

Administrative Law Judge or the Commission if it reviews the matter in the first instance, shall issue a decision either dismissing the allegations or, if it is determined that the allegations are supported by a preponderance of the evidence, specify an appropriate sanction. An Administrative Law Judge's decision may be appealed to the Commission by either party within 30 days. If the Administrative Law Judge's decision is appealed, the Commission will thereafter issue a scheduling order governing the appeal.

(vii) Investigations and administrative proceedings prior to the hearing on the order to show cause will be nonpublic unless otherwise ordered by the Commission. Any administrative hearing on the order to show cause, and any oral argument on appeal, shall be open to the public unless otherwise ordered for good cause by the Commission or the Administrative Law Judge.

(6) Regardless of any action or determination the Commission may or may not make, the Commission may direct the General Counsel to refer the allegations of misconduct to the appropriate state, territory, or District of Columbia bar or any other appropriate authority for further action.

(7) Upon receipt of notification from any authority having power to suspend or disbar an attorney from the practice of law within any state, territory, or the District of Columbia, demonstrating that an attorney practicing before the Commission is subject to an order of final suspension (not merely temporary suspension pending further action) or disbarment by such authority, the Commission may, without resort to any of the procedures described in this section, enter an order temporarily suspending the attorney from practice before it and directing the attorney to show cause within 30 days from the date of said order why the Commission should not impose further discipline against the attorney. If no response is filed, the attorney will be deemed to have acceded to such further discipline as the Commission deems appropriate. If a response is received, the Commission may take action or initiate proceedings consistent with paragraph (e)(5) of this section before making a determination whether, and to what extent, to impose further discipline against the attorney.

(8) The disciplinary process described in this section is in addition to, and does not supersede, the authority of the Commission or an Administrative Law Judge to discipline attorneys participating in part 3 proceedings pursuant to §§ 3.24(b)(2) or 3.42(d).

#### § 4.2 [Amended]

■ 16. In § 4.2, amend paragraphs (d)(2) and (d)(4), by removing the phrase “§ 2.7(d), § 2.7(f)” and adding in its place “§ 2.10(a)”.

#### § 4.9 [Amended]

■ 17. Amend § 4.9, by removing the phrase “(16 CFR 2.7)” from paragraph (b)(4) heading and the phrase “, requests for review by the full Commission of those rulings, and Commission rulings on such requests” from paragraph (b)(4)(i).

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,  
Secretary.

The following will not appear in the Code of Federal Regulations.

#### Statement of Chairman Jon Leibowitz Regarding Revisions to the Commission's Part 2 Rules and Rule 4.1(e)

September 19, 2012

Today the Commission issued final changes to Parts 2 and 4 of the agency's Rules of Practice. The revised Rules streamline and update the procedures for Commission investigations, and clarify the agency's procedures for evaluating allegations of misconduct by attorneys practicing before the Commission, making us a more effective agency.

All of the Commission generally supports the revisions. A legitimate question has been raised, however, that the revisions to the Part 2 Rules should have gone further. One issue involves the occasional use of “access letters,” rather than compulsory process, to conduct Commission competition investigations. Over the past few years, the Commission has moved decisively toward greater use of compulsory process in these investigations. Compulsory process results in faster, more efficient investigations, especially in anticompetitive conduct matters where the recipients may not have strong incentives to cooperate quickly with Commission staff. Our experience has shown that, all too often, the recipients of voluntary access letters slow walk compliance. Nevertheless, while most competition investigations warrant compulsory process, and its use is strongly encouraged, it makes sense to provide staff with at least some flexibility in choosing which method to deploy in at least some investigations.

Another question that has been raised is whether the Rules should require staff to submit regular status reports to all Commissioners on pending investigations. Our staff already meets

regularly with individual Commissioners and responds to any inquiries about particular matters. Moreover, our current practice is for staff to submit regular status updates to the Commission at six-month intervals. This best practice, however, is a matter of internal management that does not necessarily need to be enshrined in the Rules of Practice.

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## DEPARTMENT OF EDUCATION

### 34 CFR Parts 668, 674, 682, and 685

#### Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program)

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Updated waivers and modifications of statutory and regulatory provisions.

**SUMMARY:** The Secretary is issuing updated waivers and modifications of statutory and regulatory provisions governing the Federal student financial aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act requires the Secretary to publish, in a notice in the **Federal Register**, the waivers or modifications of statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA), to assist individuals who are performing qualifying military service, and individuals who are affected by a disaster, war or other military operation or national emergency, as described in the **SUPPLEMENTARY INFORMATION** section of this notice.

**DATES:** Effective September 27, 2012. The waivers and modifications in this document expire on September 30, 2017.

**FOR FURTHER INFORMATION CONTACT:** For provisions related to the title IV loan programs (Federal Perkins Loan Program, Federal Family Education Loan (FFEL) Program, and Federal Direct Loan (Direct Loan) Program): Gail McLarnon, U.S. Department of Education, 1990 K Street NW., Room 8026, Washington, DC 20006-8510. Telephone: (202) 219-7048 or by email: [Gail.McLarnon@ed.gov](mailto:Gail.McLarnon@ed.gov). For other

provisions: Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006–8510. Telephone: (202) 502–7526 or by email: [Wendy.Macias@ed.gov](mailto:Wendy.Macias@ed.gov).

If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), 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 compact disc) by contacting Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006–8510. Telephone: (202) 502–7526 or by email: [Wendy.Macias@ed.gov](mailto:Wendy.Macias@ed.gov).

**SUPPLEMENTARY INFORMATION:** In a notice published in the **Federal Register** on December 12, 2003 (68 FR 69312), the Secretary exercised the authority under the HEROES Act (Pub. L. 108–76, 20 U.S.C. 1098bb(b)) and announced waivers and modifications of statutory and regulatory provisions designed to assist “affected individuals.” Under 20 U.S.C. 1098ee(2), the term “affected individual” means an individual who:

- Is serving on active duty during a war or other military operation or national emergency;
- Is performing qualifying National Guard duty during a war or other military operation or national emergency;
- Resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or
- Suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary.

Under the HEROES Act, the Secretary’s authority to provide the waivers and modifications would have expired on September 30, 2005. On September 30, 2005, Public Law 109–78 extended the expiration date of the Secretary’s authority to September 30, 2007. Accordingly, in a notice in the **Federal Register** published on October 20, 2005 (70 FR 61037), the Secretary extended the expiration of the waivers and modifications published on December 12, 2003, to September 30, 2007.

On September 30, 2007, the President signed into law Public Law 110–93, which eliminated the September 30, 2007, expiration date of the HEROES Act, thereby making permanent the Secretary’s authority to issue waivers and modifications of statutory and regulatory provisions.

On December 26, 2007, the Secretary published a notice in the **Federal Register** (72 FR 72947) extending the waivers and modifications published on December 12, 2003, to September 30, 2012. In that notice, the Secretary also indicated an intent to review the waivers and modifications published on December 12, 2003, in light of statutory and regulatory changes and to consider whether to change some or all of the published waivers and modifications.

We are now updating the waivers and modifications to reflect the results of that review. With limited exceptions, the waivers and modifications in this notice reflect the same waivers and modifications originally published in the December 12, 2003, **Federal Register** notice. However, they have been updated to reflect statutory and regulatory changes that have occurred since the original publication. In addition, a waiver has been added to assist affected individuals in regard to the annual reevaluation requirements for borrowers who are repaying loans made under the Federal Family Education Loan (FFEL) Program or Federal Direct Loan (Direct Loan) Program under the Income-Based Repayment (IBR) or Income-Contingent Repayment (ICR) plans.

The waiver and modifications related to military deferments were eliminated because the time-limited military service deferment under section 455(f)(4) of the HEA to which they applied (commonly referred to as the Armed Forces deferment) has been replaced by the military service deferment authorized in sections 428(b)(1)(M)(iii), 455(f)(2)(C), and 464(c)(2)(A)(iii) of the HEA, which is available to all borrowers, regardless of when they received their loans, for any period during which a borrower is serving on active duty during a war or other military operation or national emergency, or is performing qualifying National Guard duty during a war or other military operation or national emergency.

In addition, the Secretary has decided not to retain the modification to the amount of unearned funds an institution must return under the Return of Title IV Funds requirements in section 484(b)(1) of the HEA and 34 CFR 668.22(g) because the Secretary has determined that it is not in the best interest of affected individuals. The removal of institutional charges that the institution is required to cover, and has covered, with non-title IV sources of aid generally results in the institution returning less unearned title IV, HEA program funds and the student returning more, often leaving the

student with a larger title IV, HEA program loan debt.

The Secretary is issuing these waivers and modifications under the authority of the HEROES Act, 20 U.S.C. 1098bb(a). In accordance with the HEROES Act, the Secretary is providing the waivers and modifications of statutory and regulatory provisions applicable to the student financial assistance programs under title IV of the HEA that the Secretary believes are appropriate to ensure that:

- Affected individuals who are recipients of student financial assistance under title IV are not placed in a worse position financially in relation to that financial assistance because they are affected individuals;
- Affected individuals who are recipients of student financial assistance are not unduly subject to administrative burden or inadvertent, technical violations or defaults;
- Affected individuals are not penalized when a determination of need for student financial assistance is calculated;
- Affected individuals are not required to return or repay an overpayment of grant funds based on the HEA’s Return of title IV Funds provision; and
- Entities that participate in the student financial assistance programs under title IV of the HEA and that are located in areas that are declared disaster areas by any Federal, State, or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, receive temporary relief from administrative requirements.

In 20 U.S.C. 1098bb(b)(1), the HEROES Act further provides that section 437 of the General Education Provisions Act (20 U.S.C. 1232) and section 553 of the Administrative Procedure Act (5 U.S.C. 553) do not apply to the contents of this notice.

In 20 U.S.C. 1098ee, the HEROES Act defines the following terms used in this notice:

*Active duty* has the meaning given that term in 10 U.S.C. 101(d)(1), but does not include active duty for training or attendance at a service school (e.g., the U.S. Military Academy or U.S. Naval Academy).

*Military operation* means a contingency operation as that term is defined in 10 U.S.C. 101(a)(13).

*National emergency* means a national emergency declared by the President of the United States.

*Serving on active duty during a war or other military operation or national emergency* includes service by an individual who is—

(A) a Reserve member of an Armed Force ordered to active duty under 10 U.S.C. 12301(a), 12301(g), 12302, 12304, or 12306, or any retired member of an Armed Force ordered to active duty under 10 U.S.C. 688, for service in connection with a war or other military operation or national emergency, regardless of the location at which that active duty service is performed; and

(B) any other member of an Armed Force on active duty in connection with any war, operation, or emergency or subsequent actions or conditions who has been assigned to a duty station at a location other than the location at which the member is normally assigned.

*Qualifying National Guard duty during a war or other military operation or national emergency* means service as a member of the National Guard on full-time National Guard duty (as defined in 10 U.S.C. 101(d)(5)) under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 U.S.C. 502(f), in connection with a war, another military operation, or a national emergency declared by the President and supported by Federal funds.

The following waivers and modifications are grouped into four categories, according to the affected individuals to whom they apply.

*Category 1: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for ALL affected individuals as specified in the SUPPLEMENTARY INFORMATION section of this notice:*

#### Need Analysis

Section 480 of the HEA provides that, in the calculation of an applicant's expected family contribution (EFC), the term "total income," which is used in the determination of "annual adjusted family income" and "available income," is equal to adjusted gross income plus untaxed income and benefits for the preceding tax year minus excludable income. The HEROES Act allows an institution to substitute adjusted gross income plus untaxed income and benefits received in the first calendar year of the award year for which such determination is made for any affected individual, and for his or her spouse and dependents, if applicable, in order to reflect more accurately the financial condition of an affected individual and his or her family. The Secretary has determined that an institution has the option of using the applicant's original EFC or the EFC based on the data from the first calendar year of the award year.

If an institution chooses to use the alternate EFC, it should use the

administrative professional judgment procedures established by the Secretary as discussed in the following section on "Professional Judgment."

#### Professional Judgment

Section 479A of the HEA specifically gives the financial aid administrator (FAA) the authority to use professional judgment to make case-by-case 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. The Secretary is modifying this provision by removing the requirement that adjustments be made case by case for affected individuals. The use of professional judgment in Federal need analysis is discussed in the Federal Student Aid Handbook available at [www.ifap.ed.gov](http://www.ifap.ed.gov).

The Secretary encourages FAAs to use professional judgment in order to reflect more accurately the financial need of affected individuals. To that end, the Secretary encourages institutions to determine an affected individual's need using the method listed below that is the most beneficial to the affected individual:

- By using the adjusted gross income (AGI) plus untaxed income and benefits received in the first calendar year of the award year;
- By using professional judgment; or
- By making no modifications. (For example, in some cases, an individual's income will increase as a result of serving on active duty or performing qualifying National Guard duty.)

The FAA must clearly document the reasons for any adjustment and the facts supporting the decision. In almost all cases, the FAA should have documentation from a third party with knowledge of the student's unusual circumstances. As usual, any professional judgment decisions made by an FAA that affect a student's eligibility for a subsidized student financial assistance program must be reported to the Central Processing System.

#### Return of Title IV Funds—Grant Overpayments Owed by the Student

Section 484B(b)(2) of the HEA and 34 CFR 668.22(h)(3)(ii) require a student to return or repay, as appropriate, unearned grant funds for which the student is responsible under the Return of Title IV Funds calculation. For a student who withdraws from an institution because of his or her status as an affected individual, the Secretary is waiving these statutory and regulatory requirements so that a student is not required to return or repay any

overpayment of grant funds based on the Return of Title IV Funds provisions.

For these students, the Secretary also waives 34 CFR 668.22(h)(4), which:

- Requires an institution to notify a student of a grant overpayment and the actions the student must take to resolve the overpayment;
- Denies eligibility to a student who owes a grant overpayment and does not take an action to resolve the overpayment; and
- Requires an institution to refer a grant overpayment to the Secretary under certain conditions.

Therefore, an institution is not required to contact the student, notify the National Student Loan Data System, or refer the overpayment to the Secretary. However, the institution must document in the student's file the amount of any overpayment as part of the documentation of the application of this waiver.

The student is not required to return or repay an overpayment of grant funds based on the Return of Title IV Funds provision. Therefore, an institution must not apply any title IV credit balance to the grant overpayment prior to: using a credit balance to pay authorized charges; paying any amount of the title IV credit balance to the student or parent, in the case of a parent PLUS loan; or using the credit balance to reduce the student's title IV loan debt (with the student's authorization) as provided in Dear Colleague Letter GEN-04-03 (February 2004; revised November 2004).

#### Verification of AGI and U.S. Income Tax Paid

Pursuant to 34 CFR 668.57(a)(3)(ii), for an individual who is required to file a U.S. income tax return and has been granted a filing extension by the Internal Revenue Service (IRS), an institution must accept, in lieu of an income tax return for verification of AGI or income tax paid:

- A copy of 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
- 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 AGI for the specified year.

The Secretary is modifying this provision so that the submission of a

copy of IRS Form 4868 or a copy of the IRS extension approval is not required if an affected individual has not filed an income tax return by the filing deadline.

For these individuals, an institution must accept, in lieu of an income tax return for verification of AGI and taxes paid:

- A signed statement from the individual certifying that he or she has not filed an income tax return or a request for a filing extension because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency; and
- A copy of each W-2 received for the specified year or, for a self-employed individual, a statement signed by the individual certifying the amount of AGI for the specified year.

An institution may request that an individual granted a filing extension submit tax information using the IRS Data Retrieval Tool, or by obtaining a tax return transcript from the IRS that lists tax account information for the specified year after the income tax return is filed. If an institution receives the tax information, it must verify the income information of the tax filer(s).

*Category 2: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty, performing qualifying National Guard duty during a war or other military operation or national emergency, or who reside or are employed in a disaster area as described in the SUPPLEMENTARY INFORMATION section of this notice.*

#### **Return of Title IV Funds—Post-Withdrawal Disbursements of Loan Funds**

Under 34 CFR 668.22(a)(6)(iii)(A)(5) and (a)(6)(iii)(D), a student (or parent for a parent PLUS loan) must be provided a post-withdrawal disbursement of a title IV loan if the student (or parent) responds to an institution's notification of the post-withdrawal disbursement within 14 days of the date that the institution sent the notice, or a later deadline set by the institution. If a student or parent submits a late response, an institution may, but is not required to, make the post-withdrawal disbursement.

The Secretary is modifying this requirement so that, for a student who withdraws because of his or her status as an affected individual in this category and who is eligible for a post-withdrawal disbursement, the 14-day time period in which the student (or parent) must normally respond to the offer of the post-withdrawal

disbursement is extended to 45 days, or to a later deadline set by the institution. If the student or parent submits a response after the designated period, the institution may, but is not required to, make the post-withdrawal disbursement. As required under the current regulations, if the student or parent submits the timely response instructing the institution to make all or a portion of the post-withdrawal disbursement, or the institution chooses to make a post-withdrawal disbursement based on receipt of a late response, the institution must disburse the funds within 180 days of the date of the institution's determination that the student withdrew.

#### **Leaves of Absence**

Under 34 CFR 668.22(d)(3)(iii)(B), a student is required to provide a written, signed, and dated request, which includes the reason for that request, for an approved leave of absence prior to the leave of absence. However, if unforeseen circumstances prevent a student from providing a prior written request, the institution may grant the student's request for a leave of absence if the institution documents its decision and collects the written request at a later date. It may be appropriate in certain limited cases for an institution to provide an approved leave of absence to a student who must interrupt his or her enrollment because he or she is an affected individual in this category. Therefore, the Secretary is waiving the requirement that the student provide a written request for affected individuals who have difficulty providing a written request as a result of being an affected individual in this category. The institution's documentation of its decision to grant the leave of absence must include, in addition to the reason for the leave of absence, the reason for waiving the requirement that the leave of absence be requested in writing.

#### **Treatment of Title IV Credit Balances When a Student Withdraws**

Under 34 CFR 668.164(e), an institution must pay any title IV credit balance to the student, or parent in the case of a parent PLUS loan, within 14 days after the balance occurred. However, under 34 CFR 668.165(b)(i), if a student (or parent) has provided authorization, an institution may use a title IV credit balance to reduce the borrower's total title IV loan debt, not just the title IV loan debt for the period for which the Return of Title IV Funds calculation is performed.

Therefore, for students who withdraw because they are affected individuals in this category, the Secretary is modifying

34 CFR 668.164(e) to consider that the institution has met the 14-day requirement if, within that timeframe, the institution attempts to contact the student (or parent) to suggest that the institution be authorized to return the credit balance to the loan program(s).

Based upon the instructions of the student (or parent), the institution must promptly return the funds to the title IV loan programs or pay the credit balance to the student (or parent).

In addition, if an institution chooses to attempt to contact the student (or parent) for authorization to apply the credit balance to reduce the student's title IV loan debt, it must allow the student (or parent) 45 days to respond. If there is no response within 45 days, the institution must promptly pay the credit balance to the student (or parent) or return the funds to the title IV programs if the student or parent cannot be located.

Consistent with the guidance provided in Dear Colleague Letter GEN-04-03 (February 2004; revised November 2004), the institution may also choose to pay the credit balance to the student (or parent) without first requesting permission to apply the credit balance to reduce the student's title IV loan debt.

#### **Cash Management—Borrower Request for Loan Cancellation**

Under 34 CFR 668.165(a)(4)(ii), an institution must return loan proceeds or cancel the loan, or both, if the institution receives a loan cancellation request from a borrower within 14 days after the date of the institution's notice to the borrower of his or her right to cancel all or a portion of a loan, or by the first day of the payment period if the institution sends the notice more than 14 days before the first day of the payment period. Under 34 CFR 668.165(a)(4)(iii), if an institution receives a late loan cancellation request from a borrower, the institution may, but is not required to, comply with the request. For a borrower who is an affected individual in this category, the Secretary is modifying this provision to require an institution to allow at least 60 days, rather than at least 14 days, for the borrower to request the cancellation of all or a portion of a loan for which proceeds have been credited to the account at the institution. If an institution receives a loan cancellation request from a borrower after the 60-day period, the institution may, but is not required to, comply with the request.

### Cash Management—Student and Parent Authorizations

Under 34 CFR 668.164(c)(3)(i), an institution must obtain affirmative consent from a student or parent, as applicable, to disburse title IV funds to a bank account designated by the student or parent. In addition, 34 CFR 668.165(b)(1) provides that an institution must obtain a written authorization from a student or parent, as applicable, to:

- Use title IV funds to pay for educationally related charges incurred by the student at the institution other than charges for tuition and fees and, as applicable, room and board; and
- Hold on behalf of the student or parent any title IV funds that would otherwise be paid directly to the student or parent.

The Secretary is modifying these provisions to permit an institution to accept affirmative consent and any authorization provided by a student (or parent for a parent PLUS loan) orally, rather than in writing, if the student or parent is prevented from providing a written affirmative consent or authorization because of his or her status as an affected individual in this category. The institution must document the oral consent or authorization.

### Satisfactory Academic Progress

Institutions may, in cases where a student failed to meet the institution's satisfactory academic progress standards as a direct result of being an affected individual in this category, apply the exception provision of "other special circumstances" contained in 34 CFR 668.34(a)(9)(ii).

### Borrowers in a Grace Period

Sections 428(b)(7)(D) and 464(c)(7) of the HEA and 34 CFR 674.31(b)(2)(i)(C), 682.209(a)(5), and 685.207(b)(2)(ii) and (c)(2)(ii) exclude from a Federal Perkins Loan, FFEL, or Direct Loan borrower's (title IV borrower's) initial grace period any period during which a borrower who is a member of an Armed Forces reserve component is called or ordered to active duty for a period of more than 30 days. The statutory and regulatory provisions further require that any single excluded period may not exceed three years and must include the time necessary for the borrower to resume enrollment at the next available regular enrollment period. Lastly, any borrower who is in a grace period when called or ordered to active duty is entitled to another six- or nine-month grace period, as applicable, upon completion of the excluded period of service.

The Secretary is modifying these statutory and regulatory provisions to exclude from a title IV borrower's initial grace period, any period, not to exceed three years, during which a borrower is an affected individual in this category. Any excluded period must include the time necessary for an affected individual in this category to resume enrollment at the next available enrollment period.

### Borrowers in an "In-School" Period

A title IV borrower is considered to be in an "in-school" status and is not required to make payments on a title IV loan that has not entered repayment as long as the borrower is enrolled at an eligible institution on at least a half-time basis. Under sections 428(b)(7) and 464(c)(1)(A) of the HEA and 34 CFR 674.31(b)(2), 682.209(a), and 685.207(b), (c), and (e)(2) and (3), when a title IV borrower ceases to be enrolled at an eligible institution on at least a half-time basis, the borrower is obligated to begin repayment of the loan after a six- or nine-month grace period, depending on the title IV loan program and the terms of the borrower's promissory note. The Secretary is modifying the statutory and regulatory provisions that obligate an "in-school" borrower who has dropped below half-time status to begin repayment if the borrower is an affected individual in this category, by requiring the holder of the loan to maintain the loan in an "in-school" status for a period not to exceed three years, including the time necessary for the borrower to resume enrollment in the next regular enrollment period, if the borrower is planning to go back to school. The Secretary will pay interest that accrues on a subsidized Stafford Loan as a result of the extension of a borrower's in-school status under this modification.

### Borrowers in an In-School or Graduate Fellowship Deferment

Under sections 427(a)(2)(C)(i), 428(b)(1)(M)(i), 428B(a)(2) and (d)(1), 428C(b)(4)(C), 455(f)(2)(A), and 464(c)(2)(A)(i) of the HEA and 34 CFR 674.34(b)(1), 682.210(b)(1)(i) and (ii), 682.210(s)(2) and (3), and 685.204(b)(1)(i)(A) and (B), a title IV borrower is eligible for a deferment on the loan during periods after the commencement or resumption of the repayment period on the loan when the borrower is enrolled and in attendance as a regular student on at least a half-time basis (or full-time, if required by the terms of the borrower's promissory note) at an eligible institution; enrolled and in attendance as a regular student in a course of study that is part of a

graduate fellowship program; or engaged in graduate or post-graduate fellowship-supported study outside the United States. The borrower's deferment period ends when the borrower no longer meets one of the above conditions.

The Secretary is waiving the statutory and regulatory eligibility requirements for this deferment for title IV borrowers who were required to interrupt a graduate fellowship deferment, or who were in an in-school deferment but who left school, because of their status as an affected individual in this category. The holder of the loan is required to maintain the loan in the graduate fellowship deferment or in-school deferment status for a period not to exceed three years during which the borrower is an affected individual in this category. This period includes the time necessary for the borrower to resume his or her graduate fellowship program or resume enrollment in the next regular enrollment period if the borrower returns to school. The Secretary will pay interest that accrues on a subsidized Stafford Loan as a result of extending a borrower's eligibility for deferment under this waiver.

### Forbearance

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2), there is a three-year cumulative limit on the length of forbearances that a Federal Perkins Loan borrower can receive. To assist Federal Perkins Loan borrowers who are affected individuals in this category, the Secretary is waiving these statutory and regulatory requirements so that any forbearance based on a borrower's status as an affected individual in this category is excluded from the three-year cumulative limit.

Under section 464(e) of the HEA and 34 CFR 674.33(d)(2) and (3), a school must receive a request and supporting documentation from a Federal Perkins Loan borrower before granting the borrower a forbearance, the terms of which must be in the form of a written agreement. The Secretary is waiving these statutory and regulatory provisions to require an institution to grant forbearance based on the borrower's status as an affected individual in this category for a one-year period, including a three-month "transition period" immediately following, without supporting documentation or a written agreement, based on the written or oral request of the borrower, a member of the borrower's family, or another reliable source. The purpose of the three-month transition period is to assist borrowers so that they will not be required to

reenter repayment immediately after they are no longer affected individuals in this category. In order to grant the borrower forbearance beyond the initial twelve- to fifteen-month period, supporting documentation from the borrower, a member of the borrower's family, or another reliable source is required.

Under 34 CFR 682.211(i)(1), a FFEL borrower who requests forbearance because of a military mobilization must provide the loan holder with documentation showing that he or she is subject to a military mobilization. The Secretary is waiving this requirement to allow a borrower who is not otherwise eligible for the military service deferment under 34 CFR 682.210(t)(9), 685.204(e)(7), and 674.34(h)(7) to receive forbearance at the request of the borrower, a member of the borrower's family, or another reliable source for a one-year period, including a three-month transition period that immediately follows immediately following, without providing the loan holder with documentation. In order to grant the borrower forbearance beyond this period, documentation supporting the borrower's military mobilization must be submitted to the holder of the loan.

The Secretary will apply the forbearance waivers and modifications in this section to loans held by the Department of Education.

#### **Collection of Defaulted Loans**

In accordance with 34 CFR part 674, subpart C—Due Diligence, and 682.410(b)(6), schools and guaranty agencies must attempt to recover amounts owed from defaulted Federal Perkins and FFEL borrowers, respectively. The Secretary is waiving the regulatory provisions that require schools and guaranty agencies to attempt collection on defaulted loans for the time period during which the borrower is an affected individual in this category and for a three-month transition period. The school or guaranty agency may stop collection activities upon notification by the borrower, a member of the borrower's family, or another reliable source that the borrower is an affected individual in this category. Collection activities must resume after the borrower has notified the school or guaranty agency that he or she is no longer an affected individual and the three-month transition period has expired. The loan holder must document in the loan file why it has suspended collection activities on the loan, and the loan holder is not required to obtain evidence of the borrower's status while collection activities have

been suspended. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

#### **Loan Cancellation**

Depending on the loan program, borrowers may qualify for loan cancellation if they are employed fulltime in specified occupations, such as teaching, as a civil legal assistance attorney, or in law enforcement, pursuant to Sections 428J, 428L, 460(b)(1), and 465(a)(2)(A)–(M) and (a)(3) of the HEA, and 34 CFR 674.53, 674.55, 674.55(b), 674.56, 674.57, 674.58, 674.60, 682.216, and 685.217. Generally, to qualify for loan cancellation, borrowers must perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as five consecutive years.

For borrowers who are affected individuals in this category, the Secretary is waiving the requirements that apply to the various loan cancellations that such periods of service be uninterrupted or consecutive, if the reason for the interruption is related to the borrower's status as an affected individual in this category. Therefore, the service period required for the borrower to receive or retain a loan cancellation for which he or she is otherwise eligible will not be considered interrupted by any period during which the borrower is an affected individual in this category, including the three-month transition period. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

#### **Rehabilitation of Defaulted Loans**

A borrower of a Direct Loan or FFEL Loan must make nine on-time, monthly payments over ten consecutive months to rehabilitate a defaulted loan in accordance with section 428F(a) of the HEA and 34 CFR 682.405 and 685.211(f). Federal Perkins Loan borrowers must make nine consecutive, on-time monthly payments to rehabilitate a defaulted Federal Perkins Loan in accordance with section 464(h)(1)(A) of the HEA. To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving the statutory and regulatory requirements that payments made to rehabilitate a loan must be consecutive or made over no more than ten consecutive months. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category, or

the three-month transition period, as an interruption in the number of monthly, on-time payments required to be made consecutively, or the number of consecutive months in which payment is required to be made, for loan rehabilitation. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer considered to be an affected individual in this category, and the three-month transition period has expired, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

#### **Reinstatement of Title IV Eligibility**

Under sections 428F(b) and 464(h)(2) of the HEA and under the definition of "satisfactory repayment arrangement" in 34 CFR 668.35(a)(2), 674.2(b), 682.200(b), and 685.102(b), a defaulted title IV borrower may make six consecutive, monthly, on-time payments to reestablish eligibility for title IV student financial assistance. To assist title IV borrowers who are affected individuals in this category, the Secretary is waiving statutory and regulatory provisions that require the borrower to make consecutive payments in order to reestablish eligibility for title IV student financial assistance. Loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the six consecutive, monthly, on-time payments required for reestablishing title IV eligibility. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer considered to be an affected individual or in the three-month transition period for purposes of this notice, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status. The Secretary will apply the waivers described in this paragraph to loans held by the Department of Education.

#### **Consolidation of Defaulted Loans**

Under the definition of "satisfactory repayment arrangement" in 34 CFR

685.102(b), a defaulted FFEL or Direct Loan borrower may establish eligibility to consolidate a defaulted loan in the Direct Consolidation Loan Program by making three consecutive, monthly, on-time payments on the loan. The Secretary is waiving the regulatory requirement that such payments be consecutive. FFEL loan holders should not treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the three consecutive, monthly, on-time payments required for establishing eligibility to consolidate a defaulted loan in the Direct Consolidation Loan Program. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer considered to be an affected individual in this category or in the three-month transition period, the required sequence of qualifying payments may resume at the point they were discontinued as a result of the borrower's status as an affected individual. The Secretary will apply the waivers described in this paragraph to Direct and FFEL loans held by the Department of Education and to commercially held FFEL loans.

#### **Annual Reevaluation Requirements for Direct Loan and FFEL Borrowers Under the Income-Based Repayment (IBR) and Income-Contingent Repayment (ICR) Plans**

Section 493C(c) of the HEA requires the Secretary to establish procedures for annually determining a borrower's eligibility for income-based repayment, including verification of a borrower's annual income and the annual amount due on the total amount of the borrower's loans. Section 493C(b)(6) of the HEA provides that if a borrower no longer has a partial financial hardship, the maximum monthly payment amount the borrower will be required to pay is an amount that does not exceed the monthly amount paid under the standard repayment plan based on a ten-year repayment period. Under 34 CFR 682.215(e), 682.221(e), and 685.209, borrowers repaying under the IBR or ICR plan must be evaluated annually to determine if the borrower continues to have a partial financial hardship, if applicable, and whether the borrower's monthly payment amount under the IBR or ICR plan should be recalculated based on changes in the borrower's income or family size. Borrowers are required to provide information about their annual income and family size to

the loan holder each year by the deadline specified by the holder. A borrower who fails to provide the required information would have his or her monthly payment amount adjusted to the amount the borrower would pay under the ten-year standard payment plan.

The Secretary is waiving these statutory and regulatory provisions to require loan holders to maintain an affected borrower's payment at the most recently calculated IBR or ICR monthly payment amount for up to a three-year period, including a three-month transition period immediately following, if the borrower's status as an affected individual in this category has prevented the borrower from providing documentation of updated income and family size by the specified deadline for the holder's receipt of that information.

*Category 3: The Secretary is waiving or modifying the following provisions of title IV of the HEA and the Department's regulations for affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency as described in the SUPPLEMENTARY INFORMATION section of this notice.*

#### **Institutional Charges and Refunds**

The HEROES Act encourages institutions to provide a full refund of tuition, fees, and other institutional charges for the portion of a period of instruction that a student was unable to complete, or for which the student did not receive academic credit, because he or she was called up for active duty or for qualifying National Guard duty during a war or other military operation or national emergency. Alternatively, the Secretary encourages institutions to provide a credit in a comparable amount against future charges.

The HEROES Act also recommends that institutions consider providing easy and flexible reenrollment options to students who are affected individuals in this category. At a minimum, an institution must comply with the requirements of 34 CFR 668.18, which addresses the readmission requirements for service members under certain conditions.

Of course, an institution may provide such treatment to affected individuals other than those who are called up to active duty or for qualifying National Guard duty during a war or other military operation or national emergency.

Before an institution makes a refund of institutional charges, it must perform the required Return of Title IV Funds calculations based upon the originally

assessed institutional charges. After determining the amount that the institution must return to the title IV Federal student aid programs, any reduction of institutional charges may take into account the funds that the institution is required to return. In other words, we do not expect that an institution would both return funds to the Federal programs and also provide a refund of those same funds to the student.

*Category 4: The Secretary is waiving or modifying the following provisions of the HEA and the Department's regulations for dependents and spouses of affected individuals who are serving on active duty or performing qualifying National Guard duty during a war or other military operation or national emergency as described in the SUPPLEMENTARY INFORMATION section of this notice.*

#### **Verification Signature Requirements**

Regulations in 34 CFR 668.57(b) and (c) require signatures to verify the number of family members in the household and the number of family members enrolled in postsecondary institutions. The Secretary is waiving the requirement that a dependent student submit a statement signed by one of the applicant's parents when no responsible parent can provide the required signature because of the parent's status as an affected individual in this category.

#### **Required Signatures on the Free Application for Federal Student Aid (FAFSA), Student Aid Report (SAR), and Institutional Student Information Record (ISIR)**

Generally, when a dependent applicant for title IV aid submits the FAFSA or submits corrections to a previously submitted FAFSA, at least one parental signature is required on the FAFSA, SAR, or ISIR. The Secretary is waiving this requirement so that an applicant need not provide a parent's signature when there is no responsible parent who can provide the required signature because of the parent's status as an affected individual in this category. In these situations, a student's high school counselor or the FAA may sign on behalf of the parent as long as the applicant provides adequate documentation concerning the parent's inability to provide a signature due to the parent's status as an affected individual in this category.

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

**Program Authority:** 20 U.S.C. 1071, 1082, 1087a, 1087aa, Part F-1.

Dated: September 24, 2012.

**David A. Bergeron,**

*Acting Assistant Secretary for Postsecondary Education.*

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**BILLING CODE 4000-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 51

#### RIN 2900-AO36

### Removal of 30-Day Residency Requirement for Per Diem Payments

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Direct final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is taking direct final action to amend its regulations concerning per diem payments to State homes for the provision of nursing home care to veterans. Specifically, this rule removes the requirement that a veteran must have resided in a State home for 30 consecutive days before VA will pay per diem for that veteran when there is no overnight stay. The intended effect of this direct final rule is to permit per diem payments to State homes for veterans who do not stay overnight, regardless of how long the veterans have resided at the State homes, so that the State homes will hold the veterans' beds until the veterans return.

**DATES:** *Effective:* This rule is effective on November 26, 2012, without further notice, unless VA receives a significant adverse comment by October 29, 2012. If significant adverse comment is received, VA will publish a timely withdrawal of the rule in the **Federal Register**.

**ADDRESSES:** Written comments may be submitted through <http://www.regulations.gov>; by mail or hand delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AO36, Removal of 30-Day Residency Requirement for Per Diem Payments." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Harold Bailey, Program Management Officer (Director of Administration), VA Health Administration Center, Purchased Care (10NB3), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (303) 331-7551. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This rule amends part 51 of title 38, Code of Federal Regulations, to remove the requirement that a veteran receiving nursing home care in a State home must have resided in the State home for at least 30 consecutive days before VA will pay per diem when that veteran does not stay in the State home overnight. VA pays per diem to State homes for veterans who stay elsewhere overnight to create a "bed hold," so that the State home reserves the veteran's bed until the veteran returns from a temporary absence. Typically, these temporary absences arise from a veteran's acute need for a higher level of care, such as a period of hospitalization. Temporary absences also arise for reasons other than hospital care, such as when a veteran travels to visit family members.

This rule also clarifies in 38 CFR 51.43(c) that VA calculates occupancy rate "by dividing the total number of patients in the nursing home or domiciliary by the total recognized

nursing home or domiciliary beds in that facility." This is consistent with current practice, and will help ensure that State homes understand our methodology.

The 30-day residency requirement for bed hold per diem payments was established in 2009 in 38 CFR 51.43(c), which stated: "Per diem will be paid under §§ 51.40 and 51.41 for each day that the veteran is receiving care and has an overnight stay. Per diem also will be paid when there is no overnight stay if the veteran has resided in the facility for 30 consecutive days (including overnight stays) and the facility has an occupancy rate of 90 percent or greater. However, these payments will be made only for the first 10 consecutive days during which the veteran is admitted as a patient for any stay in a VA or other hospital (a hospital stay could occur more than once in a calendar year) and only for the first 12 days in a calendar year during which the veteran is absent for purposes other than receiving hospital care." See 74 FR 19433.

In the proposed rule that preceded the addition of § 51.43, we stated that the basis for the 30-day residency requirement was that "State homes should receive per diem payments to hold beds only for permanent residents and only if the State home would likely fill the bed without such payments. Allowing payments for bed holds only after a veteran has been in a nursing home for at least 30 consecutive days (including overnight stays) appears to be sufficient to establish permanent residency." 73 FR 72402. In addition, the 2009 final rule confirmed VA's intent to make the 30-day rule a factor that directly affected eligibility for bed hold payments, stating: "We believe that 30 days is a minimal amount of time for demonstrating that a veteran intends to be a resident at the State home and that the veteran was not temporarily placed in the State home." 74 FR 19429.

VA adopted the 30-day residency requirement as the measure for determining whether a veteran would likely return to a State home after not having stayed there overnight, and in turn whether the State home should receive continued per diem payments in the veteran's absence to hold the veteran's bed. Through application of this requirement, however, VA has come to recognize that duration of residency in a State home is not an accurate predictor of whether a veteran is likely to return to a State home after a temporary absence. For instance, when absences resulting from the veteran's need for hospital care, the veteran's health status while hospitalized is actually what determines whether and