

**DEPARTMENT OF EDUCATION****34 CFR Parts 600 and 668****[Docket ID ED–2018–OPE–0076]****RIN 1840–AD38****Distance Education and Innovation****AGENCY:** Office of Postsecondary Education, Department of Education.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the general, establishing eligibility, maintaining eligibility, and losing eligibility sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA), related to distance education and innovation. In addition, the Secretary proposes to amend the Student Assistance General Provisions regulations issued under the HEA.

**DATES:** The U.S. Department of Education (the “Department” or “we”) must receive your comments on or before May 4, 2020.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

If you are submitting comments electronically, we strongly encourage you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), we strongly encourage you to convert the PDF to print-to-PDF format or to use some other commonly used searchable text format. *Please do not submit the PDF in a scanned format.* Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions.

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using [Regulations.gov](http://Regulations.gov), including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under “Help.”

- *Postal Mail, Commercial Delivery, or Hand Delivery:* The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about the proposed regulations, address them to Scott Filter,

U.S. Department of Education, 400 Maryland Ave. SW, Mail Stop 294–42, Washington, DC 20202.

*Privacy Note:* The Department’s policy is to make comments received from members of the public available for public viewing on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact Scott Filter at (202) 453–7249 or [Scott.Filter@ed.gov](mailto:Scott.Filter@ed.gov).

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

**SUPPLEMENTARY INFORMATION:****Executive Summary***Purpose of This Regulatory Action*

The purpose of these distance education and innovation regulations is to reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers. Institutions of higher education (IHEs) may be dissuaded from innovating because of added regulatory burden and uncertainty about how the Department will apply its regulations to new types of programs and methods of institutional educational delivery. In the past, the Department has not updated its regulations frequently enough to keep pace with new types of technology or educational innovations. For example, the current regulations do not address subscription-based programs or consider programs made possible through artificial intelligence-driven adaptive learning. On the other hand, the regulations refer to outdated technologies, in some cases based on statutory language, such as “facsimile transmission” and “video cassettes, DVDs, and CD-ROMs.” Because of the time it takes to implement new regulations, it is unlikely that the Department will be able to keep pace with developing technologies and other innovations in real time. These proposed regulations attempt to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students, and also provide sufficient flexibility to ensure that future innovations we cannot yet anticipate

have an opportunity to move forward without undue risk of a negative program finding or other sanction on an institution.

The Department’s proposed regulations are also designed to protect students and taxpayers from unreasonable risks. Inadequate consumer information could result in students enrolling in programs that will not help them meet their goals. In addition, institutions adopting innovative methods of educating students may expend taxpayer funds in ways that were not contemplated by Congress or the Department, resulting in greater risk to the taxpayers of waste, fraud, and unnecessary spending. These proposed regulations attempt to limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors. This delegation of authority through the higher education regulatory triad entrusts oversight of most consumer protections to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department.

Through this regulatory action, the Department proposes to: (1) Amend the definitions of “clock hour” and “credit hour” to provide flexibility to distance education and other types of educational programs that emphasize demonstration of learning rather than seat time when measuring student outcomes, while still allowing those programs to participate in the Federal Student Aid programs authorized under title IV of the HEA (title IV, HEA programs), (2) amend the definitions of “distance education” and “correspondence course” to account for changes in distance education technology and the types of programs offered by institutions, *e.g.*, competency-based education (CBE) programs, (3) clarify, through new definitions, the requirements of regular and substantive interaction between students and instructors for a course to be considered distance education and not a correspondence course, (4) define “incarcerated student” and “juvenile justice facility” to clarify the Pell Grant eligibility requirements for incarcerated students, (5) allow students enrolled in foreign institutions to take courses at domestic institutions, (6) define “subscription-based programs” and establish the conditions for disbursement of title IV, HEA assistance in such programs, (7) clarify and simplify the requirements for “direct assessment programs,” including regulations for the determination of equivalent credit hours for such

programs, (8) define a “week of instruction” for asynchronous online programs to clarify how that term applies to distance education or correspondence courses, (9) amend regulations to ensure the treatment of students enrolled in distance or competency-based programs in a manner consistent with their peers in traditional programs, and (10) amend regulations regarding financial responsibility to codify and clarify requirements when there is an institutional change of ownership or control.

#### *Summary of the Major Provisions of This Regulatory Action*

The proposed regulations would—

- Clarify that when calculating the number of correspondence students, a student is considered “enrolled in a correspondence course” if correspondence courses constitute 50 percent or more of the courses in which the student enrolled during an award year;
  - Limit the requirement for the Secretary’s approval to an institution’s first direct assessment program at each credential level;
  - Require institutions to report to the Secretary when they add a second or subsequent direct assessment program or establish a written arrangement for an ineligible institution or organization to provide more than 25 percent, but no more than 50 percent, of a program;
  - Require prompt action by the Department on any applications submitted by an institution to the Secretary seeking a determination that it qualifies as an eligible institution and any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for HEA programs;
  - Allow students enrolled in eligible foreign institutions to complete up to 25 percent of an eligible program at an eligible institution in the United States; and clarify that, notwithstanding this provision, an eligible foreign institution may permit a Direct Loan borrower to perform research in the United States for not more than one academic year if the research is conducted during the dissertation phase of a doctoral program;
  - Clarify the conditions under which a participating foreign institution may enter into a written arrangement with an ineligible entity;
  - Provide flexibility to institutions to modify their curriculum at the recommendations of industry advisory boards and without relying on a traditional faculty-led decision-making process;

- Provide flexibility to institutions when conducting clock-to-credit hour conversions to eliminate confusion about the inclusion of homework time in the clock-hour determination;
  - Clarify the eligibility requirements for a direct assessment program;
  - Clarify, in consideration of the challenges to institutions posed by minimum program length standards associated with occupational licensing requirements, which vary from State to State, that an institution may demonstrate a reasonable relationship between the length of a program, as defined in 20 U.S.C. 1001(b)(1), and the entry-level requirements of the occupation for which that program prepares students;
  - Clarify that a student is not considered to have withdrawn for purposes of determining the amount of title IV grant or loan assistance that the student earned if the student completes all the requirements for graduation for a non-term program or a subscription-based program, if the student completes one or more modules that comprise 50 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program;
  - Remove provisions pertaining to the use and calculation of the Net Present Value of institutional loans for the calculation of the 90/10 ratio for for-profit IHEs, because the provisions are no longer applicable;
  - Clarify satisfactory academic progress requirements for non-term credit or clock programs, term-based programs that are not a subscription-based program, and subscription-based programs;
  - Clarify that the Secretary will rely on the requirements established by an institution’s accrediting agency or State authorizing agency to evaluate an institution’s appeal of a final audit or program review determination that includes a finding about the institution’s classification of a course or program as distance education, or the institution’s assignment of credit hours;
  - Clarify that the Secretary may deny an institution’s application for certification or recertification to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits in a timely manner; and
  - Clarify that an institution is not financially responsible if a person who exercises substantial ownership or control over an institution also exercised substantial ownership or control over another institution that

closed without executing a viable teach-out plan or agreement.

*Costs and Benefits:* As further detailed in the *Regulatory Impact Analysis*, the benefits of the proposed regulations include—(1) updating and clarifying definitions of key terms related to distance education, correspondence courses, direct assessment and competency-based programs to support the continued development of these innovative educational methods; (2) identifying a disbursement process for a subscription model for competency-based education so schools know how their students can access title IV aid for them, removing one potential barrier to growth of such programs; and (3) eliminating references to outdated technologies and making the regulations flexible enough to accommodate further technological advancements.

Institutions that choose to offer these programs would benefit from the clarifications of terms and processes involved in establishing and administering direct assessment programs and reduced barriers to entry. While those currently offering such programs or competency-based courses would be best positioned to offer new programs in the near-term, we expect additional institutions to take advantage of the opportunities to offer new programs. While it is more a function of continued evolution in the postsecondary market, removing the barriers to entry will increase competition and some institutions could face a cost associated with losing students to those that offer appealing new programs.

The emphasis on flexibility, workforce development, and innovative educational approaches could be beneficial to students. Students, especially non-traditional students that have been a key market for existing competency-based or distance education programs, could benefit from flexible pacing and different models for assessing progress. Additionally, while competency-based models are a relatively new segment of the postsecondary market, some evidence suggests that the self-pacing model and other efforts by institutions may allow students to graduate with lower debt, but it is not clear how that factor will develop as more institutions develop competency-based programs.<sup>1</sup>

The proposed regulations would involve a significant amount of monetary transfers among the Federal government, students, and institutions

<sup>1</sup> [www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/](http://www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/).

through increased Pell Grants and Federal student loans. The Department assumes students in the existing baseline who switch from one program to another will receive similar amounts of Federal aid and not have a significant budget impact. We estimate that new students attracted to the new competency-based or other programs developed in part because of the proposed regulations would have a net Federal budget impact over the 2020–2029 loan cohorts of \$[– 237] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of \$1,021 million over 10 years, for a total net impact of \$784 million. The Department provides additional detail related to budget estimates in the *Regulatory Impact Analysis* section and provides burden estimates in the *Paperwork Reduction Act* section of this NPRM.

*Invitation to Comment:* We invite you to submit comments regarding these proposed regulations. 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 address, and provide relevant information and data whenever possible, even when there is no specific solicitation of data and other supporting materials in the request for comment. We also urge you to arrange your comments in the same order as the proposed regulations. Please do not submit comments that are outside the scope of the specific proposals in this NPRM, as we are not required to respond to such comments.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 13771 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about the proposed regulations by accessing *Regulations.gov*. You may also inspect the comments in person at 400 Maryland Ave. SW, Washington, DC, between 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays. To schedule a time to inspect comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

*Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record:* On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed regulations. To schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### *Background*

The Secretary proposes to amend §§ 600.2, 600.7, 600.10, 600.20, 600.21, 600.52, 600.54, 668.1, 668.2, 668.3, 668.5, 668.8, 668.10, 668.13, 668.14, 668.15, 668.22, 668.28, 668.34, 668.111, 668.113, 668.164, 668.171, 668.174, and 668.175 of title 34 of the Code of Federal Regulations (CFR). The regulations in 34 CFR part 600 pertain to institutional eligibility under the HEA. The regulations in 34 CFR part 668 pertain to student assistance general provisions. We are proposing these amendments to—(1) clarify that when calculating the number of correspondence students, a student is considered “enrolled in a correspondence course” if correspondence courses constitute 50 percent or more of the courses in which the student enrolled during an award year; (2) limit the requirement for the Secretary's approval to an institution's first direct assessment program at each credential level; (3) require prompt action by the Department on any applications submitted by an institution to the Secretary seeking a determination that it qualifies as an eligible institution and any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for title IV, HEA programs; (4) require institutions to report to the Secretary when they add a second or subsequent direct assessment program or establish a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program; (5) allow students enrolled in eligible foreign institutions to complete up to 25 percent of an eligible program at an eligible institution in the United States; (6) clarify that an eligible foreign institution may permit an individual Direct Loan recipient to perform research in the United States for not more than one academic year, if the research is conducted during the dissertation phase of a doctoral program; (7) clarify the conditions under which a foreign school may enter into a written arrangement with an ineligible entity to provide educational

services; (8) provide flexibility to institutions to modify curricula at the recommendations of industry advisory boards that include employers who hire program graduates, widely recognized industry standards and organizations, or industry-recognized credentialing bodies; (9) provide flexibility to institutions when conducting clock-to-credit hour conversions to eliminate confusion about the inclusion of homework time in the clock-hour determination; (10) clarify the requirements for a direct assessment program to qualify as an eligible program; (11) clarify the eligibility requirements for programs that prepare students for gainful employment in a recognized occupation by establishing how an institution may demonstrate a reasonable relationship between the length of a program, as defined in 20 U.S.C. 1001(b)(1), and the entry-level requirements of the occupation for which that program prepares students; (12) clarify that a student is not considered to have withdrawn if the student completes all the requirements for graduation from his or her educational program, if the student completes one or more modules that comprise 50 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program; (13) remove provisions pertaining to the use and calculation of the Net Present Value of institutional loans for the calculation of the 90/10 ratio for for-profit institutions, because the provisions are no longer applicable; (14) clarify the requirements for satisfactory academic progress for students enrolled in non-term credit or clock programs, term-based programs that are not a subscription-based program, and subscription-based programs; (15) clarify that the Secretary will rely on the requirements established by an institution's accrediting agency to evaluate an institution's compliance when the institution appeals a final audit or program review determination that includes a finding about the institution's classification of a course or program as distance education, or the institution's assignment of credit hours; (16) clarify that the Secretary may deny an institution's application for certification or recertification to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits in a timely manner; (17) clarify that an institution is not financially responsible if a person who exercises substantial

ownership or control over an institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution; and (18) make technical and conforming changes.

#### Public Participation

On July 31, 2018, we published a notice in the **Federal Register** (83 FR 36814) announcing our intent to establish a negotiated rulemaking committee to prepare proposed regulations for the title IV, HEA programs. We also announced our intention to create two subcommittees for this committee. In addition, we announced three public hearings at which interested parties could comment on the topics suggested by the Department and could suggest additional topics that should be considered for action by the negotiating committee. The hearings were held on—

- September 6, 2018, in Washington, DC;
- September 11, 2018, in New Orleans, LA; and
- September 13, 2018 in Sturtevant, WI.

Transcripts from the public hearings are available at: [www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html](http://www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html).

We also invited parties unable to attend a public hearing to submit written comments on the proposed topics and to submit other topics for consideration. Written comments submitted in response to the July 31, 2018, **Federal Register** notice may be viewed through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov), within docket ID ED–2018–OPE–0076. Instructions for finding comments are also available on the site under “Help.”

#### Negotiated Rulemaking

Section 492 of the HEA, 20 U.S.C. 1098a, requires the Secretary to obtain public involvement in the development of proposed regulations affecting programs authorized by title IV of the HEA. After obtaining extensive input and recommendations from the public, including individuals and representatives of groups involved in the title IV, HEA programs, the Secretary in most cases, must subject the proposed regulations to a negotiated rulemaking process. If negotiators reach consensus on the proposed regulations, the Department agrees to publish without substantive alteration a defined

group of regulations on which the negotiators reached consensus unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreement reached during negotiations. Further information on the negotiated rulemaking process can be found at: [www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html](http://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html).

On October 15, 2018, the Department published a notice in the **Federal Register** (83 FR 51906) announcing its intention to establish one negotiated rulemaking committee—the Accreditation and Innovation Committee (committee)—to prepare proposed regulations for the title IV, HEA programs. The notice set forth a schedule for the committee meetings and requested nominations for individual negotiators to serve on the negotiating committee. We also announced the creation of three subcommittees—the Distance Learning and Innovation Subcommittee (referred to as the “subcommittee” in this document unless otherwise noted), the Faith-Based Entities Subcommittee, and the TEACH Grants Subcommittee—and requested nominations for individuals with pertinent expertise to participate on the subcommittees.

The Department sought negotiators to represent the following groups for the Accreditation and Innovation Committee: Students; legal assistance organizations that represent students; financial aid administrators at postsecondary institutions; national accreditation agencies; regional accreditation agencies; programmatic accreditation agencies; IHEs primarily offering distance education; IHEs eligible to receive Federal assistance under title III, parts A, B and F, and title V of the HEA, which include Historically Black Colleges and Universities, Hispanic-Serving Institutions, American Indian Tribally Controlled Colleges and Universities, Alaska Native and Native Hawaiian-Serving Institutions, and other institutions with a substantial enrollment of needy students as defined in title III of the HEA; two-year public IHEs; four-year public IHEs; faith-based IHEs; private, nonprofit IHEs; private, proprietary IHEs; employers; and veterans.

For the Distance Learning and Innovation Subcommittee, the Department sought negotiators to represent the following groups: Students; legal assistance organizations that represent students; private, nonprofit IHEs, with knowledge of direct assessment programs and

competency-based education; private, for-profit IHEs, with knowledge of direct assessment programs and competency-based education; public IHEs, with knowledge of direct assessment programs and competency-based education; accrediting agencies; associations or organizations that provide guidance to or represent institutions with direct assessment programs and competency-based education; financial aid administrators at postsecondary institutions; academic executive officers at postsecondary institutions; nonprofit organizations supporting inter-State agreements related to State authorization of distance or correspondence education programs; and State higher education executives.

The Accreditation and Innovation negotiating committee included the following members:

Susan Hurst, Ouachita Baptist University, and Karen McCarthy (alternate), National Association of Student Financial Aid Administrators, representing financial aid administrators at postsecondary institutions.

Robyn Smith, Legal Aid Foundation of Los Angeles, and Lea Wroblewski (alternate), Legal Aid of Nebraska, representing legal assistance organizations that represent students.

Ernest McNealey, Allen University, and Eric Hill Hart (alternate), North Carolina A&T State University, representing IHEs that award or have awarded TEACH grants and that are eligible to receive Federal assistance under title III, Parts A, B, and F, and title V of the HEA, which include Historically Black Colleges and Universities, Hispanic-Serving Institutions, American Indian Tribally Controlled Colleges and Universities, Alaska Native and Native Hawaiian-Serving Institutions, Predominantly Black Institutions, and other institutions with a substantial enrollment of needy students as defined in title III of the HEA.

David Dannenberg, University of Alaska, Anchorage, and Tina Falkner (alternate), University of Minnesota, representing four-year public IHEs.

Terry Hartle, American Council on Education, and Ashley Ann Reich (alternate), Liberty University, representing private, nonprofit IHEs.

Jillian Klein, Strategic Education, Inc., and Fabian Fernandez (alternate), Schiller International University, representing private, proprietary IHEs.

William Pena, Southern New Hampshire University, and M. Kimberly Rupert (alternate), Spring Arbor University, representing IHEs primarily offering distance education.

Christina Amato, Sinclair College, and Daniel Phelan (alternate), Jackson College, representing two-year public IHEs.

Barbara Gellman-Danley, Higher Learning Commission, and Elizabeth Sibolski (alternate), Middle States Commission on Higher Education, representing regional accreditation agencies.

Laura King, Council on Education for Public Health, and Janice Knebl (alternate),

American Osteopathic Association Commission on Osteopathic College Accreditation, representing programmatic accreditation agencies.

Michale S. McComis, Accrediting Commission of Career Schools and Colleges, and India Y. Tips (alternate), Accrediting Bureau of Health Education Schools, representing national accreditation agencies.

Steven M. Sandberg, Brigham Young University, and David Altshuler (alternate), San Francisco Theological Seminary, representing faith-based IHEs.

Joseph Verardo, National Association of Graduate-Professional Students, and John Castellaw (alternate), University of Arizona, representing students.

Edgar McCulloch, IBM Corporation, and Shaun T. Kelleher (alternate), BAM Technologies, representing employers.

Daniel Elkins, Enlisted Association of the National Guard of the U.S., and Elizabeth Bejar (alternate), Florida International University, representing veterans.

Annamarie Weisman, U.S. Department of Education, representing the Department.

The negotiated rulemaking committee met to develop proposed regulations on January 14–16, 2019; February 19–22, 2019; March 25–28, 2019; and April 1–3, 2019.

The negotiated rulemaking committee also tasked a subcommittee to make recommendations on issues related to Distance Learning and Innovation. The subcommittee met on January 17–18, 2019; February 12–13, 2019; and March 11–12, 2019. The membership of the Distance Learning and Innovation Subcommittee included the following members:

Mary C. Otto, Campbell University, representing financial aid administrators at postsecondary institutions.

Jessica Ranucci, New York Legal Assistance Group, representing legal assistance organizations that represent students.

Merodie Hancock, Thomas Edison University, representing public IHEs, with knowledge of direct assessment programs and competency-based education.

Jody Feder, National Association of Independent Colleges and Universities, representing private, nonprofit IHEs, with knowledge of direct assessment programs and competency-based education.

Sue Huppert, Des Moines University, representing nonprofit organizations supporting inter-State agreements related to State authorization of distance or correspondence education programs.

Russell Poulin, The WICHE Cooperative for Educational Technologies, representing associations or organizations that provide guidance to or represent institutions with direct assessment programs and competency-based education.

Robert E. Anderson, State Higher Education Executive Officers, representing State higher education executives.

Jillian Klein, Strategic Education, Inc., representing private, for-profit IHEs, with

knowledge of direct assessment programs and competency-based education.

Leah K. Matthews, Distance Education Accrediting Commission, representing accrediting agencies.

David Schejbal, Marquette University, representing academic executive officers at postsecondary institutions.

Amanda Martinez, American University, and Joseph Verardo, National Association of Graduate-Professional Students, representing students.

Carolyn Fast, Office of the New York State Attorney General, representing State attorneys general.

Gregory Martin and David Musser, U.S. Department of Education, representing the Department.

At its first meeting, the full negotiated rulemaking committee reached agreement on its protocols and proposed agenda. The protocols provided, among other things, that the committee would operate by consensus. Consensus means that there must be no dissent by any member for the committee to have reached agreement. Under the protocols, the Department would use the consensus-based language in its proposed regulations for each “bucket” of issues, as described in more detail below, on which final consensus was achieved. Furthermore, the Department would not substantively alter the consensus-based language of its proposed regulations unless the Department reopened the negotiated rulemaking process or provided a written explanation to the committee members regarding why it decided to depart from that language.

At the first meeting, the Department received a petition for membership from David Tandberg, Vice President of Policy Research and Strategic Initiatives at the State Higher Education Executive Officers Association, to represent State Higher Education Executive Officers. The negotiated rulemaking committee voted to include Mr. Tandberg on the full committee. The Department also received petitions to add other members. The Department received a petition to add a member representing State Attorneys General to the full committee and the Distance Education and Innovation subcommittee. The committee did not agree to add a member representing this constituency to the full committee but did agree by consensus to add Carolyn Fast, a representative of the New York Attorney General, as a member to the subcommittee.

During the first meeting, the negotiating committee agreed to negotiate an agenda of 22 issues related to distance learning and innovation, including some definitions and topics related to accreditation that have been

addressed in another notice of proposed rulemaking published in the **Federal Register** on June 12, 2019 (84 FR 27404). These 22 issues were: Accreditation-related definitions; definitions of “additional location” and “branch campus”; definition of “clock hour”; definition of “credit hour”; definitions of “distance education” and “correspondence course”; definitions of “incarcerated student” and “nonprofit”; State authorization of distance education; definitions of “teach-out” and “teach-out agreement”; changes in ownership and eligibility of additional locations; limitations on taking coursework in the United States while enrolled at a foreign institution; written arrangements with ineligible institutions or organizations; subscription period disbursement; definition of a “week of instruction for asynchronous online programs”; clock-to-credit hour conversion; direct assessment programs; certification procedures; limitation on hours in a program that exceeds the State minimum for employment; return of title IV funds; satisfactory academic progress; disclosure related to prior learning assessment; use of accrediting agency definitions for audit or program review appeals; and financial responsibility. Under the protocols, these issues were placed into a “bucket” on distance learning and innovation upon which a final consensus would be voted on by the full negotiated rulemaking committee.

During committee meetings, the committee reviewed and discussed the Department’s drafts of regulatory language and the committee and subcommittee members’ alternative language and suggestions. The committee was briefed by each of the subcommittees, including the Distance Learning and Innovation Subcommittee, through extensive written materials and in-person presentations. At the final meeting on April 3, 2019, the committee reached consensus on the Department’s proposed regulations. For this reason, and according to the committee’s protocols, all parties who participated or were represented in the negotiated rulemaking and the organizations that they represent have agreed to refrain from commenting negatively on the consensus-based regulatory language. For more information on the negotiated rulemaking sessions, please visit: [www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html#info](http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html#info).

#### *Summary of Proposed Changes*

The proposed regulations would—

- Amend in § 600.2 the definitions of “clock hour,” “correspondence course,” “credit hour,” “distance education,” “incarcerated student,” and “nonprofit institution”;
  - Add in § 600.2 new definitions for “academic engagement” and “juvenile justice facility”;
  - Provide in § 600.7 that, when calculating the number of correspondence students for purposes of determining whether an institution exceeds statutory limitations on the number of such students it enrolls, a student is considered “enrolled in correspondence courses” if correspondence courses constituted more than 50 percent of the courses in which the student enrolled during an award year;
  - Amend § 600.10 to require the Secretary’s approval for an institution’s first direct assessment program at each credential level;
  - Amend § 600.20 to require prompt action by the Department on any materially complete applications submitted by participating IHEs to the Secretary seeking approval for new programs. Additionally, the Department proposes to amend this section to remove the requirement that an institution obtain approval to offer additional educational programs, unless the Secretary alerts the institution that a program must be approved;
  - Establish new reporting requirements in § 600.21 to require an institution to report to the Secretary its addition of a second or subsequent direct assessment program or its establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program pursuant to § 668.5(c);
  - Amend in § 600.52 the definition of “foreign institution” to clarify that students enrolled in eligible foreign institutions may complete up to 25 percent of an eligible program at an eligible institution in the United States, and that an institution may permit an individual Direct Loan borrower to perform research in the United States for not more than one academic year, if conducted during the dissertation phase of a doctoral program;
  - Clarify in § 600.54 the conditions under which a foreign school may enter into a written arrangement with an ineligible entity;
  - Provide clarifying edits in § 668.1;
  - Remove the definition of “Academic Competitiveness Grant,” amend the definition of “full-time student” to include students enrolled in subscription-based programs, provide clarifying edits to the definition of “third-party servicer,” and define “subscription-based program” in § 668.2;
  - Amend § 668.3 to clarify the definition of “a week of instructional time for a program offered using asynchronous coursework through distance education”;
  - Amend § 668.5 to increase the flexibility of institutions using written arrangements to timely provide relevant educational program offerings, allowing institutions to modify their curriculum at the recommendations of industry advisory boards or faculty review committees, and calculating the percentage of a program that is offered by an ineligible institution or organization;
  - Amend § 668.8 to provide additional flexibility for institutions that are conducting a clock-to-credit hour conversion by equating a semester or trimester hour to 30 clock hours of instruction;
  - Amend § 668.10 to clarify the requirements for a direct assessment program to qualify as an eligible program;
  - Amend § 668.13 to clarify the requirements the Secretary will use to certify a location as a branch campus and to grant renewal of certification to an institution if the Secretary does not make a determination within 12 months of the expiration of its current period of participation and provide a number of clarifying edits;
  - Provide clarifying edits in § 668.14 and provide additional flexibility to programs described in 20 U.S.C. 1001(b)(1), in demonstrating a reasonable relationship between the length of the program and licensure requirements associated with the recognized occupation for which the program prepares students;
  - Provide clarifying edits in § 668.15;
  - Amend § 668.22 to remove any references to “modules” with respect to non-term credit hour and clock hour programs and clarify that a student is not considered to have withdrawn if the student completes all the requirements for graduation before completing the days or hours in the period that he or she was scheduled to complete, if the student completes one or more modules that comprise 50 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program;
  - Remove the provisions pertaining to the use and calculation of the Net Present Value of institutional loans from § 668.28, because those provisions are no longer applicable;
  - Amend § 668.34 to clarify that an institution may establish a program’s maximum time frame in credit hours or in calendar time, that a pace for evaluation for a non-term credit or clock hour program is not required due to the requirements that students complete half of the hours and weeks of instruction in an academic year before a subsequent disbursement of aid can be made, and that an institution may calculate a student’s pace in a term-based program that is not a subscription-based program by dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted or by determining the number of hours that the student should have completed at the evaluation point in order to complete the program within the maximum timeframe;
  - Provide clarifying edits in § 668.111;
  - Amend § 668.113 to clarify that in cases where an institution or third-party servicer appeals a final audit or program review determination that includes a finding about the institution’s classification of a course or program as distance education, or the institution’s assignment of credit hours, the Secretary relies on the requirements established by the institution’s accrediting agency or State approval agency to evaluate the institution’s or servicer’s compliance;
  - Provide clarifying and technical edits in § 668.164 for a subscription-based program by revising the early disbursement rules to clarify the earliest an institution may disburse funds to students in such a program;
  - Amend § 668.171 to clarify that the Secretary may deny the institution’s application for certification or recertification to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits timely;
  - Amend § 668.174 to clarify that an institution is not financially responsible if a person who exercises substantial ownership or control over the institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution’s accrediting agency and faithfully executed by the institution and to provide clarifying edits; and
  - Provide clarifying edits in § 668.175.
- Significant Proposed Regulations:* We discuss 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.

### § 600.2 Definitions

#### Academic Engagement

*Statute:* The HEA does not define “academic engagement.”

*Current Regulations:* There is no regulatory definition of “academic engagement.” The regulations governing the return of title IV funds process under § 668.22 set certain requirements for activities that may be considered “academic attendance” or “attendance at an academically-related activity” and use those requirements as the basis for establishing a student’s withdrawal date. The types of academic attendance identified in § 668.22(l)(7)(i)(A) include the following: (1) Physically attending a class where there is an opportunity for direct interaction between the instructor and students; (2) submitting an academic assignment; (3) taking an exam, interactive tutorial, or computer assisted instruction; (4) attending a study group assigned by the institution; (5) participating in an online discussion about academic matters; and (6) initiating contact with a faculty member to ask a question about the academic subject studied in the course. Section 668.22(l)(7)(i)(B) provides that certain types of activities may not be considered academic attendance or attendance at an academically-related activity, including (1) living in institutional housing; (2) participating in an institution’s meal plan; (3) logging into an online class without active participation; and (4) participating in academic counseling or advisement.

*Proposed Regulations:* The Department proposes to incorporate the majority of the language in the regulations governing the return of title IV funds in § 668.22(l)(7) relating to requirements for academic attendance and attendance at academically-related activities into a definition of “academic engagement” under § 600.2. We propose to modify those requirements by specifying that academic engagement includes active participation by a student in activities related to their course of study, such as an online course with an opportunity for interaction or an interactive tutorial, webinar, or other interactive computer-assisted instruction. It does not include, for example, simply logging into an online platform. Such interaction could include the use of artificial intelligence or other adaptive learning tools so that the student is receiving feedback from technology-mediated instruction. We also propose to strike the phrase “without active participation” and

replace it with “without any further participation.”

*Reasons:* The definitions of “academic attendance” and “attendance at an academically-related activity” were included in a final rule published in the **Federal Register** on October 29, 2010 (75 FR 66832) to clarify the types of activities that the Department viewed as sufficient for an institution to use as a basis for establishing a student’s withdrawal date for purposes of the return of title IV funds process. The Department proposes to exclude certain activities, such as participating in academic counseling or advisement or logging into an online class without participation, from the types of activities that can be considered academic attendance, because these activities have been sources of past abuse and, while potentially beneficial, may not by themselves help a student progress through their program.

During subcommittee meetings, the Department proposed to use the framework for defining “academic attendance” that had been established in the return of title IV funds regulations to establish requirements for earning a clock hour in a program using distance education or correspondence courses. The underlying concepts behind the requirements for attendance focus on student participation in activities that are academic in nature. Thus, they are easily applicable to the requirements for earning clock hours. Members of the subcommittee were generally supportive of this approach but proposed to move the requirements for academic attendance to the definitions under part 600 for consistency. The Department agreed to this approach, and it was later agreed to by the full committee.

In response to comments from members of the subcommittee and the full committee, the Department made several changes to the requirements for academic attendance as they existed in the return of title IV funds regulations. One subcommittee member expressed concern that participating in an online tutorial or webinar that was not interactive was more akin to reading or homework performed passively, and therefore should not be included in a definition of “academic engagement.” The Department added the word “interactive” before the words “tutorial, webinar, or other interactive computer-assisted instruction” to address this member’s concern. This change clarifies that the Department expects that academic engagement will involve the opportunity for active engagement by a student rather than only the passive consumption of information. Active engagement in this regard could include

the use of artificial intelligence or other adaptive learning tools so that the student is receiving feedback from technology-mediated instruction. The interaction need not be exclusively with a human instructor.

The Department also made changes in response to other comments from committee members. We revised paragraph (2)(i) of the definition, which had previously referred to physical attendance in a class, to include attendance at a synchronous online class where there is an opportunity for interaction between the instructor and students. This change reflects the committee’s view that this type of academic engagement is similar in both classroom and online modalities. We also propose to include “field or laboratory activity” as academic attendance, because these activities are interactive and have traditionally been considered forms of academic engagement. Finally, to clarify an ambiguity raised by committee members, we rephrased paragraph (3)(iii) to omit the word “active” before “participation” and instead refer to “any further participation.”

#### Clock Hour

*Statute:* The HEA does not define a “clock hour.” 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.

*Current Regulations:* Section 600.2 defines a “clock hour” as a period of time consisting of a 50- to 60-minute class, lecture, or recitation in a 60-minute period; a 50- to 60-minute faculty supervised laboratory, shop training, or internship in a 60-minute period; or 60 minutes of preparation in a correspondence course.

*Proposed Regulations:* The proposed regulations would define a “clock hour in a distance education program” as 50 to 60 minutes in a 60-minute period of attendance in a synchronous class, lecture, or recitation where there is an opportunity for direct interaction between the instructor and students. The proposed regulations specify that a clock hour in a distance education program must meet all accrediting

agency and State requirements and that it does not meet the conditions of the definition if it exceeds an agency's restrictions on the number of clock hours that may be offered through distance education. As is always the case, the Department may take action if an agency is not following its policies. The proposed regulations would also require that an institution be technically capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour in a distance education program through technology that measures time spent on relevant work or other means.

*Reasons:* In recent years, distance learning technology has sufficiently advanced to permit institutions to conduct remotely synchronous, face-to-face instruction with students and to monitor the exact amount of time that students spend participating in these learning sessions. However, the current regulatory definition of "clock hour" has existed in substantially the same form since it was promulgated as part of the Basic Educational Opportunity Grant regulations on November 6, 1974 (39 FR 39412), except for an amendment to include a definition relating to correspondence programs. The current definition therefore predates the internet and the emergence of distance education programs.

The current definition of "clock hour" presumes that, in programs other than correspondence programs, students will be in a classroom, laboratory, or other physical setting and will be supervised by one or more faculty members. Because of this presumption, the Department has received numerous questions from institutions regarding whether the regulations permit any distance education coursework to use clock hours for title IV purposes. In response to these questions, the Department has previously adopted the position that a clock hour program can include clock hours earned through distance education, but only if the institution's or program's accrediting agency permits the institution to use that modality and the institution has sufficient technological resources to monitor a student's academic engagement in 50 to 60 minutes of distance education.

We propose to amend the definition of "clock hour" to codify this policy, and to further specify that only clock hours that involve synchronous instruction where students have an opportunity to interact with instructors meet the requirements of the proposed definition. We believe that this definition closely aligns with the requirements of the current definition of

"clock hour" while incorporating reasonable requirements to ensure that institutions can monitor a student's participation during each hour. The proposed definition would also clearly distinguish between activities that have historically been included in the definition of "clock hour," such as instruction and hands-on training, and activities such as reading or studying that would have been considered homework and would not have counted toward the student's completion of clock hours under the current regulations.

States and accrediting agencies may also have an interest in limiting the number of hours that students are permitted to earn through distance education or setting specific standards for hours earned through online training, particularly when the hours are associated with programs or professions that require hands-on training. The Department proposes to clarify that any hours that are not approved or permitted by States or accrediting agencies would not meet the requirements of the Department's definition of "clock hour" as the Department is relying upon those approvals to make its determinations.

#### Correspondence Course

*Statute:* The HEA does not define "correspondence course." Institutional eligibility requirements in section 102(a)(3) of the HEA provide that institutions offering more than 50 percent of their courses by correspondence or enrolling 50 percent or more of their students in correspondence courses, are ineligible for title IV, HEA program assistance.

*Current Regulations:* The definition of "correspondence course" in § 600.2 states that interaction between the instructor and the student in such a course is limited, is not regular and substantive, and is primarily initiated by the student. The definition also notes that a correspondence course is typically designed so that a student proceeds through the course at the student's own pace.

*Proposed Regulations:* The Department proposes to change the definition of "correspondence course" to refer to "instructors" rather than "the instructor" and to strike the sentence indicating that correspondence courses are typically self-paced.

*Reasons:* Much of the distinction between correspondence courses and distance learning courses depends upon the role of the instructor. However, the term "instructor" has been the subject of questions from the field and a recent audit by the Department's Office of the

Inspector General. We also believe that the definition should be changed because approaches other than a single instructor at the front of a traditional lecture hall may be effective at helping students learn.

The current definition of "correspondence course" suggests that only one instructor is responsible for a given course and is involved with the majority of academic interactions with students. However, the Department is aware of many postsecondary programs that use more than one instructor to teach a course, including those that rely heavily on the use of non-credentialed graduate students to provide a significant amount of instruction or grading. Other arrangements utilize a team approach to educating a student where each member of the team may perform a different function. In some team-taught courses or programs, each instructor uses his or her specialized expertise to serve students in different ways. These arrangements occur in correspondence courses as well as in in-person courses. Therefore, the Department proposes to make the term "instructors" plural in the definition of a "correspondence course." The Department also seeks to clarify that instructional support roles directly related to the course meet the definition of "instructor" as long as the roles of such personnel meet qualifications for instruction established by the institution's accrediting agency.

The current definition of "correspondence course" indicates that correspondence courses are typically self-paced. While self-pacing is a facet of many correspondence courses, the Department does not consider whether a course is self-paced when distinguishing a correspondence course from a course offered using distance education. Instead, the Department evaluates the level of interaction between students and instructors in such courses. Therefore, the sentence relating to self-pacing in correspondence courses is both unnecessary and confusing, and the Department proposes to strike it.

#### Credit Hour

*Statute:* The HEA does not define "credit hour." Section 481(a)(2) of the HEA defines an "academic year for an undergraduate program," in part, as requiring a minimum of 24 semester 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 to qualify for a loan under parts B or 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.

**Current Regulations:** The definition of "credit hour" in § 600.2, except as it pertains to the requirements for clock-to-credit hour conversion, is an amount of work represented in intended learning outcomes and verified by evidence of student achievement that is an institutionally established equivalency that reasonably approximates not less than—

- 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; or
- Other academic activities as established by the institution including laboratory work, internships, practica, studio work, and other academic work leading to an award of credit hours.

**Proposed Regulations:** The Department proposes to retain, in large part, the current definition of "credit hour," including time-based requirements relative to classroom instruction and other academic activities. The Department proposes that the amount of student work defined by the institution as appropriate in meeting the requirement for a credit hour be approved by its accrediting agency or State approval agency. In addition, current language defining a "credit hour," in part, "as an amount of work represented by intended learning outcomes and verified by evidence of student achievement" would be modified to reference work defined by an institution that is consistent with commonly accepted practice in postsecondary education. Finally, we propose to add language clarifying that, in determining the amount of work associated with a credit hour, an institution may take into account a variety of delivery methods,

measurements of student work, academic calendars, disciplines, and degree levels. This would incorporate into the regulation, sub-regulatory guidance in Dear Colleague Letter GEN-11-06<sup>2</sup> relevant to the current definition of "credit hour."

**Reasons:** The current regulatory definition of "credit hour" was established in 2010 (75 FR 66831), based on the HEA use of credit hour as a proxy for learning. Accrediting agencies have held institutions to various credit hour standards prior to that regulation. The credit hour's legacy dates to Andrew Carnegie and his desire to measure faculty workload in order to help them earn a pension. It was not designed to measure student learning, but has been used by accrediting agencies as an imperfect measure of student progress.<sup>3</sup> Those agencies' definitions have, in turn, been used by institutions to determine the types and amounts of title IV aid for which students are eligible. Over the last decade, as a result of new educational delivery methods and growth in distance education program offerings and enrollment, the Department believes that it is necessary to adopt a broader definition of "credit hour" that focuses on student learning rather than seat time and is flexible enough to account for innovations in the delivery models used by institutions. It is also important to recognize that the Department has no evidence that students complete the requisite two hours of out of class work required by the current definition, nor has the Department ever enforced or required institutions to prove that such homework is being completed. Additionally, the Department is concerned that students enrolled in most laboratory classes do not receive credit for out-of-class hours, even though such classes typically do have intense homework requirements that are necessary to carry out work in the laboratory.<sup>4,5</sup>

During the first meeting of the subcommittee, the Department proposed revising the definition of "credit hour" to eliminate time-based requirements and allow institutions to develop their own definitions, provided they met accrediting agency requirements. Citing the need for a definition of "credit

hour" that creates some measure of consistency across higher education, the subcommittee generally opposed removing time-based requirements associated with direct faculty instruction, out of class student work, and other academic activities from the definition. The proposed definition includes language ultimately agreed upon by the subcommittee, and on which consensus was reached, that retains existing time-based standards. While the Department and others expressed concern about the 2010 credit hour regulation as written, some subcommittee members believed that subsequent guidance, in particular, Dear Colleague Letter GEN-11-06, provided needed clarity.<sup>6</sup> The sub-regulatory guidance in the Dear Colleague Letter permits an institution to consider a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels in determining the amount of work associated with a credit hour. We agree that the Dear Colleague Letter established appropriately flexible standards and accommodates different types of programs, while ensuring consistency among postsecondary institutions in how credit hours are defined. Therefore, we agreed with the subcommittee recommendation to adopt language from Dear Colleague Letter GEN-11-06 into the proposed regulations. However, the Department continues to be concerned that, despite agreement that the institutions must be consistent in the way that they assign credit hours, in practice institutions and accreditors assign different values to laboratory classes than they do to lecture classes.<sup>7,8,9,10,11</sup> For example, a student who takes a lecture class that meets for three hours per week, and who is expected to do two hours of homework for each hour spent in class, is awarded three credits. This, despite ample evidence that most students do not spend anywhere near the amount of time doing homework that they are given credit for in the credit hour definition. On the other hand, a student who spends three hours in a laboratory class, and who is more likely to actually complete homework assignments since laboratory classes generally require

<sup>6</sup> [ifap.ed.gov/dpclatters/GEN1106.html](http://ifap.ed.gov/dpclatters/GEN1106.html)

<sup>7</sup> [www.lasc.edu/students/Credit%20Hour%20Definition%20for%20LASC.pdf](http://www.lasc.edu/students/Credit%20Hour%20Definition%20for%20LASC.pdf).

<sup>8</sup> [docs.accet.org/downloads/docs/doc15.pdf](http://docs.accet.org/downloads/docs/doc15.pdf).

<sup>9</sup> [academicprograms.humboldt.edu/sites/default/files/howtocalculatescu.pdf](http://academicprograms.humboldt.edu/sites/default/files/howtocalculatescu.pdf).

<sup>10</sup> [oucc.dasa.ncsu.edu/courseleaf-2/instructional-formats/](http://oucc.dasa.ncsu.edu/courseleaf-2/instructional-formats/).

<sup>11</sup> [www.ccsf.edu/en/employee-services/office-of-instruction/curriculum\\_committee/policies\\_resolutions/lecture\\_lab\\_hours.html](http://www.ccsf.edu/en/employee-services/office-of-instruction/curriculum_committee/policies_resolutions/lecture_lab_hours.html).

<sup>2</sup> [ifap.ed.gov/dpclatters/GEN1106.html](http://ifap.ed.gov/dpclatters/GEN1106.html).

<sup>3</sup> [www.newamerica.org/education-policy/higher-education/higher-ed-watch/the-curious-birth-of-the-credit-hour/](http://www.newamerica.org/education-policy/higher-education/higher-ed-watch/the-curious-birth-of-the-credit-hour/).

<sup>4</sup> [www.asccc.org/content/credit-where-credit-due-incongruities-value-lab-and-lecture](http://www.asccc.org/content/credit-where-credit-due-incongruities-value-lab-and-lecture).

<sup>5</sup> [www.dailytexanonline.com/2019/02/14/ut-students-deserve-more-credit-for-required-lab-courses](http://www.dailytexanonline.com/2019/02/14/ut-students-deserve-more-credit-for-required-lab-courses).

considerable preparation as well as laboratory reports after-the-fact, receives only one credit. As mentioned previously, because the credit hour was developed to measure eligibility for faculty employment benefits and since laboratory classes are often taught by graduate students or part-time faculty, there was less interest in assigning a credit value that would result in higher wages to individuals in these roles. This is unfair to students and it means that a student in a STEM major is likely to spend many more hours in class than a non-STEM major who is completing an equivalent number of credits in lecture classes. This leaves fewer hours available for a STEM student to work or participate in extracurricular activities and could contribute to STEM attrition. The Department wishes to call attention to the need to be consistent in the way that institutions and accreditors measure a credit hour, and that it may no longer be justifiable to treat lecture and laboratory classes differently when assigning credit. The new definition of a credit hour demands equitable treatment of student work; therefore, the amount of credit awarded for laboratory classes should be equivalent to that awarded for lecture classes.<sup>12</sup>

#### Distance Education

*Statute:* Section 103 of the HEA defines “distance education” as education that uses one or more technologies to deliver education to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The definition contains a list of technologies.

*Current Regulations:* Section 600.2 states that “distance education” means education that uses one or more technologies to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include the internet; one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices; audio conferencing; or video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in

conjunction with any of the other technologies listed.

*Proposed Regulations:* The Department proposes to amend the definition of “distance education” to refer to “the instructor or instructors” rather than simply “the instructor.” We also propose to eliminate references to the various types of media described under paragraph (2)(iv) of the definition and replace those references with the phrase “other media.”

We propose to add a paragraph (3) to the definition that would define an “instructor” as an individual responsible for delivering course content and who meets the qualifications for instruction established by the institution’s accrediting agency.

We also propose to add a paragraph (4) to the definition that would define “substantive interaction” as engaging students in teaching, learning, and assessment, consistent with the content under discussion, and including at least two of the following—providing direct instruction; assessing or providing feedback on a student’s coursework; providing information or responding to questions about the content of a course or competency; facilitating a group discussion regarding the content of a course or competency; or other instructional activities approved by the institution’s or program’s accrediting agency.

We propose to add a paragraph (5) to the definition that would require that an institution ensures regular interaction between a student and an instructor or instructors by, prior to the student’s completion of a course or competency, providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency, and monitoring the student’s academic engagement and success and ensuring that an instructor is responsible for proactively engaging in substantive interaction with the student when needed, on the basis of such monitoring, or upon request by the student.

*Reasons:* Since the Higher Education Opportunity Act of 2008 created a statutory definition of “distance education,” there have been significant improvements in distance education technology, including interactive software that supports student learning and learning analytics tools that help institutions better understand their students’ strengths and weaknesses, as well as students’ level of academic engagement.

Some of the improvements in distance education technology have contributed

to increased interest in CBE programs that measure student progress based on their demonstration of specific competencies rather than sitting in a seat or at a computer for a prescribed period of time. Many CBE programs are designed to permit students to learn at their own pace while having access to instructional resources and faculty support when assistance is needed. As postsecondary institutions have begun to experiment and innovate with new instructional modalities, including CBE, that are facilitated by distance education technology, the Department has been asked regularly about the meaning of several terms in the definition of “distance education” that, in this context, are ambiguous or unclear. The majority of these questions have related to the statutory requirement for distance education to “support regular and substantive interaction between the students and the instructor,” which is the primary factor (in addition to the types of technology that may be used) that distinguishes distance education from correspondence courses. Ambiguity with respect to this phrase has complicated the Department’s enforcement of the law through the resolution of audits or program reviews. Efforts to provide clarity through a series of sub-regulatory guidance documents have provided some assurance to institutions, but uncertainty remains about both the content of the guidance and its permanence because it is not in the regulations.

The lack of clarity in the definition of “distance education” has also prevented some institutions from using certain innovative technology or pedagogical techniques in online programs for fear of being found to be out of compliance with the Department’s regulations. The repercussions for violating the requirements of the definition of “distance education” can be particularly severe because an online course that does not meet the requirements for distance education is treated as a correspondence course, which could limit eligibility for title IV, HEA assistance for students enrolled in such a course, and could also cause an institution to lose eligibility for title IV, HEA program funds entirely if it offers too many correspondence courses or enrolls too many correspondence students. Therefore, the Department seeks to more clearly distinguish between correspondence courses and distance education courses.

Consistent with our proposed changes to the definition of “correspondence course,” we propose adding the words “or instructors” after the phrase “the

<sup>12</sup> [static.newamerica.org/attachments/2334-cracking-the-credit-hour/Cracking\\_the\\_Credit\\_Hour\\_Sept5\\_0\\_ab0048b12824428cba568ca359017ba9.pdf](https://static.newamerica.org/attachments/2334-cracking-the-credit-hour/Cracking_the_Credit_Hour_Sept5_0_ab0048b12824428cba568ca359017ba9.pdf).

instructor” in the definition of “distance education” to clarify that an institution can fulfill the requirements of the definition by ensuring that students regularly and substantively interact with multiple qualified instructors rather than a single individual. We also proposed to simplify the definition by replacing references to the various types of media that can be used to deliver distance education in conjunction with the internet, one-way and two-way electronic transmissions, and audio conferencing with the phrase “other media.”

The Department originally proposed to reformulate the concept of “instructor” in the definition of “distance education” by adding an option for students to interact with members of an “instructional team,” which could be comprised of more staff members than a single instructor. The subcommittee generally expressed support for the concept of an instructional team but indicated a preference for a strong role for subject-matter experts on such teams. However, the subcommittee did not agree on the extent to which subject-matter experts, as opposed to other staff members, would be required to interact with students. Some subcommittee members indicated that an instructional team should include a subject-matter expert who had the “primary responsibility” for interacting with students, whereas other members of the instructional team would identify problem areas and refer students to subject-matter experts when needed. Other members of the subcommittee indicated that requiring people to refer students to subject-matter experts does not reflect the current or future state of distance education, which is increasingly using analytics to identify struggling or accelerated learners in order to refer them to subject-matter experts or additional adaptive learning experiences to support their learning needs.

The subcommittee ultimately agreed with a proposal to define an “instructor” as a content expert whose qualifications would be determined by an institution’s accrediting agency. Accrediting agencies were chosen for this role because they are responsible for academic oversight and for setting standards related to academic quality. The full committee largely adopted the subcommittee’s approach to the requirements for an “instructor,” but decided to replace the concept of “content expert” with language that expressed that an instructor was someone who had responsibility for delivering course content, as opposed to

merely advising students about the courses in which a student should enroll or about administrative or technical matters.

The Department originally proposed to define “substantive interaction” as interaction that was “related to course material under discussion” to limit the types of interactions to those specific to the course. The subcommittee generally opposed that definition, because it did not specifically address teaching and learning. Following discussion of the topic, the subcommittee tentatively agreed to define “substantive” as engaging students in teaching, learning, and assessment, consistent with the content under discussion, and to identify providing direct instruction, assessing or providing feedback on a student’s coursework, providing information or responding to questions about the content of a course or competency, and facilitating a group discussion regarding the content of a course or competency as specific activities that would be considered “substantive” for purposes of fulfilling the requirement for supporting “regular and substantive interaction.” These activities were chosen because they represent traditional instructional tasks associated with teaching and learning, and because several subcommittee members wished to ensure that the definition did not de-emphasize learning in favor of administrative check-ins with students. The committee largely adopted the subcommittee’s approach to the definition of “substantive interaction,” but in recognition of the possibility that alternative methods of instruction could be as effective or more effective than established methods, the committee agreed to add a fifth option that would include other instructional activities that are approved by an institution’s accrediting agency or, in event that one or more of an institution’s programs is programmatically accredited, by the relevant programmatic accrediting agency (or agencies). The committee also agreed to define “substantive interaction” as including at least two instructional activities in order to prevent a course from qualifying as “distance education” if the institution provides only a single limited form of interaction as part of that course.

During the initial discussions in the subcommittee, the Department sought to reach agreement on possible requirements for the “regularity” of substantive interactions between students and instructors that were clear and easy to understand. Using those guidelines, the Department proposed one option that would have required

one substantive interaction in every week of instruction for a course that was worth at least three credit hours, or one substantive interaction for every two weeks of instruction for a course that was worth fewer than three credit hours. However, the subcommittee expressed concerns about that proposal and any other one-size-fits-all requirement for how often substantive interactions must occur, citing the wide variety of different types of online programs and pedagogical techniques used in postsecondary education. Several subcommittee members also indicated that requirements for regularity that were too restrictive would impose unnecessary administrative burdens on institutions and students, such as mandating that an instructor “check in” with a student even if the student did not need or request such a check-in or requiring students to submit blog posts or other similar assignments that may be tied more to a mandate for quantity than quality. One subcommittee member proposed tying the number and frequency of required substantive interactions to the number of credit hours associated with the courses in which a student was enrolled and the timeframe in which those courses would take place, but the Department indicated that it had attempted to develop a requirement using that framework and had determined that any such system would be too complex and administratively burdensome to implement.

Most of the subcommittee members ultimately agreed to a compromise in which an institution would ensure regular interaction by either scheduling substantive interactions on a predictable and regular basis, or by monitoring a student’s academic engagement and promptly and proactively engaging in substantive interaction with the student on the basis of that monitoring. The committee subsequently decided to require institutions to offer predictable and regular opportunities for substantive interaction and to monitor each student’s academic engagement and success in order to ensure that instructors engage with the student as needed. The committee also revised the wording of the proposed definition to require scheduled opportunities for interaction rather than scheduled interactions in order to emphasize that the regulations should not require every student to participate in every scheduled interaction.

#### Incarcerated Student

*Statute:* Section 401 of the HEA prohibits the award of a Federal Pell Grant to an individual who is

incarcerated in a Federal or State penal institution or who is subject to an involuntary civil commitment upon completion of a period of incarceration for a forcible or non-forcible sexual offense (as determined in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting Program).

Section 472 of the HEA states that the cost of attendance for incarcerated students can only include tuition and fees and, if required, books and supplies. Section 484 of the HEA states that no incarcerated student is eligible to receive a loan. However, the term "incarcerated student" is not defined in the HEA.

*Current Regulations:* Current regulations define "incarcerated student" as a student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, or other similar correctional institution. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only on weekends.

*Proposed Regulations:* We propose to add "juvenile justice facility" to the list of correctional institutions in the definition of "incarcerated student." We also propose to add that for the purposes of Pell Grant eligibility under § 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal government or a State, but is considered incarcerated for purposes of determining the cost of attendance under HEA section 472 in determining eligibility for and the amount of a Pell Grant.

*Reasons:* The Department proposes to add the term "juvenile justice facility" to the definition in response to questions raised during Department technical assistance events regarding whether these facilities are correctional institutions. A subcommittee member believed that the addition of the term "juvenile justice facility" could be misinterpreted by the public to mean that the Department is attempting to restrict access to Federal Pell Grants to students serving in a juvenile justice facility. Several main committee members agreed.

Current § 668.32(c)(2)(ii) states that an individual incarcerated in a Federal or State penal institution is not eligible for a Federal Pell Grant. The Department proposes to add that a student who is

incarcerated in a juvenile justice facility is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, to ensure that students incarcerated in a juvenile justice facility continue to be eligible for Federal Pell Grants. A reference to section 472 of the HEA was added because the same rules apply for determining the cost of attendance for all incarcerated students. These amendments to the definition of "incarcerated student" represent no substantive change to current practice.

#### Juvenile Justice Facility

*Statute:* There is no statutory reference to "juvenile justice facility" in the HEA.

*Current Regulations:* There is no current regulatory definition of "juvenile justice facility."

*Proposed Regulations:* The Department proposes to define a "juvenile justice facility" as a public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws—

- (1) Are accused of committing a delinquent act;
- (2) Have been adjudicated delinquent; or
- (3) Are determined to be in need of supervision.

*Reasons:* The Department proposes to add a definition of "juvenile justice facility" to codify current sub-regulatory guidance published on December 8, 2014 (DCL ID: GEN 14–21)<sup>13</sup> and to provide sufficient clarity where the term is referenced in the Department's regulations and materials, including in the definition of "incarcerated student."

#### Nonprofit Institution

*Statute:* Section 103 of the HEA defines the term "nonprofit" as a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

*Current Regulations:* Paragraph (1) of the definition of "nonprofit institution" in § 600.2 defines a "nonprofit institution" as an institution that—

- Is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

- Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and
- Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Paragraph 3 of this definition repeats the language in paragraph (1), stipulating that an institution is a "nonprofit institution" if it is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

*Proposed Regulations:* The Department proposes to delete paragraph (3) from the definition of "nonprofit institution."

*Reasons:* The language in paragraph (3) is entirely redundant of paragraph (1)(iii). Members of the subcommittee and the full committee endorsed this change.

#### § 600.7 Conditions of Institutional Ineligibility

*Statute:* Section 102(a)(3) of the HEA states that an institution does not meet the definition of an "institution of higher education" if the institution offers more than 50 percent of its courses by correspondence (unless the institution meets the definition in section 3(3)(C) of the Carl D. Perkins Career and Technical Education Act) or enrolls 50 percent or more of its students by correspondence. The statute specifically excludes courses offered by telecommunication from consideration in those calculations and provides that an institution may be exempted from the limitation on correspondence students by the Secretary for good cause if the institution provides a 2- or 4-year program of instruction for which the institution awards an associate or baccalaureate degree, respectively.

*Current Regulations:* Section 600.7(a)(1)(i) and (ii) incorporates the statutory limitations on the number of correspondence courses that an institution may offer and the number of correspondence students that an institution may enroll. Section 600.7(b)(1)(i) defines a correspondence course for this purpose as either a complete educational program offered by correspondence, or one course provided by correspondence in an on-campus (residential) educational program. Section 600.7(b)(1)(ii) states that a course must be considered as being offered once during an award year regardless of the number of times it is

<sup>13</sup> [ifap.ed.gov/dpclatters/GEN1421.html](http://ifap.ed.gov/dpclatters/GEN1421.html).

offered during the year. Section 600.7(b)(1)(iii) provides that a course that is offered both on campus and by correspondence must be considered two courses for the purposes of determining the total number of courses the institution provided during an award year. There are currently no regulations that clarify which students are “enrolled in correspondence courses.”

*Proposed Regulations:* The Department proposes to add a new paragraph (b)(2) to provide that a student is considered “enrolled in correspondence courses” if correspondence courses constitute more than 50 percent of the courses in which the student enrolled during an award year.

*Reasons:* Currently, the regulations do not address when a student who is enrolled in some correspondence coursework should be counted as “enrolled in correspondence courses” for the purpose of determining whether an institution has exceeded the limitation on the number of correspondence students it may enroll during an award year. This has led to confusion regarding an important institutional eligibility factor for the title IV, HEA programs.

During the negotiations, the Department initially proposed to define a “student enrolled in correspondence courses” as one whose enrollment during an award year was entirely in correspondence courses. Several subcommittee members indicated that this would create a loophole whereby an institution could avoid considering a student to be a correspondence student by having the student enroll in a single distance education or in-person course. Some subcommittee members indicated that enrollment in 50 percent or 75 percent correspondence courses would avoid that loophole. The Department incorporated those suggestions by using a “more than 50 percent” threshold of enrollment in correspondence courses because it means a student would be mostly enrolled in such courses.

*Date, Extent, Duration, and Consequence of Eligibility (§ 600.10)*

*Statute:* Section 498 of the HEA requires the Secretary to determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility of an IHE. Section 498(b) requires the Secretary to provide a single application form that requires sufficient information and documentation from institutions to determine that the requirements of eligibility, accreditation, financial

responsibility, and administrative capability are met.

Section 481(b) of the HEA defines the types of educational programs for which students can receive aid under the title IV, HEA programs and includes among those programs instructional programs that use direct assessment of student learning, or recognize the direct assessment of student learning by others, in lieu of measuring student learning in credit hours or clock hours. Section 481(b)(4) provides that, in the case of a direct assessment program for which eligibility is being determined for the first time, the Secretary must make the eligibility determination before the program is considered eligible for title IV participation.

*Current Regulations:* Section 600.10(c)(1)(iii) provides that an institution that seeks to establish eligibility for a direct assessment program must obtain the Secretary’s approval every time the institution adds a program.

*Proposed Regulations:* The proposed regulations would require an institution to seek and obtain the Department’s approval of a direct assessment program when the institution adds such a program for the first time, and when the institution offers the first direct assessment program at each level of offering (e.g., a first direct assessment master’s degree program or bachelor’s degree program) than what the Secretary had previously approved.

*Reasons:* We believe that once an institution demonstrates that it can capably administer a direct assessment program, there is little risk that the same institution would not properly administer other direct assessment programs. In reviewing initial direct assessment requests, the Department will review the institution’s processes related to title IV aid administration but will not evaluate academic content or academic quality of programs, except to confirm that an accrediting agency has specifically approved each program. Accordingly, once an institution has demonstrated its capability to administer these programs, there is little value in the Department reviewing subsequent programs.

Under the proposed regulations, an institution would not be required to submit a second or subsequent direct assessment program to the Department for approval unless otherwise required to do so under § 600.20(c)(1). The committee requested an exception to this rule, however, when an institution adds a direct assessment program at a different level of offering than what the Secretary had previously approved, arguing that such a change was worthy

of additional scrutiny. The Department agrees that an institution may have different administrative procedures, capacity, and expertise in place for graduate versus undergraduate programs or for two-year versus four-year programs, so additional review would have merit in these circumstances.

The Department has revised the consensus language to clarify that the first program at each credential level must be approved. The language could have been read to imply that each program at a new credential level would need to be approved (but not at the first credential level). Instead, the Department would approve a first direct assessment program (for example, a bachelor’s degree program) and then, to ensure an institution has sufficient capacity and expertise, also approve the first master’s degree program. Since the Department is not approving subsequent bachelor’s degree programs, there would be no reason to approve subsequent master’s degree programs and that was not the goal of the consensus language.

*§ 600.20 Notice and Application Procedures for Establishing, Reestablishing, Maintaining, or Expanding Institutional Eligibility and Certification*

*Statute:* Section 498 of the HEA requires the Secretary to determine an institution’s legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility for purposes of determining the institution’s eligibility to participate in title IV, HEA programs. In making such determinations, the Secretary considers information and documentation provided by the institution.

*Current Regulations:* Section 600.20(d)(1)(ii)(A) requires an institution that notifies the Secretary of its intent to add an educational program for which it is required to apply to the Secretary for approval under § 600.10(c), to ensure such notification is received by the Secretary at least 90 days before the first day of class of the educational program. An institution that properly submits its notification of intent to add an educational program is not required to obtain approval to offer the additional program unless the Secretary alerts the institution at least 30 days before the first day of class that the program must be approved for title IV, HEA purposes.

*Proposed Regulations:* The proposed regulations would remove § 600.20(d)(1)(ii)(B), which provides that an institution submitting a notice in accordance with § 600.20(d)(1)(ii)(A) is not required to obtain approval to offer the additional program unless alerted by

the Secretary at least 30 days before the first day of class that the program must be approved. Additionally, the Department proposes to modify § 600.20(a) and (b) to commit the Secretary to take prompt action in response to any initial eligibility application or reapplication received from an institution.

*Reasons:* The current regulations create an unnecessarily prolonged process for approval of new programs, especially since an institution trying to timely offer new programs to meet student demand or workforce needs cannot reasonably wait until 30 days prior to the start of the program to advertise or enroll students in the program. The regulations also do not include a time frame for the Secretary to notify an institution that approval by the Secretary is necessary. This could create a situation where the Department's approval is delayed for so long that the institution's State authorizing agency or its accrediting agency requires the institution to start over and submit a new application and fees and undergo an additional site visit at the institution's expense. Since the Department does not determine program quality, the Department should not second-guess the accrediting agency or State authorizing agency approval of new programs. After the approval process has concluded, the Secretary notifies the institution of the outcome. The proposed regulations recognize the appropriate role of accrediting agencies and State authorizing agencies in determining the quality of new programs and reflects the Department's intent that the Department should not block an institution's addition of new programs except in rare and unique circumstances related to the Department's regulatory requirements or in relation to requirements that are specifically indicated in an institution's program participation agreement (PPA).

#### § 600.21 Updating Application Information

*Statute:* Section 498(b) of the HEA requires the Secretary to provide a single application form that requires sufficient information and documentation from institutions to determine that the requirements of eligibility, accreditation, administrative capability, and financial responsibility are met.

Section 481(b) of the HEA provides for the eligibility of direct assessment programs, and HEA section 481(b)(4) states that, in the case of a direct assessment program for which eligibility is being determined for the first time, the Secretary must make the eligibility

determination before the program is considered eligible for title IV participation.

*Current Regulations:* Section 600.21 requires an institution to notify the Department of various changes to certain information regarding the institution no later than 10 days after the change occurs in the information. Section 600.10 requires the Department to approve all direct assessment programs, necessitating submission of information regarding those programs to the Secretary and obviating the need for a separate reporting requirement under § 600.21. The regulations currently do not require institutions to notify the Department when they add a program in which more than 25 percent of the program is provided by an ineligible institution or organization.

*Proposed Regulations:* The Department proposes to add two new reporting requirements to § 600.21. Under the proposed regulations, an institution would be required to report the following changes to the Secretary, no later than 10 days after the change occurs:

- The addition of a second or subsequent direct assessment program at the same credential level; and
- The establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program under § 668.5(c).

The Department also revises § 600.21(a)(11) to remove citations and a reference to “updating certification pursuant to § 668.414(b).”

*Reasons:* Section 600.10(c)(1)(iii) requires the Department to approve each direct assessment program an institution offers. Under the proposed regulations, the Department would review and approve such programs only the first time an institution offers such a program and the first time it offers a direct assessment program at a higher degree level. Since the Department would no longer have a role in approving direct assessment programs after the first one is approved, unless the new direct assessment program is at a different credential level, the Department would need to create a reporting mechanism to track such programs. Therefore, without a conforming change to § 600.21, the Department would only be notified that an institution had added its first direct assessment program at each degree level and would not be told about subsequent direct assessment programs. Because direct assessment programs are still a relatively recent development in postsecondary education, the Department has an interest in monitoring the growth and expansion of

such programs even though there is no compelling reason for the Department to approve each one. Therefore, we propose to add a requirement in § 600.21 for an institution to report the addition of a second or subsequent direct assessment program no later than 10 days after the first day that the program is offered.

Similarly, because the Department has an interest in understanding the extent to which written arrangements are used to deliver title IV eligible programs, we propose to require an institution to report when it enters into a written arrangement with an ineligible institution or organization to provide more than 25 percent of a program under § 668.5(c). This will enable the Department to monitor such arrangements and ensure that institutions have sought and received approval for such arrangements from their accrediting agencies.

The changes to § 600.21(a)(11) remove references to sections that were modified or eliminated in the final Gainful Employment regulation.<sup>14</sup>

#### § 600.52 Definitions

*Statute:* Section 102 of the HEA establishes that for the purposes of part D of title IV (Federal Direct Student Loan Program), an institution outside the United States that is comparable to an IHE as defined in section 101 of the HEA and that has been approved by the Secretary for the purpose of part D of title IV, meets the definition of an IHE for title IV purposes. Section 102 further directs the Secretary to establish criteria by regulation for the approval of institutions outside the United States and for the determination that such institutions are comparable to an IHE as defined in section 101 of the HEA.

*Current Regulations:* The definition of a “foreign institution” in § 600.52 precludes such an institution, except with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2), from having any type of written arrangement, within the meaning of § 668.5, with any institutions or organizations within the United States for students to take courses from such institutions or organizations. Additionally, a foreign institution may not permit students to enroll in any course offered by the foreign institution in the United States, including research, work, internship, externship, or special studies. The definition does, however, contain an exception for independent research done by an individual student in the United States for not more than one

<sup>14</sup> 84 FR 31392.

academic year, if that research is conducted during the dissertation phase of a doctoral program and the research can only be performed in the United States.

*Proposed Regulations:* The Department proposes to revise paragraph (1)(ii)(B) of the definition of “foreign institution” to allow an eligible foreign institution to enter into a written arrangement with an eligible institution within the United States to provide no more than 25 percent of the courses required for a student’s eligible program. The proposed regulations would further permit students enrolled in a program at an eligible foreign institution to complete up to 25 percent of an eligible program by enrolling in coursework, research, work, internship, externship, or special studies offered by an eligible institution in the United States. The current exception for independent research done by an individual student in the United States for not more than one academic year for research conducted during the dissertation phase of a doctoral program (and the research can only be performed at a facility in the United States) would be retained but moved to paragraph (2) of the definition and would not be subject to the overall restriction on the percentage coursework offered by the institution in the United States.

Accordingly, a doctoral candidate conducting research in the United States under this exception would be able to do so for a full academic year even if that academic year comprises more than 25 percent of the doctoral program. However, it would not be permissible for a student enrolled in a doctoral program, who, prior to the dissertation phase of that program, has completed any portion of it by taking coursework in the United States (as permitted under the proposed definition of “foreign institution,” paragraph (1)(ii)(B) and (1)(ii)(C)), to later conduct independent research in the United States that cumulatively exceeds 25 percent of the program. The Department seeks comments regarding whether this limitation as proposed is necessary and appropriate or should be broadened such that a doctoral student, having already completed 25 percent of his or her eligible program by taking coursework in the United States, would be permitted an additional full academic year to conduct independent research there as well.

In several places, the Department has modified the existing and consensus regulations to remove the word “State” and replace it with “United States” in order to clarify that the distinction being made relates to whether an institution is

located in any State (*i.e.* the United States), rather than one State or another.

*Reasons:* Current restrictions on foreign institutions executing written arrangements with institutions or organizations in the United States or permitting students enrolled in eligible programs to enroll in any coursework offered in the United States are based on the Department’s long-held position that U.S. students borrowing from the Direct Loan program for enrollment in a program at an eligible foreign institution should reside in the country where that institution is located. The proposed regulations are consistent with that position. However, we believe that the current regulations are needlessly restrictive and unfairly circumscribe the overall educational experience that foreign institutions may offer their U.S. students. There are several legitimate reasons why a foreign institution might want to permit U.S. students enrolled in its eligible programs to complete part of their education in the United States. For example, a student may wish to continue his or her education while residing at home during the institution’s summer recess or pursue opportunities for a specific internship or externship that is only in the United States, or may experience personal difficulties that would necessitate study in the United States for a limited time period.

While introducing flexibilities that the Department believes will enable foreign institutions to provide U.S. students an improved educational experience, these proposed regulations retain key safeguards that would ensure program integrity and reinforce the expectation that U.S. students enrolling in an eligible foreign institution do so with the intent of taking coursework from that institution and, for the period of matriculation, residing in the country where it is located. Toward that end, the Department proposes to limit to 25 percent the portion of an eligible program offered at a foreign institution that may be provided by an institution in the United States either under a written arrangement or through the student enrolling in coursework, internship, externship, or special studies at an eligible institution in the United States. Additionally, such coursework or other types of work could only be offered by institutions meeting the definition of an “eligible institution.” The Department seeks comments regarding whether the options available to students for study or internships in the United States under this proposed flexibility should be expanded to include organizations that are not eligible institutions. We wish to clarify that these proposed

regulations would not permit students who are enrolled in an eligible foreign institution but taking coursework in the United States under a written arrangement to receive title IV, HEA assistance other than a Direct Loan. While the terms of such an arrangement may stipulate that the host institution (the U.S. institution in this case) is responsible for the functions of awarding and disbursing title IV aid, that institution may only award Direct Loans and not other types of aid for which a student at a foreign institution is ineligible.

*§ 600.54 Criteria for Determining Whether a Foreign Institution Is Eligible To Apply To Participate in the Direct Loan Program*

*Statute:* Section 102 of the HEA establishes that for the purposes of part D of title IV (Federal Direct Student Loan Program), an institution outside the United States that is comparable to an IHE as defined in section 101 of the HEA and that has been approved by the Secretary for the purpose of part D of title IV, meets the definition of an IHE for title IV purposes. Section 102 further directs the Secretary to establish criteria by regulation for the approval of institutions outside the United States and for the determination that such institutions are comparable to an IHE as defined in section 101 of the HEA.

*Current Regulations:* Section 600.54(c) prohibits a foreign institution from entering into a written arrangement under which an ineligible institution or organization provides any portion of one or more of the eligible foreign institution’s programs.

*Proposed Regulations:* The Department proposes to revise § 600.54(c) to permit written arrangements between an eligible foreign institution and an ineligible entity, provided the ineligible entity is an institution that satisfies the definition in paragraphs (1)(iii) and (iv) of “foreign institution” and the ineligible foreign institution provides 25 percent or less of the educational program.

*Reasons:* We believe that the current regulatory prohibition on eligible foreign institutions entering into written arrangements with ineligible foreign institutions unfairly restricts U.S. students enrolled abroad from taking advantage of an important option available to their counterparts attending domestic institutions, namely the opportunity to take courses at any number of host institutions under an agreement that allows credits earned at those institutions to count toward matriculation in the student’s program

of study at his or her home institution. Currently, eligible foreign institutions may enter into written arrangements with other eligible foreign institutions, but due to the limited number of those institutions, students' options are similarly limited.

These proposed regulations would broaden the educational experiences available to U.S. students enrolled in eligible foreign institutions while providing assurance that the quality of academic instruction offered students at ineligible host institutions is reasonably equivalent to what they receive at their home institutions. As discussed above, ineligible foreign institutions would be required to meet the definition of "foreign institution" under paragraphs (1)(iii) and (iv) of that definition in order to enter into written arrangements with eligible foreign institutions. Those provisions require the ineligible institution to be legally authorized by the educational ministry, council, or equivalent agency of the country in which the institution is located to provide an education beyond the secondary level; and award degrees, certificates, or other recognized educational credentials in accordance with § 600.54(e) that are officially recognized by the country in which the institution is located.

#### § 668.1 Scope

*Statute:* Title I, part A of the HEA establishes the general provisions that define "institution of higher education" for the purposes of title IV programs, including public or nonprofit institutions and proprietary institutions of higher education.

*Current Regulations:* Section 668.1 defines the scope for part 668, which establishes general rules that apply to an institution that participates in any title IV, HEA program. This section also provides that an institution's use of a third-party servicer does not alter the institution's responsibility for compliance with the regulations in part 668. This section also states that the term "institution" includes those that are defined in 34 CFR 600.4 (definition of "institution of higher education"), 600.5 (definition of "proprietary institution of higher education"), and 600.6 (definition of "postsecondary vocational institution"). This section lists the following programs as title IV, HEA programs: Federal Pell Grant, Academic Competitiveness Grant (ACG), Federal Supplemental Educational Opportunity Grant, the Leveraging Educational Assistance Partnership Program, the Federal Stafford Loan Program, the Federal PLUS Program, the Federal

Consolidation Loan Program, the Federal Work-Study Program, the William D. Ford Federal Direct Loan Program, the Federal Perkins Loan Program, the National SMART Grant program, and the TEACH Grant program.

*Proposed Regulations:* The Department proposes to add the phrase "unless otherwise specified" in paragraph (b), which states that for this part, an "institution" includes the definition of "institution of higher education" established in 34 CFR 600.4, the definition of a "proprietary institution of higher education" established in 34 CFR 600.5, and the definition of a "postsecondary vocational institution" as established in 34 CFR 600.6.

*Reasons:* This proposed addition is a technical change to indicate that the Department will note if there is any change to the definition of "institution" throughout Part 668. For example, if a regulation only applies to a postsecondary vocational institution, the Department would note that in an appropriate regulation. Otherwise, the term "institution" includes all three types of institutions, as defined in §§ 600.4, 600.5, and 600.6.

#### § 668.2 Definitions

##### Academic Competitiveness Grant

*Statute:* Section 401(A) previously authorized the Academic Competitiveness Grant program.

*Current Regulations:* Section 668.2 defines the "Academic Competitiveness Grant (ACG) Program" as a grant program authorized by Title IV–A–1 of the HEA under which grants are awarded during the first and second academic years of study to eligible financially needy undergraduate students who successfully complete rigorous secondary school programs of study.

*Proposed Regulations:* The Department proposes to eliminate the definition of "Academic Competitiveness Grant (ACG) program."

*Reasons:* We propose to eliminate the definition of the "Academic Competitiveness Grant program," because the program is no longer authorized by the HEA and regulatory provisions using the definition are therefore no longer effective.

##### Full-Time Student

*Statute:* The definition of "academic and award year," in section 481 of the HEA, provides that a full-time student is expected to complete at least 24 semester or trimester hours or 36 quarter credit hours in a course of study that

measures its program length in credit hours, or 900 clock hours in a course of study that measures its program length in clock hours.

*Current Regulations:* Section 668.2 defines a "full-time student" as an enrolled student who is carrying a full-time academic workload, as determined by the institution, under a standard applicable to all students enrolled in a particular educational program. That definition also states that, for a term-based program, the student's workload may include repeating any coursework previously taken in the program but may not include more than one repetition of a previously passed course. The definition sets requirements for an institution's minimum standard for full-time enrollment in an undergraduate program, including:

- For a program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), 12 semester hours or 12 quarter hours per academic term.
- For a program that measures progress in credit hours and does not use terms, 24 semester hours or 36 quarter hours over the weeks of instructional time in the academic year, or the prorated equivalent if the program is less than one academic year.
- For a program that measures progress in credit hours and uses nonstandard-terms (terms other than semesters, trimesters, or quarters) the number of credits determined by dividing the number of weeks of instructional time in the term by the number of weeks of instructional time in the program's academic year; and multiplying the resulting fraction determined by the number of credit hours in the program's academic year.
- For a program that measures progress in clock hours, 24 clock hours per week.
- A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.
- The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.
- For correspondence coursework, a full-time course load must be commensurate with the full-time definitions listed above, and at least one-half of the coursework must be made up of non-correspondence coursework that meets one-half of the institution's requirement for full-time students.

There is currently no regulatory definition of a "subscription-based program," nor a definition of a "full-

time student in a subscription-based program” in § 668.2.

*Proposed Regulations:* In the definition of “full-time student,” we propose to exclude subscription-based programs from the types of term-based programs in which a student’s workload may include no more than one repetition of a previously passed course. We also propose to add a new paragraph (8) to this definition that describes the requirements for full-time enrollment in a subscription-based program as completion of a full-time course load commensurate with the “full-time” definitions in paragraphs (1), (3), and (5) through (7) of the definition of “full-time student.”

*Reasons:* The Department proposes changes to the definition of “full-time student” to provide clarity for subscription-based programs in accordance with discussion during negotiated rulemaking that concluded that current regulations were insufficient to accommodate new technology-driven models of education. The Department wishes to express our continuing concern that there is often a disconnect between the requirements for licensure and the requirements for employment. We encourage employers to be cognizant of the limitations the Department places on students when preparing to enter a field that is subject to licensure requirements.

The requirements for subscription-based programs are not addressed in the current regulations because they are generally programs that have become possible or practicable only with the development of more recent technology-driven models in direct assessment programs.

Under subscription-based models, a student does not progress until demonstrating competency in a given skill or subject area, as opposed to completing a course with a defined timeframe in a traditional educational program. In a traditional course, a student may have passed the course but failed to master some of the material. Alternatively, sections of the same course taught by different instructors could present different information. However, subscription-based programs measure student progress based on demonstrated competencies rather than the passage of time. There would be no reason for a student who demonstrated all of the necessary competencies to complete a subscription-based course to be given an opportunity to repeat the course. Therefore, the regulatory provision allowing a student to retake a completed course for title IV, HEA purposes is nonsensical when applied

to a subscription-based direct assessment program.

Finally, because the Department is also proposing a definition for “subscription-based program,” the inclusion of that term in “full-time student” is a necessary conforming change in order to ensure that student eligibility for those enrolled in a subscription-based program can be established.

#### Subscription-Based Program

*Statute:* Under sections 428G(a) and 455(a) of the HEA the interval between the first and second installment of Federal Direct Loan student loan payments must not be less than one-half of the period of enrollment, except in the case of programs offered in semesters, quarters, or a similar division of the period of enrollment. Section 401(b)(2)(B) provides that in any case where a student attends an institution on a less than full-time basis, the amount of Pell Grant funds to which the student is entitled shall be reduced in proportion to the student’s enrollment in accordance with a schedule of reductions established by the Secretary. Section 401(e) of the HEA states that Pell Grant payments shall be made in accordance with regulations promulgated by the Secretary. Section 484(b)(2) of the HEA provides that to be eligible for a loan under the Direct Loan program, a student must be carrying at least one-half the normal full-time workload for the course of study that the student is pursuing, as determined by an eligible institution. The HEA does not refer to the term “subscription-based education.”

*Current Regulations:* Section 668.4(a) provides that for a student enrolled in an eligible program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), or for a student enrolled in an eligible program that measures progress in credit hours and uses nonstandard-terms that are substantially equal in length, the payment period is the academic term. Section 668.4(b) provides that for a student enrolled in an eligible program that measures progress in credit hours and uses nonstandard-terms that are not substantially equal in length, for purposes of the Pell Grant, FSEOG, and TEACH Grant programs the payment period is the term, but for purposes of the Direct Loan Program the payment period is the period of time in which the student successfully completes half of the credit hours and weeks of instructional time in the academic year, or, if the program or the remaining portion of the program that the student

is attending is shorter than an academic year, half of the credit hours and weeks of instruction in the program or remaining portion of the program, respectively. Section 668.4(c) provides that for an academic program that does not have academic terms or a program that measures progress in clock hours, the payment period is the period of time in which the student successfully completes half of the credit hours and weeks of instructional time in the academic year, or, if the program or the remaining portion of the program that the student is attending is shorter than an academic year, half of the credit hours and weeks of instruction in the program or remaining portion of the program, respectively. The current regulations do not refer to subscription-based programs.

*Proposed Regulations:* We propose to define “subscription-based program” as a standard or nonstandard-term direct assessment program in which the institution charges a student for each term on a subscription basis with the expectation that the student will complete a specified number of credit hours during that term. We propose to clarify that coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term, and that students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. We also propose to require that an institution must establish a single enrollment status that will apply to a student throughout the student’s enrollment in a subscription-based program, except that a student may change his or her enrollment status no more often than once per academic year. Finally, we propose to explain the method for determining the number of credit hours (or the equivalent) that a student in a subscription-based program must complete before receiving subsequent disbursements as follows:

- An institution first determines, for each term, the number of credit hours (or the equivalent) associated with the institution’s minimum standard for the student’s enrollment status (for example, full-time, three-quarter time, or half-time) for that period. An institution would be required to adjust this figure to at least one credit (or the equivalent) for a student who is enrolled less than half-time.
- Following this determination, the institution adds together the number of credit hours (or the equivalent) determined for each term that the

student enrolled in and attended, excluding the current and most recently attended terms.

*Reasons:* The current regulatory requirements for disbursements by payment period in term-based and non-term programs are designed to ensure that institutions are permitted to make all title IV, HEA program disbursements at the same time using consistent definitions of payment periods that apply to all programs. The requirements for term-based programs are intended to maintain a simple and consistent aid delivery system for term-based programs by making each term a payment period in cases where an institution's terms are of sufficient length and have discrete start and end dates. The Secretary's approach for non-term credit hour and clock hour programs ensured that institutions offering such programs would be prohibited from making a second disbursement of Federal student loan funds until the later of the calendar midpoint of the loan period or the date that the student completes half the academic coursework in the loan period.

CBE programs, including direct assessment programs, measure a student's academic progress by assessing the student's learning, typically based on the student's demonstration of proficiency or mastery of a defined set of competency standards. Because advancement in CBE programs is not tied to scheduled time periods, many CBE programs allow students to set their own pace for progressing through a program. Therefore, under the current statutory and regulatory requirements for title IV aid disbursement, an institution providing a CBE program has two choices: The institution can either set a discrete period of time during which a student must begin and end work on a given competency in order to use standard or nonstandard terms, or, if the institution chooses to operate the program as a non-term program, the student's title IV aid may be disbursed only after the student has completed both a specific predefined portion of coursework and a predefined period of calendar time. Requiring competency-based coursework to begin and end within a specific timeframe limits a student's flexibility to work at his or her own pace and could artificially delay a student's progress if the institution was required to deny a student's request to begin a new competency near the end of a term. Conversely, implementing a non-term disbursement system for a CBE program is more complicated than for a non-term program that has a strict

progression. Substantial variation in the speed at which students progress through the program would require an institution to carefully monitor each student to ensure that it did not make a disbursement before the student had completed the requisite weeks of instruction and credit hours (or the equivalent). Therefore, the current requirements for disbursement in term-based and non-term programs make it substantially more difficult for institutions to implement CBE programs in which students work at their own pace without adopting a complicated and administratively burdensome disbursement methodology.

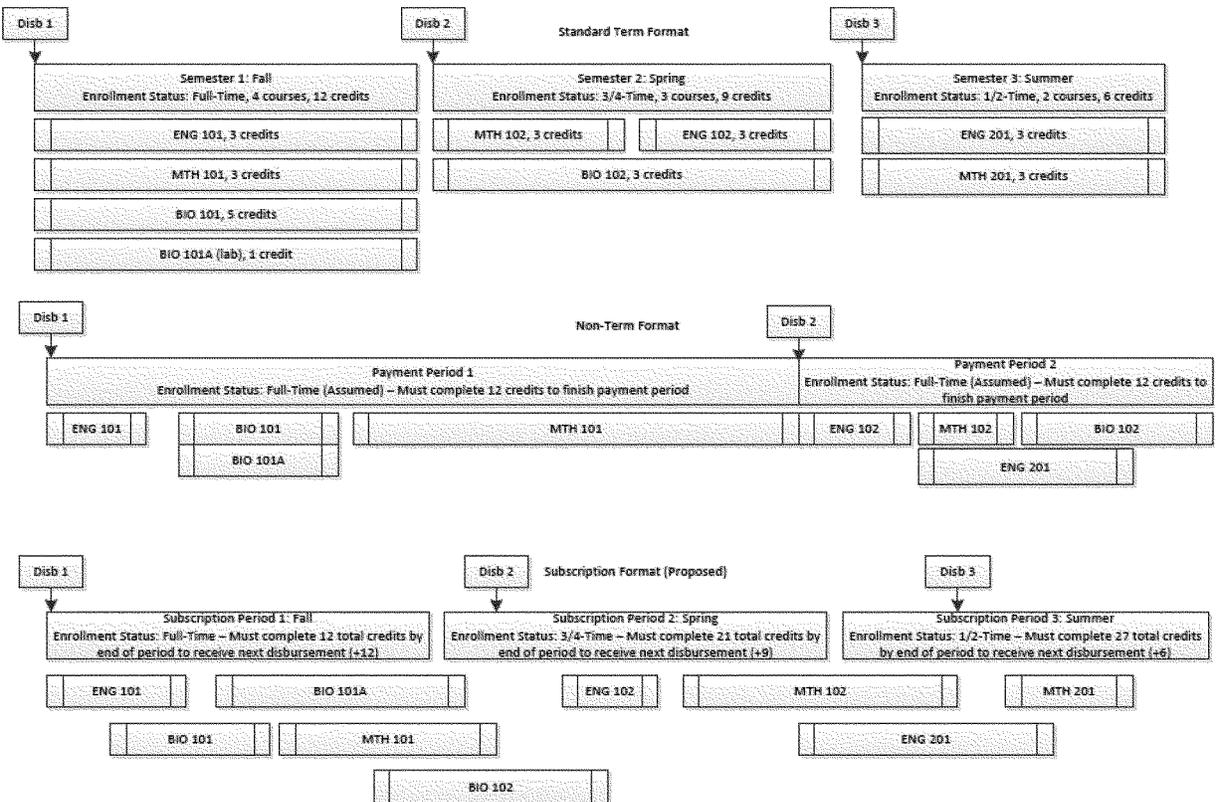
In a **Federal Register** notice published July 31, 2014 (79 FR 44429), the Secretary established the Competency-Based Education Experiment in order to test new approaches to disbursing title IV, HEA assistance to students in CBE programs. The experiment permitted an institution to disburse title IV, HEA assistance for institutional charges as soon as a student completed a required number of competencies while requiring disbursements of aid for indirect costs (such as living expenses) at regular intervals related to the completion of a certain number of weeks of instruction. A number of institutions participating in the experiment indicated to the Department that there were administrative challenges to implementing the experiment resulting from the requirement to track separately a student's completion of competencies and the student's completion of calendar time and make disbursements of title IV, HEA assistance separately for direct and indirect costs, respectively. Institutions also indicated that there were specific challenges associated with implementing that form of disbursement for programs that charged students a set amount for a defined period of time rather than charging an amount for each required competency in the program. The Secretary responded by expanding the Competency-Based Education experiment in a **Federal Register** notice published November 18, 2015 (80 FR 72052). The expanded experiment permitted an institution to participate in one of three different versions of the experiment, including a new version that provided waivers and modifications of regulatory requirements specifically designed to support disbursement in subscription-based programs.

The new version of the experiment (referred to as "Subscription-Based Disbursement") allowed participating institutions to include in a determination of a student's enrollment status competencies that began prior to

the start of the subscription period as long as it did not include such competencies in the same student's enrollment status for more than one payment period. Participating institutions were required to disburse title IV, HEA assistance based on the number of competencies that the institution expected the student to complete during a given subscription period. Participating institutions also identified drawbacks to this version of the experiment, noting that the version limited flexibility by requiring institutions to "lock" enrollment on a given date several weeks after the beginning of a payment period. The experiment also required an institution to identify specific competencies that had been counted in a student's enrollment status and ensure that such competencies were never included in enrollment status again, resulting in substantial administrative burden for the institution monitoring a student's progress.

During the second meeting of the subcommittee, the Department proposed to implement a term-based method of disbursing title IV, HEA assistance in direct assessment programs, to limit the administrative burden for institutions, increase the flexibility for students to complete competencies at their own pace, and maintain the integrity of the title IV, HEA programs. The Department's proposed disbursement method would permit an institution to treat a subscription period as a payment period, but would avoid requiring institutions to identify specific competencies to assign to a given payment period, instead requiring a student to complete a certain number of competencies in past subscription periods to receive title IV, HEA assistance in subsequent subscription periods. The Department's proposal would also permit an institution to allow students to work on competencies at any time, rather than requiring students to begin and end work on a given competency within the specific timeframe established for the subscription period. This would provide substantially greater flexibility for students to study on their own schedule, rather than adhering to a schedule mandated by the Department's regulations.

As part of its presentation to the subcommittee, the Department provided an example illustrating the differences between the proposed subscription-based disbursement method and the current disbursement requirements for term-based and non-term credit hour programs.



The example demonstrates that under the Department's proposed disbursement method for subscription-based programs, students would be permitted to take coursework that overlaps or extends beyond the start and end dates of payment periods, unlike in term-based credit hour programs under the current regulations. Additionally, the example showed that under the proposed subscription-based disbursement method, an institution would not be required to wait until the middle of a student's academic year in order to make a second or subsequent disbursement of title IV, HEA assistance, as is currently required for credit hour non-term programs. Under subscription-based disbursement, students could receive disbursements of title IV, HEA assistance at the beginning of each payment period, but only if the student had completed the requisite number of credit hours or the equivalent associated with the student's enrollment status in all prior payment periods.

The Department proposed limiting the use of this disbursement method to direct assessment programs that charged students for each term on a subscription basis with the expectation that the student complete a specified number of competencies during that term. The Department would prefer to allow all CBE programs to use the method, but the HEA does not provide a definition

of "CBE programs" on which the Secretary could rely for this purpose. The subcommittee did not object to the proposed limitations on the types of programs that would be permitted to adopt the proposed disbursement method.

Following the Department's presentation, subcommittee members identified two concerns with the Department's proposed approach:

1. The approach would require institutions using this disbursement method to track each student's completion of credit hours or the equivalent, which is an administratively burdensome process that can be confusing for students.

2. The approach would be disadvantageous to students who fall behind on completing coursework, because it would cut off those students' ability to receive title IV, HEA assistance. Institutions would have little incentive to let such students continue if the students were unable to pay for institutional charges without such assistance.

One subcommittee member presented an alternative to the Department's proposal that would have permitted disbursement based on attempted coursework rather than completed coursework and would have allowed an institution to include a competency in a student's enrollment status more than

once if the competency overlapped more than one subscription period. The Department could not support that framework, because we believe it could lead to abuse by allowing institutions to pay title IV aid for the same course twice. This potential for abuse was also the reason that the Department proposed to prevent institutions with subscription-based programs from including repeated coursework in a student's enrollment status.

The Department indicated that it believes that the completion framework is the best way to permit adequate flexibility related to the timeframe for completing coursework while ensuring integrity of the title IV, HEA programs. As an added protection for students, in the third subcommittee meeting, the Department and the subcommittee agreed to revise the proposal to provide a single additional subscription period to permit students to catch up without losing eligibility for title IV, HEA assistance if the students had failed to complete a sufficient number of credit hours. That agreement also provided that an institution using the subscription-based disbursement method would be required to establish a single enrollment status (*i.e.*, full-time, three-quarters time, half-time, or less-than-half time) that would apply to a student throughout his or her program.

Under the language agreed upon by the subcommittee, students would be permitted to transfer into different versions of the same program—for example, from the full-time version to the half-time version—no more than once per academic year. This limitation is intended to permit students to reduce or increase their enrollment status according to changing personal needs while avoiding “gaming” in which students repeatedly switch between enrollment statuses for no reason except to avoid completion requirements. The subcommittee agreed to this limitation in order to address the Department’s concerns about the integrity of the Title IV programs.

The subcommittee also agreed to establish a minimum enrollment status requirement of one credit or the equivalent per term for less-than-half-time subscription-based programs. This requirement was established because, in the absence of a statutory or regulatory definition of a “less-than-half-time student,” a *de minimis* standard for completion is needed in order to ensure that students in less-than-half-time programs make at least some progress in each subscription period in order to qualify for subsequent disbursements of title IV, HEA assistance.

The full committee accepted the subcommittee’s agreement regarding the requirements for subscription-based programs and recommended no further changes.

#### Third-Party Servicer

*Statute:* Section 481(c) of the HEA defines the term “third-party servicer” as “any individual, any State, or any private, for-profit or nonprofit organization” that enters into a contract with an eligible IHE to administer any aspect of the institution’s student assistance programs or a guaranty agency, or an eligible lender, to administer any aspect of such agency’s or lender’s student loan programs.

*Current Regulations:* Section 668.2 defines a “third-party servicer” as an entity that enters into a contract with an eligible institution to administer any aspect of the institution’s participation in any title IV, HEA program. Under paragraph (1)(i) of the definition of “third-party servicer,” the Secretary considers administration of participation in a title IV, HEA program to include, among other things, certifying loan applications.

*Proposed Regulations:* We propose to replace the words “Certifying loan applications” with “Originating loans” in paragraph (1)(i)(D) of the definition of “third-party servicer.”

*Reasons:* We propose to change “certifying loan applications” to “originating loans” to capture current terminology used in the student loan award and application process. The proposed change would not change current practices but merely update the terminology used.

#### § 668.3 Academic Year

*Statute:* Section 481(a)(2) of the HEA provides that, for purposes of the title IV, HEA programs, an “academic year” requires a minimum of 30 weeks of instructional time for a credit hour program and a minimum of 26 weeks of instructional time for a clock-hour program. An academic year for an undergraduate program of study must additionally include at least 24 semester or trimester hours, 36 quarter hours, or 900 clock hours.

*Current Regulations:* Section 668.3 defines the minimum requirements for an institution’s definition of an “academic year,” and defines certain terms related to that definition. The regulations currently define a “week of instructional time” as any week in which at least one day of regularly scheduled instruction or examinations occurs or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs. The definition currently excludes vacation periods, homework, or periods of orientation or counseling.

*Proposed Regulations:* The Department proposes to revise the definition of a “week of instructional time” as it pertains to an institution’s definition of an “academic year.” The definition would be separated into two parts: One that applies to traditional postsecondary programs and one that applies to programs using asynchronous coursework through distance education or correspondence courses. The definition applying to traditional programs would remain unchanged and would be included as paragraph (2)(i) of the definition. The Department proposes to add a new paragraph (2)(ii) to establish the requirements for a week of instructional time in a program using asynchronous coursework through distance education or correspondence courses. For those programs, a week of instructional time would be defined in paragraph (2)(ii)(A) as a week in which the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives. The Department proposes to establish in paragraph (2)(ii)(B) that in a program using asynchronous coursework through

distance education (not a correspondence course) the institution must also expect enrolled students to perform educational activities demonstrating academic engagement during the week. We also propose to amend paragraph (3) of the definition, relating to the types of activities excluded from the definition of a “week of instructional time,” to remove references to vacation periods and homework and instead refer to scheduled breaks and activities not included in the definition of “academic engagement” under 34 CFR 600.2.

*Reasons:* The Department proposes to clarify the definition of a “week of instructional time” to accommodate programs without scheduled instruction, specifically distance education and correspondence courses that are offered asynchronously.

The definition of a “week of instructional time” is an important component in the regulatory requirements for the proration of Pell Grant and Direct Loan funds, but the definition currently states that a week of instructional time must include at least one day of scheduled instruction. This requirement, which is not included in the statute, effectively makes it impossible for institutions to offer title IV-eligible postsecondary programs without scheduling at least one day of instruction per week. Because the statutory definition of “distance education” under HEA section 103(7) specifically includes asynchronous instruction, we believe the current regulations are not consistent with Congress’ overall intent and must be revised to accommodate distance education coursework offered asynchronously.

The Department originally proposed to apply the alternative definition of a “week of instructional time” to both direct assessment programs and programs using asynchronous coursework through distance education or correspondence. However, one subcommittee member opposed including direct assessment programs in the definition, noting that direct assessment is a large category that may or may not include distance education. Based on that concern, the Department agreed to limit the alternative definition to only distance education and correspondence programs offered asynchronously. Several subcommittee members also expressed concern about the limited requirements for a week of instruction, indicating that a requirement for an institution to merely provide the materials and instructional support for student engagement did not seem comparable to the requirements

for programs with scheduled instruction. Acknowledging this concern, the Department proposed adding a separate requirement for asynchronous programs offered through distance education (as opposed to correspondence courses) that would ensure that such programs created an expectation for academic engagement (in accordance with the proposed definition of that term in § 600.2) while also ensuring that the appropriate materials and instructional support were available to students.

Following the first subcommittee meeting, the Department proposed to exempt distance education or correspondence programs from the prohibition on including homework in the concept of “instructional time” since such programs are generally completed at home and the concept of homework is less clear in such programs. However, one subcommittee member indicated that allowing institutions to count homework as meeting requirements for a week of instructional time in a distance education or correspondence program would provide an advantage for such programs over traditional programs with classroom instruction. The Department responded to this concern by revising that part of the definition to exclude activities not included in the definition of academic engagement under 34 CFR 600.2 instead of homework. This would provide institutions with additional flexibility to design innovative, non-traditional programs while still protecting taxpayers.

The subcommittee members did not object to that language or other aspects of the definition presented by the Department at the third subcommittee meeting. The committee accepted the definition as written, except that it proposed to replace the phrase “vacation periods” with “scheduled breaks” to use a phrase more commonly understood among postsecondary institutions. The Department agreed to this change as part of consensus with the committee.

#### *§ 668.5 Written Arrangements To Provide Educational Programs*

*Statute:* While the HEA does not reference written arrangements, it does allow the Department to establish criteria for institutions to follow as part of the institution’s PPA to participate in the title IV, HEA programs.

*Current Regulations:* Section 668.5 establishes the framework for written arrangements between two eligible institutions or written arrangements between an eligible institution and an ineligible institution or organization to

provide part of an educational program. This section does not address workforce responsiveness or the methodology for calculating the portion of a program offered by an ineligible institution or organization. Additionally, it does not address an institution’s acceptance of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit, or the internship or externship portion of a program.

*Proposed Regulations:* The Department proposes to revise § 668.5 by adding new paragraphs (f) *Workforce responsiveness*, (g) *Calculation of percentage of a program*, and (h) *Non-applicability to other interactions with outside entities*. The Department proposes to clarify that institutions utilizing written arrangements may align or modify their curriculum in order to meet the recommendations or requirements of industry advisory boards or industry-recognized credentialing bodies. This flexibility to account for established industry standards in designing programs would extend to institutional governance or decision-making changes where an institution looks to such standards as an alternative to allowing or requiring faculty control or approval.

The Department also proposes to clarify the calculation for determining the percentage of the program that is provided by an ineligible institution or organization under § 668.5(c) in paragraph (g). The number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the ineligible organization or organizations would be divided by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program. A course would be considered to be provided by an ineligible institution or organization if the contracted organization with which the institution has a written arrangement has authority over the design, administration, or instruction in the course. Lastly, the Department proposes to clarify that neither the acceptance by the institution of transfer credits, the use of prior learning assessment or other non-traditional methods of providing academic credit, nor the internship/externship portion of a program, if governed by accrediting agency standards that require the oversight and supervision of the institution are subject to the provisions of § 668.5 in paragraph (h).

The Department further proposes to revise the existing regulatory language pertinent to written arrangements between two or more eligible

institutions that are owned or controlled by the same individual, partnership, or corporation in § 668.5(a)(2), and written arrangements between an eligible institution and an ineligible institution or organization in § 668.5(c)(1). In the case of the former, the proposed regulations would remove current § 668.5(a)(2)(ii), which requires that, under the terms of a written arrangement between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation, the institution granting the degree or certificate must provide more than 50 percent of the eligible program. With respect to the latter provision, proposed § 668.5(c)(1)(i) would require an ineligible institution or organization that is party to a written arrangement with an eligible institution to demonstrate (1) experience in the delivery and assessment of the program or portion of the program they will be contracted to deliver under the provisions of the written arrangement and (2) that the program has been effective in meeting the stated learning objectives. The Department has also added citations to the consensus language in order to reference the appropriate portion of the substantive change regulations in § 602.22.

*Reasons:* The Department believes the proposed revisions to § 668.5 would better facilitate educational innovations and allow institutions increased flexibility in partnering with entities to provide critical workforce training that may be beyond the capability of institutions to offer on their own. The proposed revisions are also intended to clarify the requirements for institutions to seek and receive approval from accrediting agencies to engage in such partnerships in some circumstances.

Specifically, the proposed addition of paragraph (f) *Workforce responsiveness* would make clear an institution’s prerogative to modify its curriculum or academic requirements to meet the needs of industry advisory boards and employers who hire program graduates. Proposed § 668.5(c)(1)(i) would balance this flexibility by requiring that an ineligible organization that enters into a written arrangement with an eligible institution demonstrate experience in the delivery and assessment of the program or portion of the program the ineligible institution will be contracted to deliver under the provisions of the written arrangement and that the program has been effective in meeting the stated learning objectives. However, the Department seeks comment on whether this requirement would be difficult to meet as it may require an institution to “demonstrate experience

in the delivery and assessment of the program” and show that the program has been “effective” before it can enroll students in partnership with an institution. The Department has removed other similar “experience” requirements, including in § 602.12.

We propose to add paragraph (g) to establish specific requirements for how an institution must determine the percentage of a program that an ineligible organization will offer through a written arrangement. The current regulations do not establish specific requirements for performing this calculation, which has resulted in ambiguity regarding when an institution is subject to requirements under § 668.5(c)(3)(ii) for accrediting agency approval of the arrangement. Our intent is to offer a clear and simple method for an institution to determine the portion of the program offered by an ineligible institution or organization by dividing the number of hours provided by the ineligible organization by the total number of hours in the program. We propose to include in the numerator of this calculation the credit hours, clock hours, or the equivalent associated with any course in which the ineligible organization has authority over the design, administration, or instruction in the course, including the establishment of requirements for successful completion of the course, delivering instruction, or assessing student learning. These criteria were chosen because they reflect a circumstance in which the ineligible institution exerts full control over one or more of the fundamental academic functions associated with a given course, and such transfer of academic authority merits additional oversight by an institution’s accrediting agency when undertaken for a significant portion of the educational program.

In other words, this provision is reserved for cases where the eligible institution is relying upon the outside entity to offer part of a program just as it might defer to the expertise of another eligible institution. This section would not be utilized, for example, in cases where an institution seeks support moving a ground-based program online or where an institution utilizes third-party resources, instructors, or expertise to deliver part of a program through its own ground-based or online resources unless the entity providing such resources or support is actually performing instructional functions instead of the eligible institution. Written arrangements are focused exclusively on the delivery of instruction, and are separate and distinct from online program

management, hiring a third party for food service, and other efforts by institutions to utilize a third-party service provider in an area it does not have core expertise.

In seeking to better prepare students for the workplace and provide them with a competitive advantage in securing employment, many institutions include internship options alongside their curriculum. Through policy guidance, the Department has concluded that written arrangements are not necessary for these internships, nor do the restrictions on such arrangements apply to the internship or externship portion of a program if the internship or externship is governed by accrediting agency standards that require the oversight and supervision of the institution, and students are monitored by qualified institutional personnel. The addition of proposed paragraph (h) *Non-applicability of other interactions with outside entities* would codify this guidance in the regulations. This paragraph would also clarify the Department’s position that the limitations on written arrangements do not apply to acceptance by the institution of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit.

The Department proposes to eliminate § 668.5(a)(2)(ii), requiring that under a written arrangement between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation, the institution granting the degree or certificate provide more than 50 percent of the eligible program, because we believe that the provision is needlessly restrictive. Although institutions that are party to such a written arrangement may share ownership or control, each institution must meet the criteria to be an eligible institution.

The Department initially proposed to relax the limitations on the percentage of a program that may be provided by an ineligible institution or organization through a written arrangement. The Department sought comment from the subcommittee on appropriate limitations for these arrangements. The Department’s goal was to facilitate partnerships between the eligible institutions offering programs and organizations that can provide instruction using trade experts in a workplace environment that mirrors what graduates will encounter in their places of employment. Members of the subcommittee generally opposed making any changes to the restrictions currently found in § 668.5(c)(3). Subcommittee members expressed the

collective opinion that the existing allowances already provide sufficient flexibility for the purposes expressed by the Department and that permitting any larger portion of an educational program to be offered by an ineligible entity would call into question whether that program was in fact being offered by an eligible institution.

In the absence of agreement between the Department and non-Federal subcommittee members, the matter was referred to the main negotiating committee without recommended proposed regulatory language. Non-Federal negotiators expressed concerns similar to those of the subcommittee. A minority of negotiators suggested that greater accreditor oversight would adequately ensure program integrity in the case of educational programs largely provided by ineligible entities. In light of these concerns, the Department withdrew its initial proposal to allow an increased portion of educational programs to be offered by noneligible entities.

Instead, in response to concerns about the amount of processing time required for institutions’ requests to obtain accreditor approval to execute written arrangements involving more than 25 but less than 50 percent of a program being provided by an ineligible entity, negotiators agreed to add language to § 602.22(a) that would require an accreditor to make a final decision on such requests within 90 days. Accreditors would also be able to designate agency senior staff to approve or disapprove the request, instead of requiring board approval, which should allow more timely decisions. This would ensure that programs designed to respond to immediate workforce needs are not needlessly delayed.

#### 668.8 Eligible Program

*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 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 to qualify for a loan under parts B or 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 halftime 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.

*Current Regulations:* Section 668.8(e) states that the number of clock hours in "short-term" programs, that is, programs subject to the requirements of § 668.8(d)(3)(i) through (iv), may not exceed by more than 50 percent the minimum number of clock hours required for licensure in the recognized occupation for which the program prepares students, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency.

Section 668.8(k) requires an institution offering a program in credit hours that is less than two academic years in length and does not lead to an associate degree, bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or, alternatively, does not provide for each course within that program to be acceptable for full credit toward an associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, to use the formula in section 668.8(l) to determine the number of credit hours in that program. The formula for converting clock hours to credit hours requires that a semester or trimester hour include at least 37.5 clock hours of instruction and a quarter hour at least 25 hours of instruction. However, if student work outside of class combined with clock hours of instruction meets or exceeds these numeric values (the institution's accrediting agency, or recognized State agency for vocational institutions, must not have identified any deficiencies with the institution's policies and procedures for determining the number of credit hours it awards), the institution may convert clock hours to credit hours using a minimum standard by which a semester or trimester hour must include at least 30 clock hours of instruction and a quarter hour at least 25 clock hours of instruction.

*Proposed Regulations:* The Department proposes to revise § 668.8(e)(1)(iii) to state that an eligible short-term program must demonstrate reasonable program length, in accordance with § 668.14(b)(26).

Additionally, the Department proposes revisions to § 668.8(l), which contains the formula for calculating a clock-to-credit hour conversion. Under the proposed regulations, the minimum number of clock hours that must be included in a semester or trimester credit hour would be reduced from 37.5 to 30, and the minimum number of clock hours that must be included in a quarter credit hour would be reduced from 25 to 20. All references to work outside of class would be removed and have no bearing on the conversion formula.

*Reasons:* The limits on program length for short-term programs in § 668.8 reflect those in § 668.14, which applies to all gainful employment programs for which an institution must demonstrate a reasonable relationship between the length of the program and entry-level requirements for the recognized occupation for which the program prepares the student. We are proposing revisions to § 668.14(b)(26) that would make changes to the standard used to demonstrate that reasonable relationship. The consensus language mirrored most, but not all, of the provisions of § 668.14(b)(26). For this reason, the Department is instead proposing to simply refer to this provision to make the regulations in each section as consistent and clear as possible.

Regarding the proposed revisions to the formula for calculating a clock-to-credit hour conversion, the Department believes the current formula described above has proved confusing for institutions while yielding little in way of increased program integrity.

When the clock-to-credit conversion was originally established in final regulations published July 23, 1993 (58 FR 39618), the Secretary adopted a regulatory formula based upon the statutory definition of an "academic year," which included at least 24 semester or trimester hours, 36 quarter hours, or 900 clock hours of instruction. During that rulemaking, the original conversion ratios adopted by the Secretary were obtained by dividing 900 clock hours by 24 semester hours or 36 quarter hours, yielding ratios of 37.5 clock hours for each semester hour and 25 clock hours for each quarter hour, respectively. However, the Secretary acknowledged in the final rule that the formula did not account for the fact that credit hours have traditionally assumed both in-class and out-of-class work, whereas clock hours have been defined only in terms of in-class instructional hours. Thus, the formula did not account for the number of hours of outside preparation assumed for credit

hours. To address this problem, the Secretary revised the formula to reduce the ratios to 30 clock hours for each semester hour and 20 clock hours for each quarter hour with a presumption that at least some out-of-class work was being performed for each credit hour subject to the conversion.

In final regulations published October 29, 2010 (75 FR 66832), the Secretary revised the conversion formula in an attempt to more strictly reflect the statute's definition of an academic year. The ratio was set at 37.5 clock hours for each semester hour and 25 clock hours for each quarter hour with an option for an institution to use the original 30-to-1 and 20-to-1 ratios if the institution (1) documented adequate out-of-class work to make up the other hours; and (2) had not been cited by its accrediting agency for problems with its establishment of credit hours.

In the period since that regulation was published, the Secretary has identified a number of significant problems regarding the implementation and enforcement of the conversion requirements. As noted above with respect to the proposed definition of a "credit hour," even absent the conversion requirement, the Department has no evidence that students complete the requisite two hours of out of class work required by the current definition of a credit hour. Neither the Department nor accrediting agencies are capable of systematically evaluating whether students actually perform work outside of class, and thus are forced to rely on each institution's assertion that it expects students to perform such work under the current regulations.

Additionally, the revised conversion formula added substantial complication to an institution's calculation of each student's eligibility for title IV, HEA funds and resulted in a diminished amount of aid for students during portions of programs without written expectations of out-of-class work, such as laboratory or clinical requirements, despite the fact that many students perform substantial out-of-class work during those experiences.

Given these problems, the Secretary proposes to revert to the original conversion ratios that presume an amount of out-of-class work in accordance with an accrediting agency's requirements for the establishment of credit hours. The proposed changes would establish equitable, measurable, and clear conversion standards keyed only to instructional hours, eliminating the ambiguity associated with the consideration of outside work.

### § 668.10 Direct Assessment Program

*Statute:* Section 481(b)(4) of the HEA provides that instructional programs that use direct assessment of student learning or recognize the direct assessment of student learning by others, in lieu of measuring student learning in credit hours or clock hours, are eligible to participate in title IV, HEA programs as long as the assessment is consistent with the institution's or program's accreditation. The statute also requires the Secretary to approve an institution's first direct assessment program.

*Current Regulations:* Section 668.10(a) defines a "direct assessment program" as an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment or recognizes the direct assessment of student learning by others, and specifies that the assessment must be consistent with the accreditation of the institution or program utilizing the results of the assessment. The regulations clarify that "direct assessment of student learning" is a measure by the institution of what a student knows and can do in terms of the body of knowledge making up the educational program, and that such measures provide evidence that a student has command of a specific subject, content area, or skill or that the student demonstrates a specific quality associated with the subject matter of the program. The regulations provide several examples of direct assessments. Section 668.10(a) also clarifies that references to credit or clock hours as a measurement in that section apply to direct assessment programs and that, because direct assessment programs do not utilize credit or clock hours as a measure of student learning, an institution must establish a methodology to reasonably equate the direct assessment program (or the direct assessment portion of any program, as applicable) to credit or clock hours for the purpose of complying with applicable regulatory requirements and provide a factual basis satisfactory to the Secretary for its methodology.

Section 668.10(a) also contains definitions for a number of terms that exist elsewhere in the regulations for the title IV, HEA programs, including the definitions of "academic year," "payment period," "week of instructional time," and "full-time student." The definitions for "academic year" and "week of instructional time" are different for direct assessment programs. In § 668.10(a), an "academic year" is a minimum of 30 weeks of instruction and 24 semester or trimester

credit hours, 36 quarter credit hours, or 900 clock hours, whereas there are exceptions to those requirements under § 668.3. The definition of a "week of instruction" in § 668.10(a) is one in which at least one day of educational activity occurs, which differs from the definition of the term for all other programs in § 668.3(b)(2) insofar as the definition in § 668.3(b)(2) requires one day of scheduled instruction rather than educational activity and does not include a lengthy discussion of the types of educational activities that are included in the definition in § 668.10(a).

Section 668.10(b) establishes the requirements for an application for an institution to offer a direct assessment program that is eligible to participate in title IV, HEA programs. Such an application must include—

- A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;
- A description of how the assessment of student learning is done;
- A description of how the direct assessment program is structured, including information about how and when the institution determines on an individual basis what each student enrolled in the program needs to learn;
- A description of how the institution assists students in gaining the knowledge needed to pass the assessments;
- The number of semester or quarter credit hours, or clock hours, that are equivalent to the amount of student learning being directly assessed;
- The methodology the institution uses to determine the number of credit or clock hours to which the program is equivalent;
- The methodology the institution uses to determine the number of credit or clock hours to which the portion of a program an individual student will need to complete is equivalent;
- Documentation from the institution's accrediting agency indicating that the agency has evaluated the institution's offering of direct assessment program(s) and has included the program(s) in the institution's grant of accreditation;
- Documentation from the accrediting agency or relevant State licensing body indicating agreement with the institution's claim of the direct assessment program's equivalence in terms of credit or clock hours; and
- Any other information the Secretary may require in determining whether to approve the institution's application.

Under § 668.10(c), an eligible direct assessment program must meet the requirements in § 668.8 including, if

applicable, minimum program length and qualitative factors.

Under § 668.10(d), no program offered by a foreign institution that involves direct assessment is an eligible program.

Under § 668.10(e), a direct assessment program may use learning resources (e.g., courses or portions of courses) that are provided by entities other than the institution providing the direct assessment program without regard to the limitations on contracting for part of an educational program in § 668.5(c)(3).

Under § 668.10(f), title IV, HEA program funds may be used only for learning that results from instruction provided, or overseen, by the institution, not for the portion of the program that the student has demonstrated mastery of prior to enrollment in the program or tests of learning that are not associated with educational activities overseen by the institution.

Under § 668.10(g), title IV, HEA program eligibility is limited to direct assessment programs approved by the Secretary, and title IV, HEA program funds may not be used for the course of study described in § 668.32(a)(1)(ii) and (iii) if offered by direct assessment, or remedial coursework described in § 668.20 offered by direct assessment, except that remedial instruction that is offered in credit or clock hours in conjunction with a direct assessment program is eligible for title IV, HEA program funds.

Under § 668.10(h), the Secretary's approval of a direct assessment program expires on the date that the institution changes one or more aspects of the program described in the institution's application and specifies that an institution making such changes must obtain prior approval from the Secretary through a reapplication under the requirements in § 668.10(b).

*Proposed Regulations:* The Department proposes to simplify and clarify numerous aspects of the regulations for direct assessment programs. We propose to revise the definition of "direct assessment" to state that it is a measure of a student's knowledge, skills, and abilities designed to provide evidence of the student's proficiency in the relevant subject area. We propose to add a new paragraph (a)(3) that would require an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours, expressing that this methodology must be consistent with the requirements of the institution's accrediting agency or State approval agency. We propose to revise redesignated paragraph (a)(4) to state

that all regulatory requirements in that section that refer to credit or clock hours as a measurement apply to direct assessment programs according to whether they use credit or clock hour equivalencies, respectively. We propose to add a paragraph (a)(5) to clearly state that a direct assessment program that is not consistent with the requirements of an institution's accrediting agency or State approval agency is not an eligible program, and in order for direct assessment programs to be considered eligible programs, the agency must have evaluated the programs based on the agency's accreditation standards and criteria, included them in the institution's grant of accreditation or preaccreditation, and reviewed and approved the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours. We propose to remove the definitions of "academic year," "payment period," "week of instructional time," and "full-time student" in § 668.10(a) and refer instead to requirements appearing elsewhere in the regulations.

We propose to revise § 668.10(b) to require an institution to submit for the Secretary's approval only the first direct assessment program that it offers, whereas additional direct assessment programs at an equivalent or lower academic level may be determined to be eligible without further approvals from the Secretary except as required by § 600.10(c)(1)(iii), § 600.20(c)(1), or § 600.21(a), as applicable, if such programs are consistent with the policies and procedures of the institution's accreditation or State approval agency. We propose to require an institution to explain how it excludes from consideration of a student's eligibility for title IV, HEA program funds any credits or competencies earned on the basis of prior learning. Failing to do so could result in a negative audit finding or program review. We also propose to remove current paragraph (b)(10), which states that the application must include any other information the Secretary may require.

We propose to remove current § 668.10(c), which states that a direct assessment program must meet the requirements in § 668.8.

We propose to revise the prohibitions on the types of coursework for which direct assessment can be used while maintaining eligibility for title IV, HEA funds to state that such coursework can be eligible, but only if the Secretary has already approved one or more direct assessment programs at the institution and the institution's offering of direct assessment coursework is consistent

with the institution's accreditation and State authorization, if applicable. If an institution meets such requirements, it may offer the course of study described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), or remedial coursework described in § 668.20, using direct assessment for title IV, HEA purposes.

We propose to clarify that student progress in a direct assessment program can be measured using a combination of credit hours and credit hour equivalencies or clock hours and clock hour equivalencies.

We propose to remove current § 668.10(h), which states that the Secretary's approval of a direct assessment program expires on the date that the institution changes one or more aspects of the program described in the institution's application and that an institution making such changes must reapply for approval of the program.

*Reasons:* The current regulations for direct assessment programs are lengthy, complicated, and in several areas, redundant of other regulations. The Department proposes to simplify the direct assessment regulations and, wherever possible, to refer to other regulatory requirements rather than restating such requirements or modifying them specifically for direct assessment programs.

The Department proposes to require approval only of an institution's first direct assessment program to comply with statutory requirements while limiting administrative burden. The current regulations requiring the Department's approval of each new direct assessment program and any change to an existing direct assessment program imposes substantial administrative burden on institutions that wish to offer direct assessment programs. Furthermore, the Department's experience with the direct assessment application process has shown that institutions that have completed the application process for their first direct assessment program largely understand the requirements for such programs and have overcome technical and operational difficulties implementing the title IV, HEA program regulations associated with such programs and can therefore be trusted to do so in the best interest of students and taxpayers. Published metrics from institutions offering multiple such programs have shown signs of success. For example, Western Governors University states that 97 percent of employers surveyed felt graduates were prepared for their jobs and that graduates are able to finish their bachelor's degree in 2.5 years on average, resulting in cost savings to

students.<sup>15</sup> <sup>16</sup> Similarly, the University of Wisconsin's Flex Option program found that 98 percent of graduates would recommend their program.<sup>17</sup> By eliminating the requirement to review subsequent programs, the Department would reduce the administrative burden on the institution while maintaining substantial oversight over the institution's implementation of direct assessment programs during the initial approval process.

We propose to require an institution to explain how it excludes credit earned through prior learning assessment from consideration of a student's eligibility for title IV, HEA program funds, because the Department remains concerned that institutions may include such coursework in their determination of a student's eligibility. The nature of CBE programs, including direct assessment programs, is such that an institution is often assessing a student's proficiency or learning in a given area without regard to whether it has provided instruction in that area, making it more difficult for the institution to separate credit earned through prior learning assessment and credit earned through instruction by the institution. The Department proposes requiring an institution to explain its approach in this area to ensure that it has considered how it will comply with the Department's prohibition on payment of title IV, HEA assistance for credit earned through prior learning assessment.

We propose to permit institutions to offer coursework described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), or remedial coursework described in § 668.20, using direct assessment, because such coursework does not meaningfully differ from coursework in other eligible programs. The Department believes that an institution that has been approved to offer a direct assessment program is capable of applying the normal title IV, HEA regulatory requirements to these types of coursework. Similarly, we propose to permit institutions to offer programs that are offered in part through credit hours or clock hours and in part through credit hour equivalencies or clock hour equivalencies to increase the amount of flexibility institutions have when designing educational programs. Although this increased flexibility would afford institutions more latitude in the design of direct assessment

<sup>15</sup> [www.wgu.edu/online-business-degrees/bachelors-programs.html](http://www.wgu.edu/online-business-degrees/bachelors-programs.html).

<sup>16</sup> [www.wgu.edu/blog/how-long-to-online-degree1902.html](http://www.wgu.edu/blog/how-long-to-online-degree1902.html).

<sup>17</sup> [flex.wisconsin.edu/wp-content/uploads/2019/10/FY19\\_UW-Flexible-Option-Annual-Report.pdf](http://flex.wisconsin.edu/wp-content/uploads/2019/10/FY19_UW-Flexible-Option-Annual-Report.pdf).

programs than currently exists, proposed new paragraph (a)(3) (discussed above) would require an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. For example, a program would not be permitted to switch between clock hours and credit hour equivalencies. Accordingly, transitions within programs would occur between traditional coursework and direct assessment under like measures, posing little risk to the integrity of the title IV, HEA programs.

#### § 668.13 Certification Procedures

*Statute:* Section 498(a) of the HEA requires the Secretary to determine an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility when determining the institution's eligibility to participate in title IV, HEA programs.

*Current Regulations:* Section 668.13(a) sets the requirements for the certification that an institution must complete to be eligible to participate in the title IV, HEA programs. It requires institutions that are participating for the first time in the title IV, HEA programs or that have undergone a change in ownership to complete training provided by the Secretary. Those individuals that are required to complete the training include the title IV administrator and the institution's chief administrator. The regulations do not specifically address the Secretary's responsibilities with respect to an application from an institution for recognition of a branch campus. Section 668.13(b) directs the Secretary to extend, on a month-to-month basis, an institution's existing certification, provided the institution has submitted an application for renewal of certification that is materially complete at least 90 days prior to expiration of its current period of participation. However, the regulations do not specify a timeframe for the Secretary to decide on the application. Section 668.13(c) sets the conditions for which the Secretary may provisionally certify an institution, and paragraph (d) allows the Secretary to revoke an institution's provisional certification if the Secretary determines that the provisionally certified institution is unable to meet its responsibilities under its PPA.

*Proposed Regulations:* The Department proposes to add a new paragraph (ii) to § 668.13(a)(1), clarifying that on an application from an institution, the Secretary certifies a location of an institution as a branch if

it satisfies the definition of "branch" in § 600.2. The Department also proposes to renumber paragraph (a)(1) as (a)(1)(i). The Department proposes to add § 668.13(b)(3), indicating that in the event the Secretary does not make a determination to grant or deny certification within 12 months of the expiration date of an institution's current period of participation, the institution will automatically be granted renewal of certification, which may be provisional for cause, but not automatically because the Department failed to make an affirmative decision within the twelve-month timeframe. The Department also proposes to clarify in a new paragraph (c)(1)(i)(F) that the Secretary may provisionally certify an institution if the institution is a participating institution that has been provisionally recertified under the automatic recertification requirement under paragraph (b)(3). References to transmission of documentation by facsimile in § 668.13(d) would be replaced by the phrase "electronic transmission" and the option to mail documentation through means other than the U.S. Postal Service would be recognized.

*Reasons:* Current regulations do not directly address the actions to be taken by the Secretary upon receipt of an application from an institution for certification of a branch location. The proposed addition of paragraph (ii) to § 668.13(a)(1) would provide that the Secretary will certify a location of an institution as a branch if it satisfies the definition of a "branch campus."

As noted above, when an institution that is currently certified submits a materially complete application for recertification to the Department no later than 90 calendar days before its PPA expires, its PPA remains valid, and its eligibility to participate in the title IV, HEA programs is extended on a month-to-month basis until its application is either approved or not approved. Although an institution's eligibility is extended on a month-to-month basis for as long as is necessary for the Secretary to render a decision on its application for renewal of certification, we are aware of the uncertainty experienced by institutions in cases where the decision period is lengthy. The proposed regulations would address this by providing that renewal of an institution's certification is automatically granted if the Secretary has not made a determination to grant or deny certification within 12 months of the expiration of the current period of participation. Because the renewal of an institution's certification may be provisional (for as little as one year in

length), the Department would retain the requisite degree of control over the certification process.

#### § 668.14 Program Participation Agreement

*Statute:* Section 487(a) of the HEA requires that, in order to be eligible to participate in title IV, HEA programs, an institution must be an IHE or an eligible institution that has entered into a program participation agreement with the Secretary.

*Current Regulations:* Section 668.14(b) identifies the terms to which an institution must agree when entering into a PPA. Paragraph (b)(10) provides that an institution that advertises job placement rates as a means of attracting students must make available to prospective students the most recent available data concerning employment statistics and relevant State licensing requirements of the State in which the institution is located. Under paragraph (b)(26), if an educational program offered by an institution is required to prepare a student for gainful employment in a recognized occupation, the institution must be able to demonstrate a reasonable relationship between the length of the program and the entry-level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by a Federal agency. Under paragraph (b)(31), the institution is required to submit a teach-out plan to its accrediting agency.

*Proposed Regulations:* The Department proposes to clarify the requirements in § 668.14(b)(10) by specifying that the institution must make available to prospective students the most recent data available concerning employment statistics, graduation statistics, and any other information to substantiate the truthfulness of its advertisements that used job placement rates as a means of attracting students. Additionally, the Department proposes to remove the requirement to provide the source of such statistics and any associated timeframes and methodology. The Department proposes to replace the phrase "an educational program offered by the institution" with the phrase "the course of instruction" in paragraph

(b)(10)(ii). Proposed changes to § 668.14(b)(26) would still require an institution to demonstrate a reasonable relationship between the length of the program and the entry-level requirements for which the program prepares the student. However, the requirement for a reasonable relationship would be satisfied if the number of clock hours in the program does not exceed the greater of 150 percent of the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by a Federal agency; or the minimum number of clock hours required for training in a recognized occupation for which the program prepares the student established in a State adjacent to the State in which the institution is located. In paragraph (b)(31), the regulations list certain circumstances under which an institution must provide a teach-out plan to its accrediting agency. The Department proposes to further require that the institution update its teach-out plan under those circumstances. The Department also references 34 CFR 668.43(a)(5)(v) to more clearly connect this provision with recently published provisions relating to State Authorization of Distance Education.

The changes to § 668.43(b)(26) remove a reference to a section that was eliminated in the final Gainful Employment regulation.<sup>18</sup>

*Reasons:* The Department proposes a technical change in paragraph (b)(10) to change the word “it” to “the institution.” The Department believes this will clarify the wording in this paragraph to ensure that institutions understand their responsibilities if they use job placement rates as a means of attracting students. In paragraph (b)(10)(i), the Department proposes to delete the phrase “including the source of such statistics and any associated time frames and methodology,” because the Department believes this language is redundant with the other requirements in that paragraph to provide the most recent available data to students and any information necessary to substantiate the truthfulness of the advertisements, which may include methodologies. In paragraph (b)(10)(ii), the Department proposes to replace the phrase “an educational program offered by the institution” to “the course of instruction” to ensure that institutions are providing proper information to prospective students when they are

interested in enrolling at that institution. The Department believes that if an institution uses job placement rates for any educational offerings, even if it is not an official educational program, the institution should be able to provide updated data and prove the truthfulness of such advertising.

A number of occupations, such as massage therapy and cosmetology, are subject to varying licensure requirements from one State to another. This can present a difficult challenge to both institutions and students. This can lead to difficulty not only in meeting licensing requirements, but also in transferring credits. Students who reside in and attend a program in one State may seek to be employed in an adjacent State where the minimum number of hours required for licensure is at least 150 percent of the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located. For example, New Jersey requires 500 hours for a massage therapy license, but New York requires 1,000 hours.<sup>19, 20</sup>

To reduce unnecessary barriers to employment that the Department’s limitations on program length create, the Department proposes that a program meets the reasonable length requirement if it does not exceed 150 percent of the hours required by the State in which it is located, or it does not exceed 100 percent of the requirements of an adjacent State. This would help ensure that institutions can offer programs that meet the professional licensure requirements of multiple nearby States, even when one or more of those nearby States maintain entry-level requirements that are greater than 150 percent of entry-level requirements in the State where the institution is located. This change would help institutions in multi-State regions to better meet the needs of students.

The Department initially proposed changes to § 668.14(b)(26) to allow a program length equal to 100 percent of the requirements in any State. Members of the subcommittee generally opposed providing this degree of latitude. Subcommittee members suggested that institutions might set a program’s length at 100 percent of the longest minimum requirement of any State, without regard to whether graduates of that program seek employment in that State.

Subsequently, the Department proposed limiting program length to 100

percent of the minimum program length required for licensure in an adjoining State. Although this proposal enjoyed majority support among subcommittee members, several members continued to express concern about changing the requirements in any way, suggesting that it would encourage institutions to add hours to programs beyond those necessary for students to become employed. These members argued that the current 150 percent threshold is reasonable and sufficient to accommodate most cases where nearby States have higher requirements. We also raise concerns that students face disparate treatment because Title IV funds can be used by a student who wishes to pursue a graduate degree simply because they are interested in a topic, but cannot be used by a student in a CTE program who wants to complete coursework to develop advanced skills and competencies that go beyond basic licensure requirements. We agree that we do not want schools to inflate the number of hours in a program beyond those that a student needs to complete in order to get a good job in their field, but at the same time, we need to afford those pursuing career and technical education the same opportunities to develop advanced competencies in order to qualify for higher paying and more secure jobs.

One subcommittee member suggested that where institutions needed more hours than 150 percent of State requirements, an accrediting agency could be the arbiter of whether additional hours were necessary. Since accreditors are typically more knowledgeable about occupational standards and the needs of employers, the Department was supportive of that recommendation.

Discussions among the committee members mirrored those that took place in the subcommittee. Ultimately, negotiators reached consensus on the second proposal, which would limit program length to the greater of 150 percent of the minimum program length required for licensure in the State in which the institution is located or 100 percent of the minimum program length required for licensure in an adjoining State.

The Department proposes to require an institution to update its teach-out plan if the Secretary initiates the limitation, suspension, or termination of the institution’s participation in the title IV, HEA programs; the institution’s accrediting agency acts to withdraw, terminate, or suspend the accreditation or pre-accreditation of the institution; the institution’s State licensing or authorizing agency revokes the

<sup>19</sup> [www.op.nysed.gov/prof/mt/mtlic.htm](http://www.op.nysed.gov/prof/mt/mtlic.htm).

<sup>20</sup> [www.njconsumeraffairs.gov/mbt/Pages/individual.aspx](http://www.njconsumeraffairs.gov/mbt/Pages/individual.aspx).

institution's license; or the institution otherwise intends to cease operations. We believe that an institution should update its teach-out plan to protect students in the event that steps are taken that may ultimately lead to an institution's closure. The Department believes that it is vital for an institution to have an updated plan when certain negative events may occur to provide the best protections to students and the taxpayers.

#### § 668.15 Factors of Financial Responsibility

*Statute:* Section 487(a) of the HEA provides that in order to be an eligible institution for the purposes of any title IV, HEA program, an institution must be an IHE or an eligible institution for a particular program and enter into a program participation agreement.

Section 498(c) requires the Secretary to determine whether an institution has the financial responsibility to provide the services described in its official publications, provide the administrative resources necessary to comply with title IV requirements, and to meet all its financial obligations. Institutions that do not meet those requirements may still be deemed financially responsible if they submit a third-party financial guarantee, such as a bond or letter of credit. Determinations about an institution's financial responsibility is based on audited and certified financial statements of the institution.

*Current Regulations:* Section 668.15(a) requires that for an institution to begin and to continue participation in any title IV, HEA program, it must demonstrate to the Secretary that it is financially responsible under the requirements in § 668.15.

*Proposed Regulations:* The Department proposes to change the title of Section 668.15 to "Factors of financial responsibility for changes in ownership or control." Additionally, the Department proposes to revise paragraph (a) to provide that, to begin and continue to participate in any title IV, HEA program after a change in ownership or control, an institution must demonstrate to the Secretary that the institution is financially responsible under the requirements established in § 668.15.

*Reasons:* The proposed regulations would codify the current practice of the Department to use the factors of financial responsibility when it is notified of an institution's change in ownership or control. The Department seeks to clarify that the regulations governing the factors of financial responsibility must be addressed when

there is a change of ownership or control of an IHE.

#### § 668.22 Treatment of Title IV Funds When a Student Withdraws

*Statute:* Section 484B(a)(1) of the HEA provides that if a recipient of title IV, HEA assistance withdraws from an institution during the payment period or period of enrollment in which the recipient began attendance, the institution must perform a calculation under that section to determine the amount of funds to be returned to the title IV, HEA programs. Section 484B(b) states that an institution must return the lesser of the amount of title IV, HEA assistance not earned by the student or an amount equal to the total institutional charges incurred by the student for the period multiplied by the percentage of title IV, HEA assistance not earned by the student, and section 484B(a)(3)(B)(i) defines the "percentage earned" as equal to the percentage of the payment period or period of enrollment for which assistance was awarded that was completed as of the day the student withdrew, provided that such date occurs on or before the completion of 60 percent of the payment period or period of enrollment. Section 484B(a)(3)(B)(ii) provides that a student has earned 100 percent if the day the student withdrew occurs after the student has completed 60 percent of the period.

*Current Regulations:* Section 668.22 contains several references to programs that are no longer authorized, specifically the ACG, the National SMART Grant, the Federal Perkins Loan, and the Federal Family Education Loan (FFEL) program, including:

- § 668.22(a)(3), which identifies the types of title IV, HEA assistance that are included in the return of title IV funds calculation; and
- § 668.22(i), which explains the order in which funds from the various title IV, HEA programs must be returned.

Section 668.22(a)(2)(i) provides that a student is considered to have withdrawn during a payment period or period of enrollment:

- In the case of a program that is 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;
- In the case of a program that is measured in clock hours, if the student does not complete all the clock hours in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing.

Paragraph (a)(2)(i) also provides that for students in non-term or nonstandard-term programs, a student is considered to have withdrawn if he or she is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on an approved leave of absence.

Under § 668.22(a)(2)(ii), a student enrolled in a program that is offered in modules is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will attend a module that begins later in the same payment period or period of enrollment, except that such module must begin no later than 45 days after the end of the module the student has ceased attending if the student is enrolled in a non-term or nonstandard-term program. Furthermore, if an institution has obtained written confirmation of future attendance, a student may change the date of return to a module that begins later in the same payment period or period of enrollment provided that the student does so in writing prior to the return date that he or she had previously confirmed. Students in non-term or nonstandard-term programs may only select a date of return to a module that begins no later than 45 days after the end of the module the student ceased attending. If an institution obtains written confirmation of future attendance in these circumstances, but the student does not return as scheduled, the student is considered withdrawn from the period and the student's withdrawal date is the withdrawal date that would have applied if the student had not provided written confirmation of a future date of attendance in accordance with the regulations.

Section 668.22(a)(6) explains that post-withdrawal disbursements must be made from available grant funds before available loan funds and that if outstanding charges exist on the student's account, the institution may credit the student's account up to the amount of outstanding charges with all or a portion of any grant funds that make up the post-withdrawal disbursement in accordance with § 668.164(d)(1) and (d)(2) and loan funds that make up the post-withdrawal disbursement in accordance with § 668.164(d)(1), (d)(2), and (d)(3) only after obtaining confirmation from the student or parent (in the case of a parent PLUS loan) that they wish to have the loan funds disbursed.

Section 668.22(b)(1) provides that a withdrawal date for a student who withdraws from an institution that is required to take attendance is the last date of academic attendance as determined by the institution from its attendance records. Section 668.22(c)(3) provides that an institution that is not required to take attendance may choose to use as a student's withdrawal date the student's last date of attendance at an academically-related activity provided that the institution documents that the activity is academically-related and documents the student's attendance at the activity.

Section 668.22(d) includes the requirements for an approved leave of absence, which include a requirement that upon the student's return from the leave of absence, the student must be permitted to complete the coursework he or she began prior to the leave of absence. The requirement for a student to be permitted to resume coursework does not apply to clock hour or non-term credit hour programs.

Section 668.22(f)(2)(i) provides 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, except that the total number of days does not include scheduled breaks of at least five consecutive days, days in which the student was on an approved leave of absence or, for a period in which any of the courses in the program are offered in modules, any scheduled breaks of at least five consecutive days when the student is not scheduled to attend a module or other course offered during that time.

Section 668.22(l) establishes several definitions related to the return of title IV funds requirements, including:

- Under paragraph (l)(6), a program is "offered in modules" if a course or courses in the program do not span the entire length of the payment period or period of enrollment; and
- Under paragraph (l)(7), "academic attendance" and "attendance at an academically-related activity" include, but are not limited to, physically attending a class where there is an opportunity for direct interaction between the instructor and students; submitting an academic assignment; taking an exam, an interactive tutorial, or computer-assisted instruction; attending a study group that is assigned by the institution; participating in an online discussion about academic

matters; and initiating contact with a faculty member to ask a question about the academic subject studied in the course. However, "academic attendance" and "attendance at an academically-related activity" do not include activities where a student may be present, but not academically engaged, such as living in institutional housing; participating in the institution's meal plan; logging into an online class without active participation; or participating in academic counseling or advisement.

*Proposed Regulations:* In § 668.22(a)(2)(i)(C), the Department proposes to eliminate the reference to non-term programs and add standard term programs (except for subscription-based programs) to the types of programs in which students must be considered withdrawn if they have ceased attendance and are not scheduled to begin another course within a payment period for more than 45 calendar days after the end of the module they ceased attending. We propose to add a new clause (a)(2)(i)(D) that explains that a student in a non-term program or a subscription-based program is considered withdrawn if the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance.

We propose to establish in § 668.22(a)(2)(ii) two new exceptions to the requirements for determining that a student has withdrawn. First, we would not consider a student to have withdrawn if the student completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete. Second, in a program offered in modules, we would not consider a student to have withdrawn if the student completes:

- One module that includes 50 percent or more of the number of days in the payment period;
- A combination of modules that when combined contain 50 percent or more of the number of days in the payment period; or
- Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under § 668.2 for the payment period.

We propose to specify that an electronic confirmation is one type of written confirmation that a student can provide to avoid being considered withdrawn and having title IV, HEA assistance returned as part of the return of title IV funds process.

We propose to eliminate the reference to non-term programs and include

standard term programs (except for subscription-based programs) among the types of programs in which students cannot avoid being considered withdrawn, even with a written confirmation of future attendance, if the next module the student plans to attend begins later than 45 days after the end of the module the student ceased attending. We also propose to provide that, for non-term and subscription-based programs, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date is no later than 60 calendar days after the student ceased attendance. The regulations would also prescribe that students enrolled in subscription-based programs may only avoid withdrawal through a written confirmation of future attendance if they indicate that they plan to resume attendance during the same payment period or period of enrollment.

In the regulations explaining how a student may change the date of his or her planned return after providing written confirmation of future attendance, we propose to eliminate the reference to non-term programs and include standard term programs (except for subscription-based programs), among the types of programs in which students cannot change the date of their return to a module that begins later than 45 calendar days after the end of the module the student ceased attending. We also propose that, for non-term and subscription-based programs, the student can change his or her date of return if the student's program permits the student to resume attendance no later than 60 calendar days after the student ceased attendance.

We propose to strike references to title IV, HEA programs under which financial aid is no longer authorized to be awarded or disbursed, specifically the Federal Perkins Loan, FFEL, ACG, and National SMART Grant programs, in each place they appear in § 668.22. We also propose to add Iraq and Afghanistan Service Grants to the types of grants that are included in the return of title IV funds calculation and insert those grants as the second type of grant to be returned by an institution if the institution is subject to a return of grant funds. Iraq and Afghanistan Service Grants would be returned after Pell Grants, but before FSEOG Program aid. The resulting order of return of would be:

1. Unsubsidized Federal Direct Stafford loans.

2. Subsidized Federal Direct Stafford loans.
3. Federal Direct PLUS loans made to a parent to pay expenses on behalf of the student.
4. Federal Pell Grants.
5. Iraq and Afghanistan Service Grants.
6. FSEOG Program grants.
7. TEACH Grants.

We propose to make technical changes in various places in § 668.22 to correct references to parts of the cash management regulations that were changed in the final regulations published October 30, 2015 (80 FR 67126).

Under the requirements for a leave of absence in § 668.22(d)(1)(vii), we propose to add subscription-based programs to the types of programs that do not require the institution to permit the student to complete coursework he or she began prior to the leave of absence to grant an approved leave of absence.

We propose to amend § 668.22(l)(6) to clarify that a program is “offered in modules” if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. Non-term programs would no longer be considered programs “offered in modules” in any circumstances.

We propose to amend the definitions of “academic attendance” and “attendance at an academically-related activity” in § 668.22(l)(6) to refer to the proposed definition of “academic engagement” in § 600.2 rather than listing the specific activities that would be included and excluded from those definitions.

*Reasons:* In general, the Department proposes to remove any references to “modules” with respect to non-term credit hour and clock hour programs and replace such references with separate requirements relating specifically to non-term programs. The Department’s requirements for programs offered in modules are primarily intended to address abuse in term-based programs, and the Department maintains separate requirements for non-term programs that obviate the need for many of the requirements relating to modules.

The primary purpose of the regulations related to modules was to prevent an institution from considering a student to have completed a payment period or period of enrollment by virtue of completing a very short module at the beginning of a term. However, a

payment period in a non-term program is defined in § 668.4(c) as the period of time during which a student completes half the credit hours or clock hours in the academic year or program, whichever is shorter, and a period of enrollment for such a program is always comprised of two payment periods. Thus, completion of a single course or module in a non-term program does not automatically result in the student’s completion of the entire period for purposes of the return of title IV funds calculation even absent the regulations for modules.

There were some instances in which the Department did not maintain separate requirements for non-term programs that accomplish the same thing as the requirements for programs offered in modules, and in those cases, we propose to add separate requirements that would be specific to non-term programs. For example, the Department’s various regulations related to written confirmation of a student’s intent to return at a later point in a payment period or period of enrollment currently apply to all programs using modules, including non-term programs using credit hours or clock hours. Because we are eliminating all references to modules with respect to non-term programs, we propose to alter the requirements related to written confirmation to specify that students in non-term programs may provide written confirmation of their intent to return if their program permits a return within 60 days of the date that the student ceased attendance. These requirements are intended to be like the requirements for programs offered in modules.

The Department also proposes to make standard term programs subject to the limitations on the timeframe for a student to return following a written confirmation of future attendance. Though it is less common for a module in a standard term program to begin more than 45 days following the end of a prior module, the Department maintains the same concerns about long periods of non-attendance for standard term programs as it does for nonstandard-term and non-term programs, and believes that students should be treated consistently in these situations.

We propose to make several changes regarding whether a student is considered withdrawn in order to address specific unintended circumstances that have arisen as a result of the current regulations. First, we propose that a student who has completed all the requirements for graduation should not be considered withdrawn under any circumstances,

since such a student has effectively completed his or her educational program and should not be penalized for doing so faster than anticipated.

Second, we are proposing changes related to withdrawals in programs offered in modules, because the current regulations have created unintended consequences that have created inequitable outcomes for students who withdrew from such programs. Under the current regulations, a student is considered withdrawn from a credit hour program if the student ceases attendance before completing all the days that he or she was scheduled to attend in the payment period or period of enrollment. This requirement does not pose a problem when all classes during a period occur during the same timeframe. However, when the student’s classes occur during different timeframes—that is, when the student is enrolled in a program offered in modules—substantial complications can arise, especially when a student is permitted to make changes to his or her enrollment throughout the payment period or period of enrollment. For example, consider a student who is enrolled in two modules in a single payment period. The student attends the first module, but then decides to withdraw. If the student follows the institution’s process for formally withdrawing from the institution and drops all classes in both modules at the same time, the student will be considered withdrawn and the institution will include in the denominator of the student’s return of title IV funds calculation all the days in both modules. However, if the student decides to drop the classes in the second module first, waits a week, and then drops the classes in his or her current module, the denominator of the student’s return of title IV funds calculation will include only the days in the first module. Depending on how much of the first module the student has attended at the time he or she withdraws, this decision could have substantial effects on the amount of title IV, HEA assistance the student has earned, potentially resulting in a difference of thousands of dollars in aid eligibility between the two scenarios. This difference in treatment has no policy purpose but can have negative effects on a student that chooses to drop all of his or her courses at the same time.

In order to mitigate these problems, the Department proposes two remedies. First, we propose to consider students to have completed a payment period or period of enrollment in certain circumstances when the student has

completed coursework in such a period. Second, we propose to treat a student as being scheduled to complete the days in a module if any coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds.

The Department proposes to revise its approach to the treatment of students who complete some, but not all, of the coursework they were scheduled to attend during a payment period to ensure more equitable treatment of such students while maintaining the integrity of the title IV, HEA programs. When the return of title IV funds requirements were first implemented in 1999, the Department took the position that a student who completed any coursework in a payment period or period of enrollment was not considered to have withdrawn. The Department revised its approach in 2010 after it became aware of instances of abuse in which institutions established very short modules (*e.g.*, one or two weeks in duration) that were easy for students to complete, and then used such completions as a basis to avoid return of title IV funds provisions for those students even if the students completed no other part of the period. The Department now proposes to treat a student as having completed a period if the student has completed a substantial portion of the time or coursework that the student was scheduled to attend during the period. We believe that this approach would prevent the types of abuse described above while also avoiding punitive consequences for students who complete a substantial amount of coursework during the period.

In discussions with the subcommittee, the Department originally proposed that, under the proposed regulations, a student would be considered to have completed a payment period or period of enrollment if the student completed a module or a set of modules that constituted at least 50 percent of the days in the period. The Department's intent was that a student would be considered to have completed the period if the student completed coursework constituting at least half of the days in the period, not including the days in scheduled breaks. While the subcommittee generally accepted the Department's rationale for this change, one subcommittee member proposed to also consider a student to have completed a period if the student completed the equivalent of half-time coursework during that period. Acknowledging that this approach would also address the Department's concerns about a student avoiding a

withdrawal by completing a minimal amount of coursework, the Department adopted the subcommittee member's suggestion.

The Department also proposes to introduce a new method of determining the number of days that should be used in the denominator of a return of title IV funds calculation when a student withdraws from a program offered in modules to simplify the calculation and reduce the administrative burden associated with such calculations. Currently, a student is considered to be scheduled to attend a module if he or she is scheduled to attend the module on the day of the withdrawal. However, a student's enrollment in modules can fluctuate during a payment period or period of enrollment, and as described above, there are circumstances in which dropping or adding courses before or after withdrawing can have a significant impact on a student's return of title IV funds calculation without a specific policy purpose. To limit the uncertainty inherent in these situations, the Department proposes to establish a clear system for identifying the number of days that a student is scheduled to attend in a payment period when the student's coursework uses modules. An institution awards and disburses a student's title IV assistance using an enrollment status that is based on a determination of a student's schedule at a specific point in time, and the Department proposes to use the student's schedule at that fixed point to determine the number of days the student is scheduled to attend during the period for return of title IV funds purposes. Using this approach, subsequent fluctuations in the student's enrollment would have no effect on the number of days in the denominator of the return of title IV funds calculation if the student withdraws, resulting in a greater degree of certainty for students, a diminished likelihood of improper payments, and reduced administrative burden for institutions performing such calculations.

Finally, the Department proposes to eliminate all references to title IV, HEA programs under which financial aid is no longer authorized to be awarded or disbursed and add programs that have been authorized since the last time the regulations were changed, to reflect statutory requirements and provide additional clarity in the regulations.

The committee discussed clarifying changes to the requirements related to considering a student to have completed a period if the student completed a module or set of modules comprising at least 50 percent of the period and ultimately reached consensus on the

language. The changes would clarify that the 50 percent threshold could be reached either with a single module or a combination of modules that, when combined, contain 50 percent or more of the number of days in the payment period.

#### *§ 668.28 Non-Title IV Revenue (90/10)*

*Statute:* Section 487 of the HEA requires that, to be an eligible institution, an institution must enter into a program participation agreement with the Secretary that, in the case of a proprietary IHE, stipulates that such institution must derive not less than ten percent of its revenues from sources other than title IV, HEA program funds. The percentage of revenues from sources other than title IV, HEA program funds is calculated according to the formula prescribed in § 668.21(d)(1) (90/10 calculation). Institutions failing to meet the required ten percent threshold for revenue derived from a source other than title IV, HEA program funds, would be subject to the sanctions described in § 668.21(d)(2) of this section.

*Current Regulations:* Section 668.28, in paragraph (a)(5), addresses the proper treatment of revenue generated from institutional aid in the 90/10 calculation. Specifically, for loans made to students (by the institution) on or after July 1, 2008, and prior to July 1, 2012, institutions are instructed to include as revenue, the net present value of the loans made to students during the fiscal year. Paragraph (b)(1) of this section contains the formula for determining net present value. As an alternative to performing the calculation, institutions are permitted under paragraph (b)(2) to use 50 percent of the total amount of loans that the institution made during the fiscal year as the net present value, with the restriction that it may not sell any of the loans until they have been in repayment for at least two years.

*Proposed Regulations:* The Department proposes to remove paragraph (b), pertaining to net present value, in its entirety.

*Reasons:* For loans made to students before July 1, 2008, and on or after July 1, 2012, the applicable regulations in § 668.28(a)(5)(ii) and § 668.28(a)(5)(iii) respectively instruct institutions to include as revenue in the 90/10 calculation only the amount of payments made on those loans that the institution received during the fiscal year. The intervening four-year period during which net present value was to be used has elapsed. And because revenue under the net present value calculation is derived only from loans

made during a given fiscal year, future payments are not a consideration. Accordingly, the regulatory formula for calculating net present value is unnecessary.

#### § 668.34 Satisfactory Academic Progress

*Statute:* Section 484(a)(2) of the HEA requires that a student make satisfactory progress in the student's course of study 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.

*Current Regulations:* Section 668.34 requires that an institution's satisfactory academic progress (SAP) policy specify, for all programs, 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. The pace at which a student is progressing must be calculated by dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted. Maximum timeframe is currently defined in § 668.34(b) as, 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. For an undergraduate program measured in clock hours, maximum timeframe is defined as a period of time 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.

*Proposed Regulations:* The Department proposes to revise current § 668.34(a)(5)(ii) to provide that the requirement for an institution's SAP policy to 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, applies only to credit hour programs using standard or nonstandard-terms that are not subscription-based programs. For those programs, institutions would, in addition to dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted, have the option of calculating pace by determining the number of hours that the student should have completed at the evaluation point in order to complete the program within the maximum timeframe.

The proposed regulations would continue to require that an institution's SAP policy specify, for all programs, a maximum timeframe within which students must complete the educational program in order to be eligible to receive title IV, HEA program funds. However, under proposed § 668.34(b), maximum timeframe for an undergraduate program measured in credit hours could be a period expressed in calendar time, as well as measured in credit hours (the only option permitted under current regulations) that is no longer than 150 percent of the published length of the educational program.

Regardless of whether pace is calculated by dividing the cumulative number of hours successfully completed by the number of hours attempted or determining the number of hours that the student should have completed at the evaluation point, it must be a measure of whether a student is on track to complete the program within the maximum timeframe. For example, a four-year, degree-granting program might consist of 120 credit hours. Expressed in credit hours, the 150 percent maximum timeframe for such a program is 180 attempted credit hours. A cumulative pace of completion of 66.666 percent (rounded to 67 percent), evaluated at each evaluation point, ensures that a student will be able to complete his or her program within the 150 percent maximum timeframe.

Alternatively, the institution could, under these proposed regulations, choose to define the 150 percent maximum timeframe for this program in calendar time, meaning that a student would have six years to complete a four-year program. However, it still must be determined at each evaluation point whether the student has successfully completed enough credit hours to enable completion of the program within the six-year maximum timeframe. Assuming the institution checks SAP for this program on an annual basis, a student must have successfully completed at least 20 credit

hours after the first year, 40 credit hours after the second year, 60 credit hours after the third year etc. to maintain a pace necessary to complete all 120 credit hours in the program within the maximum timeframe of six years.

*Reasons:* The definition of a payment period in § 668.4(c), as it pertains to a program that measures progress in credit hours and does not have academic terms or for a program that measures progress in clock hours, requires a student to successfully complete all the credit or clock hours, and all the weeks in that payment period. Only then does the student progress to the next payment period and become eligible for the disbursement of title IV, HEA funds associated with that payment period. Unlike for students in term-based, credit hour programs, it is not possible for a student enrolled in a non-term credit hour or clock hour program to receive subsequent disbursements until all the hours for which he or she has already been paid are successfully completed. The de facto 100 percent pace requirement imposed by the definition of a payment period for programs that measure progress in credit hours without terms or clock hours obviates the need for an institution's SAP policy to specify the pace at which a student must progress through his or her educational program to ensure that he or she will complete the program within the maximum timeframe. We believe this proposed change will significantly reduce the administrative burden on institutions offering non-term programs in performing redundant SAP calculations associated with pace.

As noted earlier, under proposed § 668.2 (see the discussion related to § 668.2), the Department would add a new definition of "subscription-based program," clarifying that students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. The current regulations require an institution to evaluate a student's pace of completion by dividing completed credits over attempted credits. This calculation is difficult to apply in competency-based programs, including subscription-based programs, because there is often no set period of time during which a student "attempts" a competency in such programs; rather, the student works on a competency until he or she can demonstrate mastery of it. Given the limitations in this proposed definition on a student's eligibility to receive additional

disbursements, we believe it is unnecessary and needlessly burdensome for an institution's SAP policy to include pace requirements for subscription-based programs.

Finally, the Department proposes to provide additional flexibility by giving institutions the option of expressing the maximum timeframe (for an undergraduate program measured in credit hours) in calendar time. Measuring maximum timeframe in credit hours, with pace determined by dividing the cumulative number of successfully completed credit hours by the cumulative number of attempted hours, more easily accounts for variances in enrollment status. However, using calendar time may make more sense for certain programs, especially those where coursework or enrollment status is prescribed.

Members of the subcommittee were generally supportive of the proposed changes to § 668.34. One member expressed the desire for more flexibility in applying SAP to subscription-based programs given that the Department's proposed disbursement changes for such programs would already require students to make progress in order to receive subsequent disbursements of title IV, HEA assistance. The proposed regulations in this section applicable to subscription-based programs reflect discourse which occurred, both in the subcommittee and among negotiators, within the wider context of defining subscription-based programs (refer to the discussion of *subscription-based programs* under § 668.2 *Definitions*).

#### § 668.111 Scope and Purpose

*Statute:* Section 487(b) of the HEA provides that an institution that has received written notice of a final audit determination or a program review determination may seek a review of the determination by the Secretary.

*Current Regulations:* Section 668.111 explains the scope of Subpart H—Appeal Procedures for Audit Determinations and Program Review Determinations. The regulations indicate that subpart H establishes rules governing the appeal by an institution or third-party servicer of a final audit determination or a final program review determination.

*Proposed Regulations:* The Department proposes to expand the scope to include the issuance of such determinations by the Department.

*Reasons:* The proposed expansion of scope for this subpart to include the issuance of final audit determinations and final program review determinations is a conforming change to the proposed changes in § 668.113,

which would provide that the Secretary will rely on an accrediting agency's or State approval agency's requirements in resolving findings related to distance education or the establishment of credit hours.

#### § 668.113 Request for Review

*Statute:* Section 487(b) of the HEA provides that an institution that has received written notice of a final audit determination or a program review determination may seek a review of the determination by the Secretary.

*Current Regulations:* Section 668.113 establishes the requirements for an institution or a third-party servicer to submit a written request for review of a final audit determination or a final program review determination. The regulations establish that an institution or servicer must file its request for review no later than 45 days from the date that the determination was received, must attach a copy of the determination to its request, and must state its position together with the pertinent facts and reasons supporting that position. The regulations also provide in paragraph (d)(1) that if an institution's violation results from an administrative, accounting, or recordkeeping error that was not part of a pattern of error and there is no evidence of fraud or misconduct related to the error, the Secretary permits the institution to correct the error. Paragraph (d)(2) states that an institution corrects an error described in paragraph (d)(1) with regard to liability if the correction eliminates the basis for the liability.

*Proposed Regulations:* The Department proposes to add a new paragraph that explains that if a final audit determination or final program review determination includes liabilities resulting from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary would rely on the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the work associated with the institution's credit hours is consistent with commonly accepted practice in higher education.

*Reasons:* The Department proposes these changes in order to conform with changes to the definitions of "distance education" and "credit hour" under § 600.2, both of which rely upon the judgment and requirements of an institution's accrediting agency or State approval agency. To the extent that a final audit determination or a final program review determination

addresses these topics, we believe such determinations should specifically reference the agency's requirements.

#### § 668.164 Disbursing Funds

*Statute:* Section 487(c)(1)(B) of the HEA provides that the Secretary "shall prescribe such regulations as may be necessary to provide for" reasonable standards of financial responsibility, and appropriate institutional administrative capability to administer the title IV, HEA programs, in matters not governed by specific program provisions, "including any matter the Secretary deems necessary to the sound administration of the financial aid programs."

*Current Regulations:* Section 668.164 establishes requirements for the disbursement of funds under the title IV, HEA programs. Current § 668.164(i) provides that the earliest an institution may disburse title IV, HEA funds to an eligible student or parent is—

- For a student enrolled in a credit-hour program offered in terms that are substantially equal in length, 10 days before the first day of classes; or
- For a student enrolled in a non-term program or a term-based program in which the terms are not substantially equal in length, the later of 10 days before the first day of classes in a payment period or the date the student completed the previous payment period for which he or she received title IV, HEA funds.

*Proposed Regulations:* The Department proposes to exclude subscription-based programs from the current provisions for early disbursements under § 668.164(i)(1)(i) and (ii) and establish requirements that will apply specifically to subscription-based programs in new paragraph (i)(1)(iii). The proposed regulations would establish that if a student is enrolled in a subscription-based program, the earliest that an institution may make a disbursement to that student is the later of 10 days before the first day of classes in the payment period or the date that the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms attended under the definition of a subscription-based program in § 668.2.

*Reasons:* We are proposing these changes to conform with the establishment of the proposed disbursement methodology for subscription-based programs that is provided under § 668.2. The proposed regulations would establish the specific timing requirements for disbursement in a subscription-based programs. The requirements would be similar to

requirements for programs with terms that are substantially equal, except that an institution would not be permitted to disburse funds to a student in a subscription-based program until the student has completed the appropriate number of credit hours (or the equivalent) in accordance with the requirements in the definition of “subscription-based program.”

#### § 668.171 General

*Statute:* Section 498(c) of the HEA grants the Secretary the authority to determine whether an institution is financially responsible.

*Current Regulations:* If the Secretary determines that an institution is not financially responsible under the standards and provisions of § 668.171 or under an alternative standard in § 668.175, or the institution does not submit a financial or compliance audit by the date permitted and in the manner required under § 668.23, the Secretary may initiate an action under subpart G of part 668 to fine the institution, or to limit, suspend, or terminate the institution’s participation in the title IV, HEA programs or for an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

*Proposed Regulations:* The Department proposes to add § 668.171(e)(3), which would allow the Secretary to deny the institution’s application for certification or recertification to participate in the title IV, HEA programs if the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date permitted and in the manner required under § 668.23.

*Reasons:* The Department proposes to codify current practice into regulation. The addition of § 668.171(e)(3) represents no substantive change and will have no impact on current practice.

#### § 668.174 Past Performance

*Statute:* Section 498(c) of the HEA grants the authority to determine whether an institution is financially responsible to the Secretary.

*Current Regulations:* Section 668.174 governs the past performance of an institution and provides that an institution is not financially responsible if a person who exercises substantial control over the institution, or any member of that person’s family, (1) owes a liability for a violation of a title IV, HEA program requirement that is not being repaid; or (2) exercises or

exercised control over another institution with an outstanding liability that is not being repaid.

In such cases, the Secretary may nonetheless determine that an institution is financially responsible if the institution notifies the Secretary that the person who exercises substantial control over the institution has repaid a portion of the liability that equals or exceeds the greater of (1) the total percentage of the ownership interest held by that person and/or any member of that person’s family (including when represented by a voting trust, power of attorney, proxy, or similar agreement; or (2) 25 percent, if the person or any member of the person’s family is or was a member of the board of directors, chief executive officer, or other executive officer of the institution that owes the liability. Additionally, the Secretary may determine an institution is financially responsible if the owner’s liability is currently being repaid in accordance with a written agreement with the Secretary. Lastly, the Secretary may find that the institution is financially responsible if the institution demonstrates why the person who exercises substantial control over the institution does not or did not exercise substantial control over the institution that owes the liability.

The current regulations also define the term “ownership interest” as a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of, the operation of an institution, an institution’s parent corporation, a third-party servicer, or a third-party servicer’s parent corporation. The definition also indicates that a person is considered to exercise substantial control over an institution or third-party servicer if the person directly or indirectly holds at least a 25 percent ownership interest in the institution or servicer, holds at least a 25 percent ownership interest in the institution or servicer, represents at least a 25 percent ownership in the institution or servicer, or is a member of the board of directors, a general partner, the chief executive officer, or other executive officer as designated by institution, or an entity that holds at least a 25 percent ownership interest in the institution.

*Proposed Regulations:* The Department proposes to add either the term “or entity” or the term “or entities” after the references to “person” or “persons” in § 668.174(b), (b)(1)(ii), (b)(2)(i), (b)(2)(ii), (b)(2)(ii)(A), (b)(2)(ii)(B), (b)(2)(iii)(A), (b)(2)(iii)(B), and (c)(3). We also propose to revise “substantial control” in

§ 668.174(b)(1)(i) and (b)(1)(i)(A) to “substantial ownership or control.”

The Department proposes to add § 668.174(b)(1)(ii)(B), which would state that an institution is not considered financially responsible if a person or entity who exercises substantial ownership or control over the institution, or any member or members of that person’s family, alone or together exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution’s accrediting agency and faithfully executed by the institution.

*Reasons:* The Department proposes to add “or entity” or “or entities” to follow the words “person” or “persons” in various provisions because substantial ownership or control of an institution is sometimes vested in an entity as well as an individual. We believe that this addition would allow the Department to consider more structures of substantial ownership or control when determining the past performance of an institution in assessing its financial responsibility.

The Department proposes to add “substantial ownership or control” to conform with the proposed language change in § 668.15.

The Department proposes to add § 668.174(b)(1)(i)(B) because we believe the Secretary should consider whether a person or entity affiliated with an institution has overseen the precipitous closure of another institution. We want to encourage all institutions to have a viable teach-out plan if the institution closes. We believe this will prevent an institution from being substantially owned or controlled by persons or entities that would cause the institution to be financially irresponsible and close without providing to students a plan to finish their education in place or at another institution.

#### § 668.175 Alternative Standards and Requirements

*Statute:* Section 498(c) of the HEA grants authority to the Secretary to determine whether an institution is financially responsible.

*Current Regulations:* A participating institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5 may participate in the title IV, HEA programs as a financially-responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative as long as the institution meets the two conditions in § 668.175(d), as long as its composite score is in the range from 1.0 to 1.4,

which is known as the zone alternative. Institutions that are qualified under the zone alternative must provide information regarding certain oversight and financial events to the Secretary, under § 668.175(d)(2)(ii). Under § 668.175(d)(3)(i), institutions can submit this information to the Secretary by certified mail or electronic or facsimile transmission.

*Proposed Regulations:* The Department proposes to delete the reference to facsimile transmission from § 668.175(d)(3)(i).

*Reasons:* Facsimile transmission is an outdated method of correspondence that is encompassed by the broader term “electronic transmission.” The deletion of the words “facsimile transmission” represents no substantive change and will have no impact on current practice.

### **Executive Orders 12866, 13563, and 13771**

#### *Regulatory Impact Analysis*

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by 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 stated in the Executive order.

OMB has determined that this proposed rule is an economically significant action and would have an annual effect on the economy of more than \$100 million. This regulation would enable institutions to harness the power of innovation to expand postsecondary options, leverage advances in technology to improve student learning, and allow students to progress by demonstrating competencies rather than seat time. According to the

Department’s FY 2020 Budget Summary, Federal Direct Loans and Pell Grants accounted for almost \$124 billion in new aid available in 2018. Given this scale of Federal student aid amounts disbursed yearly, the addition of even small percentage changes could result in transfers between the Federal government and students of more than \$100 million on an annualized basis.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a “major rule,” as defined by 5 U.S.C. 804(2).

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866, and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The proposed rule is considered an E.O. 13771 deregulatory action. We believe the effect of this regulation would be to remove barriers for development of distance and direct assessment programs and their participation in title IV, HEA funding, reduce the Department’s role in approving programs, and promote innovation in higher education. We believe this regulatory action would be, in sum, deregulatory.

As required by Executive Order 13563, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and we are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that the regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed, both quantitatively and qualitatively, the potential costs and benefits of this regulatory action.

In this regulatory impact analysis, we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, and regulatory alternatives we considered.

Elsewhere in this section, under *Paperwork Reduction Act of 1995*, we identify and explain burdens specifically associated with information collection requirements.

#### *Need for Regulatory Action*

The emphasis in the proposed regulations is on clarifying the distinctions between distance education and correspondence courses, affirming the permissibility of team teaching models, improving worker mobility by accommodating differences in licensure requirements across State lines, simplifying conversions between clock and credit hours to enable students to meet licensure requirements while also earning credits more likely to transfer to other institutions, establishing regulations regarding subscription-based programs so that institutions can confidently implement programs that measure competencies rather than seat time, and reducing barriers that limit the number of direct assessment programs available to students.

These proposed changes would benefit institutions by enabling them to employ innovative methods and models without undue risk of inadvertently violating title IV requirements. These options would benefit students by expanding the number of postsecondary education opportunities available to them, including those who may have been poorly served by more traditional “seat-time” instructional models. By providing a larger variety of postsecondary options and strategies such as blended learning, adaptive learning, and competency-based education, students will be much more likely to persist in and complete their programs and institutions will be much more equipped to drive student success.<sup>21 22</sup> Proposed regulations would define or clarify terms such as “correspondence course,” “distance education,” and “regular and substantive interaction,” and would streamline the current regulations to reduce the complexity of performing clock-to-credit hour conversions, disbursing aid to students enrolled in subscription-based programs, and ensuring that programs align with program length restrictions, while improving worker mobility across State lines. In some instances, the proposed definitions would clarify terms used in, but not defined by, the HEA. In other cases, the proposed regulations would

<sup>21</sup> [www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html](http://www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html).

<sup>22</sup> [www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/](http://www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/).

codify program administration requirements that had previously been communicated only through sub-regulatory guidance, to give institutions the certainty they need to expand the postsecondary education options that they make available to students.

For instance, while CBE programs using direct assessment have been permitted by statute since 2006, most institutions continue to evaluate progress in CBE programs based on measures of time (or time equivalency) rather than a student's demonstration of competency. This is largely due to uncertainties regarding how to disburse and calculate return-to-title IV for students enrolled in programs that measure competencies rather than time.

As a result, the potential benefits of CBE programs, such as accelerated learning and completion as well as providing better assurances to employers that graduates are prepared for workplace demands, were mitigated because programs still were required to adhere to time-based title IV disbursement methodologies.<sup>23</sup> These regulations would provide needed certainty to institutions about how to disburse aid to students enrolled in CBE programs. The regulations would also eliminate a significant legal obstacle to the adoption of direct assessment CBE programs by permitting title IV-eligible programs to be offered partly through direct assessment and partly using credit or clock hours. Eliminating this restriction would make it easier for institutions to experiment with direct assessment without having to immediately establish and implement a program offered entirely through direct assessment.

The proposed regulations acknowledge that subscription-based programs are permissible and would provide instructions to institutions about how to disburse aid and evaluate satisfactory academic progress for students enrolled in these programs. These regulations would also reduce the steps involved in gaining approval for direct assessment programs, which would reduce the burden associated with administering these programs and reduce the risk that an institution could invest resources in designing a program that the Department denies or unnecessarily delays. Institutions that better understand the rules for administering Federal student aid in circumstances that depart from traditional delivery models are more likely to invest in developing those

models, and administering them properly, thus avoiding improper payments and improving the student experience.

The proposed regulations also acknowledge that, given the cost of developing sophisticated technology-driven instructional tools or building specialized facilities on college campuses, a rational approach may be to rely on a third-party provider with a much broader reach than an individual institution or on industry partners who have other incentives to maintain state-of-the-art facilities and equipment. Until institutions fully understand what is permissible in the development and implementation of innovative delivery models, institutional leaders will remain largely risk averse, and solutions that would otherwise help large numbers of students will not be made available to them.

Finally, the proposed regulations would change the return of title IV funds and satisfactory academic progress provisions to reduce administrative burden and increase flexibility for many postsecondary institutions offering innovative programs. Reducing the amount of burden and expense associated with the administration of the title IV, HEA programs for unique or non-traditional programs would also encourage institutions to offer programs that do not fit into the traditional mold and improve the available offerings for students.

The Department believes this proposed regulatory action would have an annual effect on the economy of more than \$100 million. If students have more postsecondary options to select from and if more students persist to completion, the number of students who enroll for the full duration of a program may increase. For example, although extremely limited in availability now, if there were fewer barriers to starting a direct assessment program, there could be an increase in the number available, and perhaps adult learners would find this to be a more satisfying way to learn, or the only way they can juggle the demands of work, school, and family.

While a limited number of experienced institutions with established direct assessment programs may increase their program offerings, it is difficult to predict whether larger numbers of students will be attracted to higher education, in general, or if the current number of students would be distributed differently across the landscape of available programs. Direct assessment programs may be considerably more attractive to busy adult learners who would get credit for

what they know from prior work or life experience.<sup>24</sup>

The demand for distance education programs has visibly increased in recent years. In 2003–04, 15.6 percent of undergraduate students took at least one distance education class and only 4.9 percent of students were exclusively in distance education while by 2015–16, 43 percent of undergraduate students took at least one distance education class and approximately 11 percent were in exclusively distance programs.<sup>25</sup> In many cases, more students are taking at least one online class while enrolled in a traditional ground-based program.

Correspondingly, there has also been significant growth in the number of students who are enrolled in exclusively online programs.<sup>26</sup> We have also seen significant redistribution of online enrollments as some large non-profit and public institutions have increased their market share, while at the same time some proprietary schools that once dominated distance education delivery are suffering sizeable enrollment losses and even closures. Overall, growth in the number of students enrolled exclusively online has been moderate, increasing 22 percent between 2013 and 2018. The number of students taking at least one online class has increased 28 percent between 2013 and 2018.<sup>27 28 29</sup>

While current providers of CBE and direct assessment learning do so through distance learning modalities, it is possible that, as regulatory requirements become clearer, those institutions that primarily provide ground-based education will also develop and implement CBE and direct assessment programs. On the other hand, programs that lead to licensure may be slower to introduce CBE or

<sup>24</sup> [onlinelibrary.wiley.com/doi/full/10.1002/cbe2.1008](https://onlinelibrary.wiley.com/doi/full/10.1002/cbe2.1008).

<sup>25</sup> U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 2018*, Table 311.22. Number and percentage of undergraduate students enrolled in distance education or online classes and degree programs, by selected characteristics: Selected years, 2003–04 through 2015–16. Available at [nces.ed.gov/programs/digest/d18/tables/dt18\\_311.22.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_311.22.asp).

<sup>26</sup> [www.insidehighered.com/digital-learning/article/2019/12/11/more-students-study-online-rate-growth-slowed-2018](https://www.insidehighered.com/digital-learning/article/2019/12/11/more-students-study-online-rate-growth-slowed-2018).

<sup>27</sup> [nces.ed.gov/programs/digest/d18/tables/dt18\\_311.15.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_311.15.asp).

<sup>28</sup> [nces.ed.gov/programs/digest/d14/tables/dt14\\_311.15.asp](https://nces.ed.gov/programs/digest/d14/tables/dt14_311.15.asp).

<sup>29</sup> U.S. Department of Education, National Center for Education Statistics, *IPEDS, Spring 2019, Fall Enrollment component (provisional data)*, Number and percentage distribution of students enrolled at Title IV institutions, by control of institution, student level, level of institution, distance education status of student, and distance education status of institution: United States, fall 2018.

<sup>23</sup> [www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html](https://www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html).

direct assessment models since licensing boards tend to resist change.<sup>30</sup> As can be seen in Table 1 below, which is based on data collected by the National Center for Education Statistics (NCES), while the percentage of students who are enrolled exclusively in online programs has increased slightly between 2013 and 2018, the largest growth has been in the percentage of

students who take at least one, but not all, of their classes online. The number of students engaged in online learning grew between 2013 and 2018 from approximately 5.5 million to 6.9 million. This suggests that learning modalities will change as innovation creates a broader range of options, but, based on current trends, an increase in

the percentage of students who enroll in online classes will not likely result in overall increases in postsecondary enrollments. College enrollments are most dependent upon economic cycles, so changes in delivery models may be less important than macroeconomic conditions in determining total enrollments.

TABLE 1

All institutions	Total students (#)	No-distance education courses (%)	At least one distance course, not all (%)	All-distance education courses (%)
2018 .....	20,008,434	65.3	18.4	16.3
2017 .....	19,765,598	66.3	18.0	15.7
2015 .....	19,977,270	70.2	15.4	14.4
2013 .....	20,375,789	72.9	14.1	13.1
4-year (total):				
2018 .....	13,901,011	64.3	18.0	17.6
2017 .....	13,823,640	65.8	17.3	16.9
2015 .....	13,486,342	69.7	14.4	15.9
2013 .....	13,407,050	73.0	12.2	14.8
2-year (total):				
2018 .....	6,107,423	67.6	19.2	13.2
2017 .....	5,941,958	67.5	19.5	13.0
2015 .....	6,490,928	71.2	17.6	11.2
2013 .....	6,968,739	72.7	17.6	9.8
Public:				
2018 .....	14,639,681	66.1	21.5	12.3
2017 .....	14,560,155	67.8	20.8	11.4
2015 .....	14,568,103	72.0	18.0	10.0
2013 .....	14,745,558	74.6	16.7	8.7
Private Non-Profit:				
2018 .....	4,147,604	69.7	10.1	20.2
2017 .....	4,106,477	71.3	9.5	19.2
2015 .....	4,063,372	75.0	8.5	16.5
2013 .....	3,974,004	80.0	6.9	13.1
Private For-Profit:				
2018 .....	1,221,149	41.0	8.6	50.4
2017 .....	1,098,966	29.0	11.1	59.9
2015 .....	1,345,795	35.9	8.6	55.5
2013 .....	1,656,227	40.7	7.6	51.7

Growth in the number and percentage of online learners was especially strong among private not-for-profit institutions, where students who took all courses through distance education increased over 54 percent, from 13.1 to 20.2 percentage points. At 2-year institutions, the percentage of students taking all courses online increased from 9.8 to 13.2 percentage points, almost a 35-percent jump from 2013 to 2018. However, total enrollments at 2-year institutions during that same time period decreased by over 850,000 students.

While the percentage of students enrolled exclusively in distance learning is highest among proprietary institutions (60 percent), relatively few

students are enrolled at these institutions (only approximately 1 million of the nearly 20 million enrolled in postsecondary education in 2017 were enrolled at proprietary institutions). There have been sizable decreases in total enrollments at proprietary institutions between 2013 and 2017, and in 2017 only 659,379 students were enrolled exclusively online at proprietary institutions as compared to 821,296 students who were enrolled exclusively online at private non-profit institutions and 1.6 million who were enrolled exclusively in online programs at public institutions. These data suggest that increases in enrollments among exclusively online courses do not necessarily result in

increased number of total postsecondary enrollments.

The CBE marketplace overall has also seen significant attention from within the postsecondary education community and general public, but the direct assessment component of CBE has not, potentially because of the length of time it takes for the Department to review applications for direct assessment programs, and because several audits by the Department's Office of Inspector General in the past decade have been sharply critical of the oversight of direct assessment by the Department and accrediting agencies.<sup>31 32 33</sup> The Department also believes that another recent report by the Department's

<sup>30</sup> [ij.org/wp-content/themes/ijorg/images/ltw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](http://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf).

<sup>31</sup> [www2.ed.gov/about/offices/list/oig/auditreports/fy2014/a05n0004.pdf](http://www2.ed.gov/about/offices/list/oig/auditreports/fy2014/a05n0004.pdf).

<sup>32</sup> [www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05o0010.pdf](http://www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05o0010.pdf).

<sup>33</sup> [www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a05p0013.pdf](http://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a05p0013.pdf).

Inspector General, which questioned the validity of the team teaching model employed by one institution (and permitted by the Department's sub-regulatory guidance), had a chilling effect on other institutions that were considering the development of CBE programs. Audit determinations requiring the return of hundreds of millions of dollars in title IV funds pose an existential threat to most institutions, including public institutions, even if such determinations are ultimately reversed.<sup>34</sup>

The Department's data does not break out information about competency-based education students to the same extent as it does for distance education students, but a number of surveys and articles provide some background on existing programs. According to the 2018 National Survey of Postsecondary Competency-Based Education (NSPCBE), co-authored by American Institutes of Research (AIR) and Eduventures, a majority of respondents believe that CBE will experience strong growth although they also perceive that a number of barriers to implementation remain.<sup>35</sup> The survey was sent to over 3,000 institutions including primarily 2- and 4-year institutions listed in the Integrated Postsecondary Education Data System (IPEDS). About 69 percent of respondents were 4-year institutions and 31 percent were 2-year institutions. A total of 501 institutions replied to the survey, representing a survey response rate of 16 percent. It is possible that the survey may suffer from selection bias if the institutions that completed the survey were more likely to be those institutions considering adding CBE programs, which would mean that the survey results could not be accurately projected to the full postsecondary system.

Four-hundred-thirty of the 501 respondents reported being interested in, or in the process of, implementing CBE programs, while 71 indicated no interest. Some 57 institutions stated that they were currently offering at least one CBE program, with these institutions, in aggregate, offering a total of 512 CBE programs. The largest portion of programs (427 of 512) was at the undergraduate level with 85 at the graduate level. The highest concentration of CBE programs was in the fields of nursing and computer science. Given the requirement for nursing students to participate in

clinical rotations, it is likely that CBE programs in nursing were designed to target students who are already registered nurses (with an associate degree) and now wish to complete a bachelor's degree.

Over 50 percent of institutions reported CBE undergraduate enrollments of no more than 50 students per program while only a small number of institutions (approximately 4 percent) enrolled more than 1,000 undergraduate students in CBE programs at their institution. Thus, assuming these findings are characteristic of the overall CBE landscape, it appears that most institutions are still in the early stages of implementing CBE programs with only a handful of institutions operating large-scale programs.

Similar results were described in the 2019 survey that had 602 respondents with 54 percent from public institutions, 42 percent from private, nonprofit institutions and 4 percent were from proprietary institutions.<sup>36</sup> Of the 588 programs offered by 64 institutions, 84 percent were undergraduate and 16 percent were graduate programs. The majority of existing programs remain small, with 53 percent with enrollment under 50 students.<sup>37</sup> As in the 2018 survey, popular fields for competency-based programs include nursing, computer and information sciences, and business administration.<sup>38</sup> Seventy-seven percent of responding institutions with competency-based programs reported that they are eligible for federal financial aid. Of those, 75 percent report they maintain that eligibility by using a course structure to map to credit hours.<sup>39</sup>

One of the three top barriers to implementing CBE programs, as cited by over 50 percent of the responding institutions, was "Federal student aid regulations." The other two key barriers to entry included the need to change business processes and the high costs associated with start-up. While the survey results point to a guarded optimism on the growth of CBE programs, this optimism is tempered by a perception that the regulatory climate needs to be flexible and conducive to expansion of CBE programs; however, the report suggests that it is crucial to preserve consumer protections.

The Department agrees with this theme, as we note in the executive summary that "the purpose of these distance education and innovation regulations is to reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers."

Therefore, this NPRM sends a signal to the higher education community that the Department is committed to reducing regulatory burden to make way for responsible innovations, such as CBE programs and direct assessment programs. Further, the proposed regulations would enable institutions to develop new title IV disbursement models, such as subscription-based programs, to align the delivery of aid with programs that allow students to complete as many classes as possible during a given period of time, but to also pace themselves appropriately based on other demands and learning needs.

While technology has transformed the way almost every industry in America does business, it has not fundamentally transformed the way we educate students, monitor their progress, or diagnose when and what kind of additional support services a student needs. We are educating postsecondary students today in a very similar manner to methods and practices used a hundred years ago. Nonetheless, there have been some early innovators who have made advances despite the Department's lagging in this area. In that regard, this NPRM represents the Department's effort to catch up with innovations that are already taking place at forward-looking institutions. We seek to promote continuing innovation, both in distance learning and ground-based education. The proposed regulations would update our definitions of "distance education" and "correspondence courses" to acknowledge that as a result of CBE and direct assessment, many students enrolled in distance education progress at their own pace, which is a characteristic that in the past was determinant of a correspondence course. With the introduction of adaptive learning and other technologies, a student enrolled in distance education is likely to be learning at his or her own pace, although that learner continues to have regular and substantive interactions with the instructor(s). The proposed regulations acknowledge that adaptive learning can play an important role in a student's educational

<sup>34</sup> [www2.ed.gov/documents/press-releases/20190111-wgu-audit.pdf](http://www2.ed.gov/documents/press-releases/20190111-wgu-audit.pdf).

<sup>35</sup> [www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf](http://www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf).

<sup>36</sup> American Institutes for Research, *State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education*, available at [www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf](http://www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf).

<sup>37</sup> *Id.*, p. 25.

<sup>38</sup> *Id.*, p. 26.

<sup>39</sup> *Id.*, p. 31.

experience and can facilitate regular and substantive interaction between students and instructors by providing students with continuous feedback regarding their learning. The Department appreciates the considerable effort of negotiators to recommend and agree to regulatory changes that promote and enable flexibility, while at the same time ensuring the preservation of student protections and the responsible distribution of title IV, HEA assistance. It is the combination of changes addressed in these proposed regulations

that cumulatively would have sufficient impact on the economy to warrant classifying this regulation as economically significant. Specifically, while there could be increases in the number of students seeking title IV, HEA assistance, or the number of students who persist to completion, these increased Federal expenditures could result in the preparation of a more capable workforce and a better-educated citizenry. As more adults are required to obtain additional postsecondary courses or credentials throughout their professional lifetime, the availability of

more efficient learning opportunities, such as CBE and direct assessment learning, will enable more adults to evolve in their careers.

*Costs, Benefits, and Transfers*

The Department anticipates that the proposed regulations would affect students, IHEs, accrediting agencies, and the Federal government. State government may also be impacted in some instances. Table 2 refers to key changes described in the identified preamble sections and summarizes potential impacts.

TABLE 2—SUMMARY OF KEY CHANGES

Change	Affected parties	Impacts
<b>Reg Section 600.2—Definitions</b>		
Create definition for “academic engagement” .....	Students/Institutions/Federal Government.	Clarifies and expands the types of activities that verify student enrollment for the purpose of performing return to title IV funds calculations while standardizing the Department’s definition of “academic engagement” for use elsewhere in the regulations. Prevents improper payment of title IV funds to students who are not legitimately engaged in postsecondary learning.
Defines “clock hour” for distance education .....	Students/Institutions/Federal Government/Accrediting Agencies.	Codifies current policy allowing institutions to record clock hours earned through distance education but requires such hours to be taught through synchronous instruction by the instructor. Clock hours may be earned through distance education only when permitted by licensing boards or other regulatory entities that require enrollment to be measured in clock hours. Regulatory clarity may encourage greater use of distance education to provide the didactic portion of occupationally focused programs, thus expanding access to students who are working, raising families, or live far from campus.
Modifies definitions of “correspondence course” and “distance education” to clarify that it is permissible to employ a team approach to instruction and clarifies that the requirements for regular interaction are met if the institution provides opportunities for interaction, even if each student does not take advantage of each opportunity. Removes self-pacing from definition of “correspondence course” as it is not a necessary characteristic for such courses.	Students/Institutions/Federal Government/Accrediting Agencies.	Benefits students by encouraging the development of programs taught by instructional teams consisting of experts in the various elements of high-quality instruction, as opposed to a more traditional model that relies on a single faculty member to meet all of the student’s learning needs. Benefits students and institutions by potentially reducing some of the costs of instruction. Reduces the need for institutions to require students to engage in less substantive work solely for the purpose of documenting that regular and substantive interaction took place in order to document that a course is offered using distance education and is not a correspondence course.
Refines definition of “credit hour” to reflect current sub-regulatory guidance in DCL GEN–11–06 that references a variety of delivery methods.	Students/Institutions/Federal Government.	Maintains time-based standard to ensure consistency among institutions regarding the awarding of academic credit, while also creating the necessary flexibility to take into account that many new educational delivery models are not based on seat time. Codifies flexibility provided in sub-regulatory guidance under the Department’s Dear Colleague Letter GEN–11–06.
Amends definition of “distance education” by removing references to specific kinds of electronic media used in providing instruction, relegating the determination of instructor qualifications to accrediting agencies, including the use of interactive technologies to meet the requirements for “substantive interaction,” and establishing standards for “regular interaction” that include predictable opportunities for interaction and monitoring of student engagement.	Students/Institutions/Federal Government/Accrediting Agency.	Updates regulations to remove references to outdated forms of electronic media and to ensure that new forms of electronic media will be covered by the regulations in the future. Acknowledges that the use of interactive learning technologies can facilitate regular and substantive interaction between students and instructors. Benefits institutions by more clearly explaining regulatory compliance requirements for educational innovations, thus reducing risk and potential financial penalties for those institutions pursuing educational innovation. Benefits students by expanding learning opportunities and flexibilities, including personalized learning, without unnecessary bureaucratic hurdles for the purpose of meeting title IV requirements for regular participation. Benefits the Federal government by ensuring that students are receiving high-quality education when using Federal student aid to pay for that education. Benefits students by ensuring that online learning includes meaningful interactions with qualified instructors who can monitor and improve student learning.
Clarifies definitions of “incarcerated student” and “juvenile justice facilities”.	Students/Institutions/Federal Government.	Reflects current practice and sub-regulatory guidance and clarifies that individuals in certain correctional facilities may be eligible for Pell grants, but limits the use of Pell grants to appropriate instructional expenses.
Amends definition of “nonprofit institution” to delete reference to 501(c)(3) tax status.	Institutions .....	Redundant language removed; no impact anticipated.
<b>Reg Section 600.7—Conditions of Institutional Eligibility</b>		
Establishes that a student is not considered to be “enrolled in correspondence courses” until at least 50 percent of the student’s classes are correspondence courses.	Students/Institutions .....	Impact minimal based on the small number of correspondence courses operating in the country. Potential benefit to institutions and students is that enrollment in a single or small number of correspondence courses does not cause a student to be counted against the institution for eligibility purposes. Provides greater flexibilities for students who are managing multiple life demands or for whom travel to the campus is difficult or for whom technology access is limited, by allowing them to participate in a small number of correspondence courses without putting title IV participation for the institution at risk.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
<b>Reg Section 600.10—Date, Extent, Duration, and Consequences of Eligibility</b>		
Limits Secretary's approval of direct assessment programs at the same academic levels to the first such program at an institution.	Students/Institutions/Federal Government.	Acknowledges that the Department's role in approving direct assessment programs is limited to ensuring the integrity of the title IV, HEA programs, and assumes that if an institution can disburse aid properly to students in one program at a given academic level, it is likely to be able to do so for additional programs. Ensures that an institution that creates a first new direct assessment program at a new academic level is reviewed by the Department to ensure appropriate administration of title IV funds. Encourages institutions that have demonstrated the ability to design and operate a direct assessment program to expand that model of instruction and enables institutions to more quickly respond to student and workforce needs. Reduces a potential barrier or reduces time required to establish a direct assessment program. A consequence of eliminating the requirement that the Secretary approve each new direct assessment program at the same academic level is that it may lead to the rapid expansion a direct assessment programs without the guardrail of the Department's review.
<b>Reg Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification</b>		
Requires the Secretary to provide timely review of new program applications and enables institutions to start advertising programs early enough to enroll a full cohort of students.	Students/Institutions/Federal Government.	Benefits institutions and students by allowing faster development of new programs, especially those responsive to workforce development needs. Reflects role of accreditors in assessing program quality and Department's intent to rely on accreditor's assessment except in rare circumstances related to the Department's statutory and regulatory requirements or specific requirements of the institution's PPA. Protects an institution from Department's failure to act on an application for new program approval and reduces the likelihood that delays on the Department's part will require an institution to navigate the State and accreditor approval process a second time.
<b>Reg Section 600.21—Updating Application Information</b>		
Adds reporting requirements for (1) the addition of second and subsequent direct assessment programs at the same academic level; and (2) written arrangements with ineligible institutions or organizations to provide 25 percent or more of an eligible program.	Institutions/Federal Government.	With the elimination of the requirement for the Department to approve subsequent programs, this allows the Department to monitor the growth and development of direct assessment programs and written arrangements. Also allows cross-checking with accreditors to be sure program or arrangement has approval.
<b>Reg Section 600.52 and 600.54 (related to Foreign Institutions)</b>		
Amended to permit written arrangements with an eligible institution in the United States to provide no more than 25 percent of a student's program.	Students/Institutions/Federal Government.	Benefits students by allowing them to take Federal student loans to enroll at certain foreign institutions but retain the ability to take a limited number of courses in the U.S., such as during summer breaks. Also enables title IV-participating students enrolled at foreign institutions to pursue qualifying internships or externships in the United States.
Amended to permit written arrangements between a foreign institution and an ineligible entity for no more than 25 percent of a student's program; provided that the ineligible entity satisfies definition of "foreign institution".	Students/Foreign Institutions/Federal Government.	Allows students at eligible foreign institutions to take courses at other approved foreign institutions in that country, thus benefiting from the same opportunities as their international peers enrolled at foreign schools. Broadens educational opportunities available to U.S. students at foreign institutions while maintaining reasonably equivalent quality. However, while the regulations require the ineligible institution to meet the requirements of the foreign country in which it is located, these arrangements would not be overseen by a recognized accrediting agency or the Department, outside of the regulatory requirements, which may make it difficult to ensure academic quality of the coursework offered by the ineligible foreign institution.
<b>Reg Section 668.2—Definitions</b>		
Eliminates definition of Academic Competitiveness Grant (ACG).	None .....	ACG program is no longer authorized by HEA. Removing definition has no impact on students or institutions.
Amends "full-time student" to define requirements for subscription-based programs and to prevent an institution offering such a program from including repeated courses for which a student has already received a passing grade in a student's enrollment status.	Students/Institutions/Federal Government.	Provides clarity for institutions regarding subscription-based models and how they can be structured in order to permit students to receive title IV, HEA assistance.
Defines "subscription-based program" for title IV disbursement purposes as standard or non-standard term direct assessment program for which an institution charges a student for a term with the expectation that the student completes a specified number of credit hours within the term. Clarifies that no specific timeframe applies for the terms and that students must complete a cumulative number of credit hours (or the equivalent) during or following the term before receiving another disbursement of title IV funds.	Students/Institutions/Federal Government.	Benefits all parties by clarifying how title IV aid disbursements work for subscription-based programs. Provides flexibility for students to take advantage of self-pacing inherent in this program model while limiting potential for abuse by requiring completion before subsequent disbursements of aid. Some protection for students with possibility of one single subscription period for catch-up work before loss of title IV eligibility. Clarity provided by definition may increase the establishment of direct assessment programs, to the benefit of the institutions that offer them, and as options for students, including the non-traditional students that have taken advantage of existing CBE programs. Provides an opportunity for students who fall behind in a subscription-based program to catch up and get back on track.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Requires institutions to establish a single enrollment status that applies to a student throughout his or her enrollment in a subscription-based program, with the student able to change their enrollment status once in an academic year.	Students/Institutions/Federal Government.	Provides consistency for students regarding expectations for completion of coursework in a subscription-based program. Offers clarity to institutions regarding requirements for structuring such programs in order to ensure access to Federal aid. Improves program integrity by limiting options for students to avoid completion requirements through changes in enrollment status.
Explains method for determining number of credit hours (or the equivalent) that must be completed before subsequent disbursements of title IV aid.	Students/Institutions/Federal Government.	Benefits institutions by clarifying how to match disbursements to pace of each student's progress. Benefits the Federal government by establishing a clear completion standard for students to meet before they receive subsequent disbursements of Federal aid. Benefits students by allowing for an additional term to "catch-up" on coursework before losing title IV eligibility.
Modifies definition of "third party servicer" to use "originating loans" instead of "certifying loan applications".	None .....	Reflects current practices and terminology. No impact anticipated on any party.

**Reg Section 668.3—Academic Year**

Revises definition of "week of instructional time" as it pertains to an institution's "academic year." One part of the definition would cover traditional post-secondary programs and remain unchanged and the other would cover programs using asynchronous coursework through distance education or correspondence courses. For these courses, defines it as a week in which the institution "makes available the instructional material, other resources, and instructor support necessary for academic engagement and completion of course objectives".	Students/Institutions/Federal Government.	Benefits institutions by clarifying requirements for building instructional calendars in programs offered asynchronously through distance education and may spur additional innovation given better understanding of compliance thresholds. Benefits students and the Federal government by ensuring that institutions make appropriate instructional materials and support available during instructional periods in exchange for Federal student aid.
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**Reg Section 668.5—Written Arrangements to Provide Educational Programs**

Clarifies that institutions using written arrangements may align or modify their curriculum to meet requirements of industry advisory boards or other industry-recognized credentialing bodies rather than going through a mandatory, and typically lengthy, shared governance decision-making process.	Institutions/Faculty/Students/Accrediting Agencies.	Enables institutions to keep pace with changing needs of employers and protects non-accredited providers from having their educational programs or technologies manipulated by others. This is important since providers through written arrangements must prove the efficacy of their programs, so outsiders should not be allowed to modify or change the program in a way that could influence those results. Ensures that students are better prepared for entry to the workforce in certain occupations. Could create tension with faculty and reduce their influence over certain aspects of the curriculum but could require proper oversight by partnering institutions and accreditors to reduce risk of harm to students.
Clarifies calculation of percentage of program that could be provided by an ineligible institution.	Students/Institutions/Accreditors/Ineligible Entities involved in Written Arrangements.	Ensures that degree-granting institutions retain academic control of a program and maintain the responsibility for delivering at least half of an academic program. Setting out a clear methodology makes clear when and how written arrangements may be used but ensures that colleges and universities are not simply outsourcing instructional responsibilities to non-accredited providers. Benefits institutions by improving speed with which accrediting agencies review and approve such arrangements. While the accrediting agency can deny the request for a written arrangement, increasing the speed for review and expanding the options for staff that can review these arrangements could make for a less robust or rigorous review. Benefits students and institutions by allowing institutions to engage other providers, such as unions and apprenticeship providers, who may have specialized facilities and uniquely trained employees who can serve as teachers and mentors. Benefits institutions by allowing them to offer educational opportunities or technologies that are developed by outside providers who may be better situated to invest in new technologies due to their opportunities to deliver them to a larger population of students than are typically at a single institution.
Clarifies that written arrangements are not necessary for certain other interactions with outside entities. Specifically, the limitations in § 668.5 do not apply to the transfer of credits, use of prior learning assessment or other non-traditional methods of providing academic credit, or the internship or externship portion of a program.	Institutions/Students .....	Offers clarity for institutions to ensure that use of written arrangements does not result in fewer credits being accepted through transfer or awarded through prior learning assessment. Benefits students by reducing costs and time to completion for those who bring pre-existing knowledge and skills to the classroom.
Removes 50 percent limitation on written arrangements between two or more eligible institutions under joint ownership.	Institutions .....	Allows greater opportunities for institutions to share administrative or instructional resources when under shared ownership.
Ineligible entities must demonstrate experience in delivery and assessment of the program or portion the ineligible entity delivers and that the programs have been successful in meeting stated learning objectives.	Institutions .....	Allows institutions to use third parties to deliver portions of programs, to integrate advanced technologies, enable student access to specialized facilities and experts, expand the number of learning options available to students and potentially increase the number of students an institution can responsibly serve. While written arrangements may reduce the cost of delivering certain kinds of instruction, constructing specialized facilities, or developing new technologies, the written arrangement will have associated costs that could reduce revenue. Students could have access to newer technologies or higher quality instruction than could be provided by the institution, but there are risks that the outside provider could be of lower quality and have less of a vested interest in the student's success.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
<b>Reg Section 668.8—Eligible Programs</b>		
Eliminates consideration of “out-of-class” hours for purposes of performing clock-to-credit conversions for non-degree programs that are subject to those requirements.	Institutions .....	Aligns the Department’s requirements with those of most licensing boards and simplifies the conversion process. Enables students to meet licensure requirements in programs that are title IV eligible and helps institutions by allowing them to comply with the reasonable length requirements while also allowing credit hour to clock hour conversions. May result in additional title IV funds expenditures for programs currently lacking any out-of-class components.
<b>Reg Section 668.10—Direct Assessment Programs</b>		
Revises definition of “direct assessment” and eliminates separate definitions of key terms for direct assessment programs, referring instead to requirements elsewhere in regulations.	Institutions .....	Simplifies and clarifies requirements related to direct assessment programs.
Eliminates certain prohibitions on types of coursework that can be offered through direct assessment, including remedial coursework, and enables “hybrid” programs to provide students options to take some direct assessment courses and some traditional or distance learning courses.	Students/Institutions/Federal Government.	Allows institutions to provide students with more options so that learners can select the learning modality that best meets their needs. Allows students to take some traditional courses even if some of their other courses are direct assessment courses. Recognizes that co-remediation is a promising practice, and direct assessment classes may increase the number of students who can participate in co-remediation programs while taking other classes.
Codifies current policy by adding prohibition on paying title IV, HEA funds for credit earned solely through prior learning assessment.	Students/Institutions/Federal Government.	Benefits students and taxpayers by discouraging institutions from charging excessive fees for conducting prior learning assessment and ensures that taxpayer dollars are not being used to pay institutions for instruction that they are not providing.
<b>Reg Section 668.13—Certification Procedures</b>		
Automatic renewal of an institution’s certification if the Secretary does not make a decision on an application for recertification submitted no later than 90 calendar days before its PPA expires within 12 months.	Institutions .....	Benefits institutions by setting a time limit for the uncertainty of month-to-month eligibility. With the option of provisional recertification, the Department retains sufficient control over recertification process but cannot use certification delays to prevent institutions from starting new programs or making other necessary changes.
<b>Reg Section 668.14—Program Participation Agreement</b>		
Clarifies requirements related to making data available to prospective students about the most recent employment statistics, graduation statistics, or other information to substantiate the truthfulness of its advertising that uses job placement rates to attract students.	Institutions .....	Benefits institutions by reducing the amount of information that must be disclosed to students in order to enable institutions to include graduation rates or employment statistics in their marketing materials. Benefits students by improving the accuracy and truthfulness of published outcomes data, and by making an appropriate amount of information available to students without overwhelming them with extraneous data. Maintains the requirement for institutions to make available any information needed to substantiate the truthfulness of the institution’s advertisements about job placement or graduation rates.
Eliminates requirements to provide the source of such statistics, associated timeframes, and methodology.	.....	Considered redundant to requirement to provide data and other information to substantiate truth in the institution’s advertising.
Aligns program length to occupational requirements. Limits program length to 150 percent of minimum program length for the State in which the institution is located or 100 percent of the minimum program hours for licensure in an adjoining State.	Students/institutions .....	Allows institutions to create programs that meet professional licensure requirements in multiple States, thus expanding the potential pool of students served and the number of job opportunities available to graduates. Students benefit by increased occupational mobility and, in some cases, being able to go to school in a lower cost State but work upon graduation in a different State where wages are higher. Conversely, if an institution increases program length, a student may have to pay more to meet requirements of a State in which the student does not plan to work.
Requires updates to teach-out plans after specified negative events.	Students/Institutions/Accrediting Agencies.	Allows accrediting agencies to gather more information from institutions that will be helpful to triad partners in assisting students find transfer and teach-out opportunities, and retain access to their academic records, when a school closure occurs. Requires institutions to update teach-out plans in instances where risk of closure increases.
<b>Reg Section 668.15—Factors of Financial Responsibility</b>		
Changes section title to emphasize changes in ownership or control.	Institutions/Federal Government.	Codifies current practice requiring factors of financial responsibility to be addressed when there is a change in ownership or control of an institution.
<b>Reg Section 668.22—Treatment of Title IV Funds When a Student Withdraws</b>		
Adds several exceptions to determination a student has withdrawn, including early completion of requirements for graduation, completion of module(s) containing 50 percent or more of the days in the payment period, or completion of coursework equal to or greater than the institution’s requirements for a half-time student.	Students/Institutions .....	Benefits institutions by not requiring them to return title IV funds simply because a student is a faster learner. Benefits students by allowing them to complete courses at a quicker pace and still retain full title IV eligibility. Could improve completion rates and reduce time to completion if students are not required to participate in busy work if they finish the legitimate work required by the course more quickly than other students.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Applies 45-day time limit on delaying withdrawal for students who cease attendance to standard term programs. Eliminates references to modules for nonterm programs and revises timeframes for allowing students to provide written confirmation of intent to return without beginning an approved leave of absence.	Students/Institutions .....	Improves consistency of regulations as they apply to programs with different types of academic calendars and addresses concerns about long periods of non-attendance by students. Ensures that institutions perform return of title IV calculations when students cease attendance for long periods of time without beginning an approved leave of absence.
Clarifies requirements for determining the number of days in the payment period or period of enrollment for a student who is enrolled in a program offered using modules. Requires an institution to include all the days in modules that included coursework used to determine the student's eligibility for title IV, HEA assistance.	Institutions/Federal Government.	Simplifies and clarifies requirements for establishing the denominator of the return of title IV funds calculation when a student is enrolled in a program that uses modules. May result in a greater amount of title IV funds being returned for a limited number of students who enroll in numerous modules during a payment period or period of enrollment but fail to attend those modules.
Eliminates references to programs under which financial aid is no longer disbursed. Adds Iraq and Afghanistan Service Grants to types of aid subject to the return of title IV funds calculation and clarifies order for application of returned funds.	.....	No impact anticipated for technical changes incorporating current policy.
<b>Reg Section 668.28—Non-title IV Revenue (90/10)</b>		
Removes references to net present value when including institutional loans in the 90/10 calculation.	.....	No impact anticipated for technical changes.
<b>Reg Section 668.34—Satisfactory Academic Progress</b>		
Eliminates pace requirements for satisfactory academic progress for subscription-based programs.	Students/Institutions/Federal Government.	Reduces burden on institutions for making pace-based title IV calculations for students in subscription-based programs. Improves flexibility for students by allowing them to determine the pace of their learning without certain limits.
Allows maximum timeframe for undergraduate programs measured in credit hours to be expressed in calendar time in addition to current credit hour measurement. Limited to 150 percent of published length of program.	Students/Institutions/Federal Government.	Increases flexibility for institutions and students and provides new options for monitoring student progress when traditional semester-based time constraints conflict with a student's work or life responsibilities. However, sets outer limit for use of aid to ensure that students are progressing through their program and using Federal student aid funds efficiently.
<b>Reg Section 668.111—Scope and Purpose and 668.113—Request for Review</b>		
Indicates that, for final audit or program review determinations related to classification of a program as distance education or the assignment of credit hours, the Secretary will rely on institution's accrediting agency or State agency requirements.	Institutions/Federal Government.	Conforms with changes to definitions of "distance education" and "credit hour" and provides regulatory clarity that accreditors are the triad member given the responsibility of monitoring program quality and establishing standards for academic quality, faculty credentials, and effective distance learning.
<b>Reg Section 668.164—Disbursing Funds</b>		
Establishes disbursement requirements specific to subscription-based programs. Sets the later of 10 days before the first day of classes in the payment period or the date the student completed the cumulative number of credit hours associated with student's enrollment status in all prior terms attended.	Students/Institutions/Federal Government.	Conforming change with disbursement pattern for subscription-based programs in §668.2 to enforce requirement that no disbursements are made until the student has completed the appropriate credit hours.
<b>Reg Section 668.171—General</b>		
Allows the Secretary to determine an institution is not financially responsible if the institution does not submit its financial and compliance audits by the date permitted and manner required under §668.23.	Institutions/Federal Government.	Codifies current practice; no impact expected.
<b>Reg Section 668.174—Past Performance</b>		
Adds the term "entity" or "entities" to various provisions as ownership may be vested in an entity or an individual.	Institutions/Federal Government.	Allows the Department to consider more ownership structures when evaluating past performance.
Clarifies that institution is not financially responsible if a person who exercises substantial ownership or control over the institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution.	Institutions/Federal Government.	Allows the Department to consider whether a person or entity affiliated with an institution has overseen the precipitous closure of another institution with the goal of preventing an institution from being substantially owned or controlled by persons or entities that would cause the institution to be financially irresponsible and close without providing to students a plan to finish their education in place or at another institution.
<b>Reg Section 668.175—Alternative Standards and Requirements</b>		
Eliminates reference to fax transmission .....	None .....	Change to recognize technological advancements. No impact.

A key change that would result from this regulation is greater certainty among institutions about how to implement innovative programs without running afoul of title IV disbursement requirements. Institutions are not

inherently opposed to regulations, but instead crave information that will enable them to be sure they are complying with regulations that are otherwise difficult to interpret. The new proposed definitions would ensure a shared understanding of the various kinds of programs an institution can provide and the rules for disbursing title IV aid to students enrolled in those programs. Greater clarity in our regulations would reduce the likelihood that student and taxpayer dollars will be wasted or that institutions will face undeserved negative program review findings and financial liabilities that could have devastating consequences to the institution and its students.

### Students

Students will benefit from the expanded program options available when institutions understand the ground rules for offering new kinds of programs and when they don't fear surprises at a program review. Despite being permitted by the HEA for decades, there are relatively few competency-based programs available to students, and even fewer direct assessment programs. Yet these types of programs may be very appealing to adult learners who bring considerable knowledge and skills to their programs. Expansion of subscription-based programs provides students with the scheduling flexibility they may need if managing responsibilities from school, work, and family. A clearer framework for administering title IV aid to students enrolled in competency-based programs on a subscription basis may increase institutions' willingness to develop new programs.

The proposed regulations eliminate the financial penalties that students and institutions would otherwise face when a student progresses quickly through a course and completes it early. Students, especially non-traditional students, could benefit from the flexible pacing and different model for assessing progress offered by this type of program. The emphasis on flexibility, workforce development, and innovative educational approaches could be beneficial to students and the national economy.

According to U.S Census data,<sup>40</sup> for the civilian non-institutionalized population, there were approximately 44 million adults between the ages of 25 and 49 with high school or some college

as their highest educational level in 2018. In addition to students outside that age range and those with a degree who may want to pursue competency-based graduate certificates or degrees to enhance their careers, even a small percentage of that group represents a sizeable potential market for expansion of competency-based or other distance education programs. While a variety of factors may explain individual education attainment, to the extent that traditional programs were not suitable for some students' academic and employment goals, competency-based programs may provide an appealing option. However, evaluating the quality of new programs may be challenging, and it could be difficult to determine how much a student should learn to be awarded a certain amount of credit, as opposed to more traditional delivery models that award aid and mark progress by the number of hours during which a student is scheduled to sit in a seat (many institutions do not take attendance, and therefore do not monitor how much time an individual student actually sits in a seat). As with all programs, students would need to carefully consider if specific competency-based or distance education programs are appropriate for their objectives and learning. Distance learning, subscription-based programs, and other self-paced options require a higher degree of academic discipline on the part of students, which may pose challenges to students who are already burdened by work and family responsibilities.<sup>41</sup> For those who are so motivated, they could complete their program more quickly. For those who struggle to stay engaged, innovative learning models emphasizing coach or mentor support may improve retention and completion in online programs where students with poor self-directed learning skills might otherwise fail.<sup>42 43</sup>

Another potential benefit for students in competency-based programs could be reduced costs to obtain a postsecondary credential. Western Governors University (WGU), for example, is known for its success in adopting this instructional approach, although it still disburses aid using a time-based model. In its 2018 annual report, WGU states

<sup>41</sup> California Community College Chancellor's Office, 2017 Distance Education Report, 2017, <http://californiacommunitycolleges.cccco.edu/Portals/0/Reports/2017-DE-Report-Final-ADA.pdf>.

<sup>42</sup> [www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/](http://www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/).

<sup>43</sup> Xu, D. and Xu, Y. March 2019. The Promises and Limits of Online Higher Education: Understanding How Distance Education Affects Access, Cost, and Quality. American Enterprise Institute.

that the average time to a bachelor's degree completion among its students is 2.5 years, which could generate substantial savings to students and taxpayers. An analysis done by Robert Kelchen<sup>44</sup> based on 14 cost structures at 13 institutions for credits earned through portfolio or prior learning assessment found that significant savings could be generated, but they vary substantially among colleges. Potential savings for 3 credits varied from \$127 to \$1,270.<sup>45</sup> The fee structure, amount of credits allowed to be obtained through these methods, the availability of federal aid, and the ability of students to pass those assessments with limited attempts all contribute to determining whether a competency-based approach would generate savings for a given student. The other pricing model, one that is supported by the proposed regulations, is subscription based pricing in which the potential savings relate to the number of credits a student completes during a subscription period and student's eligibility for financial aid in their specific program. Kelchen calculates the number of credits needed in a subscription period for students who receive a full Pell Grant and non-aided students to break even with traditional pricing models at 5 institutions that offer a subscription pricing option. These range from 6 credits for a non-aided student to 27 credits for a student in a bachelor's degree program who receives a full Pell Grant.<sup>46</sup> The subscription periods and prices vary by institution and pricing policies may have been updated since the time of this analysis, but that idea that subscription pricing may result in cost savings for students depending upon the speed of their progress is still valid.<sup>47</sup>

While more difficult to quantify, the Department also expects students would find benefits in programs they can complete more quickly in terms of reduced opportunity costs, which include wages lost when the student is in school rather than in the job for

<sup>44</sup> Robert Kelchen, *The Landscape of Competency-Based Education—Enrollments, Demographics, and Affordability*, January 2015. Center for Higher Education Reform, American Enterprise Institute AEI Series on Competency-Based Higher Education. Available at [www.aei.org/wp-content/uploads/2015/04/Competency-based-education-landscape-Kelchen-2015.pdf](http://www.aei.org/wp-content/uploads/2015/04/Competency-based-education-landscape-Kelchen-2015.pdf).

<sup>45</sup> Id., p. 11, Table 4 Cost Structures of Portfolio and Prior Learning Assessment Programs.

<sup>46</sup> Id., p.14. Table 5 Costs of Subscription-Based CBE Programs Compared to Other Online Providers.

<sup>47</sup> Western Governors University, *WGU 2018 Annual Report*, p. 17. Available at [www.wgu.edu/content/dam/western-governors/documents/annual-report/annual-report-2018.pdf](http://www.wgu.edu/content/dam/western-governors/documents/annual-report/annual-report-2018.pdf).

<sup>40</sup> U.S. Census Bureau, Table 1. Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2018. Available at [www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html](http://www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html). Last accessed November 29, 2019.

which the student is preparing. Also, since student retention declines as time to degree completion expands, programs that enable students to finish more quickly are likely to increase credential completion.

Of course, it could be the unique attributes of WGU, or the students attracted to the institution, that contribute to these results, and it is not yet known if the results would be replicated by other institutions that adopt the WGU model. A number of factors, including a given student's anticipated pace of learning, likelihood of completion, desired employment outcomes, personal motivation, and the range of options available to them will influence the return the student enjoys on their educational investment.

Students would also benefit from the proposed changes to the definition of a week of instruction. Under the proposed regulations, institutions would be less likely to assign less substantive work to students (such as posting a blog or responding to a chat) simply to meet title IV requirements. Where these activities are substantive, they would likely continue to take place, but in many instances, these activities have been integrated into courses simply to provide evidence of "regular and substantive" interaction. Students who may otherwise be successful in distance learning can become frustrated if they are not allowed to move at their own pace because of requirements to post blogs, participate in chats, or answer questions that do not actually enhance learning.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this NPRM and none of the burden is assigned to students in that analysis.

#### Institutions

Institutions should benefit from the proposed regulatory clarifications, especially those institutions that seek to expand competency-based and direct assessment learning options but are uncertain as to the Department's requirements for disbursing aid to students enrolled in those programs. A significant barrier to entry for institutions seeking to provide direct assessment programs is a lack of clarity regarding what the Department expects of these programs in order to approve them, and the slowness with which the Department has made decisions on applications submitted by institutions. Only a handful of institutions, as of 2019, have been approved by the Department to offer direct assessment programs. This indicates that either there is a lack of interest in offering

direct assessment programs, or institutions are hesitant to invest in their development because approval requirements are too burdensome or uncertainties too great about what the Department and accreditors require. The proposed regulations would reduce burden and provide clarity to encourage more institutions to experiment with direct assessment programs. Under the proposed rule, the Department would be required to approve the first direct assessment program offered by an institution at a given credential level, but after that, only the accreditor would be required to review the program to ensure academic quality. Some institutions may aggressively seek approval for more direct assessment programs, while others may take a wait-and-see attitude until other institutions have forged new ground.

In the short term, it is likely that institutions already approved to offer at least one direct assessment program would expand offerings since their experience well positions them to do so. According to the Department's data, there are only six institutions that have established direct assessment programs. Although these institutions may expand the number of direct assessment programs available, the Department anticipates that these programs would mostly attract students away from more traditional distance learning programs, but may not add significantly to the total number of students enrolled in postsecondary education. Students looking for a flexible postsecondary program can find many advantages through distance education already but may gravitate to direct assessment programs because of added advantages, including in pacing and format. The Department's assumptions about potential student growth related to the proposed regulations are described in the Net Budget Impact section of this analysis and we welcome comments about the number and source of future enrollees in such programs.

However, over time, additional institutions may develop new direct assessment programs, especially if early adopters create demand among students for this new form of education. The Department projects that if new institutions engage in direct assessment, and those already approved to offer direct assessment programs launch new programs, there could be shifting of students from other programs to self-paced direct assessment programs. It is also possible that students not interested in current pedagogical models will find direct assessment programs to be attractive and will decide to enroll in a postsecondary

program. This could increase the number of students who would qualify for Pell Grants or take Federal Direct Loans. While increased interest in direct assessment could result in higher title IV participation, it is possible that students enrolled in direct assessment programs would finish their programs more quickly, therefore reducing the amount of financial aid a student uses to complete his or her program.

Changes to the limitations on the ability of clock hour programs to offer didactic instruction through distance learning may enable more individuals to enroll in these programs. In turn, this could increase the number of individuals qualified for State licensure or certification, and thus gainful employment, in licensed occupations. There are very few clock-hour programs that use distance learning to provide portions of the program since there are few State or professional licensing boards that permit distance learning for clock-hour programs. However, for clock-hour programs permitted to incorporate distance learning, it is possible that more students could be served or that more students would persist to completion.

The proposed regulations would more clearly define what constitutes a reasonable length for clock-hour programs and allow institutions to meet the licensure requirements of surrounding States, thus enabling greater student and workforce mobility. There are only a few States that have licensure requirements that are significantly longer than other States, but if programs in surrounding States increase their clock hours to meet those requirements, there could be small increases in cost and utilization of title IV, HEA assistance. On the other hand, if programs can be structured to ensure that students can work if they cross State lines, there could be cost savings since, under the status quo, a student who moves from one State to another may be required to start their program over in order to meet the clock-hour requirements since shorter-term "completer programs" are not typically approved by those States. Therefore, this regulation could reduce the cost of education for students who move from one State to the next and could increase worker mobility in fields that employ large numbers of workers, such as cosmetology and massage therapy.<sup>48 49</sup>

Institutions would also benefit from simplifications to the formula for clock-

<sup>48</sup> [www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm](http://www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm).

<sup>49</sup> [www.bls.gov/ooh/healthcare/massage-therapists.htm](http://www.bls.gov/ooh/healthcare/massage-therapists.htm).

to-credit hour conversions. The proposed regulations would eliminate the need for institutions to consider the number of homework hours associated with each credit hour in programs that are subject to the conversion. This change would reduce administrative burden while allowing institutions to offer programs in credit hours that are more likely to transfer to other schools than clock hours, but still meet the clock-hour requirements of licensing boards by calculating clock-hour equivalencies.

As discussed further in the *Paperwork Reduction Act of 1995* section of this preamble, the proposed regulations are expected to result in a net reduction in burden. In estimating costs and savings associated with these changes in burden, we assume that these activities are conducted by postsecondary administrators, which earn an average wage of \$53.47.<sup>50</sup> Throughout, to estimate the total costs and savings associated with these changes, we multiply wage rates by two to account for overhead and benefits. The elimination of the Net Present Value calculation related to the 90/10 rule is estimated to save – 2,808 hours, which would generate cost savings of approximately \$300,000 annually. The proposed regulations also impose burden related to reporting subsequent direct assessment programs, reporting about written arrangements, and demonstrating that ineligible institutions have the experience in the delivery and assessment of the program or portion thereof it is contracted to provide. Together, these provisions are estimated to impose 138 hours of burden annually for a cost of \$15,000 using the same hourly rate of \$53.47 multiplied by two for overhead and benefits. Together, the estimated net reduction in burden is – 2,670 hours and \$ – 285,000.

#### Accrediting Agencies

The proposed regulations recognize the primary role that accrediting agencies play in evaluating the quality of new programs and approving institutions to offer them. Although the Department's review of direct assessment programs focuses on an institution's technical ability to calculate and disburse title IV aid to students enrolled in these programs, accreditors have always had—and will continue to have—the responsibility of ensuring that these programs are rigorous and of high quality. In conjunction with the recently published Accreditation and State Authorization

Regulations, one or more existing or new accrediting agencies may step forward to become a leader in the field for assessing and approving direct assessment programs, which could lead to more rapid expansion of direct assessment programs. Accrediting agencies will continue to play an important role in approving written arrangements covering between 25 and 50 percent of a program; however, changes already published in the accreditation regulations to allow these approvals to take place at the staff level, and requirements for accrediting agencies to approve or deny them within 90 days, could encourage more institutions to consider entering into written arrangements.

Accrediting agencies play an important role in evaluating the quality of academic programs, including distance education programs, and will continue to play that role. These regulations do not create new responsibilities in this regard; however, until accrediting agencies have more experience in reviewing and approving competency-based and direct assessment programs, the approval process could be somewhat more burdensome. Some agencies may also need to develop new standards to facilitate the evaluation of these programs, but many already have such standards in place. The Department welcomes information from accrediting agencies on existing standards and experience with evaluating such programs and any costs they anticipate from the proposed regulations. If growth in competency-based programs is more significant than anticipated, there could be an increase in accrediting agency workload, but it is possible that demand for approval of traditional programs would decline as interest shifts to competency-based or direct assessment programs.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this NPRM and does not estimate any additional burden to accrediting agencies from the proposed regulations.

#### Federal Government

In the proposed regulations, the Federal government is reducing some of the complexity of administering Federal student aid and calculating return-to-title IV obligations. These regulations also reaffirm that it is accreditors—and not the Department—who are authorized by the HEA to establish and evaluate compliance with education quality standards, including when innovative delivery models challenge the status quo. The proposed regulations

require the Secretary to provide a timely review of new program applications and limit the Secretary's approval of direct assessment programs at the same academic level to the first such program at an institution, both provisions designed to support the expansion of innovative educational programs.

#### Net Budget Impact

We estimate that these proposed regulations would have a net Federal budget impact for Federal student loan cohorts between 2020–2029, of \$[-237] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of \$1,021 million over 10 years, for a total net impact of \$784 million. A cohort reflects all loans originated in a given fiscal year. 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. The Net Budget Impact is compared to a modified version of the 2020 President's Budget baseline (PB2021) that adjusts for the recent publication of the final Borrower Defense, Gainful Employment, and Accreditation and State Authorization rules.

The Department emphasizes that its estimates of transformations in higher education delivery that could occur as a result of these proposed regulations are uncertain. Similarly, the Department is constrained in its budget estimates by the limited data available to it. We estimate how institutions and students would respond to the regulatory changes, and we present alternative scenarios to capture the potential range of impacts on Federal student aid transfers. Similarly, we do not attempt to estimate effects based on evidence cited in this NPRM that students enrolled in similar programs have persisted longer, completed at higher rates, and finished in a shorter period of time with less debt. While increased enrollment and persistence could result in increased transfers to students in the form of Federal student aid grants and loans, it could also produce graduates better prepared to succeed in the workplace and encourage robust economic growth. The Administration's emphasis on workforce development may encourage more institutions to implement competency-based educational programs, which could improve employment outcomes and loan repayment performance.

There is anecdotal evidence that competency-based education programs may have strong loan repayment performance. Looking again to WGU, an

<sup>50</sup> [www.bls.gov/oes/current/oes119033.htm](http://www.bls.gov/oes/current/oes119033.htm).

institution that has been an early adopter of competency-based learning, we note that its three-year cohort default rates of 4.6 percent for 2014, 4.1 percent for 2015, and 4.2 percent for 2016<sup>51</sup> are below the national average of 10.1 percent overall in 2016 (6.6 percent for private, 9.6 percent for public, and 15.2 percent for proprietary institutions).<sup>52</sup> Comparatively, Capella University, another leader in competency-based education, had a cohort default rate of 6.5 percent in 2015 and 6.8 percent in 2016.<sup>53</sup> Factors that could lead to lower defaults among institutions employing innovative learning models—and in particular when those models are used to provide graduate education—may be that they would attract older students who are employed and are seeking specific credentials for advancement or a career change. These individuals may be more likely to have resources (including those provided by current employers) to reduce the need to borrow and to repay any loans they need to take. On the other hand, the non-traditional students that may be the primary market for competency-based learning or direct assessment may have employment and family obligations that could make them less likely to complete their programs, potentially increasing their default risk.

An additional complicating factor in developing these estimates are the related regulatory changes on which the committee reached consensus in this negotiated rulemaking that we proposed

in separate notices of proposed rulemaking. The budget impacts estimated here are in addition to the potential increases attributed to the accreditation changes promulgated in the final rule published November 1, 2019 that are reflected in the PB 2021 baseline.<sup>54</sup>

The main budget impacts estimated from these final regulations come from changes in loan volumes and Pell Grants disbursed to students if these new delivery models were to attract an increased number of students who receive title IV, HEA funds. The Department believes that much of the growth in this area will come from future students that shift from more traditional ground-based or distance learning programs to those offered using competency-based learning or direct assessment methods. In developing the primary estimate, the Department does not estimate the types of programs and institutions students who choose competency based education may come from or the potential cost differential between those programs, as further discussed after Table 4. Instead, we assume that the growth associated with programs that are developed or expanded in part because the proposed regulations make it easier to administer title IV aid to such programs comes from students who would not otherwise have borrowed to attend a different type of program and apply an average level of borrowing to each estimated enrollee. The Department believes that many of

the students who enroll in competency based education will do so as a substitute for a different type of program for which they likely would receive some form of title IV aid, but there will be some small increase in enrollment from students who either not have pursued postsecondary education or who would not have received title IV aid for their program. Additionally, the alternate budget scenarios consider the possibility that the implementation of new pedagogical and delivery models could result in more or less new students being interested in pursuing a postsecondary credential. Expansion of subscription-based programs, provisions in these regulations that would encourage innovation, the growth of workforce development programs, and the new methods of delivery may appeal, in particular, to non-traditional students. Tables 3.A to 3.E illustrate the changes in title IV grant and loan volume developed for use in estimating the net budget impact of these proposed regulations for the primary scenario, with discussion about underlying assumptions following the tables.

In order to have a common basis for the Pell Grant and loan assumptions and to facilitate comment, we started the estimate with an assumption about the number of additional programs that would be established because of the combined effect of the proposed regulations.

TABLE 3.A—ASSUMPTIONS ABOUT CUMULATIVE NUMBER OF ADDITIONAL PROGRAMS BY SIZE OF PROGRAM

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25 .....	12	36	80	150	225	275	325	350	415	435
75 .....	5	15	35	55	90	105	128	135	160	180
150 .....	3	12	26	40	68	75	90	113	120	128
350 .....	3	10	20	28	40	52	60	70	78	84
750 .....	3	8	14	20	30	38	48	56	65	70
1,500 .....	0	3	5	9	12	16	20	24	26	30

As seen in Table 3.A, we expect the current trends of distance education programs capturing an increasing share of students to continue, and perhaps to accelerate as institutions and accreditors become more experienced in establishing or evaluating these programs. We also expect more institutions to engage in competency-based learning and direct assessment,

which may or may not be delivered online. The initial distribution of programs by enrollment size uses information from the 2018 AIR survey and the 2019 survey;<sup>55</sup> however, we acknowledge that the results of that survey may be biased in that we expect the small proportion of institutions interested in starting CBE or direct assessment programs were more likely

to respond. Nonetheless, these are the best data available to us, and we projected the results of that survey onto the postsecondary system as a whole. We assumed, based on the 2018 and 2019 survey data, that the majority of programs will be small, but assumed that over time larger programs would evolve.

<sup>51</sup> U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at [www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html](http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html).

<sup>52</sup> U.S. Department of Education, Comparison of FY 2016 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates available at

[www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf](http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf). Accessed February 21, 2020.

<sup>53</sup> U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at [www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html](http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html).

<sup>54</sup> 84 FR 58834.

<sup>55</sup> American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at [www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf](http://www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf).

In addition, as institutions become more comfortable with using written agreements to access facilities and experts that private sector organizations and unions make available, there could be growth in career and technical education programs that are currently limited due to the high cost of constructing facilities, procuring equipment and hiring faculty qualified to teach in those programs.<sup>56</sup> As more hospitals and health care facilities require nurses to have bachelor's degrees, we expect to see continued growth of RN to BSN programs, which can be delivered using CBE or direct assessment because students in these programs are typically required to be

working in the field, thus negating the need for the institution to provide clinical placements.

Other factors that support the increase in programs are recent regulatory developments with respect to accreditation and no requirement for approval of new delivery methods as a substantive change. The provisions requiring the Secretary to provide a timely review of new program applications and to limit the Secretary's review to the first competency-based education program at a given academic level could also accelerate the process of establishing programs.

We then had to develop an assumption for how many of the additional programs would be

undergraduate or graduate programs for the purposes of determining how many would potentially serve Pell recipients and subsidized loan borrowers. Of the 512 programs described in the 2018 survey, approximately 17 percent were identified as graduate programs and of the 588 programs described in the 2019 survey, 16 percent were graduate programs. However, competency-based programs could be a good fit for working adults wanting a self-paced program to earn a graduate credential, so we assumed that that the distribution of undergraduate versus graduate programs would change over time, especially among smaller programs, as shown in Table 3.B.

TABLE 3.B—UNDERGRADUATE SHARE OF CUMULATIVE ADDITIONAL PROGRAMS

Size of program	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
25 .....	83	78	70	65	60	55	50	50	45	45
75 .....	83	78	70	65	60	60	60	60	60	60
150 .....	83	78	70	65	60	60	60	60	60	60
350 .....	83	80	75	75	75	70	70	70	70	70
750 .....	83	80	80	80	75	75	75	75	75	75
1,500 .....	83	83	80	80	78	78	75	75	75	75

This resulted in an assumed number of additional undergraduate and

graduate students who may receive Pell Grants or take loans.

TABLE 3.C—NUMBER OF ADDITIONAL UNDERGRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25 .....	257	702	1,400	2,438	3,375	3,781	4,063	4,375	4,669	4,894
75 .....	280	878	1,838	2,681	4,050	4,725	5,738	6,075	7,200	8,100
150 .....	374	1,404	2,730	3,900	6,075	6,750	8,100	10,125	10,800	11,520
350 .....	813	2,744	5,250	7,350	10,500	12,740	14,700	17,150	19,110	20,580
750 .....	1,743	4,800	8,400	12,000	16,875	21,375	27,000	31,500	36,563	39,375
1,500 .....	.....	3,735	6,000	10,800	14,040	18,720	22,500	27,000	29,250	33,750
Total .....	3,467	14,263	25,618	39,169	54,915	68,091	82,100	96,225	107,591	118,219

TABLE 3.D—NUMBER OF ADDITIONAL GRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25 .....	50	200	600	1,310	2,250	3,090	4,060	4,380	5,710	5,980
75 .....	60	250	790	1,440	2,700	3,150	3,830	4,050	4,800	5,400
150 .....	80	400	1,170	2,100	4,050	4,500	5,400	6,750	7,200	7,680
350 .....	170	690	1,750	2,450	3,500	5,460	6,300	7,350	8,190	8,820
750 .....	360	1,200	2,100	3,000	5,630	7,130	9,000	10,500	12,190	13,130
1,500 .....	.....	770	1,500	2,700	3,960	5,280	7,500	9,000	9,750	11,250
Total .....	720	3,510	7,910	13,000	22,090	28,610	36,090	42,030	47,840	52,260

The next assumption involved the percent of those additional students who would receive Pell Grants and

would take out different types of loans. For existing programs, the percent of undergraduates with Pell Grants is

approximately 39 percent overall,<sup>57</sup> but this varies significantly by institution and program type. One motivating factor

<sup>56</sup> Shulock, N., Lewis, J., & Tan, C. (2013). Workforce Investments: State Strategies to Preserve Higher-Cost Career Education Programs in Community and Technical Colleges. California

State University: Sacramento. Institute for Higher Education Leadership & Policy.

<sup>57</sup> U.S. Department of Education, The FY 2021 Justification of Appropriations Estimates to

Congress Vol. II: Student Financial Assistance, p. p11. Available at [www2.ed.gov/about/overview/budget/budget21/justifications/p-sfa.pdf](http://www2.ed.gov/about/overview/budget/budget21/justifications/p-sfa.pdf).

for competency-based programs is to expand opportunities for non-traditional students, who typically qualify for Pell grants at higher rates; in the 2018–19 award year 54 of dependent applicants had a Pell eligible EFC, while 85 of independent applicants met that threshold. However, independent applicants are often ineligible for Pell at relatively moderate incomes— in AY 2018–19 88 percent of the eligible independent applicants with dependents had family incomes under \$50,000 and 96 percent of the eligible independent applicants without dependents had family incomes under \$25,000. If programs attract more

students from lower income brackets, Pell Grant costs will increase. On the other hand, CBE and distance learning programs, including direct assessment programs, may be more attractive to working adults, who may be less likely to qualify for Pell grants given their earnings. Evidence is mixed from existing programs, both because the data does not always distinguish students in CBE programs from those in traditional programs at the institution and the percentage of students receiving Pell Grants does vary among institutions with at least some CBE programs. In 2017–18 IPEDS student financial assistance data, the percent of

undergraduates receiving a Pell Grant at some institutions known for at least some competency based education programs was 30 percent for Western Governor’s University, 33 percent for Sinclair Community College, 35 percent for Northern Arizona University, 43 percent for Capella University, 45 percent for the University of Wisconsin Flex program, and 47 percent for Southern New Hampshire University. Nonetheless, we assumed that the percentage of students who may be eligible for Pell Grants increases to 50 percent, resulting in the estimated number of additional Pell recipients shown in Table 3.E.

TABLE 3.E—ESTIMATED ADDITIONAL PELL RECIPIENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25 .....	129	351	700	1,219	1,688	1,891	2,031	2,188	2,334	2,447
75 .....	140	439	919	1,341	2,025	2,363	2,869	3,038	3,600	4,050
150 .....	187	702	1,365	1,950	3,038	3,375	4,050	5,063	5,400	5,760
350 .....	407	1,372	2,625	3,675	5,250	6,370	7,350	8,575	9,555	10,290
750 .....	872	2,400	4,200	6,000	8,438	10,688	13,500	15,750	18,281	19,688
1,500 .....	.....	1,868	3,000	5,400	7,020	9,360	11,250	13,500	14,625	16,875
Total .....	1,734	7,131	12,809	19,584	27,458	34,046	41,050	48,113	53,796	59,109

We also assumed a distribution of Pell recipients based on expected growth in programs by type and control of institutions, as shown in Table 3.F. However, the share of programs reflected in Table 3.F does not necessarily reflect the share of students at each type of institution.

TABLE 3.F—ASSUMED DISTRIBUTION OF NEW PROGRAMS BY INSTITUTIONAL CATEGORY

	Share of programs (percent)
4-year public .....	22
2-year public .....	30
4 year private .....	15
2 year private .....	8
Proprietary .....	25

We welcome comments about the Pell Grant assumptions presented in Tables 3.A through 3.F as we recognize that competency-based and direct assessment programs, in particular, are a relatively new and developing part of the postsecondary market and it is not clear what institutions will pursue opportunities in this area or how the size and scope of programs offered will develop. Estimated program costs for Pell Grants range from \$30.1 billion in AY 2021–22 to \$36.1 billion in AY 2030–31, with a 10-year total estimate of \$329.0 billion. On average, the FY 2021 President’s Budget projects a baseline increase in Pell Grant recipients from 2021 to 2030 of approximately 150,000 annually. The increase in Pell Grant recipients estimated due to these proposed regulations ranges from about

6 percent in 2022 to approximately 41 percent by 2030 of the projected annual increase that would otherwise occur. The additional 59,109 recipients estimated for 2030 would account for under 1 percent of all estimated 8.25 million Pell recipients in 2030–31 and result in an increase in program costs of approximately \$1,337 million, a 0.4 percent increase in estimated 10-year Pell Grant program costs of \$329.0 billion.

For the loan programs, we used the estimated split between graduate and undergraduate programs to develop additional volume estimates by loan type and student loan model risk-group. Table 3.G presents the assumed borrowing rate by loan type of the additional students.

TABLE 3.G—ESTIMATED BORROWING RATES BY LOAN TYPE

	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
Subsidized .....	45	45	45	45	45	45	45	45	45	45
Unsubsidized .....	55	55	55	55	55	55	55	55	55	55
Parent PLUS .....	10	10	10	10	10	10	10	10	10	10
Grad Unsubsidized ...	35	35	35	35	35	35	35	35	35	35
Grad PLUS .....	25	25	25	25	25	25	25	25	25	25

We then used estimated average loans by loan type as projected for the PB2020 estimates to estimate a total increase in

volume by loan type, as shown in Tables 3.H and 3.I.

TABLE 3.H—ESTIMATED AVERAGE AMOUNTS PER BORROWER BY LOAN TYPE

Average loan	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Subsidized .....	4,240	4,240	4,240	4,250	4,250	4,260	4,260	4,270	4,280	4,290
Unsubsidized .....	4,630	4,660	4,700	4,720	4,760	4,780	4,820	4,830	4,860	4,880
PLUS .....	18,550	18,880	19,290	19,620	19,920	20,440	20,780	21,070	21,460	21,860
Grad Unsubsidized ...	20,660	20,910	21,120	21,230	21,330	21,590	21,810	22,080	22,290	22,500
Grad PLUS .....	25,990	26,760	27,510	28,130	28,640	29,330	30,100	30,870	31,760	32,660

TABLE 3.I—ESTIMATED ADDITIONAL LOAN VOLUME BY LOAN TYPE

Additional Loan Volume	2021	2022	2023	2024	2025
Subsidized .....	6,615,656	27,212,850	48,878,190	74,910,234	105,024,938
Unsubsidized .....	8,829,543	36,554,788	66,221,238	101,682,075	143,767,470
Parent PLUS .....	6,431,888	26,927,600	49,416,158	76,849,088	109,390,680
Grad Unsubsidized .....	5,206,320	25,687,935	58,470,720	96,596,500	164,912,895
Grad PLUS .....	4,678,200	23,481,900	54,401,025	91,422,500	158,164,400
Additional Loan Volume	2026	2027	2028	2029	2030
Subsidized .....	130,530,926	157,385,700	184,896,338	207,220,748	228,221,297
Unsubsidized .....	179,011,896	217,647,100	255,621,713	287,591,411	317,299,125
Parent PLUS .....	139,178,515	170,603,800	202,746,075	230,890,823	258,426,188
Grad Unsubsidized .....	216,191,465	275,493,015	324,807,840	373,223,760	411,547,500
Grad PLUS .....	209,782,825	271,577,250	324,366,525	379,849,600	426,702,900

Clearly, the large average borrowing amounts of graduate students contribute significantly to the loan volume estimates, so a different mix of programs or a different borrowing level would affect the estimated impact of the proposed regulations, so we adjust this

factor in the alternate scenarios to identify a range of possible impacts.

As subsidy rates differ by risk group and loan type, the Department assumed a distribution of the undergraduate loans as shown in Table 3-J. This distribution is based on the PB2021 distribution of loan volume by risk

group, but reduces the share in the 4-year Junior/Senior risk group by 10–15 percentage points and the 4-year Freshman/Sophomore risk group by approximately 5 percentage points and increases the share in the 2-year risk groups. All graduate loans are in the graduate risk group.

TABLE 3-J—ASSUMED DISTRIBUTION OF ADDITIONAL LOAN VOLUMES BY RISK GROUP

	Subsidized (%)	Unsubsidized (%)	Parent PLUS (%)
2-year Proprietary .....	18	15	10
2-year Not-for-Profit .....	20	15	10
4-year Freshman/Sophomore .....	32	35	42
4-year Junior/Senior .....	30	35	38

The resulting additional loan volumes are generated by simple multiplication of the estimated additional undergraduate students by the percent borrowing and average amount per borrower by loan type, and then by the distribution by risk group. The same process occurred for graduate students. We welcome comments on, and data related to, the assumed mix of undergraduate and graduate programs, the expected size of additional programs, the borrowing levels by loan type, and the distribution of borrowing by risk group. Any comments received will be considered in the development of estimates for the final regulations.

As seen from the approximately \$100 billion total annual loan volume, even small changes would result in a significant amount of additional loan

transfers. We update loan volume estimates regularly; for PB2021 the total non-consolidated loan volume estimates between FY2021 and FY2030 range from \$94 billion to \$107 billion. The assumed changes in loan volume would result in a small savings that represents the net impact of offsetting subsidy changes by loan type and risk group due to positive subsidy rates for Subsidized and Unsubsidized Stafford loans and negative subsidy rates for PLUS Loans. Given the higher loan amounts associated with PLUS loans and loans to graduate students, the negative subsidy rates that range from –20.57 in 2021 to –16.70 in 2028 generate significant savings (\$–356 mn in outlays) to offset the increased costs in other loan types. In Alternate 2, the higher non-consolidated loan volume eventually

results in higher consolidated loan volume, that, combined with the other positive subsidy categories results in a net cost in that scenario.

We do not assume any changes in subsidy rates from the potential creation of new programs or the other changes reflected in the proposed regulations. We are uncertain to what extent and in what direction the performance of programs that expand or develop under the proposed regulations will shift relative to current programs. As indicated previously, several institutions known for competency-based programs have default performance that is as good as or better than national averages, but it is not clear that most programs that will be created in the future will achieve that result. Depending on how programs are

configured, the market demand for them, and their quality, key subsidy components such as defaults, prepayments, and repayment plan choice may vary and affect the cost estimates.

Table 4 summarizes the Pell and loan effects for the Main, Alt1, and Alt2 scenarios over a 10-year period. Each column reflects a scenario showing estimated changes to Pell Grants and Direct Loans under those conditions.

Therefore, the overall amounts reflect the sum of outlay changes occurring under each scenario for Pell Grants and Direct Loans when combined.

TABLE 4—ESTIMATED NET IMPACT OF PELL GRANT AND LOAN CHANGES—2021–2030 OUTLAYS  
[\$mns]

	Main	Alt 1	Alt 2
Pell Grants .....	1,110	446	1,741
Loans .....	-45	-20	106
Overall .....	1,065	426	1,847

The cost estimates presented above do not attempt to account for several factors that could ultimately result in a different net budget impact than the primary estimate presented in Table 4, including potential cost differences among programs and relative repayment performance. As discussed previously, one potential benefit of competency based programs is reduced costs for students relative to other programs. If a large share of students would have attended a different program or completed faster, their Pell Grant or borrowing may be lower than assumed in the PB2021 baseline. However, without more significant evidence, we are not estimating any savings from that possibility. Other provisions that we do not include in the budget estimate

because of limited information on the potential significance include the treatment of out-of-class hours and the reasonable length provisions related to clock hour programs.

As discussed previously, the uncertainty around several factors affected by the proposed changes led the Department to develop some alternative scenarios for the potential impacts. The extent to which institutions invest in making direct assessment programs work and try to enroll additional students as opposed to converting some portion of existing enrollments to this type of program is unclear. In the AIR survey about competency-based education, approximately 40 percent of the 501 institutional respondents indicated CBE is in their institutions'

strategic plans in a "minor way" and 16 percent in a "major way".<sup>58</sup> It is also unclear if the size and type of existing CBE programs is representative of future CBE programs, especially direct assessment programs.

In order to capture the effect of changing some of the key assumptions associated with the primary budget estimate, the Department developed the Alternate Scenarios presented in Table 5. Alternate 1 is a low impact scenario that reduces the number of additional programs and students and lowers the average amount borrowed and the percentage of students eligible for Pell Grants. Alternate 2, the high impact scenario, increases programs and student growth, the percentage of Pell recipients, and amounts borrowed.

TABLE 5—ALTERNATE SCENARIOS

	Alternate 1—low impact	Alternate 2—high impact
Program Growth .....	Eliminate half the programs per cell for 3 smallest categories and one-third of programs in 3 largest size categories.	+20 programs per cell for 3 smallest categories; +5 programs per cell for 3 largest size categories through 2025 and +10 per cell for 2026 to 2029.
Undergraduate Program Share .....	+15 percent .....	- 15 percent.
Percent of Pell Recipients .....	30 percent .....	75 percent.
Distribution of Pell Recipients by Institutional Category.	4-yr Public 10% .....	4-yr Public 30%.
	4-yr Private 5% .....	4-yr Private 24%.
	2-yr Public 38% .....	2-yr Public 20%.
	2-yr Private 10% .....	2-yr Private 5%.
	Proprietary 37% .....	Proprietary 21%.
Borrowing Rates .....	Subsidized - 10% .....	Subsidized +5%.
	Unsubsidized - 15% .....	Unsubsidized +10%.
	Plus -5% .....	Plus +5%.
	Grad Unsub - 15% .....	Grad Unsub +10%.
	Grad Plus - 15% .....	Grad Plus +10%.
Average Loan Amount .....	Decrease 20 percent .....	Increase 10 percent.
Distribution by Risk Group (Subsidized and Unsubsidized).	2-yr Prop - 10% .....	2-yr Prop +15%.
	2-yr NFP -5% .....	2-yr NFP +10%.
	4-yr FRSO +10% .....	4-yr FRSO - 15%.
	4-yr JRSR +5% .....	4-yr JRSR - 10%.
	GRAD No change. ....	GRAD No change.

<sup>58</sup> [www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf](http://www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf).

TABLE 5—ALTERNATE SCENARIOS—Continued

	Alternate 1—low impact	Alternate 2—high impact
Distribution by Risk Group (PLUS) .....	2-yr Prop -6% ..... 2-yr NFP -3% ..... 4-yr FRSO +6% ..... 4-yr JRSR +3% ..... GRAD No change. ....	2-yr Prop +12%. 2-yr NFP +8%. 4-yr FRSO -12%. 4-yr JRSR -8%. GRAD No change.

*Accounting Statement*

As required by OMB Circular A-4 (available at [www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf)), in the following table we

have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these final regulations. This table provides our best estimate of the changes in annual monetized

transfers as a result of these final regulations. Expenditures are classified as transfers from the Federal Government to affected student loan borrowers and Pell Grant recipients.

TABLE 6—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

Category	Benefits	
Clarification of terms and processes related to establishing programs and administering title IV aid to encourage development of new programs .....	Not Quantified	
Net Reduction in Paperwork Burden on Institutions, primarily due to elimination of Net Present Value calculation related to the 90/10 rule .....	7%	3%
	\$ -0.12	\$ -0.12
	Not Quantified	
Category	Costs	
Category	Transfers	
Increased transfers of Pell Grants .....	7% \$95.8	3% \$104.3
Increased transfers of loans to students in additional programs established, in part, due to the proposed regulations .....	\$ -5.7	\$ -5.1

*Alternatives Considered*

A number of proposals were considered on various sections of the

proposed regulations as the negotiated rulemaking committee moved toward consensus. Some key alternatives that

were considered are summarized in Table 76.

TABLE 76—KEY ALTERNATIVES CONSIDERED

Topic	Alternative proposal	Reasons rejected
Definition of Credit Hour .....	Eliminate time-based requirements .....	Retain definition for some consistency across higher education.
Subscription-based programs.	Disbursement based on attempted programs, not completed ones. Include a competency in student's enrollment status more than once if it overlapped more than one subscription period.	Concern for potential abuse leading to paying title IV aid for same course twice.
Written Arrangement .....	No limitation on percentage of program that could be provided by written arrangement with ineligible entity.	Goal was to facilitate partnerships with organizations using trade experts in workplace environment. Committee found sufficient flexibility with existing limit and changes would call into question whether the eligible institution was really offering the program.
Program Length .....	Allow limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State.	Concern that changes would encourage institutions to add hours beyond what is necessary for student to become employed.

*Clarity of the Regulations*

Executive Order 12866 and the Presidential memorandum "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, § 668.43.)
- 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.

*Regulatory Flexibility Act Analysis*

*Description of the Reasons That Action by the Agency Is Being Considered*

The Department is regulating to reflect development in postsecondary education delivery models, including those facilitated by technology and those that are based on the demonstration of competencies rather than seat time, to help institutions understand regulatory requirements for such programs and to facilitate further innovations in such areas. The proposed regulations provide or clarify definitions of terms such as correspondence course, distance education, subscription-based program, and clock hour, where the HEA provides no definition.

The proposed regulations send a signal to the higher education community that the Department is committed to supporting educational innovations such as subscription-based and direct assessment programs as well as new technology-driven delivery mechanisms, such as adaptive learning. The proposed regulations also seek to clarify definitions used to differentiate between distance education and correspondence courses, while at the same time preserving student protections and title IV financial aid distribution.

*Succinct Statement of the Objectives of, and Legal Basis for, the Regulations*

The Secretary proposes to amend the Institutional Eligibility regulations issued under the HEA, related to distance education and innovation in 34 CFR part 600. In addition, the Secretary proposes to amend the Student Assistance General Provisions regulations issued under the HEA in 34 CFR part 668. The proposed changes to part 600 are authorized by 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, while the proposed changes to part 668 are authorized by 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474.

Through the proposed regulations, we attempt to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students, and also provide sufficient flexibility to ensure that future innovations we cannot yet anticipate have an opportunity to move forward.

The proposed regulations are also designed to protect students and taxpayers from unreasonable risks. Inadequate consumer information could result in students enrolling in programs that will not help them meet their goals.

In addition, institutions adopting innovative methods of educating students may expend taxpayer funds in ways that were not contemplated by Congress or the Department, resulting in greater risk to the taxpayers of waste, fraud, and abuse and to the institution of undeserved negative program review findings. These proposed regulations attempt to limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors. This delegation of authority through the higher education regulatory triad entrusts oversight of most consumer protections to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department.

*Description of and, Where Feasible, an Estimate of the Number of Small Entities to which the Regulations Will Apply*

Of the entities that the final regulations will affect, we consider many institutions to be small. The Department recently proposed a size classification based on enrollment using IPEDS data that established the percentage of institutions in various sectors considered to be small entities, as shown in Table 8. We described this size classification in the NPRM published in the **Federal Register** on July 31, 2018 for the proposed borrower defense rule (83 FR 37242, 37302). The Department discussed the proposed standard with the Chief Counsel for Advocacy of the Small Business Administration, and while no change has been finalized, the Department continues to believe this approach better reflects a common basis for determining size categories that is linked to the provision of educational services.

**TABLE 8—SMALL ENTITIES UNDER ENROLLMENT BASED DEFINITION**

Level	Type	Small	Total	Percent
2-year .....	Public .....	342	1,240	28
	Private .....	219	259	85
2-year .....	Proprietary .....	2,147	2,463	87
4-year .....	Public .....	64	759	8
	Private .....	799	1,672	48
4-year .....	Proprietary .....	425	558	76
Total .....	.....	3,996	6,951	57

The proposed regulations would provide needed clarity around title IV eligibility for distance education, correspondence courses, subscription-

based programs and direct assessment programs. They would also provide greater clarity regarding how the Department determines whether or not

a program is of reasonable length. The effect on small entities would vary by the extent they currently participate in such programs or that they choose to do

so going forward. Introducing competency-based programs in areas with strong demand could be an opportunity for some small entities to maintain or expand their business. On the other hand, small entities could be vulnerable to competition from other institutions, large or small, that are capturing an increasing share of the postsecondary market with distance or competency-based programs. Developing and implementing new programs and delivery models, and especially those that require sophisticated technology, may be impractical for small institutions that cannot distribute the cost among a population of sufficient size to result in favorable return-on-investment. We expect that the development of the first direct assessment program at an institution would be a multi-stage and multi-year process involving choosing the subject areas appropriate for this model, developing competencies, modifying course materials and teaching approaches, reaching out to potential future employers to build acceptance of the credential, and getting approval from accreditors and the Department, and recruiting students. The Department does not have a detailed understanding of the costs and timeframe involved with establishing these programs, especially for small entities and we welcome such information. Small institutions may be more inclined to rely on consortia arrangements with other, larger institutions, to make distance learning and competency-based education available to their students. The proposed regulations would remove many barriers to innovation that currently restrain institutions, including small ones, and may accelerate innovations, but these innovations were likely to take place in postsecondary education anyway given the call for new, more efficient delivery models for the growing population of non-traditional students and the likelihood that adults will be engaged in postsecondary education throughout their lifetime.

The Secretary invites comments from small 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.

*Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities that Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record*

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this NPRM. Overall, the Department estimates \$127,371 in reduced paperwork burden associated with the elimination of the net present value calculation related to the 90/10 rule. This affects proprietary institutions, of which approximately 85 percent are considered small according to Table 8 (2,572/3,021), so most of that reduction (\$127,371\*85 percent = \$108,265) will go to small entities. There are also some small increases in burden related to reporting about direct assessment programs, reporting about written arrangements, and demonstrating an ineligible institution's competence to perform its contracted duties under a written arrangement. Overall, these provisions are expected to increase burden on small entities by approximately 79 hours, a small increase for those small institutions that choose to participate in direct assessment programs or written arrangements.

*Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Proposed Regulations*

The proposed regulations are unlikely to conflict with or duplicate existing Federal regulations.

*Alternatives Considered*

As described above, the Department participated in negotiated rulemaking when developing the proposed regulations and considered a number of options for some of the provisions. These included: (1) Eliminating time-based requirements for credit hours; (2) no limitation on the percentage of a program that could be offered through written arrangement with an ineligible entity; (3) allowing limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State, (4) disbursing funds in subscription-based programs based on attempted competencies, not completed ones; and (5) including a competency that overlaps subscription periods in a student's enrollment status more than once. No alternatives were aimed specifically at small entities.

*Paperwork Reduction Act of 1995*

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Parts 600 and 668 contains information collection requirements. Under the PRA the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number.

Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations we will display the control numbers assigned by OMB to any collection requirements proposed in this NPRM and adopted in the final regulations.

*Section 600.21—Updating application information*

*Requirements:* The proposed regulations in § 600.21 would require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously has such approval. The proposed regulations would also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.

*Burden Calculation:* We believe that the calculation would impose burden on institutions. We estimate that 36 institutions will need to report such activities. We anticipate that an institution will require an average of .5 hours (30 minutes) to report such

activities for a total estimated burden of 18 hours under OMB Control Number 1845-NEW.

We estimate that there will be 12 proprietary institutions that be required to report this information for 9 burden

hours (12 institutions × .5 hours = 6 hours). We estimate that there are 11 private institutions that be required to report this information for 5 burden hours (11 institutions × .5 hours = 5

hours). We estimate that there are 13 public institutions that be required to report this information for 7 burden hours (13 institutions × .5 hours = 7 hours).

600.21—UPDATING APPLICATION INFORMATION—1845-NEW1

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost \$106.94
Proprietary .....	12	12	.5	6	\$642
Private .....	11	11	.5	5	538
Public .....	13	13	.5	7	749
Total .....	36	36	.....	18	1,929

Section 668.5—Written arrangements to provide education programs

*Requirements:* The proposed regulations in § 668.5 would require the institution to demonstrate how the ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement.

*Burden Calculation:* We believe that the calculation would impose recordkeeping burden on institutions. We estimate that 24 institutions will need to document such information. We anticipate that an institution will require an average of 5 hours to document such activities for a total estimated burden of 120 hours under OMB Control Number 1845-NEW2.

We estimate that there are 8 proprietary institutions that be required

to document this information for 40 burden hours (8 institutions × 5 hours = 40 hours). We estimate that there are 8 private institutions that be required to document this information for 40 burden hours (8 institutions × 5 hours = 40 hours). We estimate that there are 8 public institutions that be required to report this information for 40 burden hours (8 institutions × 5 hours = 40 hours).

SECTION 668.5—WRITTEN ARRANGEMENTS TO PROVIDE EDUCATION PROGRAMS.—1845-NEW2

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost \$106.94
Proprietary .....	8	8	5	40	\$4,278
Private .....	8	8	5	40	4,278
Public .....	8	8	5	40	4,278
Total .....	24	24	.....	120	12,834

Section 668.28—Non-title IV revenue (90/10).

*Requirements:* The proposed regulations in § 668.28 would remove the Net Present Value calculation currently in the regulations.

*Burden Calculation:* We believe that the proposed regulatory language change would remove burden from the institution. Based on the explanation provided in the preamble, the regulations in 668.28(b) no longer applies to the calculation of the

treatment of revenue. Therefore, the current burden applied under OMB Control Number 1845-0096 would be eliminated. Upon the effective date of these regulation, the currently assessed 2,808 burden hours would be discontinued.

SECTION 668.28—NON-TITLE IV REVENUE (90/10).—1845-0096

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost savings \$106.94/hour
Proprietary .....	-936	-936	2	-1,872	\$200,192
Proprietary .....	-936	-936	1	-936	100,096
Total .....	-1,872	-1,872	.....	-2,808	300,288

The estimated cost to institutions is \$53.47 per hour based on the 2018 mean hourly information from the Bureau of

Labor Statistics Occupational Employment Statistics for Postsecondary Education

Administrators<sup>59</sup> × 2 to account for benefits and expenses for a total per hour cost of \$106.94.

<sup>59</sup> www.bls.gov/oes/current/oes119033.htm.

Regulatory section	Information collection	OMB Control Number and estimated burden (change in burden)	Estimated costs \$106.94/hour
§ 600.21 Updating application information.	The proposed regulations in § 600.21 would require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously been awarded such approval. The proposed regulations would also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.	1845-NEW1 ..... 18 hours .....	\$1,929
§ 668.5—Written arrangements to provide education programs.	The proposed regulations in § 668.5 would require the institution to demonstrate how the ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement.	1845-NEW2 ..... 120 hours .....	12,834
§ 668.28 Non-title IV revenue (90/10).	The proposed regulations in § 668.28 would remove the Net Present Value calculation currently in the regulations.	-2,808 .....	(\$300,288)

Collection of Information OMB control number affected by the proposed regulations follows:  
 The total burden hours and change in the burden hours associated with each

OMB control number	Total proposed burden hours	Proposed change in burden hours
1845-NEW1 .....	+18	+18
1845-NEW2 .....	+120	+120
1845-0096 .....	-2,808	-2,808
Total .....	-2,670	-2,670

**Intergovernmental Review**

These regulations 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.

**Federalism**

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in 600 and 668 may have federalism implications. We encourage

State and local elected officials to review and provide comments on these proposed regulations.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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**List of Subjects**

**34 CFR Part 600**

Colleges and universities, grant programs-education, loan programs-education, reporting and recordkeeping requirements, student aid, vocational education.

**34 CFR Part 668**

Administrative practice and procedure, colleges and universities, consumer protection, grant programs—education, loan programs—education, reporting and recordkeeping requirements, student aid, vocational education.

**Betsy DeVos,**

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600 and 668, of title 34 of the Code of Federal Regulations as follows:

**PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED**

- 1. The authority citation for part 600 continues to read as follows:

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

- 2. Section 600.2 is amended by:
- a. Adding, in alphabetical order, a definition for “academic engagement”.
- b. Revising the definitions of “clock hour”, “correspondence course”, “credit hour”, “distance education”, and “incarcerated student”, and “nonprofit institution”.
- c. Adding, in alphabetical order, a definition for “juvenile justice facility”.

The additions and revisions read as follows:

**§ 600.2 Definitions.**

\* \* \* \* \*

*Academic engagement:* Active participation by a student in an instructional activity related to the student’s course of study that—

- (1) Is defined by the institution in accordance with any applicable requirements of its State or accrediting agency;
- (2) Includes, but is not limited to—
  - (i) Attending a synchronous class, lecture, recitation, or field or laboratory activity, physically or online, where there is an opportunity for interaction between the instructor and students;
  - (ii) Submitting an academic assignment;
  - (iii) Taking an assessment or an exam;
  - (iv) Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction;
  - (v) Participating in a study group, group project, or an online discussion that is assigned by the institution; or
  - (vi) Interacting with an instructor about academic matters; and
- (3) Does not include, for example—
  - (i) Living in institutional housing;
  - (ii) Participating in the institution’s meal plan;
  - (iii) Logging into an online class or tutorial without any further participation; or
  - (iv) Participating in academic counseling or advisement.

\* \* \* \* \*

*Clock hour:* (1) A period of time consisting of—

- (i) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;
- (ii) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period;
- (iii) Sixty minutes of preparation in a correspondence course; or
- (iv) In distance education, 50 to 60 minutes in a 60-minute period of attendance in a synchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students.

(2) A clock hour in a distance education program does not meet the

requirements of this definition if it does not meet all accrediting agency and State requirements or exceeds an agency’s restrictions on the number of clock hours in a program that may be offered through distance education.

(3) An institution must be capable of monitoring a student’s attendance in 50 out of 60 minutes for each clock hour under this definition.

\* \* \* \* \*

*Correspondence course:* (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructors. Interaction between instructors and students in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student.

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

(3) A correspondence course is not distance education.

*Credit hour:* Except as provided in 34 CFR 668.8(k) and (l), a credit hour is an amount of student work defined by an institution, as approved by the institution’s accrediting agency or State approval agency, that is consistent with commonly accepted practice in postsecondary education and that—

- (1) Reasonably approximates not less than—
  - (i) 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 period of time; or
  - (ii) At least an equivalent amount of work as required in paragraph (1)(i) 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; and
- (2) Permits an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels.

- (i) Providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency; and
- (ii) Monitoring the student’s academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

\* \* \* \* \*

*Distance education:* (1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the

instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include—

- (i) The internet;
- (ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
- (iii) Audio conference; or
- (iv) Other media used in a course in conjunction with any of the technologies listed in paragraph (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution’s accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—

- (i) Providing direct instruction;
- (ii) Assessing or providing feedback on a student’s coursework;
- (iii) Providing information or responding to questions about the content of a course or competency;
- (iv) Facilitating a group discussion regarding the content of a course or competency; or
- (v) Other instructional activities approved by the institution’s or program’s accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student’s completion of a course or competency—

- (i) Providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency; and
- (ii) Monitoring the student’s academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

\* \* \* \* \*

*Incarcerated student:* A student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. A student is not

considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends. For purposes of Pell Grant eligibility under 34 CFR 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal government or a State, but is considered incarcerated for the purposes of determining costs of attendance under section 472 of the HEA in determining eligibility for and the amount of the Pell Grant.

*Juvenile justice facility:* A public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws—

- (1) Are accused of committing a delinquent act;
- (2) Have been adjudicated delinquent; or
- (3) Are determined to be in need of supervision.

*Nonprofit institution:* An institution that—

(1)(i) Is owned and operated by one of more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); OR

(2) For a foreign institution—

(i) An institution that is owned and operated only by one or more nonprofit corporations or associations; and

(ii)(A) If a recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, is determined by that tax authority to be a nonprofit educational institution; or

(B) If no recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, the foreign institution demonstrates to the satisfaction of the Secretary that it is a nonprofit educational institution.

\* \* \* \* \*

■ 3. Section 600.7 is amended by:

■ a. Redesignating paragraph (b)(2) as (b)(3).

■ b. Adding new paragraph (b)(2).

The addition reads as follows:

**§ 600.7 Conditions of institutional eligibility.**

\* \* \* \* \*

(b) \* \* \*

(2) *Calculating the number of correspondence students.* For purposes of paragraph (a)(1)(ii) of this section, a student is considered “enrolled in correspondence courses” if the student's enrollment in correspondence courses constituted more than 50 percent of the courses in which the student enrolled during an award year.

\* \* \* \* \*

\* \* \* \* \*

■ 4. Section 600.10 is amended by revising paragraph (c)(1)(iii) to read as follows:

**§ 600.10 Date, extent, duration, and consequence of eligibility.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iii) For a first direct assessment program under 34 CFR 668.10, or the first direct assessment program offered at each credential level, and for a comprehensive transition and postsecondary program under 34 CFR 668.232, obtain the Secretary's approval.

\* \* \* \* \*

■ 5. Section 600.20 is amended by:

■ a. Adding a sentence to the end of paragraph (a)(1).

■ b. Removing the word “wishes” in paragraphs (b)(1) and (2) and adding in its place the word “chooses.”

■ c. Redesignating paragraphs (b)(2)(i) through (iii) as paragraphs (b)(2)(i)(A) through (C).

■ d. Redesignating paragraph (b)(2) introductory text as paragraph (b)(2)(i) introductory text.

■ e. Adding a new paragraph (b)(2)(ii).

■ f. Removing paragraph (d)(1)(ii)(B) and redesignating paragraphs (d)(1)(ii)(C) through (F) as paragraphs (d)(1)(ii)(B) through (E).

■ g. Revising redesignated paragraph (d)(1)(i)(C).

■ h. Removing redesignated paragraph (d)(1)(ii)(D) and redesignating paragraphs (d)(1)(ii)(E) and (F) as paragraphs (d)(1)(ii)(D) and (E).

■ i. Revising redesignated paragraph (d)(1)(ii)(E)(1).

The additions and revisions read as follows:

**§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.**

(a)(1) \* \* \* The Secretary must ensure prompt action is taken by the Department on any materially complete application required under this section.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) The Secretary must ensure prompt action is taken by the Department on any materially complete application required under paragraph (b)(2)(i) of this section.

\* \* \* \* \*

(d)(1) \* \* \*

(ii) \* \* \*

(C) If an additional educational program is required to be approved by the Secretary for title IV, HEA program purposes under paragraph (d)(1)(ii)(B) of this section, the Secretary may grant approval, or request further information prior to making a determination of whether to approve or deny the additional educational program.

\* \* \* \* \*

(E)(1) If the Secretary denies an application from an institution to offer an additional educational program, the denial will be based on the factors described in paragraphs (d)(1)(ii)(D)(2), (3), and (4) of this section, and the Secretary will explain in the denial how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation.

\* \* \* \* \*

■ 6. Amend § 600.21 by revising paragraph (a)(11) and adding paragraphs (a)(12) and (13) to read as follows:

**§ 600.21 Updating application information.**

(a) \* \* \*

(11) For any program that is required to provide training that prepares a student for gainful employment in a recognized occupation—

(i) Establishing the eligibility or reestablishing the eligibility of the program;

(ii) Discontinuing the program's eligibility;

(iii) Ceasing to provide the program for at least 12 consecutive months;

(iv) Losing program eligibility under § 600.40; or

(v) Changing the program's name, CIP code or credential level.

(12) Its addition of a second or subsequent direct assessment program.

(13) Its establishment of a written arrangement for an ineligible institution or organization to provide more than 25

percent of a program pursuant to § 668.5(c).

\* \* \* \* \*

■ 7. Section 600.52 is amended by revising the definition of “foreign institution” to read as follows:

§ 600.52 Definitions.

\* \* \* \* \*

Foreign institution: (1) For the purposes of students who receive title IV aid, an institution that—

- (i) Is not located in the United States;
(ii) Except as provided with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2)—

- (A) Has no U.S. location;
(B) Has no written arrangements, within the meaning of § 668.5, with institutions or organizations located in the United States for those institutions or organizations to provide a portion of an eligible program, as defined under § 668.8, except for written arrangements for no more than 25 percent of the courses required by the program to be provided by eligible institutions located in the United States; and

(C) Does not permit students to complete an eligible program by enrolling in courses offered in the United States, except that it may permit students to complete up to 25 percent of the program by enrolling in the coursework, research, work, internship, externship, or special studies offered by an eligible institution in the United States;

(iii) Is legally authorized by the education ministry, council, or equivalent agency of the country in which the institution is located to provide an educational program beyond the secondary education level; and

(iv) Awards degrees, certificates, or other recognized educational credentials in accordance with § 600.54(e) that are officially recognized by the country in which the institution is located.

(2) Notwithstanding paragraph (1)(ii)(C) of this definition, independent research done by an individual student in the United States for not more than one academic year is permitted, if it is conducted during the dissertation phase of a doctoral program under the guidance of faculty, and the research is performed only in a facility in the United States.

(3) If the educational enterprise enrolls students both within the United States and outside the United States, and the number of students who would be eligible to receive title IV, HEA program funds attending locations outside the United States is at least twice the number of students enrolled within the United States, the locations

outside the United States must apply to participate as one or more foreign institutions and must meet all requirements of paragraph (1) of this definition, and the other requirements of this part. For the purposes of this paragraph, an educational enterprise consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership.

\* \* \* \* \*

■ 8. Section 600.54 is amended by revising paragraph (c) to read as follows:

§ 600.54 Criteria for determining whether a foreign institution is eligible to apply to participate in the Direct Loan Program.

\* \* \* \* \*

(c)(1) Notwithstanding § 668.5, written arrangements between an eligible foreign institution and an ineligible entity are limited to those under which—

(i) The ineligible entity is an institution that meets the requirements in paragraphs (1)(iii) and (iv) of the definition of “foreign institution” in § 600.52; and

(ii) The ineligible foreign institution provides 25 percent or less of the educational program.

(2) For the purpose of this paragraph (c), written arrangements do not include affiliation agreements for the provision of clinical training for foreign medical, veterinary, and nursing schools.

\* \* \* \* \*

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 9. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474, unless otherwise noted.

■ 10. Section 668.1 is amended by revising paragraph (b) introductory text to read as follows:

§ 668.1 Scope.

\* \* \* \* \*

(b) As used in this part, an “institution,” unless otherwise specified, includes—

\* \* \* \* \*

■ 11. Section 668.2 is amended by:

■ a. Adding in alphabetical order in the list of definitions in paragraph (a) the words “Direct assessment program”, “Distance education”, “Religious mission”, “Teach-out”, “Teach-out agreement”, and “Teach-out plan”.

■ b. In paragraph (a):

■ i. Removing from the list of definitions the words “Telecommunications course”; and

■ ii. Adding in alphabetical order in the list of definitions the words “Title IV, HEA program”.

■ c. In paragraph (b):

■ i. Removing the definition of “Academic Competitiveness Grant (ACG)”;

■ ii. Revising the definition of “full-time student”;

■ iii. Adding in alphabetical order the definition of “subscription-based program”; and

■ iv. In the definition of “Third-party servicer”, in paragraph (1)(i)(D), removing the words “Certifying loan applications” and adding in their place the words “Originating loans”.

The additions and revisions read as follows:

§ 668.2 General definitions.

\* \* \* \* \*

(b) \* \* \*

Full-time student: An enrolled student who is carrying a full-time academic workload, as determined by the institution, under a standard applicable to all students enrolled in a particular educational program. The student’s workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. For a term-based program that is not subscription-based, the student’s workload may include repeating any coursework previously taken in the program; however, the workload may not include more than one repetition of a previously passed course. For an undergraduate student, an institution’s minimum standard must equal or exceed one of the following minimum requirements, based on the type of program:

(1) For a program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), 12 semester hours or 12 quarter hours per academic term.

(2) For a program that measures progress in credit hours and does not use terms, 24 semester hours or 36 quarter hours over the weeks of instructional time in the academic year, or the prorated equivalent if the program is less than one academic year.

(3) For a program that measures progress in credit hours and uses nonstandard-terms (terms other than semesters, trimesters, or quarters) the number of credits determined by—

(i) Dividing the number of weeks of instructional time in the term by the number of weeks of instructional time in the program’s academic year; and

(ii) Multiplying the fraction determined under paragraph (3)(i) of

this definition by the number of credit hours in the program's academic year.

(4) For a program that measures progress in clock hours, 24 clock hours per week.

(5) A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.

(6) The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.

(7) For correspondence coursework—

(i) A full-time course load must be commensurate with the requirements listed in paragraphs (1) through (6) of this definition; and

(ii) At least one-half of the coursework must be made up of non-correspondence coursework that meets one-half of the institution's requirement for full-time students.

(8) For a subscription-based program, completion of a full-time course load commensurate with the requirements in paragraphs (1), (3), and (5) through (7) of this definition.

\* \* \* \* \*

*Subscription-based program:* A standard or nonstandard-term direct assessment program in which the institution charges a student for each term on a subscription basis with the expectation that the student completes a specified number of credit hours during that term. Coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term. Students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. An institution establishes an enrollment status (for example, full-time or half-time) that will apply to a student throughout the student's enrollment in the program, except that a student may change his or her enrollment status no more often than once per academic year. The number of credit hours (or the equivalent) a student must complete before receiving subsequent disbursements is calculated by—

(1) Determining for each term the number of credit hours (or the equivalent) associated with the institution's minimum standard for the student's enrollment status (for example, full-time, three-quarter time, or half-time) for that period commensurate with paragraph (8) in the definition of "full-time student," adjusted for less than full-time students

in light of the definitions of "half-time student" and "three-quarter time student," and adjusted to at least one credit (or the equivalent) for a student who is enrolled less than half-time; and

(2) Adding together the number of credit hours (or the equivalent) determined under paragraph (1) for each term in which the student was enrolled in and attended that program, excluding the current and most recently attended terms.

\* \* \* \* \*

■ 12. Section 668.3 is amended by revising paragraphs (b)(2) and (3) to read as follows:

**§ 668.3 Academic year.**

\* \* \* \* \*

(b) \* \* \*

(2) A week of instructional time is any week in which—

(i) At least one day of regularly scheduled instruction or examinations occurs, or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs; or

(ii)(A) In a program offered using asynchronous coursework through distance education or correspondence courses, the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives; and  
(B) In a program using asynchronous coursework through distance education, the institution expects enrolled students to perform educational activities demonstrating academic engagement during the week.

(3) Instructional time does not include any scheduled breaks and activities not included in the definition of "academic engagement" in 34 CFR 600.2, or periods of orientation or counseling.

■ 13. Section 668.5 is amended by:

■ a. Revising paragraphs (a), (c), and (d)(1).

■ b. Adding paragraphs (f), (g) and (h).

The revisions and additions 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, certificate, or other recognized educational credential 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 the educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.

\* \* \* \* \*

(c) *Written arrangements between an eligible institution and an ineligible institution or organization.* Except as provided in paragraph (d) of this section, if an eligible institution enters into a written arrangement with an institution or organization that is not an eligible institution under which the ineligible institution or organization provides part of the educational program of students enrolled in the eligible institution, the Secretary considers that educational program to be an eligible program if—

(1) The ineligible institution or organization—

(i) Demonstrates experience in the delivery and assessment of the program or portion of the program they will be contracted to deliver under the provisions of the written arrangement and that the program has been effective in meeting the stated learning objectives; and

(ii) Has not—

(A) Had its eligibility to participate in the title IV, HEA programs terminated by the Secretary;

(B) 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, or guarantor, or by the Secretary;

(C) Had its certification to participate in the title IV, HEA programs revoked by the Secretary;

(D) Had its application for recertification to participate in the title IV, HEA programs denied by the Secretary; or

(E) Had its application for certification to participate in the title IV, HEA programs denied by the Secretary;

(2) The educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8; and

(3)(i) The ineligible institution or organization provides 25 percent or less

of the educational program, including in accordance with § 602.22(b)(4); or

(ii)(A) The ineligible institution or organization provides more than 25 percent but less than 50 percent of the educational program, in accordance with § 602.22(a)(1)(ii)(J);

(B) The eligible institution and the ineligible institution or organization are not owned or controlled by the same individual, partnership, or corporation; and

(C) The eligible institution's accrediting agency or, if the institution is a public postsecondary vocational educational institution, the State agency listed in the **Federal Register** in accordance with 34 CFR part 603 has specifically determined that the institution's arrangement meets the agency's standards for executing a written arrangement with an ineligible institution or organization.

(d) *Administration of title IV, HEA programs.* (1) If an institution enters into a written arrangement as described in paragraph (a), (b), or (c) of this section, or provides coursework as provided in paragraph (h)(2) of this section, except as provided in paragraph (d)(2) of this section, the institution at which the student is enrolled as a regular student must determine the student's eligibility for the title IV, HEA program funds, and must calculate and disburse those funds to that student.

\* \* \* \* \*

(f) *Workforce responsiveness.* Nothing in this or any other section prohibits an institution utilizing written arrangements from aligning or modifying its curriculum or academic requirements in order to meet the recommendations or requirements of industry advisory boards that include employers who hire program graduates, widely recognized industry standards and organizations, or industry-recognized credentialing bodies, including making governance or decision-making changes as an alternative to allowing or requiring faculty control or approval or integrating industry-recognized credentials into existing degree programs.

(g) *Calculation of percentage of program.* When determining the percentage of the program that is provided by an ineligible institution or organization under paragraph (c) of this section, the institution divides the number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the ineligible organization or organizations by the total number of semester, trimester, or quarter credit hours, clock

hours, or the equivalent required for completion of the program. A course is provided by an ineligible institution or organization if the organization with which the institution has a written arrangement has authority over the design, administration, or instruction in the course, including, but not limited to—

- (1) Establishing the requirements for successful completion of the course;
  - (2) Delivering instruction in the course; or
  - (3) Assessing student learning.
- (h) *Non-applicability to other interactions with outside entities.* Written arrangements are not necessary for, and the limitations in this section do not apply to—

- (1) Acceptance by the institution of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit; or
- (2) The internship or externship portion of a program if the internship or externship is governed by accrediting agency standards that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.

\* \* \* \* \*

■ 14. Section 668.8 is amended by revising paragraphs (e)(1)(iii), (k)(2), and (l) to read as follows:

**§ 668.8 Eligible program.**

\* \* \* \* \*

(e) \* \* \* (1) \* \* \*  
(iii) The institution can demonstrate reasonable program length, in accordance with 34 CFR 668.14(b)(26); and

\* \* \* \* \*

(k) \* \* \*  
(2) Each course within the program is acceptable for full credit toward completion of an eligible program offered by the institution that provides an associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that—

- (i) The eligible program requires at least two academic years of study; and
- (ii) The institution can demonstrate that at least one student was enrolled in the program during the current or most recently completed award year.

(l) *Formula.* For purposes of determining whether a program described in paragraph (h) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for

the purposes of the title IV, HEA programs—

(1) A semester or trimester hour must include at least 30 clock hours of instruction; and

(2) A quarter hour must include at least 20 clock hours of instruction.

\* \* \* \* \*

■ 15. Section 668.10 is revised to read as follows:

**§ 668.10 Direct assessment programs.**

(a)(1) A direct assessment program is a program that, in lieu of credit or clock hours as the measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others. The assessment must be consistent with the accreditation of the institution or program utilizing the results of the assessment.

(2) Direct assessment of student learning means a measure of a student's knowledge, skills, and abilities designed to provide evidence of the student's proficiency in the relevant subject area.

(3) An institution must establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. This methodology must be consistent with the requirements of the institution's accrediting agency or State approval agency.

(4) All regulatory requirements in this chapter that refer to credit or clock hours as a measurement apply to direct assessment programs according to whether they use credit or clock hour equivalencies, respectively.

(5) A direct assessment program that is not consistent with the requirements of the institution's accrediting agency or State approval agency is not an eligible program as provided under § 668.8. In order for any direct assessment program to qualify as an eligible program, the accrediting agency must have—

(i) Evaluated the program based on the agency's accreditation standards and criteria, and included it in the institution's grant of accreditation or preaccreditation; and

(ii) Reviewed and approved the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

(b)(1) An institution that wishes to offer a direct assessment program must apply to the Secretary to have its direct assessment program or programs determined to be eligible programs for title IV, HEA program purposes. Following the Secretary's initial approval of a direct assessment program, additional direct assessment programs at an equivalent or lower academic level may be determined to be

eligible without further approvals from the Secretary except as required by § 600.10(c)(1)(iii), § 600.20(c)(1), or § 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.

(2) The institution's direct assessment application must provide information satisfactory to the Secretary that includes—

(i) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;

(ii) A description of how the direct assessment program is structured, including information about how and when the institution determines on an individual basis what each student enrolled in the program needs to learn and how the institution excludes from consideration of a student's eligibility for title IV, HEA program funds any credits or competencies earned on the basis of prior learning;

(iii) A description of how learning is assessed and how the institution assists students in gaining the knowledge needed to pass the assessments;

(iv) The number of semester, trimester, or quarter credit hours, or clock hours, that are equivalent to the amount of student learning being directly assessed for the certificate or degree;

(v) The methodology the institution uses to determine the number of credit or clock hours to which the program or programs are equivalent; and

(vi) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of direct assessment program(s) and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency indicating agreement with the institutions methodology for determining the direct assessment program's equivalence in terms of credit or clock hours.

(vii) Notwithstanding paragraphs (a) and (b) of this section, no program offered by a foreign institution that involves direct assessment will be considered to be an eligible program under § 668.8.

(c) A direct assessment program may use learning resources (e.g., courses or portions of courses) that are provided by entities other than the institution providing the direct assessment program without regard to the limitations on contracting for part of an educational program in § 668.5(c)(3).

(d) Title IV, HEA program funds may be used to support instruction provided, or overseen, by the institution, except for the portion of the program that the student is awarded based on prior learning.

(e) Unless an institution has received initial approval from the Secretary to offer direct assessment programs, and the institution's offering of direct assessment coursework is consistent with the institution's accreditation and State authorization, if applicable, title IV, HEA program funds may not be used for—

(1) The course of study described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), if offered using direct assessment; or

(2) Remedial coursework described in § 668.20, if offered using direct assessment.

(f) Student progress in a direct assessment program may be measured using a combination of—

(1) Credit hours and credit hour equivalencies; or

(2) Clock hours and clock hour equivalencies.

■ 16. Section 668.13 is amended by:

■ a. Redesignating paragraph (a)(1) as paragraph (a)(1)(i).

■ b. Adding paragraph (a)(1)(ii).

■ c. Adding paragraph (b)(3).

■ d. Removing the word "or" at the end of paragraph (c)(1)(i)(D).

■ e. Removing the period and adding in its place "; or", at the end of paragraph (c)(1)(i)(E).

■ f. Adding paragraph (c)(1)(i)(F).

■ g. Removing the word "facsimile" and adding in its place the word "electronic" in paragraphs (d)(3)(i) and (d)(3)(ii)(C).

■ h. Revising paragraph (d)(3)(iii).

■ i. Removing paragraph (d)(3)(iv).

■ j. Revising paragraph (d)(5).

The additions and revisions read as follows:

**§ 668.13 Certification procedures.**

(a) \* \* \* (1)(i) \* \* \*

(ii) On application from the institution, the Secretary certifies a location of an institution that meets the requirements of 34 CFR 668.13(a)(1)(i) as a branch if it satisfies the definition of "branch" in 34 CFR 600.2.

\* \* \* \* \*

(b) \* \* \*

(3) In the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration of its current period of participation, the institution will automatically be granted renewal of certification, which may be provisional.

(c) \* \* \* (1)(i) \* \* \*

(F) The institution is a participating institution that has been provisionally

recertified under the automatic recertification requirement in paragraph (b)(3) of this section.

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(iii) Documents filed by electronic transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation.

\* \* \* \* \*

(5) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service or another service that provides delivery confirmation for that document.

\* \* \* \* \*

■ 17. Section 668.14 is amended by revising paragraphs (b)(10), (26), and (31) to read as follows:

**§ 668.14 Program participation agreement.**

\* \* \* \* \*

(b) \* \* \*

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which the course of instruction is designed to prepare such prospective students, as provided in 34 CFR 668.43(a)(5)(v);

\* \* \* \* \*

(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed the greater of—

(A) One hundred and fifty percent of the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is

located, if the State has established such a requirement, or as established by any Federal agency; or

(B) The minimum number of clock hours required for training in the recognized occupation for which the program prepares the student as established in a State adjacent to the State in which the institution is located; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

\* \* \* \* \*

(31) The institution will submit a teach-out plan to its accrediting agency in compliance with 34 CFR 602.24(c) and the standards of the institution's accrediting agency. The institution will update its teach-out plan upon the occurrence of any of the following events:

\* \* \* \* \*

■ 18. Section 668.15 is amended by:

- a. Revising the section heading; and
- b. Adding the phrase "after a change in ownership or control" after the phrase "any Title IV, HEA program" in paragraph (a).

The revision reads as follows:

**§ 668.15 Factors of financial responsibility for changes in ownership or control.**

\* \* \* \* \*

■ 19. Section 668.22 is amended by:

- a. Removing the word "or" at the end of paragraph (a)(2)(i)(B).
- b. Revising paragraph (a)(2)(i)(C).
- c. Adding paragraph (a)(2)(i)(D).
- d. Revising paragraph (a)(2)(ii).
- e. Removing the word "nonterm" and adding in its place the word "non-term" in paragraph (a)(2)(iii)(B).
- f. Revising paragraph (a)(3).
- g. Removing the citation "\$ 668.164(g)" at the end of paragraph (a)(5) and adding in its place the citation "\$ 668.164(i)".
- h. Revising paragraphs (a)(6)(ii), (d)(1)(vii), and (i).
- i. Removing the citation "\$ 668.164(g)" in paragraph (l)(1) and adding in its place the citation "\$ 668.164(j)".
- j. Removing the citation "\$ 668.164(g)(2)" in paragraph (l)(4) and adding in its place the citation "\$ 668.164(j)(2)".
- k. Adding the phrase "the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and" after the word "if" in paragraph (l)(6).
- l. Revising paragraph (l)(7).
- m. Adding paragraph (l)(9).

The additions and revisions read as follows:

**§ 668.22 Treatment of title IV funds when a student withdraws.**

(a) \* \* \*  
(2)(i) \* \* \*

(C) For a student in a standard or nonstandard-term program, excluding a subscription-based program, the student is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on approved leave of absence, as defined in paragraph (d) of this section; or

(D) For a student in a non-term program or a subscription-based program, the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance.

(ii)(A) Notwithstanding paragraph (a)(2)(i) of this section—

(1) A student who completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete is not considered to have withdrawn;

(2) In a program offered in modules, a student is not considered to have withdrawn if the student completes—

(i) One module that includes 50 percent or more of the number of days in the payment period;

(ii) A combination of modules that when combined contain 50 percent or more of the number of days in the payment period; or

(iii) Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under 34 CFR 668.2 for the payment period;

(3) For a payment period or period of enrollment in which courses in the program are offered in modules—

(i) A student is not considered to have withdrawn if the institution obtains written confirmation, including electronic confirmation, from the student at the time that would have been a withdrawal of the date that he or she will attend a module that begins later in the same payment period or period of enrollment; and

(ii) For standard and nonstandard-term programs, excluding subscription-based programs, that module begins no later than 45 calendar days after the end of the module the student ceased attending;

(4) For a subscription-based program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she

will resume attendance, and that date occurs within the same payment period or period of enrollment and is no later than 60 calendar days after the student ceased attendance; and

(5) For a non-term program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date is no later than 60 calendar days after the student ceased attendance.

(B) If an institution has obtained the written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) of this section—

(1) A student may change the date of return that begins later in the same payment period or period of enrollment, provided that the student does so in writing prior to the return date that he or she had previously confirmed;

(2) For standard and nonstandard-term programs, excluding subscription-based programs the later module that he or she will attend begins no later than 45 calendar days after the end of the module the student ceased attending; and

(3) For non-term and subscription-based programs, the student's program permits the student to resume attendance no later than 60 calendar days after the student ceased attendance.

(C) If an institution obtains written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) and, if applicable, (a)(2)(ii)(B) of this section, but the student does not return as scheduled—

(1) The student is considered to have withdrawn from the payment period or period of enrollment; and

(2) The student's withdrawal date and the total number of calendar days in the payment period or period of enrollment would be the withdrawal date and total number of calendar days that would have applied if the student had not provided written confirmation of a future date of attendance in accordance with paragraph (a)(2)(ii)(A) of this section.

\* \* \* \* \*

(3) For purposes of this section, "title IV grant or loan assistance" includes only assistance from the Direct Loan, Federal Pell Grant, Iraq and Afghanistan Service Grant, TEACH Grant, and FSEOG programs, not including the non-Federal share of FSEOG awards if an institution meets its FSEOG matching share by the individual recipient method or the aggregate method.

\* \* \* \* \*

(6) \* \* \*

(ii)(A) If outstanding charges exist on the student's account, the institution may credit the student's account up to the amount of outstanding charges in accordance with § 668.164(c) with all or a portion of any—

(1) Grant funds that make up the post-withdrawal disbursement; and

(2) Loan funds that make up the post-withdrawal disbursement only after obtaining confirmation from the student or parent in the case of a parent PLUS loan, that they still wish to have the loan funds disbursed in accordance with paragraph (a)(6)(iii) of this section.

\* \* \* \* \*

(d)(1) \* \* \*

(vii) Except for a clock hour or non-term credit hour program, or a subscription-based program, upon the student's return from the leave of absence, the student is permitted to complete the coursework he or she began prior to the leave of absence; and

\* \* \* \* \*

(i) *Order of return of title IV funds—*

(1) *Loans.* Unearned funds returned by the institution or the student, as appropriate, in accordance with paragraph (g) or (h) of this section respectively, must be credited to outstanding balances on title IV loans made to the student or on behalf of the student for the payment period or period of enrollment for which a return of funds is required. Those funds must be credited to outstanding balances for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Unsubsidized Federal Direct Stafford loans.

(ii) Subsidized Federal Direct Stafford loans.

(iii) Federal Direct PLUS received on behalf of the student.

(2) *Remaining funds.* If unearned funds remain to be returned after repayment of all outstanding loan amounts, the remaining excess must be credited to any amount awarded for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Federal Pell Grants.

(ii) Iraq and Afghanistan Service Grants.

(iii) FSEOG Program aid.

(iv) TEACH Grants.

\* \* \* \* \*

(l) \* \* \*

(7)(i) "Academic attendance" and "attendance at an academically-related activity" must include academic engagement as defined under 34 CFR 600.2.

(ii) A determination of "academic attendance" or "attendance at an

academically-related activity" must be made by the institution; a student's certification of attendance that is not supported by institutional documentation is not acceptable.

\* \* \* \* \*

(9) A student in a program offered in modules is scheduled to complete the days in a module if the student's coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds for the payment period or period of enrollment.

\* \* \* \* \*

**§ 668.28 [Amended]**

■ 20. Section 668.28 is amended by removing and reserving paragraph (b).

■ 21. Section 668.34 is amended by:

■ a. Revising paragraph (a)(5).

■ b. Adding the phrase "or expressed in calendar time" after the phrase "credit hours" in paragraph (1) in the definition for "maximum timeframe" in paragraph (b).

The revision reads as follows:

**§ 668.34 Satisfactory academic progress.**

(a) \* \* \*

(1) \* \* \*

(5) The policy specifies—

(i) For all programs, the maximum timeframe as defined in paragraph (b) of this section; and

(ii) For a credit hour program using standard or nonstandard terms that is not a subscription-based program, the pace, measured at each evaluation, 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, calculated by either dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted or by determining the number of hours that the student should have completed by the evaluation point in order to complete the program within the maximum timeframe. In making this calculation, the institution is not required to include remedial courses.

\* \* \* \* \*

(b) \* \* \*

Maximum timeframe. 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, or expressed in calendar time;

\* \* \* \* \*

**§ 668.111 [Amended]**

■ 22. Section 668.111 is amended by adding the phrase "issuance by the

Department of and" after the phrase "establishes rules governing the" in the first sentence of paragraph (a).

■ 23. Section 668.113 is amended by:

■ a. Replacing the word "shall" with the word "must" in both instances it is used in paragraph (c) introductory language.

■ b. Redesignating paragraphs (d)(1) and (2) as paragraphs (d)(2) and (3).

■ c. Adding new paragraph (d)(1).

The addition reads as follows:

**§ 668.113 Request for review.**

\* \* \* \* \*

(d)(1) If the final audit determination or final program review determination in paragraph (a) of this section results from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary relies upon the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the amount of work associated with the institution's credit hours is consistent with commonly accepted practice in postsecondary education, in applying the definitions of "distance education" and "credit hour" in 34 CFR 600.2.

\* \* \* \* \*

■ 24. Section 668.164 is amended by:

■ a. Adding the phrase "that is not a subscription-based program" after the phrase "equal in length" in paragraphs (i)(1)(i) and (i)(1)(ii).

■ b. Removing the word "or" at the end of paragraph (i)(1)(i).

■ c. Removing the period and adding in its place the punctuation and the word "; or" in paragraph (i)(1)(ii)(B).

■ d. Adding paragraph (i)(1)(iii).

The addition reads as follows:

**§ 668.164 Disbursing funds.**

\* \* \* \* \*

(i)(1) \* \* \*

(iii) If the student is enrolled in a subscription-based program, the later of—

(A) Ten days before the first day of classes of a payment period; or

(B) The date the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms that the student attended under the definition of a subscription-based program in 34 CFR 668.2.

\* \* \* \* \*

■ 25. Section 668.171 is amended by:

■ a. Removing the word "or" at the end of paragraph (e)(1).

■ b. Removing the period and adding in its place the punctuation and the word "; or", in paragraph (e)(2).

■ c. Adding paragraph (e)(3).

The additions reads as follows:

**§ 668.171 General.**

\* \* \* \* \*

(e) \* \* \*

(3) Deny the institution’s application for certification or recertification to participate in the title IV, HEA programs.

\* \* \* \* \*

■ 26. Section 668.174 is amended by:

- a. Revising paragraph (b)(1)(i) introductory text.
- b. Adding the phrase “ownership or” after the word “substantial” in and removing the word “or” at the end of, paragraph (b)(1)(i)(A).
- c. Redesignating paragraph (b)(1)(i)(B) as paragraph (b)(1)(i)(C).
- d. Adding a new paragraph (b)(1)(i)(B).
- e. Adding the word “entity” and a comma after the phrase “That person,” in paragraph (b)(1)(ii).

- f. Adding the phrase “or entity” after the word “person” in paragraphs (b)(2)(i) and (ii).
- g. Adding the word “entity” and a comma afterward after the phrase “owes the liability by that” in paragraph (b)(2)(ii)(A).
- h. Adding the word “entity” and a comma afterward after the phrase “owes the liability that the” in paragraph (b)(2)(ii)(B).
- i. Adding the phrase “or entity” after the phrase “The person” in paragraphs (b)(2)(iv)(A) and (B).
- j. Adding the phrase “or entity” after both uses of the word “person” in paragraph (c)(3) introductory language.

The revisions and additions read as follows:

**§ 668.174 Past performance.**

\* \* \* \* \*

(b) *Past performance of persons or entities affiliated with an institution.*

(1)(i) Except as provided in paragraph (b)(2) of this section, an institution is not financially responsible if a person or entity who exercises substantial ownership or control over the institution, as described under 34 CFR 600.31, or any member or members of that person’s family alone or together—

- (A) \* \* \*
- (B) Exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution’s accrediting agency and faithfully executed by the institution; or

**§ 668.175 [Amended]**

■ 27. Section 668.175 is amended by deleting the phrases “or facsimile” and “or by facsimile transmission” in paragraph (d)(3)(i).

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