

cumulative effect of changes in accounting principles, and the effect of changes in accounting estimates;

(2) May include or exclude the effects of questionable accounting treatments, such as excessive capitalization of marketing costs;

(3) Excludes all unsecured or uncollateralized related-party receivables;

(4) Excludes all intangible assets defined as intangible in accordance with generally accepted accounting principles; and

(5) Excludes from the ratio calculations Federal funds provided to an institution by the Secretary under program authorized by the HEA only if—

(i) In the notes to the institution's audited financial statement, or as a separate attestation, the auditor discloses by name and CFDA number, the amount of HEA program funds reported as expenses in the Statement of Activities for the fiscal year covered by that audit or attestation; and

(ii) The institution's composite score, as determined by the Secretary, is less than 1.5 before the reported expenses arising from those HEA funds are excluded from the ratio calculations.

(d) *Accounting for operating leases.* The Secretary accounts for operating leases by—

(1) Applying FASB Accounting Standards Update (ASU) 2016-02, Leases (Topic 842) to all leases the institution has entered into on or after December 15, 2018 (post-implementation operating/financing leases), as specified in the Supplemental Schedule (see Section 2 of Appendix A to this subpart and Section 2 of Appendix B to this subpart);

(2) Treating leases the institution entered into prior to December 15, 2018 (pre-implementation operating/financing leases), as they would have been treated prior to the requirements of ASU 2016-02, as long as the institution provides information about those leases on the Supplemental Schedule and a note in, or on the face of, its audited financial statements; and

(3) Accounting for any adjustments, such as any options exercised by the institution to extend the life of a pre-implementation operating/finance

lease, as post-implementation operating/finance leases.

(e) *Incorporation by reference.* The material listed in this paragraph (e) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at U.S. Department of Education and at the National Archives and Records Administration (NARA). Contact U.S. Department of Education at: Office of the General Counsel, 400 Maryland Avenue SW, Room 2C-136, Washington DC 20202; phone: (202) 401-6000; <https://www2.ed.gov/about/offices/list/ogc/index.html?src=oc>. For information on the availability of this material at NARA, contact the Office of the Federal Register—email: [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov); website: [www.archives.gov/federal-register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html). The material may be obtained from the Financial Accounting Standards Board (FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856-5116; (203) 847-0700; [www.fasb.org](http://www.fasb.org).

(1) Accounting Standards Update (ASU) 2016-02, Leases (Topic 842), (February 2016).

(2) Accounting Standards Codification (ASC) 205, Presentation of Financial Statements, Updated through August 9, 2021 (with taxonomy revisions as of January 26, 2022).

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#### § 668.173 Refund reserve standards.

(a) *General.* The Secretary considers that an institution has sufficient cash reserves, as required under § 668.171(b)(2), if the institution—

(1) Satisfies the requirements for a public institution under § 668.171(c)(1);

(2) Is located in a State that has a tuition recovery fund approved by the Secretary and the institution contributes to that fund; or

(3) Returns, in a timely manner as described in paragraph (b) of this section, unearned title IV, HEA program

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funds that it is responsible for returning under the provisions of § 668.22 for a student that withdrew from the institution.

(b) *Timely return of title IV, HEA program funds.* In accordance with procedures established by the Secretary or FFEL Program lender, an institution returns unearned title IV, HEA program funds timely if—

(1) The institution deposits or transfers the funds into the bank account it maintains under § 668.163 no later than 45 days after the date it determines that the student withdrew;

(2) The institution initiates an electronic funds transfer (EFT) no later than 45 days after the date it determines that the student withdrew;

(3) The institution initiates an electronic transaction, no later than 45 days after the date it determines that the student withdrew, that informs a FFEL lender to adjust the borrower's loan account for the amount returned; or

(4) The institution issues a check no later than 45 days after the date it determines that the student withdrew. An institution does not satisfy this requirement if—

(i) The institution's records show that the check was issued more than 45 days after the date the institution determined that the student withdrew; or

(ii) The date on the cancelled check shows that the bank used by the Secretary or FFEL Program lender endorsed that check more than 60 days after the date the institution determined that the student withdrew.

(c) *Compliance thresholds.* (1) An institution does not comply with the reserve standard under § 668.173(a)(3) if, in a compliance audit conducted under § 668.23, an audit conducted by the Office of the Inspector General, or a program review conducted by the Department or guaranty agency, the auditor or reviewer finds—

(i) In the sample of student records audited or reviewed that the institution did not return unearned title IV, HEA program funds within the timeframes described in paragraph (b) of this section for 5% or more of the students in the sample. (For purposes of determining this percentage, the sample includes only students for whom

the institution was required to return unearned funds during its most recently completed fiscal year.); or

(ii) A material weakness or reportable condition in the institution's report on internal controls relating to the return of unearned title IV, HEA program funds.

(2) The Secretary does not consider an institution to be out of compliance with the reserve standard under § 668.173(a)(3) if the institution is cited in any audit or review report because it did not return unearned funds in a timely manner for one or two students, or for less than 5% of the students in the sample referred to in paragraph (c)(1)(i) of this section.

(d) *Letter of credit.* (1) Except as provided under paragraph (e)(1) of this section, an institution that can satisfy the reserve standard only under paragraph (a)(3) of this section, must submit an irrevocable letter of credit acceptable and payable to the Secretary if a finding in an audit or review shows that the institution exceeded the compliance thresholds in paragraph (c) of this section for either of its two most recently completed fiscal years.

(2) The amount of the letter of credit required under paragraph (d)(1) of this section is 25 percent of the total amount of unearned title IV, HEA program funds that the institution was required to return under § 668.22 during the institution's most recently completed fiscal year.

(3) An institution that is subject to paragraph (d)(1) of this section must submit to the Secretary a letter of credit no later than 30 days after the earlier of the date that—

(i) The institution is required to submit its compliance audit;

(ii) The Office of the Inspector General issues a final audit report;

(iii) The designated department official issues a final program review determination;

(iv) The Department issues a preliminary program review report or draft audit report, or a guaranty agency issues a preliminary report showing that the institution did not return unearned funds for more than 10% of the sampled students; or

(v) The Secretary sends a written notice to the institution requesting the

letter of credit that explains why the institution has failed to return unearned funds in a timely manner.

(e) *Exceptions.* With regard to the letter of credit described in paragraph (d) of this section—

(1) An institution does not have to submit the letter of credit if the amount calculated under paragraph (d)(2) of this section is less than \$5,000 and the institution can demonstrate that it has cash reserves of at least \$5,000 available at all times.

(2) An institution may delay submitting the letter of credit and request the Secretary to reconsider a finding made in its most recent audit or review report that it failed to return unearned title IV, HEA program funds in a timely manner if—

(i)(A) The institution submits documents showing that the unearned title IV, HEA program funds were not returned in a timely manner solely because of exceptional circumstances beyond the institution's control and that the institution would not have exceeded the compliance thresholds under paragraph (c)(1) of this section had it not been for these exceptional circumstances; or

(B) The institution submits documents showing that it did not fail to make timely refunds as provided under paragraphs (b) and (c) of this section; and

(ii) The institution's request, along with the documents described in paragraph (e)(2)(i) of this section, is submitted to the Secretary no later than the date it would otherwise be required to submit a letter of credit under paragraph (d)(3).

(3) If the Secretary denies the institution's request under paragraph (e)(2) of this section, the Secretary notifies the institution of the date it must submit the letter of credit.

(f) *State tuition recovery funds.* In determining whether to approve a State's tuition recovery fund, the Secretary considers the extent to which that fund—

(1) Provides refunds to both in-State and out-of-State students;

(2) Allocates all refunds in accordance with the order required under § 668.22; and

(3) Provides a reliable mechanism for the State to replenish the fund should any claims arise that deplete the fund's assets.

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95-452, 92 Stat. 1101-1109)

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#### § 668.174 Past performance.

(a) *Past performance of an institution.* An institution is not financially responsible if the institution—

(1) Has been limited, suspended, terminated, or entered into a settlement agreement to resolve a limitation, suspension, or termination action initiated by the Secretary or a guaranty agency, as defined in 34 CFR part 682, within the preceding five years;

(2) In either of its two most recent compliance audits had an audit finding, or in a report issued by the Secretary had a program review finding for its current fiscal year or either of its preceding two fiscal years, that resulted in the institution's being required to repay an amount greater than 5 percent of the funds that the institution received under the title IV, HEA programs during the year covered by that audit or program review;

(3) Has been cited during the preceding five years for failure to submit in a timely fashion acceptable compliance and financial statement audits required under this part, or acceptable audit reports required under the individual title IV, HEA program regulations; or

(4) Has failed to resolve satisfactorily any compliance problems identified in audit or program review reports based upon a final decision of the Secretary issued pursuant to subpart G or H of this part.

(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