an eligible institution.

* * * * *

17. Section 668.16 is amended by:

A. Revising paragraph (e).

B. In paragraph (n) introductory text, removing the word "and" that appears after the punctuation";".

C. In paragraph (o)(2), removing the punctuation "." and adding, in its place, the punctuation and word "; and".

D. Adding paragraph (p).

E. Revising the OMB control number at the end of the section.

The revisions and addition read as follows:

§ 668.16 Standards of administrative capability.

* * * * *

(e) For purposes of determining student eligibility for assistance under a title IV, HEA program, establishes, publishes, and applies reasonable standards for measuring whether an otherwise eligible student is maintaining satisfactory academic progress in his or her educational program. The Secretary considers an institution's standards to be reasonable if the standards are in accordance with the provisions specified in § 668.34.

* * * * *

(p) Develops and follows procedures to evaluate the validity of a student's high school completion if the institution or the Secretary has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education.

(Approved by the Office of Management and Budget under control number 1845–0022)

* * * * *

18. Section 668.22 is amended by:

A. Redesignating paragraphs (a)(2) through (a)(5) as paragraphs (a)(3) through (a)(6), respectively.

B. Adding new paragraph (a)(2).

C. In newly redesignated paragraph (a)(5), removing the citation "(a)(5)" and adding, in its place, the citation "(a)(6)".

D. In newly redesignated paragraph (a)(6)(ii)(A)(*2*), removing the citation "(a)(5)(iii)" and adding, in its place, the citation "(a)(6)(iii)".

E. In newly redesignated paragraph (a)(6)(ii)(B)(*2*), removing the citation "(a)(5)(iii)" and adding, in its place, the citation "(a)(6)(iii)".

F. In newly redesignated paragraph (a)(6)(ii)(B)(*3*), removing the citation "(a)(5)(iii)" and adding, in its place, the citation "(a)(6)(iii)".

G. In newly redesignated paragraph (a)(6)(iii)(A)(*1*), removing the citation "(a)(5)(ii)(A)(*2*)" and adding, in its place, the citation "(a)(6)(ii)(A)(*2*)".

H. In newly redesignated paragraph (a)(6)(iii)(A)(*5*), removing the citation "(a)(5)(iii)(C)" and adding, in its place, the citation "(a)(6)(iii)(C)".

I. In newly redesignated paragraph (a)(6)(iii)(B), removing the citation "(a)(5)(iii)(A)" and adding, in its place, the citation "(a)(6)(iii)(A)".

J. In newly redesignated paragraph (a)(6)(iv), removing the citation "(a)(5)(iii)" and adding, in its place, the citation "(a)(6)(iii)".

K. Revising paragraph (b)(3).

L. In paragraph (f)(2)(i), adding the words "that the student, prior to withdrawing, was scheduled to complete" after the words "within the period".

The addition and revision read as follows:

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

* * * * *

(a) * * *

(2) A student is considered to have withdrawn from a payment period or period of enrollment if, prior to withdrawing—

(i) In the case of a program that is measured in credit hours, the student does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete; and

(ii) In the case of a program that is measured in clock hours, the student does not complete all of the clock hours in the payment period or period of enrollment that the student was scheduled to complete.

* * * * *

(b) * * *

(3)(i) An institution is required to take attendance if—

(A) An outside entity (such as the institution's accrediting agency or a State agency) has a requirement that the institution take attendance;

(B) The institution itself has a requirement that its instructors take attendance; or

(C) The institution or an outside entity has a requirement that can only be met by taking attendance or a comparable process, including, but not limited to, requiring that students in a program demonstrate attendance in the classes of that program, or a portion of that program.

(ii) If, in accordance with paragraph (b)(3)(i) of this section, an institution is required to take attendance or requires that attendance be taken for only some students, the institution must use its attendance records to determine a withdrawal date in accordance with paragraph (b)(1) of this section for those students.

(iii)(A) If, in accordance with paragraph (b)(3)(i) of this section, an institution is required to take attendance, or requires that attendance be taken, for a limited period, the institution must use its attendance records to determine a withdrawal date in accordance with paragraph (b)(3)(i) of this section for that limited period.

(B) A student in attendance at the end of the limited period identified in paragraph (b)(3)(iii)(A) of this section who subsequently stops attending during the payment period will be treated as a student for whom the institution was not required to take attendance.

(iv) If an institution is required to take attendance or requires that attendance be taken, on only one specified day to meet a census reporting requirement, the institution is not considered to take attendance.

* * * * *

19. Section 668.32 is amended by:

A. In paragraph (e)(3), removing the word "or" that appears after the punctuation ";".

B. In paragraph (e)(4)(ii), removing the punctuation "." and adding, in its place, the punctuation and word "; or".

C. Adding new paragraph (e)(5).

D. Revising paragraph (f).

The addition and revision read as follows:

§ 668.32 Student eligibility—general.

* * * * *

(e) * * *

(5) Has been determined by the institution to have the ability to benefit from the education or training offered by the institution based on the satisfactory completion of 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution.

(f) Maintains satisfactory academic progress in his or her course of study according to the institution's published standards of satisfactory academic progress that meet the requirements of § 668.34.

* * * * *

20. Section 668.34 is revised to read as follows:

§ 668.34 Satisfactory academic progress.

(a) *Satisfactory academic progress policy.* An institution must establish a reasonable satisfactory academic progress policy for determining whether an otherwise eligible student is making satisfactory academic progress in his or her educational program and may receive assistance under the title IV, HEA programs. The Secretary considers the institution's policy to be reasonable if—

(1) The policy is at least as strict as the policy the institution applies to a student who is not receiving assistance under the title IV, HEA programs;

(2) The policy provides for consistent application of standards to all students within categories of students, *e.g.,* full-time, part-time, undergraduate, and graduate students, and educational programs established by the institution;

(3) The policy provides that a student's academic progress is evaluated—

(i) At the end of each payment period if the educational program is either one academic year in length or shorter than an academic year; or

(ii) At the end of each payment period or at least annually for all other educational programs;

(4)(i) The policy specifies the grade point average (GPA) that a student must achieve at each evaluation, or if a GPA is not an appropriate qualitative measure, a comparable assessment measured against a norm; and

(ii) If a student is enrolled in an educational program of more than two academic years, the policy specifies that at the end of the second academic year, the student must have a GPA of at least a "C" or its equivalent, or have academic standing consistent with the institution's requirements for graduation;

(5)(i) The policy specifies the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, as defined in paragraph (b) of this section, and provides for measurement of the student's progress at each evaluation; and

(ii) An institution calculates the pace at which the student is progressing by dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted. In making this calculation, the institution is not required to include remedial courses;

(6) The policy describes how a student's GPA and pace of completion are affected by course incompletes, withdrawals, or repetitions, or transfers of credit from other institutions. Credit hours from another institution that are accepted toward the student's educational program must count as both attempted and completed hours;

(7) Except as provided in paragraphs (c) and (d) of this section, the policy provides that, at the time of each evaluation, a student who has not achieved the required GPA, or who is not successfully completing his or her educational program at the required pace, is no longer eligible to receive assistance under the title IV, HEA programs;

(8) If the institution places students on financial aid warning, or on financial aid probation, as defined in paragraph (b) of this section, the policy describes these statuses and that—

(i) A student on financial aid warning may continue to receive assistance under the title IV, HEA programs for one payment period despite a determination that the student is not making satisfactory academic progress. Financial aid warning status may be assigned without an appeal or other action by the student; and

(ii) A student on financial aid probation may receive title IV, HEA program funds for one payment period. While a student is on financial aid probation, the institution may require the student to fulfill specific terms and conditions such as taking a reduced course load or enrolling in specific courses. At the end of one payment period on financial aid probation, the student must meet the institution's satisfactory academic progress standards or meet the requirements of the academic plan developed by the institution and the student to qualify for further title IV, HEA program funds;

(9) If the institution permits a student to appeal a determination by the institution that he or she is not making satisfactory academic progress, the policy describes—

(i) How the student may re-establish his or her eligibility to receive assistance under the title IV, HEA programs;

(ii) The basis on which a student may file an appeal: The death of a relative, an injury or illness of the student, or other special circumstances; and

(iii) Information the student must submit regarding why the student failed to make satisfactory academic progress, and what has changed in the student's situation that will allow the student to demonstrate satisfactory academic progress at the next evaluation;

(10) If the institution does not permit a student to appeal a determination by the institution that he or she is not making satisfactory academic progress, the policy must describe how the student may re-establish his or her eligibility to receive assistance under the title IV, HEA programs; and

(11) The policy provides for notification to students of the results of an evaluation that impacts the student's eligibility for title IV, HEA program funds.

(b) *Definitions.* The following definitions apply to the terms used in this section:

Appeal. Appeal means a process by which a student who is not meeting the institution's satisfactory academic progress standards petitions the institution for reconsideration of the student's eligibility for title IV, HEA program assistance.

Financial aid probation. Financial aid probation means a status assigned by an institution to a student who fails to make satisfactory academic progress and who has appealed and has had eligibility for aid reinstated.

Financial aid warning. Financial aid warning means a status assigned to a student who fails to make satisfactory academic progress at an institution that evaluates academic progress at the end of each payment period.

Maximum time frame. Maximum timeframe means—

(1) For an undergraduate program measured in credit hours, a period that is no longer than 150 percent of the published length of the educational program, as measured in credit hours;

(2) For an undergraduate program measured in clock hours, a period that is no longer than 150 percent of the published length of the educational program, as measured by the cumulative number of clock hours the student is required to complete and expressed in calendar time; and

(3) For a graduate program, a period defined by the institution that is based on the length of the educational program.

(c) *Institutions that evaluate satisfactory academic progress at the end of each payment period.* (1) An institution that evaluates satisfactory academic progress at the end of each payment period and determines that a student is not making progress under its policy may nevertheless disburse title IV, HEA program funds to the student under the provisions of paragraph (c)(2), (c)(3), or (c)(4) of this section.

(2) For the payment period following the payment period in which the student did not make satisfactory academic progress, the institution may—

(i) Place the student on financial aid warning, and disburse title IV, HEA program funds to the student; or

(ii) Place a student directly on financial aid probation, following the procedures outlined in paragraph (d)(2) of this section and disburse title IV, HEA program funds to the student.

(3) For the payment period following a payment period during which a student was on financial aid warning, the institution may place the student on financial aid probation, and disburse title IV, HEA program funds to the student if—

(i) The institution evaluates the student's progress and determines that student did not make satisfactory academic progress during the payment period the student was on financial aid warning;

(ii) The student appeals the determination; and

(iii)(A) The institution determines that the student should be able to meet

the institution's satisfactory academic progress standards by the end of the subsequent payment period; or

(B) The institution develops an academic plan for the student that, if followed, will ensure that the student is able to meet the institution's satisfactory academic progress standards by a specific point in time.

(4) A student on financial aid probation for a payment period may not receive title IV, HEA program funds for the subsequent payment period unless the student makes satisfactory academic progress or the institution determines that the student met the requirements specified by the institution in the academic plan for the student.

(d) *Institutions that evaluate satisfactory academic progress annually or less frequently than at the end of each payment period.* (1) An institution that evaluates satisfactory academic progress annually or less frequently than at the end of each payment period and determines that a student is not making progress under its policy may nevertheless disburse title IV, HEA program funds to the student under the provisions of paragraph (d)(2) or (d)(3) of this section.

(2) The institution may place the student on financial aid probation and may disburse title IV, HEA program funds to the student for the subsequent payment period if—

(i) The institution evaluates the student and determines that the student is not making satisfactory academic progress;

(ii) The student appeals the determination; and

(iii) (A) The institution determines that the student should be able to make satisfactory academic progress during the subsequent payment period and meet the institution's satisfactory academic progress standards at the end of that payment period; or

(B) The institution develops an academic plan for the student that, if followed, will ensure that the student is able to meet the institution's satisfactory academic progress standards by a specific point in time.

(3) A student on financial aid probation for a payment period may not receive title IV, HEA program funds for the subsequent payment period unless the student makes satisfactory academic progress or the institution determines that the student met the requirements specified by the institution in the academic plan for the student.

(Authority: 20 U.S.C. 1091(d))

21. Section 668.43 is amended by:

A. In paragraph (a)(10)(ii), removing the word "and" that appears after the punctuation ";".

B. In paragraph (a)(11)(ii), removing the punctuation "." and adding, in its place, the punctuation and word "; and".

C. Adding paragraph (a)(12).

D. Revising paragraph (b).

The addition and revision read as follows:

§ 668.43 Institutional information.

(a) * * *

(12) A description of written arrangements the institution has entered into in accordance with § 668.5, including, but not limited to, information on—

(i) The portion of the educational program that the institution that grants the degree or certificate is not providing;

(ii) The name and location of the other institutions or organizations that are providing the portion of the educational program that the institution that grants the degree or certificate is not providing;

(iii) The method of delivery of the portion of the educational program that the institution that grants the degree or certificate is not providing; and

(iv) Estimated additional costs students may incur as the result of enrolling in an educational program that is provided, in part, under the written arrangement.

(b) The institution must make available for review to any enrolled or prospective student upon request, a copy of the documents describing the institution's accreditation and its State, Federal, or tribal approval or licensing. The institution must also provide its students or prospective students with contact information for filing complaints with its accreditor and State approval or licensing entity.

* * * * *

22. Subpart E of part 668 is revised to read as follows:

Subpart E—Verification and Updating of Student Aid Application Information

Sec.

Subpart E—Verification and Updating of Student Aid Application Information

§ 668.51 General.

(a) *Scope and purpose.* The regulations in this subpart govern the verification by institutions of information submitted by applicants for student financial assistance under the subsidized student financial assistance programs.

(b) *Applicant responsibility.* If the Secretary or the institution requests documents or information from an applicant under this subpart, the applicant must provide the specified documents or information.

(c) *Foreign schools.* The Secretary exempts from the provisions of this subpart participating institutions that are not located in a State.

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

§ 668.52 Definitions.

The following definitions apply to this subpart:

Free Application for Federal Student Aid (FAFSA): The student aid application provided for under section 483, of the HEA, which is used to determine a student's eligibility for the title IV, HEA programs.

Institutional Student Information Record (ISIR): An electronic record the Secretary transmits to an institution, for purposes of the title IV, HEA programs, that includes an applicant's—

(1) Personal identification information;

(2) FAFSA information used to determine eligibility for title IV, HEA program aid; and

(3) EFC.

Specified year: (1) The calendar year preceding the first calendar year of an award year, *i.e.,* the base year; or

(2) The year preceding the year described in paragraph (1) of this definition.

Student Aid Report (SAR): A report provided to an applicant by the Secretary showing the amount of his or her EFC.

Subsidized student financial assistance programs: Title IV, HEA programs for which eligibility is determined on the basis of a student's EFC. These programs include the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant (FSEOG), Federal Work-Study (FWS), Federal Perkins Loan, Subsidized Stafford Loan and Direct Subsidized Loan programs.

Unsubsidized student financial assistance programs: Title IV, HEA programs for which eligibility is not based on a student's EFC. These programs include the Teacher Education

Assistance for College and Higher Education (TEACH) Grant, Unsubsidized Stafford Loan, Direct Unsubsidized Loan, Federal PLUS Loan, and Direct Parent Loan for Undergraduate Students (Direct PLUS Loan) programs.

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

§ 668.53 Policies and procedures.

(a) An institution must establish and use written policies and procedures for verifying an applicant's FAFSA information in accordance with the provisions of this subpart. These policies and procedures must include—

(1) The time period within which an applicant must provide any documentation requested by the institution in accordance with § 668.57;

(2) The consequences of an applicant's failure to provide the requested documentation within the specified time period;

(3) The method by which the institution notifies an applicant of the results of its verification if, as a result of verification, the applicant's EFC changes and results in a change in the amount of the applicant's assistance under the title IV, HEA programs;

(4) The procedures the institution will take itself or the procedures the institution will require an applicant to follow to correct his or her FAFSA information determined to be in error; and

(5)(a) The procedures for making referrals under § 668.16(g).

(b) An institution's procedures must provide that it will furnish, in a timely manner, to each applicant whose FAFSA information is selected for verification a clear explanation of—

(1) The documentation needed to satisfy the verification requirements; and

(2) The applicant's responsibilities with respect to the verification of his or her FAFSA information, including the deadlines for completing any actions required under this subpart and the consequences of failing to complete any required action.

(c) An institution's procedures must provide that an applicant whose FAFSA information is selected for verification by the Secretary is required to complete verification before the institution exercises any authority under section 479A(a) of the HEA to make changes to the applicant's cost of attendance or to the values of the data items required to calculate the EFC.

(Approved by the Office of Management and Budget under control number 1845–0041)

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

§ 668.54 Selection of an applicant's FAFSA information for verification.

(a) *General requirements.* (1) Except as provided in paragraph (b) of this section, an institution must require an applicant whose FAFSA information is selected for verification by the Secretary, to verify the information specified by the Secretary pursuant to § 668.56.

(2) If an institution has reason to believe that an applicant's FAFSA information is inaccurate, it must verify the accuracy of that information.

(3) An institution may require an applicant to verify any FAFSA information that it specifies.

(b) *Exclusions from verification.* (1) An institution need not verify an applicant's FAFSA information if—

(i) The applicant dies;

(ii) The applicant does not receive assistance under the title IV, HEA programs for reasons other than failure to verify his or her FAFSA information;

(iii) The applicant receives only unsubsidized student financial assistance; or

(iv) The applicant who transfers to the institution, had previously completed verification at the institution from which he or she transferred, and applies for assistance based on the same FAFSA information used at the previous institution, if the current institution obtains a letter from the previous institution—

(A) Stating that it has verified the applicant's information; and

(B) Providing the transaction number of the applicable ISIR.

(2) Unless the institution has reason to believe that the information reported by a dependent applicant is incorrect, it need not verify the applicant's parents' FAFSA information if—

(i) The parents are residing in a country other than the United States and cannot be contacted by normal means of communication;

(ii) The parents cannot be located because their contact information is unknown and cannot be obtained by the applicant; or

(iii) Both of the applicant's parents are mentally incapacitated.

(3) Unless the institution has reason to believe that the information reported by an independent applicant is incorrect, it need not verify the applicant's spouse's information if—

(i) The spouse is deceased;

(ii) The spouse is mentally incapacitated;

(iii) The spouse is residing in a country other than the United States and cannot be contacted by normal means of communication; or

(iv) The spouse cannot be located because his or her contact information is unknown and cannot be obtained by the applicant.

(Approved by the Office of Management and Budget under control number 1845–0041)

(Authority: 20 U.S.C. 1091, 1094)

§ 668.55 Updating information.

(a)(1) Unless the provisions of paragraph (a)(2) of this section apply, an applicant is required to update—

(i) The number of family members in the applicant's household and the number of those household members attending postsecondary educational institutions, in accordance with provisions of paragraph (b) of this section; and

(ii) The applicant's dependency status in accordance with the provisions of paragraph (c) of this section.

(2) An institution need not require an applicant to verify the information contained in his or her FAFSA for an award year if—

(i) The applicant updated and verified the FAFSA information on an earlier transaction; and

(ii) No change in the information to be updated has taken place since the last update.

(b) If the number of family members in the applicant's household or the number of those household members attending postsecondary educational institutions changes, an applicant who is selected for verification must update his or her FAFSA information regarding those data items so that the information is correct as of the date the applicant verifies the information.

(c) If an applicant's dependency status changes during an award year, the applicant must update his or her FAFSA information so that the information is correct regardless of whether the applicant is selected for verification.

(Approved by the Office of Management and Budget under control number 1845–0041)

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

§ 668.56 Information to be verified.

(a) For each award year the Secretary publishes in the **Federal Register** notice the FAFSA information that an institution and an applicant may be required to verify.

(b) For each applicant whose FAFSA information is selected for verification by the Secretary, the Secretary specifies the specific information under paragraph (a) of this section that the applicant must verify.

(Approved by the Office of Management and Budget under control number 1845–0041)

(Authority: 20 U.S.C. 1094, 1095)

§ 668.57 Acceptable documentation.

If an applicant is selected to verify any of the following information, an institution must obtain the specified documentation.

(a) *Adjusted Gross Income (AGI), income earned from work, or U.S. income tax paid.* (1) Except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section, an institution must require an applicant selected for verification of AGI, income earned from work or U.S. income tax paid to submit to it—

(i) A copy of the income tax return or an Internal Revenue Service (IRS) form which that lists tax account information of the applicant, his or her spouse, or his or her parents, as applicable. The copy of the return must include the signature (which need not be an original) of the filer of the return or of one of the filers of a joint return;

(ii) For a dependent student, a copy of each IRS Form W–2 received by the parent whose income is being taken into account if—

(A) The parents filed a joint return; and

(B) The parents are divorced or separated or one of the parents has died; and

(iii) For an independent student, a copy of each IRS Form W–2 he or she received if the independent student—

(A) Filed a joint return; and

(B) Is a widow or widower, or is divorced or separated.

(2) An institution may accept, in lieu of an income tax return or an IRS form that lists tax account information, the information reported for an item on the applicant's FAFSA if the Secretary has identified that item as having been obtained from the IRS.

(3) An institution must accept, in lieu of an income tax return or an IRS form that lists tax account information, the documentation set forth in paragraph (a)(4) of this section if the individual for the specified year—

(i) Has not filed and, under IRS rules, or other applicable government agency rules, is not required to file an income tax return;

(ii) Is required to file a U.S. tax return and has been granted a filing extension by the IRS; or

(iii) Has requested a copy of the tax return or an IRS form that lists tax account information, and the IRS or a government of a U.S. territory or commonwealth or a foreign central government cannot locate the return or provide an IRS form that lists tax account information.

(4) An institution must accept—

(i) For an individual described in paragraph (a)(3)(i) of this section, a statement signed by that individual certifying that he or she has not filed and is not required to file an income tax return for the specified year and certifying for that year that individual's—

(A) Sources of income earned from work as stated on the FAFSA; and

(B) Amounts of income from each source. In lieu of a certification of these amounts of income, the student may provide a copy of his or her IRS Form W–2 for each source listed under paragraph (a)(4)(i)(A) of this section;

(ii) For an individual described in paragraph (a)(3)(ii) of this section—

(A) A copy of the IRS Form 4868, "Application for Automatic Extension of Time to File U.S. Individual Income Tax Return," that the individual filed with the IRS for the specified year, or a copy of the IRS's approval of an extension beyond the automatic six-month extension if the individual requested an additional extension of the filing time; and

(B) A copy of each IRS Form W–2 that the individual received for the specified year, or for a self-employed individual, a statement signed by the individual certifying the amount of the AGI for the specified year; and

(iii) For an individual described in paragraph (a)(3)(iii) of this section—

(A) A copy of each IRS Form W–2 that the individual received for the specified year; or

(B) For an individual who is self-employed or has filed an income tax return with a government of a U.S. territory or commonwealth, or a foreign central government, a statement signed by the individual certifying the amount of AGI for the specified year.

(5) An institution may require an individual described in paragraph (a)(3)(ii) of this section to provide to it a copy of his or her completed and signed income tax return when filed. If an institution receives the copy of the return, it must reverify the AGI and taxes paid by the applicant and his or her spouse or parents.

(6) If an individual who is required to submit an IRS Form W–2, under paragraph (a) of this section, is unable to obtain one in a timely manner, the institution may permit that individual to set forth, in a statement signed by the individual, the amount of income earned from work, the source of that income, and the reason that the IRS Form W–2 is not available in a timely manner.

(7) For the purpose of this section, an institution may accept in lieu of a copy of an income tax return signed by the filer of the return or one of the filers of a joint return, a copy of the filer's return that includes the preparer's Social Security Number, Employer Identification Number or the Preparer Tax Identification Number and has been signed by the preparer of the return or stamped with the name and address of the preparer of the return.

(b) *Number of family members in household.* An institution must require an applicant selected for verification of the number of family members in the household to submit to it a statement signed by both the applicant and one of the applicant's parents if the applicant is a dependent student, or only the applicant if the applicant is an independent student, listing the name and age of each family member in the household and the relationship of that household member to the applicant.

(c) *Number of family household members enrolled in eligible postsecondary institutions.* (1) An institution must require an applicant selected for verification of the number of household members in the applicant's family enrolled on at least a half-time basis in eligible postsecondary institutions to submit a statement signed by both the applicant and one of the applicant's parents, if the applicant is a dependent student, or by only the applicant if the applicant is an independent student, listing—

(i) The name of each family member who is or will be attending an eligible postsecondary educational institution as at least a half-time student in the award year;

(ii) The age of each student; and

(iii) The name of the institution that each student is or will be attending.

(2) If the institution has reason to believe that an applicant's FAFSA information or the statement provided under paragraph (c)(1) of this section regarding the number of family household members enrolled in eligible postsecondary institutions is inaccurate, the institution must obtain a statement from each institution named by the applicant in response to the requirement of paragraph (c)(1)(iii) of this section that the household member in question is or will be attending the institution on at least a half-time basis, unless—

(i) The institution the student is attending determines that such a statement is not available because the household member in question has not yet registered at the institution he or she plans to attend; or

(ii) The institution has information indicating that the student will be attending the same institution as the applicant.

(d) *Other information.* If an applicant is selected to verify other information specified in the annual **Federal Register** notice, the applicant must provide the

documentation specified for that information in the **Federal Register** notice.

(Approved by the Office of Management and Budget under control number 1845–0041)

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

§ 668.58 Interim disbursements.

(a)(1) If an institution has reason to believe that an applicant's FAFSA information is inaccurate, until the information is verified and any corrections are made, the institution may not—

(i) Disburse any Federal Pell Grant, FSEOG, or Federal Perkins Loan Program funds to the applicant;

(ii) Employ or allow an employer to employ the applicant in its FWS Program; or

(iii) Certify a Subsidized Stafford Loan or originate a Direct Subsidized Loan, or disburse any such loan proceeds for any previously certified Subsidized Stafford Loan or originated Direct Subsidized Loan to the applicant.

(2) If an institution does not have reason to believe that an applicant's FAFSA information is inaccurate prior to verification, the institution may—

(i)(A) Withhold payment of Federal Pell Grant, Federal Perkins Loan, or FSEOG Program funds for the applicant; or

(B) Make one disbursement from each of the Federal Pell Grant, Federal Perkins Loan, or FSEOG Program funds for the applicant's first payment period of the award year;

(ii) Employ or allow an employer to employ that applicant, once he or she is an eligible student, under the FWS Program for the first 60 consecutive days after the student's enrollment in that award year; or

(iii)(A) Withhold certification of the applicant's Subsidized Stafford Loan application or origination of the applicant's Direct Subsidized Loan; or

(B) Certify the Subsidized Stafford Loan application or originate the Direct Subsidized Loan provided that the institution does not disburse Subsidized Stafford Loan or Direct Subsidized Loan proceeds.

(3) If, after verification, an institution determines that changes to an applicant's information will not change the amount the applicant would receive under a title IV, HEA program, the institution—

(i) Must ensure corrections are made; and

(ii) May—

(A) Make one disbursement from each of the Federal Pell Grant, Federal Perkins Loan, or FSEOG Program funds for the applicant's first payment period of the award year;

(B) Employ or allow an employer to employ the applicant, once he or she is an eligible student, under the FWS Program for the first 60 consecutive days after the student's enrollment in that award year; or

(C) Certify the Subsidized Stafford Loan application or originate the Direct Subsidized Loan and disburse the Subsidized Stafford Loan or Direct Subsidized Loan proceeds for the applicant.

(b) If an institution chooses to make a disbursement under paragraph (a)(2)(i)(B) or (a)(2)(iii)(B) of this section, it is liable for any overpayment discovered resulting from verification to the extent that the overpayment is not recovered through reducing subsequent disbursements in the award year.

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

§ 668.59 Consequences of a change in an applicant's FAFSA information.

(a) For the subsidized student financial assistance programs, if an applicant's FAFSA information changes as a result of verification, the applicant or the institution must submit the changes to the Secretary.

(b) For the Federal Pell Grant Program an institution must—

(1) Recalculate the applicant's Federal Pell Grant on the basis of the EFC on the corrected SAR or ISIR; and

(2)(i) Disburse any additional funds under that award only if the institution receives a corrected SAR or ISIR for the student and only to the extent that additional funds are payable based on the recalculation; or

(ii) Comply with the procedures specified in § 668.61(a) if, as a result of verification, the Federal Pell Grant award is reduced.

(c) For the subsidized student financial assistance programs, excluding the Federal Pell Grant Program, if an applicant's FAFSA information changes as a result of verification, the institution must—

(1) Recalculate the applicant's EFC; and

(2) Adjust the applicant's financial aid package on the basis of the EFC on the corrected SAR or ISIR.

(d)(1) If an applicant is selected for verification for an award year for which the applicant previously received a Direct Subsidized Loan, and as a result of verification the loan amount is reduced, the institution must comply with the procedures specified in §§ 668.61(b)(2) and 34 CFR 685.303(e).

(2) If an applicant is selected for verification for an award year for which the applicant previously received a Subsidized Stafford Loan, and as a result of verification the loan amount is reduced, the institution must comply with the procedures for notifying the borrower and lender specified in §§ 668.61(b)(1) and 34 CFR 682.604(h).

(Approved by the Office of Management and Budget under control number 1845–0041)

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

§ 668.60 Deadlines for submitting documentation and the consequences of failing to provide documentation.

(a) An institution must require an applicant selected for verification to submit to it, within the period of time it or the Secretary specifies, the documentation set forth in § 668.57 that is requested by the institution.

(b) For purposes of the subsidized student financial assistance programs, excluding the Federal Pell Grant Program—

(1) If an applicant fails to provide the requested documentation within a reasonable time period established by the institution—

(i) The institution may not—

(A) Disburse any additional Federal Perkins Loan or FSEOG Program funds to the applicant;

(B) Employ, continue to employ or allow an employer to employ the applicant under FWS; or

(C) Certify the applicant's Subsidized Stafford Loan application or originate the applicant's Direct Subsidized Loan or disburse any additional Subsidized Stafford Loan or Direct Subsidized Loan proceeds for the applicant; and

(ii) The applicant must repay to the institution any Federal Perkins Loan or FSEOG received for that award year;

(2) If the applicant provides the requested documentation after the time period established by the institution, the institution may, at its option, disburse aid to the applicant notwithstanding paragraph (b)(1) of this section; and

(3) If an institution has received proceeds for a Subsidized Stafford Loan or Direct Subsidized Loan on behalf of an applicant, the institution must follow the cash management procedures provided in §§ 668.166(a), (b), or 668.167(c), respectively, and return the proceeds to the lender, or to the Secretary, in the case of a Direct Subsidized Loan, if the applicant does not complete verification within the time period specified.

(c) For purposes of the Federal Pell Grant Program—

(1) An applicant may submit a valid SAR to the institution or the institution may receive a valid ISIR after the applicable deadline specified in 34 CFR 690.61 but within an established additional time period set by the Secretary through publication of a notice in the **Federal Register**; and

(2) If the applicant does not provide to the institution the requested documentation and, if necessary, a valid SAR or the institution does not receive a valid ISIR, within the additional time period referenced in paragraph (c)(1) of this section, the applicant—

(i) Forfeits the Federal Pell Grant for the award year; and

(ii) Must return any Federal Pell Grant payments previously received for that award year.

(d) The Secretary may determine not to process FAFSA information of an applicant who has been requested to provide documentation until the applicant provides the documentation or the Secretary decides that there is no longer a need for the documentation.

(e) If an applicant selected for verification for an award year dies before the deadline for completing verification without completing that process, the institution may not—

(1) Make any further disbursements on behalf of that applicant;

(2) Certify that applicant's Subsidized Stafford Loan application, originate that applicant's Direct Subsidized Loan, or disburse that applicant's Subsidized Stafford Loan or Direct Subsidized Loan proceeds; or

(3) Consider any funds it disbursed to that applicant under § 668.58(a)(2) as an overpayment.

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

§ 668.61 Recovery of funds.

(a) If an institution discovers, as a result of verification, that an applicant received more financial aid than the applicant was eligible to receive, including an interim disbursement under § 668.58(a)(2)(ii)(A) and (a)(2)(ii)(B), the institution must eliminate the overpayment by—

(1) Adjusting subsequent disbursements in the award year in which the overpayment occurred; or

(2) Reimbursing the appropriate program account by—

(i) Requiring the applicant to return the overpayment to the institution if the institution cannot correct the overpayment under paragraph (a)(1) of this section; or

(ii) Making restitution from its own funds, by the earlier of the following dates, if the applicant does not return the overpayment:

(A) Sixty days after the applicant's last day of attendance.

(B) The last day of the award year in which the institution disbursed Federal Pell Grant, Federal Perkins Loan, or FSEOG Program funds to the applicant.

(b)(1) If the institution determines as a result of verification that an applicant received Subsidized Stafford Loan proceeds for an award year in excess of the student's financial need for the loan, the institution must withhold and promptly return to the lender any disbursement not yet delivered to the student that exceeds the amount of assistance for which the student is eligible, taking into account other financial aid received by the student. However, instead of returning the entire undelivered disbursement, the school may choose to return promptly to the lender only the portion of the disbursement for which the student is ineligible. In either case, the institution must provide the lender with a written statement describing the reason for the returned loan funds.

(2) If the institution determines as a result of verification that a student received Direct Subsidized Loan proceeds for an award year in excess of the student's need for the loan, the institution must reduce or cancel one or more subsequent disbursements to eliminate the amount in excess of the student's need.

(c) If an institution disbursed subsidized student financial assistance to an applicant under § 668.58(a)(3), and did not receive the SAR or ISIR reflecting corrections within the deadlines established under § 668.60, the institution must reimburse the program account by making restitution from its own funds.

(Approved by the Office of Management and Budget under control number 1845–0041)

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

23. Subpart F of part 668 is revised to read as follows:

Subpart F—Misrepresentation

Sec.

Subpart F—Misrepresentation

§ 668.71 Scope and special definitions.

(a) If the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary may—

(1) Revoke the eligible institution's program participation agreement;

(2) Impose limitations on the institution's participation in the title IV, HEA programs;

(3) Deny participation applications made on behalf of the institution; or

(4) Initiate a proceeding against the eligible institution under subpart G of this part.

(b) This subpart establishes the types of activities that constitute substantial misrepresentation by an eligible institution. An eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement, makes a substantial misrepresentation regarding the eligible institution, including about the nature of its educational program, its financial charges, or the employability of its graduates. Substantial misrepresentations are prohibited in all forms, including those made in any advertising, promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution.

(c) The following definitions apply to this subpart:

Misrepresentation: Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the capacity, likelihood or tendency to deceive or confuse. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required the student to make such an endorsement or testimonial to participate in a program.

Prospective student: Any individual who has contacted an eligible institution for the purpose of requesting information about enrolling at the institution or who has been contacted directly by the institution or indirectly through advertising about enrolling at the institution.

Substantial misrepresentation: Any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

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

§ 668.72 Nature of educational program.

Misrepresentation concerning the nature of an eligible institution's educational program includes, but is not limited to, false, erroneous or misleading statements concerning—

(a) The particular type(s), specific source(s), nature and extent of its institutional, programmatic, or specialized accreditation;

(b)(1) Whether a student may transfer course credits earned at the institution to any other institution;

(2) Conditions under which the institution will accept transfer credits earned at another institution;

(c) Whether successful completion of a course of instruction qualifies a student—

(1) For acceptance to a labor union or similar organization; or

(2) To receive, to apply to take or to take the examination required to receive, a local, State, or Federal license, or a non-governmental certification required as a precondition for employment, or to perform certain functions in the State in which the program or institution is located, or to meet additional conditions that the institution knows or reasonably should know are generally needed to secure employment in a recognized occupation for which the program is represented to prepare students;

(d) The requirements for successfully completing the course of study or program and the circumstances that would constitute grounds for terminating the student's enrollment;

(e) Whether its courses are recommended or have been the subject of unsolicited testimonials or endorsements by—

(1) Vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, or others; or

(2) Governmental officials for governmental employment;

(f) Its size, location, facilities, or equipment;

(g) The availability, frequency, and appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet;

(h) The nature, age, and availability of its training devices or equipment and their appropriateness to the employment objectives that it states its programs and courses are designed to meet;

(i) The number, availability, and qualifications, including the training and experience, of its faculty and other personnel;

(j) The availability of part-time employment or other forms of financial assistance;

(k) The nature and availability of any tutorial or specialized instruction, guidance and counseling, or other supplementary assistance it will provide its students before, during or after the completion of a course;

(l) The nature or extent of any prerequisites established for enrollment in any course;

(m) The subject matter, content of the course of study, or any other fact related to the degree, diploma, certificate of completion, or any similar document that the student is to be, or is, awarded upon completion of the course of study;

(n) Whether the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has been authorized by the appropriate State educational agency. This type of misrepresentation includes, in the case of a degree that has not been authorized by the appropriate State educational agency, any failure by an eligible institution to disclose this fact in any advertising or promotional materials that reference such degree; or

(o) Any matters required to be disclosed to prospective students under §§ 668.42 and 668.43 of this part.

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

§ 668.73 Nature of financial charges.

Misrepresentation concerning the nature of an eligible institution's financial charges includes, but is not limited to, false, erroneous, or misleading statements concerning—

(a) Offers of scholarships to pay all or part of a course charge;

(b) Whether a particular charge is the customary charge at the institution for a course;

(c) The cost of the program and the institution's refund policy if the student does not complete the program;

(d) The availability or nature of any financial assistance offered to students, including a student's responsibility to repay any loans, regardless of whether the student is successful in completing the program and obtaining employment; or

(e) The student's right to reject any particular type of financial aid or other assistance, or whether the student must apply for a particular type of financial aid, such as financing offered by the institution.

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

§ 668.74 Employability of graduates.

Misrepresentation regarding the employability of an eligible institution's graduates includes, but is not limited to, false, erroneous, or misleading statements concerning—

(a) The institution's relationship with any organization, employment agency, or other agency providing authorized training leading directly to employment;

(b) The institution's plans to maintain a placement service for graduates or otherwise assist its graduates to obtain employment;

(c) The institution's knowledge about the current or likely future conditions, compensation, or employment opportunities in the industry or occupation for which the students are being prepared;

(d) Whether employment is being offered by the institution or that a talent hunt or contest is being conducted, including, but not limited to, through the use of phrases such as "Men/women wanted to train for * * *," "Help Wanted," "Employment," "Business Opportunities";

(e) Government job market statistics in relation to the potential placement of its graduates; or

(f) Other requirements that are generally needed to be employed in the fields for which the training is provided, such as requirements related to commercial driving licenses or permits to carry firearms, and failing to disclose factors that would prevent an applicant from qualifying for such requirements, such as prior criminal records or pre-existing medical conditions.

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

§ 668.75 Relationship with the Department of Education.

An eligible institution, its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement may not describe the eligible institution's participation in the title IV, HEA programs in a manner that suggests approval or endorsement by the U.S. Department of Education of the quality of its educational programs.

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

24. Subpart J of part 668 is revised to read as follows:

Subpart J—Approval of Independently Administered Tests; Specification of Passing Score; Approval of State Process

Sec.

Subpart J—Approval of Independently Administered Tests; Specification of Passing Score; Approval of State Process

§ 668.141 Scope.

(a) This subpart sets forth the provisions under which a student who has neither a high school diploma nor its recognized equivalent may become eligible to receive title IV, HEA program funds by—

(1) Achieving a passing score, specified by the Secretary, on an independently administered test approved by the Secretary under this subpart; or

(2) Being enrolled in an eligible institution that participates in a State process approved by the Secretary under this subpart.

(b) Under this subpart, the Secretary sets forth—

(1) The procedures and criteria the Secretary uses to approve tests;

(2) The basis on which the Secretary specifies a passing score on each approved test;

(3) The procedures and conditions under which the Secretary determines that an approved test is independently administered;

(4) The information that a test publisher or a State must submit, as part of its test submission, to explain the methodology it will use for the test anomaly studies as described in § 668.144(c)(17) and (d)(8), as appropriate;

(5) The requirements that a test publisher or a State, as appropriate—

(i) Have a process to identify and follow up on test score irregularities;

(ii) Take corrective action—up to and including decertification of test administrators—if the test publisher or the State determines that test score irregularities have occurred; and

(iii) Report to the Secretary the names of any test administrators it decertifies and any other action taken as a result of test score analyses; and

(6) The procedures and conditions under which the Secretary determines that a State process demonstrates that students in the process have the ability to benefit from the education and training being offered to them.

(Authority: 20 U.S.C. 1091(d))

§ 668.142 Special definitions.

The following definitions apply to this subpart:

Assessment center: A facility that—

(1) Is located at an eligible institution that provides two-year or four-year degrees or is a postsecondary vocational institution;

(2) Is responsible for gathering and evaluating information about individual students for multiple purposes, including appropriate course placement;

(3) Is independent of the admissions and financial aid processes at the institution at which it is located;

(4) Is staffed by professionally trained personnel;

(5) Uses test administrators to administer tests approved by the Secretary under this subpart; and

(6) Does not have as its primary purpose the administration of ability to benefit tests.

Computer-based test: A test taken by a student on a computer and scored by a computer.

General learned abilities: Cognitive operations, such as deductive reasoning, reading comprehension, or translation from graphic to numerical representation, that may be learned in both school and non-school environments.

Independent test administrator: A test administrator who administers tests at a location other than an assessment center and who—

(1) Has no current or prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test, and has no controlling interest in any other institution;

(2) Is not a current or former employee of or consultant to the institution, its affiliates, or its parent corporation, a person in control of another institution, or a member of the family of any of these individuals;

(3) Is not a current or former member of the board of directors, a current or former employee of or a consultant to a member of the board of directors, chief executive officer, chief financial officer of the institution, its affiliates, or its parent corporation or of any other institution, or a member of the family of any of these individuals; and

(4) Is not a current or former student of the institution.

Individual with a disability: A person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Non-native speaker of English: A person whose first language is not English and who is not fluent in English.

Secondary school level: As applied to "content," "curricula," or "basic verbal and quantitative skills," the basic knowledge or skills generally learned in the 9th through 12th grades in United States secondary schools.

Test: A standardized test, assessment or instrument that has formal protocols on how it is to be administered in order to be valid. These protocols include, for example, the use of parallel, equated forms; testing conditions; time allowed for the test; and standardized scoring. Tests are not limited to traditional paper and pencil (or computer-administered) instruments for which forms are constructed prior to administration to examinees. Tests may also include adaptive instruments that use computerized algorithms for selecting and administering items in real time; however, for such instruments, the size of the item pool and the method of item selection must ensure negligible overlap in items across retests.

Test administrator: An individual who is certified by the test publisher (or the State, in the case of an approved State test or assessment) to administer tests approved under this subpart in accordance with the instructions provided by the test publisher or the State, as applicable, which includes protecting the test and the test results from improper disclosure or release, and who is not compensated on the basis of test outcomes.

Test item: A question on a test.

Test publisher: An individual, organization, or agency that owns a registered copyright of a test, or has been authorized by the copyright holder to represent the copyright holder's interests regarding the test.

(Authority: 20 U.S.C. 1091(d))

§ 668.143 [Reserved]

§ 668.144 Application for test approval.

(a) The Secretary only reviews tests under this subpart that are submitted by the publisher of that test or by a State.

(b) A test publisher or a State that wishes to have its test approved by the Secretary under this subpart must submit an application to the Secretary at such time and in such manner as the Secretary may prescribe. The application must contain all the information necessary for the Secretary to approve the test under this subpart, including but not limited to, the information contained in paragraph (c) or (d) of this section, as applicable.

(c) A test publisher must include with its application—

(1) A summary of the precise editions, forms, levels, and (if applicable) subtests for which approval is being sought;

(2) The name, address, telephone number, and e-mail address of a contact person to whom the Secretary may address inquiries;

(3) Each edition, form, level, and subtest of the test for which the test publisher requests approval;

(4) The distribution of test scores for each edition, form, level, or subtest for which approval is sought, that allows the Secretary to prescribe the passing score for each test in accordance with § 668.147;

(5) Documentation of test development, including a history of the test's use;

(6) Norming data and other evidence used in determining the distribution of test scores;

(7) Material that defines the content domains addressed by the test;

(8) Documentation of periodic reviews of the content and specifications of the test to ensure that the test reflects secondary school level verbal and quantitative skills;

(9) If a test being submitted is a revision of the most recent edition approved by the Secretary, an analysis of the revisions, including the reasons for the revisions, the implications of the revisions for the comparability of scores on the current test to scores on the previous test, and data from validity studies of the test undertaken subsequent to the revisions;

(10) A description of the manner in which test-taking time was determined in relation to the content representativeness requirements in § 668.146(b)(2), and an analysis of the effects of time on performance;

(11) A technical manual that includes—

(i) An explanation of the methodology and procedures for measuring the reliability of the test;

(ii) Evidence that different forms of the test, including, if applicable, short forms, are comparable in reliability;

(iii) Other evidence demonstrating that the test permits consistent assessment of individual skill and ability;

(iv) Evidence that the test was normed using—

(A) Groups that were of sufficient size to produce defensible standard errors of the mean and were not disproportionately composed of any race or gender; and

(B) A contemporary sample that is representative of the population of persons who have earned a high school diploma in the United States;

(v) Documentation of the level of difficulty of the test;

(vi) Unambiguous scales and scale values so that standard errors of measurement can be used to determine statistically significant differences in performance; and

(vii) Additional guidance on the interpretation of scores resulting from any modifications of the test for individuals with disabilities;

(12) The manual provided to test administrators containing procedures and instructions for test security and administration, and the forwarding of tests to the test publisher;

(13) An analysis of the item-content of each edition, form, level, and (if applicable) subtest to demonstrate compliance with the required secondary school level criterion specified in § 668.146(b);

(14) A description of retesting procedures and the analysis upon which the criteria for retesting are based;

(15) Other evidence establishing the test's compliance with the criteria for approval of tests as provided in § 668.146;

(16) A description of its test administrator certification process that provides—

(i) How the test publisher will determine that the test administrator has the necessary training, knowledge, skill, and integrity to test students in accordance with the test publisher's requirements; and

(ii) How the test publisher will determine that the test administrator has the ability and facilities to keep its test secure against disclosure or release;

(17) A description of the test anomaly analysis the test publisher will conduct and submit to the Secretary that includes—

(i) An explanation of how the test publisher will identify potential test irregularities and make a determination that test irregularities have occurred;

(ii) An explanation of the process and procedures for corrective action (up to and including decertification of a certified test administrator) when the test publisher determines that test irregularities have occurred; and

(iii) Information on when and how the test publisher will notify a test administrator, the Secretary, and the institutions for which the test administrator had previously provided testing services for that test publisher, that the test administrator has been decertified; and

(18)(i) An explanation of any accessible technologies that are available to accommodate individuals with disabilities, and

(ii) A description of the process for a test administrator to identify and report to the test publisher when accommodations for individuals with disabilities were provided, for scoring and norming purposes.

(d) A State must include with its application—

(1) The information necessary for the Secretary to determine that the test the State uses measures a student's skills and abilities for the purpose of determining whether the student has the skills and abilities the State expects of a high school graduate in that State;

(2) The passing scores on that test;

(3) Any guidance on the interpretation of scores resulting from any modifications of the test for individuals with disabilities;

(4) A statement regarding how the test will be kept secure;

(5) A description of retesting procedures and the analysis upon which the criteria for retesting are based;

(6) Other evidence establishing the test's compliance with the criteria for approval of tests as provided in § 668.146;

(7) A description of its test administrator certification process that provides—

(i) How the State will determine that the test administrator has the necessary training, knowledge, skill, and integrity to test students in accordance with the State's requirements; and

(ii) How the State will determine that the test administrator has the ability and facilities to keep its test secure against disclosure or release;

(8) A description of the test anomaly analysis that the State will conduct and submit to the Secretary that includes—

(i) An explanation of how the State will identify potential test irregularities and make a determination that test irregularities have occurred;

(ii) An explanation of the process and procedures for corrective action (up to and including decertification of a test administrator) when the State determines that test irregularities have occurred; and

(iii) Information on when and how the State will notify a test administrator, the Secretary, and the institutions for which the test administrator had previously provided testing services for that State, that the test administrator has been decertified;

(9)(i) An explanation of any accessible technologies that are available to accommodate individuals with disabilities; and

(ii) A description of the process for a test administrator to identify and report to the test publisher when accommodations for individuals with disabilities were provided, for scoring and norming purposes; and

(10) The name, address, telephone number, and e-mail address of a contact

person to whom the Secretary may address inquiries.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.145 Test approval procedures.

(a)(1) When the Secretary receives a complete application from a test publisher or a State, the Secretary selects one or more experts in the field of educational testing and assessment, who possess appropriate advanced degrees and experience in test development or psychometric research, to determine whether the test meets the requirements for test approval contained in §§ 668.146, 668.147, 668.148, or 668.149, as appropriate, and to advise the Secretary of their determinations.

(2) If the test involves a language other than English, the Secretary selects at least one individual who is fluent in the language in which the test is written to collaborate with the testing expert or experts described in paragraph (a)(1) of this section and to advise the Secretary on whether the test meets the additional criteria, provisions, and conditions for test approval contained in §§ 668.148 and 668.149.

(3) For test batteries that contain multiple subtests measuring content domains other than verbal and quantitative domains, the Secretary reviews only those subtests covering the verbal and quantitative domains.

(b)(1) If the Secretary determines that a test satisfies the criteria and requirements for test approval, the Secretary notifies the test publisher or the State, as applicable, of the Secretary's decision, and publishes the name of the test and the passing scores in the **Federal Register.**

(2) If the Secretary determines that a test does not satisfy the criteria and requirements for test approval, the Secretary notifies the test publisher or the State, as applicable, of the Secretary's decision, and the reasons why the test did not meet those criteria and requirements.

(3) If the Secretary determines that a test does not satisfy the criteria and requirements for test approval, the test publisher or the State that submitted the test for approval may request that the Secretary reevaluate the Secretary's decision. Such a request must be accompanied by—

(i) Documentation and information that address the reasons for the non-approval of the test; and

(ii) An analysis of why the information and documentation submitted meet the criteria and requirements for test approval notwithstanding the Secretary's earlier decision to the contrary.

(c)(1) The Secretary approves a test for a period not to exceed five years from the date the notice of approval of the test is published in the **Federal Register.**

(2) The Secretary extends the approval period of a test to include the period of review if the test publisher or the State, as applicable, re-submits the test for review and approval under § 668.144 at least six months before the date on which the test approval is scheduled to expire.

(d)(1) The Secretary's approval of a test may be revoked if the Secretary determines that the test publisher or the State violated any terms of the agreement described in § 668.150, that the information the test publisher or the State submitted as a basis for approval of the test was inaccurate, or that the test publisher or the State substantially changed the test and did not resubmit the test, as revised, for approval.

(2) If the Secretary revokes approval of a previously approved test, the Secretary publishes a notice of that revocation in the **Federal Register.** The revocation becomes effective—

(i) One hundred and twenty days from the date the notice of revocation is published in the **Federal Register;** or

(ii) An earlier date specified by the Secretary in a notice published in the **Federal Register.**

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.146 Criteria for approving tests.

(a) Except as provided in § 668.148, the Secretary approves a test under this subpart if—

(1) The test meets the criteria set forth in paragraph (b) of this section;

(2) The test publisher or the State satisfies the requirements set forth in paragraph (c) of this section; and

(3) The Secretary makes a determination that the information the test publisher or State submitted in accordance with § 668.144(c)(17) or (d)(8), as applicable, provides adequate assurance that the test publisher or State will conduct rigorous test anomaly analyses and take appropriate action if test administrators do not comply with testing procedures.

(b) To be approved under this subpart, a test must—

(1) Assess secondary school level basic verbal and quantitative skills and general learned abilities;

(2) Sample the major content domains of secondary school level verbal and quantitative skills with sufficient numbers of questions to—

(i) Adequately represent each domain; and

(ii) Permit meaningful analyses of item-level performance by students who are representative of the contemporary population beyond the age of compulsory school attendance and have earned a high school diploma;

(3) Require appropriate test-taking time to permit adequate sampling of the major content domains described in paragraph (b)(2) of this section;

(4) Have all forms (including short forms) comparable in reliability;

(5) Have, in the case of a test that is revised, new scales, scale values, and scores that are demonstrably comparable to the old scales, scale values, and scores;

(6) Meet all primary and applicable conditional and secondary standards for test construction provided in the 1999 edition of the *Standards for Educational and Psychological Testing,* prepared by a joint committee of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education incorporated by reference in this section. Incorporation by reference of this document has been approved by the Director of the Office of the Federal Register pursuant to the Director's authority under 5 U.S.C. 552(a) and 1 CFR part 51. The incorporated document is on file at the Department of Education, Federal Student Aid, room 113E2, 830 First Street, NE., Washington, DC 20002 and at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 1–866–272–6272, or go to: *http://www.archives.gov/Federal_register/code_of_Federal_regulations/ibr_locations.html.* The document also may be obtained from the American Educational Research Association at: *http://www.aera.net;* and

(7) Have the test publisher's or the State's guidelines for retesting, including time between test-taking, be based on empirical analyses that are part of the studies of test reliability.

(c) In order for a test to be approved under this subpart, a test publisher or a State must—

(1) Include in the test booklet or package—

(i) Clear, specific, and complete instructions for test administration, including information for test takers on the purpose, timing, and scoring of the test; and

(ii) Sample questions representative of the content and average difficulty of the test;

(2) Have two or more secure, equated, alternate forms of the test;

(3) Except as provided in §§ 668.148 and 668.149, provide tables of distributions of test scores which clearly indicate the mean score and standard deviation for high school graduates who have taken the test within three years prior to the date that the test is submitted to the Secretary for approval under § 668.144;

(4) Norm the test with—

(i) Groups that are of sufficient size to produce defensible standard errors of the mean and are not disproportionately composed of any race or gender; and

(ii) A contemporary sample that is representative of the population of persons who have earned a high school diploma in the United States; and

(5) If test batteries include sub-tests assessing different verbal and/or quantitative skills, a distribution of test scores as described in paragraph (c)(3) of this section that allows the Secretary to prescribe either—

(i) A passing score for each sub-test; or

(ii) One composite passing score for verbal skills and one composite passing score for quantitative skills.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.147 Passing scores.

Except as provided in §§ 668.144(d), 668.148, and 668.149, to demonstrate that a test taker has the ability to benefit from the education and training offered by the institution, the Secretary specifies that the passing score on each approved test is one standard deviation below the mean score of a sample of individuals who have taken the test within the three years before the test is submitted to the Secretary for approval. The sample must be representative of the population of high school graduates in the United States.

(Authority: 20 U.S.C. 1091(d))

§ 668.148 Additional criteria for the approval of certain tests.

(a) In addition to satisfying the criteria in § 668.146, to be approved by the Secretary, a test must meet the following criteria, if applicable:

(1) In the case of a test developed for a non-native speaker of English who is enrolled in a program that is taught in his or her native language, the test must be—

(i) Linguistically accurate and culturally sensitive to the population for which the test is designed, regardless of the language in which the test is written;

(ii) Supported by documentation detailing the development of normative data;

(iii) If translated from an English version, supported by documentation of procedures to determine its reliability and validity with reference to the population for which the translated test was designed;

(iv) Developed in accordance with guidelines provided in the 1999 edition of the "Testing Individuals of Diverse Linguistic Backgrounds" section of the *Standards for Educational and Psychological Testing* prepared by a joint committee of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education incorporated by reference in this section. Incorporation by reference of this document has been approved by the Director of the Office of the Federal Register pursuant to the Director's authority under 5 U.S.C. 552(a) and 1 CFR part 51. The incorporated document is on file at the Department of Education, Federal Student Aid, room 113E2, 830 First Street, NE., Washington, DC 20002 and at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 1–866–272–6272, or go to: *http://www.archives.gov/Federal_register/code_of_Federal_regulations/ibr_locations.html.* The document also may be obtained from the American Educational Research Association at: *http://www.aera.net;* and

(v)(A) If the test is in Spanish, accompanied by a distribution of test scores that clearly indicates the mean score and standard deviation for Spanish-speaking students with high school diplomas who have taken the test within five years before the date on which the test is submitted to the Secretary for approval.

(B) If the test is in a language other than Spanish, accompanied by a recommendation for a provisional passing score based upon performance of a sample of test takers representative of non-English speaking individuals who speak a language other than Spanish and who have a high school diploma. The sample upon which the recommended provisional passing score is based must be large enough to produce stable norms.

(2) In the case of a test that is modified for use for individuals with disabilities, the test publisher or State must—

(i) Follow guidelines provided in the "Testing Individuals With Disabilities" section of the *Standards for Educational and Psychological Testing;* and

(ii) Provide documentation of the appropriateness and feasibility of the modifications relevant to test performance.

(3) In the case of a computer-based test, the test publisher or State, as applicable, must—

(i) Provide documentation to the Secretary that the test complies with the basic principles of test construction and standards of reliability and validity as promulgated in the *Standards for Educational and Psychological Testing;*

(ii) Provide test administrators with instructions for familiarizing test takers with computer hardware prior to test-taking; and

(iii) Provide two or more parallel, equated forms of the test, or, if parallel forms are generated from an item pool, provide documentation of the methods of item selection for alternate forms.

(b) If a test is designed solely to measure the English language competence of non-native speakers of English—

(1) The test must meet the criteria set forth in § 668.146(b)(6), (c)(1), (c)(2), and (c)(4); and

(2) The test publisher must recommend a passing score based on the mean score of test takers beyond the age of compulsory school attendance who completed U.S. high school equivalency programs, formal training programs, or bilingual vocational programs.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.149 Special provisions for the approval of assessment procedures for individuals with disabilities.

If no test is reasonably available for individuals with disabilities so that no test can be approved under §§ 668.146 or 668.148 for these individuals, the following procedures apply:

(a) The Secretary considers a modified test or testing procedure, or instrument that has been scientifically developed specifically for the purpose of evaluating the ability to benefit from postsecondary training or education of individuals with disabilities to be an approved test for purposes of this subpart provided that the testing procedure or instrument measures both basic verbal and quantitative skills at the secondary school level.

(b) The Secretary considers the passing scores for these testing procedures or instruments to be those recommended by the test publisher or State, as applicable.

(c) The test publisher or State, as applicable, must—

(1) Maintain appropriate documentation, including a description of the procedures or instruments, their content domains, technical properties, and scoring procedures; and

(2) Require the test administrator to—

(i) Use the procedures or instruments in accordance with instructions provided by the test publisher or State, as applicable; and

(ii) Use the passing scores recommended by the test publisher or State, as applicable.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.150 Agreement between the Secretary and a test publisher or a State.

(a) If the Secretary approves a test under this subpart, the test publisher or the State that submitted the test must enter into an agreement with the Secretary that contains the provisions set forth in paragraph (b) of this section before an institution may use the test to determine a student's eligibility for title IV, HEA program funds.

(b) The agreement between a test publisher or a State, as applicable, and the Secretary provides that the test publisher or the State, as applicable, must—

(1) Allow only test administrators that it certifies to give its test;

(2) Require each test administrator it certifies to—

(i) Provide the test publisher or the State, as applicable, with a certification statement that indicates he or she is not currently decertified; and

(ii) Notify the test publisher or the State, as applicable, immediately if any other test publisher or State decertifies the test administrator;

(3) Only certify test administrators who—

(i) Have the necessary training, knowledge, and skill to test students in accordance with the test publisher's or the State's testing requirements;

(ii) Have the ability and facilities to keep its test secure against disclosure or release; and

(iii) Have not been decertified within the last three years by any test publisher or State;

(4) Decertify a test administrator for a period of three years if the test publisher or the State finds that the test administrator—

(i) Has failed to give its test in accordance with the test publisher's or the State's instructions;

(ii) Has not kept the test secure;

(iii) Has compromised the integrity of the testing process; or

(iv) Has given the test in violation of the provisions contained in § 668.151;

(5) Reevaluate the qualifications of a test administrator who has been decertified by another test publisher or State and determine whether to continue the test administrator's certification or to decertify the test administrator;

(6) Immediately notify the test administrator, the Secretary, and the institutions where the test administrator previously administered approved tests when the test publisher or the State decertifies a test administrator;

(7)(i) Review the test results of the tests administered by a decertified test administrator and determine which tests may have been improperly administered;

(ii) Immediately notify the affected institutions and students or prospective students; and

(iii) Provide a report to the Secretary on the results of the review and the notifications provided to institutions and students or prospective students;

(8) Report to the Secretary if the test publisher or the State certifies a previously decertified test administrator after the three-year period specified in paragraph (b)(4) of this section;

(9) Score a test answer sheet that it receives from a test administrator;

(10) If a computer-based test is used, provide the test administrator with software that will—

(i) Immediately generate a score report for each test taker;

(ii) Allow the test administrator to send to the test publisher or the State, as applicable, a record of the test taker's performance on each test item and the test taker's test scores using a data transfer method that is encrypted and secure; and

(iii) Prohibit any changes in test taker responses or test scores;

(11) Promptly send to the student and the institution the student indicated he or she is attending or scheduled to attend a notice stating the student's score for the test and whether or not the student passed the test;

(12) Keep each test answer sheet or electronic record forwarded for scoring and all other documents forwarded by the test administrator with regard to the test for a period of three years from the date the analysis of the tests results, described in paragraph (b)(13) of this section, was sent to the Secretary;

(13) Analyze the test scores of students who take the test to determine whether the test scores and data produce any irregular pattern that raises an inference that the tests were not being properly administered, and provide the Secretary with a copy of this analysis within 18 months after the test was approved and every 18 months thereafter during the period of test approval;

(14) Upon request, give the Secretary, a State agency, an accrediting agency, and law enforcement agencies access to test records or other documents related to an audit, investigation, or program review of an institution, the test publisher, or a test administrator;

(15) Immediately report to the Secretary if the test publisher or the State finds any credible information indicating that a test has been compromised;

(16) Immediately report to the Office of Inspector General of the Department of Education for investigation if the test publisher or the State finds any credible information indicating that a test administrator or institution may have engaged in fraud or other criminal misconduct; and

(17) Require a test administrator who provides a test to an individual with a disability who requires an accommodation in the test's administration to report to the test publisher or the State within the time period specified in § 668.151(b)(2) or § 668.152(b)(2), as applicable, the nature of the disability and the accommodations that were provided.

(c)(1) The Secretary may terminate an agreement with a test publisher or a State, as applicable, if the test publisher or the State fails to carry out the terms of the agreement described in paragraph (b) of this section.

(2) Before terminating the agreement, the Secretary gives the test publisher or the State, as applicable, the opportunity to show that it has not failed to carry out the terms of its agreement.

(3) If the Secretary terminates an agreement with a test publisher or a State under this section, the Secretary publishes a notice in the **Federal Register** specifying when institutions may no longer use the test publisher's or the State's test(s) for purposes of determining a student's eligibility for title IV, HEA program funds.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.151 Administration of tests.

(a)(1) To establish a student's eligibility for title IV, HEA program funds under this subpart, an institution must select a test administrator to give an approved test.

(2) An institution may use the results of an approved test it received from an approved test publisher or assessment center to determine a student's eligibility to receive title IV, HEA program funds if the test was

independently administered and properly administered in accordance with this subpart.

(b) The Secretary considers that a test is independently administered if the test is—

(1) Given at an assessment center by a test administrator who is an employee of the center; or

(2) Given by an independent test administrator who maintains the test at a secure location and submits the test for scoring by the test publisher or the State or, for a computer-based test, a record of the test scores, within two business days of administering the test.

(c) The Secretary considers that a test is not independently administered if an institution—

(1) Compromises test security or testing procedures;

(2) Pays a test administrator a bonus, commission, or any other incentive based upon the test scores or pass rates of its students who take the test; or

(3) Otherwise interferes with the test administrator's independence or test administration.

(d) The Secretary considers that a test is properly administered if the test administrator—

(1) Is certified by the test publisher or the State, as applicable, to give the test publisher's or the State's test;

(2) Administers the test in accordance with instructions provided by the test publisher or the State, as applicable, and in a manner that ensures the integrity and security of the test;

(3) Makes the test available only to a test-taker, and then only during a regularly scheduled test;

(4) Secures the test against disclosure or release; and

(5) Submits the completed test or, for a computer-based test, a record of test scores, to the test publisher or the State, as applicable, within the time period specified in § 668.152(b) or paragraph (b)(2) of this section, as appropriate, and in accordance with the test publisher's or the State's instructions.

(e) An independent test administrator may not score a test.

(f) An individual who fails to pass a test approved under this subpart may not retake the same form of the test for the period prescribed by the test publisher or the State responsible for the test.

(g) An institution must maintain a record for each individual who took a test under this subpart. The record must include—

(1) The test taken by the individual;

(2) The date of the test;

(3) The individual's scores as reported by the test publisher, an assessment center, or the State;

(4) The name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State; and

(5) If the individual who took the test is an individual with a disability and was unable to be evaluated by the use of an approved ATB test or the individual requested or required testing accommodations, documentation of the individual's disability and of the testing arrangements provided in accordance with § 668.153(b).

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.152 Administration of tests by assessment centers.

(a) If a test is given by an assessment center, the assessment center must properly administer the test as described in § 668.151(d), and § 668.153, if applicable.

(b)(1) Unless an agreement between a test publisher or a State, as applicable, and an assessment center indicates otherwise, an assessment center scores the tests it gives and promptly notifies the institution and the student of the student's score on the test and whether the student passed the test.

(2) If the assessment center scores the test, it must provide weekly to the test publisher or the State, as applicable—

(i) All copies of the completed test, including the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State, as applicable; or

(ii) A report listing all test-takers' scores and institutions to which the scores were sent and the name and address of the test administrator who administered the test and any identifier assigned to the test administrator by the test publisher or the State, as applicable.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.153 Administration of tests for individuals whose native language is not English or for individuals with disabilities.

(a) *Individuals whose native language is not English.* For an individual whose native language is not English and who is not fluent in English, the institution must use the following tests, as applicable:

(1) If the individual is enrolled or plans to enroll in a program conducted entirely in his or her native language, the individual must take a test approved under §§ 668.146 and 668.148(a)(1).

(2) If the individual is enrolled or plans to enroll in a program that is taught in English with an ESL component, the individual must take an English language proficiency assessment approved under § 668.148(b) and, before beginning the portion of the program taught in English, a test approved under § 668.146.

(3) If the individual is enrolled or plans to enroll in a program that is taught in English without an ESL component, or the individual does not enroll in any ESL component offered, the individual must take a test in English approved under § 668.146.

(4) If the individual enrolls in an ESL program, the individual must take an ESL test approved under § 668.148(b).

(b) *Individuals with disabilities.* (1) For an individual with a disability who has neither a high school diploma nor its equivalent and who is applying for title IV, HEA program funds and seeks to show his or her ability to benefit through the testing procedures in this subpart, an institution must use a test described in § 668.148(a)(3) or § 668.149(a).

(2) The test must reflect the individual's skills and general learned abilities.

(3) The test administrator must ensure that there is documentation to support the determination that the individual is an individual with a disability and requires accommodations—such as extra time or a quiet room—for taking an approved test, or is unable to be evaluated by the use of an approved ATB test.

(4) Documentation of an individual's disability may be satisfied by—

(i) A written determination, including a diagnosis and recommended testing accommodations, by a licensed psychologist or medical physician; or

(ii) A record of the disability from a local or State educational agency, or other government agency, such as the Social Security Administration or a vocational rehabilitation agency, that identifies the individual's disability. This record may, but is not required to, include a diagnosis and recommended testing accommodations.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

§ 668.154 Institutional accountability.

An institution is liable for the title IV, HEA program funds disbursed to a student whose eligibility is determined under this subpart only if—

(a) The institution used a test that was not administered independently, in accordance with § 668.151(b);

(b) The institution or an employee of the institution compromised the testing process in any way; or

(c) The institution is unable to document that the student received a passing score on an approved test.

(Authority: 20 U.S.C. 1091(d))

§ 668.155 [Reserved]

§ 668.156 Approved State process.

(a)(1) A State that wishes the Secretary to consider its State process as an alternative to achieving a passing score on an approved, independently administered test for the purpose of determining a student's eligibility for title IV, HEA program funds must apply to the Secretary for approval of that process.

(2) To be an approved State process, the State process does not have to include all the institutions located in that State, but must indicate which institutions are included.

(b) The Secretary approves a State's process if—

(1) The State administering the process can demonstrate that the students it admits under that process without a high school diploma or its equivalent, who enroll in participating institutions have a success rate as determined under paragraph (h) of this section that is within 95 percent of the success rate of students with high school diplomas; and

(2) The State's process satisfies the requirements contained in paragraphs (c) and (d) of this section.

(c) A State process must require institutions participating in the process to provide each student they admit without a high school diploma or its recognized equivalent with the following services:

(1) Orientation regarding the institution's academic standards and requirements, and student rights.

(2) Assessment of each student's existing capabilities through means other than a single standardized test.

(3) Tutoring in basic verbal and quantitative skills, if appropriate.

(4) Assistance in developing educational goals.

(5) Counseling, including counseling regarding the appropriate class level for that student given the student's individual's capabilities.

(6) Follow-up by teachers and counselors regarding the student's classroom performance and satisfactory progress toward program completion.

(d) A State process must—

(1) Monitor on an annual basis each participating institution's compliance with the requirements and standards contained in the State's process;

(2) Require corrective action if an institution is found to be in noncompliance with the State process requirements; and

(3) Terminate an institution from the State process if the institution refuses or fails to comply with the State process requirements.

(e)(1) The Secretary responds to a State's request for approval of its State's process within six months after the Secretary's receipt of that request. If the Secretary does not respond by the end of six months, the State's process is deemed to be approved.

(2) An approved State process becomes effective for purposes of determining student eligibility for title IV, HEA program funds under this subpart—

(i) On the date the Secretary approves the process; or

(ii) Six months after the date on which the State submits the process to the Secretary for approval, if the Secretary neither approves nor disapproves the process during that six month period.

(f) The Secretary approves a State process for a period not to exceed five years.

(g)(1) The Secretary withdraws approval of a State process if the Secretary determines that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(2) The Secretary provides a State with the opportunity to contest a finding that the State process violated any terms of this section or that the information that the State submitted as a basis for approval of the State process was inaccurate.

(h) The State must calculate the success rates as referenced in paragraph (b) of this section by—

(1) Determining the number of students with high school diplomas who, during the applicable award year described in paragraph (i) of this section, enrolled in participating institutions and—

(i) Successfully completed education or training programs;

(ii) Remained enrolled in education or training programs at the end of that award year; or

(iii) Successfully transferred to and remained enrolled in another institution at the end of that award year;

(2) Determining the number of students with high school diplomas who enrolled in education or training programs in participating institutions during that award year;

(3) Determining the number of students calculated in paragraph (h)(2) of this section who remained enrolled after subtracting the number of students who subsequently withdrew or were expelled from participating institutions and received a 100 percent refund of their tuition under the institutions' refund policies;

(4) Dividing the number of students determined in paragraph (h)(1) of this section by the number of students determined in paragraph (h)(3) of this section;

(5) Making the calculations described in paragraphs (h)(1) through (h)(4) of this section for students without a high school diploma or its recognized equivalent who enrolled in participating institutions.

(i) For purposes of paragraph (h) of this section, the applicable award year is the latest complete award year for which information is available that immediately precedes the date on which the State requests the Secretary to approve its State process, except that the award year selected must be one of the latest two completed award years preceding that application date.

(Approved by the Office of Management and Budget under control number 1845–0049)

(Authority: 20 U.S.C. 1091(d))

25. Section 668.164 is amended by adding paragraph (i) to read as follows:

§ 668.164 Disbursing funds.

* * * * *

(i) *Provisions for books and supplies.* (1) An institution must provide a way for a Federal Pell Grant eligible student to obtain or purchase, by the seventh day of a payment period, the books and supplies required for the payment period if, 10 days before the beginning of the payment period—

(i) The institution could disburse the title IV, HEA program funds for which the student is eligible; and

(ii) Presuming the funds were disbursed, the student would have a credit balance under paragraph (e) of this section.

(2) The amount the institution provides to the student to obtain or purchase books and supplies is the lesser of the presumed credit balance under this paragraph or the amount needed by the student, as determined by the institution.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

26. The authority citation for part 682 is revised to read as follows:

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

§ 682.200 [Amended]

27. Section 682.200(a)(2) is amended by adding, in alphabetical order, the term "Credit hour".

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

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

Authority: 20 U.S.C. 1070g, 1087a, *et seq.,* unless otherwise noted.

29. Section 685.102 is amended by:

A. In paragraph (a)(2), adding, in alphabetical order, the term "Credit hour".

B. In paragraph (b), adding, in alphabetical order, the definition of *Payment data* to read as follows:

§ 685.102 Definitions.

* * * * *

(b) * * *

Payment data: An electronic record that is provided to the Secretary by an institution showing student disbursement information.

* * * * *

30. Section 685.301 is amended by revising paragraph (e)(1) to read as follows:

§ 685.301 Origination of a loan by a Direct Loan Program school.

* * * * *

(e) * * *

(1) The Secretary accepts a student's Payment Data that is submitted in accordance with procedures established through publication in the **Federal Register,** and that contains information the Secretary considers to be accurate in light of other available information including that previously provided by the student and the institution.

* * * * *

PART 686—TEACHER EDUCATION ASSISTANCE FOR COLLEGE AND HIGHER EDUCATION (TEACH) GRANT PROGRAM

31. The authority citation for part 686 continues to read as follows:

Authority: 20 U.S.C. 1070g, *et seq.,* unless otherwise noted.

32. Section 686.2 is amended by:

A. In paragraph (a), adding, in alphabetical order, the term "Credit hour".

B. In paragraph (d), revising the definition of *Payment Data* to read as follows:

§ 686.2 Definitions.

* * * * *

(d) * * *

Payment Data: An electronic record that is provided to the Secretary by an institution showing student disbursement information.

* * * * *

33. Section 686.37 is amended by revising paragraph (b) to read as follows:

§ 686.37 Institutional reporting requirements.

* * * * *

(b) The Secretary accepts a student's Payment Data that is submitted in accordance with procedures established through publication in the **Federal Register,** and that contains information the Secretary considers to be accurate in light of other available information including that previously provided by the student and the institution.

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PART 690—FEDERAL PELL GRANT PROGRAM

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

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

§ 690.2 [Amended]

35. Section 690.2(a) is amended by adding, in alphabetical order, the term "Credit hour".

PART 691—ACADEMIC COMPETITIVENESS GRANT (ACG) AND NATIONAL SCIENCE AND MATHEMATICS ACCESS TO RETAIN TALENT GRANT (NATIONAL SMART GRANT) PROGRAMS

36. The authority citation for part 691 continues to read as follows:

Authority: 20 U.S.C. 1070a–1, unless otherwise noted.

§ 691.2 [Amended]

37. Section 691.2(a) is amended by adding, in alphabetical order, the term "Credit hour".

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