



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

Small Entity Compliance Guide

Distance Education and Innovation Regulations

Introduction

This guide was prepared by the staff of the U.S. Department of Education as a “small entity compliance guide” under Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, as amended. The guide summarizes and explains rules adopted by the Department but is not a substitute for any rule itself. Only the rule itself can provide complete and definitive information regarding its requirements.

Purpose of This Regulatory Action

The Department of Education is amending 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 Department is amending the Student Assistance General Provisions regulations issued under the HEA.

Summary of the Major Provisions

These regulations --

- Clarify that when calculating the number of correspondence students, a student is considered “enrolled in correspondence courses” 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 Department action on any application an institution submits to the Secretary seeking a determination that it qualifies as an eligible institution and on any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for HEA programs;

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The Department of Education’s mission is to promote student achievement and preparation for global Competitiveness by fostering educational excellence and ensuring equal access.

- 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 entity that does not participate in the title IV, HEA programs;
- Provide flexibility to institutions to modify their curricula 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 49 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 proprietary institutions, because the provisions are no longer applicable;
- Clarify the 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 certification or recertification application 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.

Compliance Date for Entities Subject to These Regulations

Section 482(c) of the Higher Education Act (HEA) requires that regulations affecting programs under title IV of the HEA be published in final form by November 1, prior to the start of the award year (July 1) to which they apply. However, that section also permits the Secretary to designate any regulation as one that an entity subject to the regulations may choose to implement earlier and the conditions for early implementation.

Consistent with the Department's objective 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 unforeseen future innovations have an opportunity to move forward, the Secretary exercised the authority under section 482(c) of the HEA to designate the regulatory changes to regulations at title 34, parts 600, 602, and 668 of the Code of Federal Regulations for early implementation beginning on September 2, 2020, at the discretion of each institution, or each agency, as appropriate. The Department will implement the regulations as soon as possible after the implementation date and will publish a separate notice announcing the timing of the implementation. Otherwise, the final regulations included in this document are effective July 1, 2021. We published a Federal Register notice on September 2, 2020 announcing the implementation date of these regulations, which are effective July 1, 2021.

Entities Subject to the Rule

The regulations affect institutions that participate in the title IV, HEA programs, including alternative certification programs not housed at institutions, and individual borrowers. The U.S. Small Business Administration (SBA) Size Standards define for-profit institutions as “small businesses” if they are independently owned and operated and not dominant in their field of operation, with total annual revenue below \$7,000,000. The SBA Size Standards define nonprofit institutions as “small organizations” if they are independently owned and operated and not dominant in their field of operation, or as “small entities” if they are institutions controlled by governmental entities with populations below 50,000. The number of Title IV, HEA-eligible institutions that are small entities would be limited because of the revenues involved in the sector that would be affected by the regulations and the concentration of ownership of institutions by private owners or public systems. As many of the entities subject to the regulations are “small entities,” we have prepared this Small Entity Compliance Guide.

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. We described this size classification in the NPRM published in the Federal Register on July 31, 2018 for the 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 the Department continues to believe this approach most accurately reflects a common basis for determining size categories that is linked to the provision of educational services. Thus, the number of small entities that will be affected by this rule is 3,996 out of 6,951 (57 percent).

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 Requirements and the Type of Professional Skills Necessary for Preparation of the Report or Record)

The Department estimates \$300,288 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 (2,572/3,021), so most of that burden reduction ($\$300,288 \times 85 \text{ percent} = \$255,245$) will be enjoyed by small entities. The overall economic impact would be negligible given that total savings of \$255,245 is spread over 85% of the nearly 3,000 participating for-profit institutions. There are also some small increases in burden related to reporting about direct assessment programs that is expected to increase burden on small entities by approximately 10 hours, a small increase for those small institutions that choose to participate in direct assessment programs or written arrangements.

Other Resources

The final regulations published for Distance Education and Innovation can be found on the Department of Education's website at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/distanceandinnovationunofficialreg.pdf>

Contacting the Department of Education

The Department of Education's Office of Postsecondary Education is happy to assist small entities with questions regarding the Distance Education and Innovation rules. Please direct questions to Greg Martin by email, Gregory.Martin@ed.gov, or telephone, (202) 453-7535.