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34 CFR Part 668

Student Assistance General Provisions; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AC17

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Final Regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions (General Provisions) regulations. The General Provisions regulations govern elements common to all of the Federal Student Financial Aid Programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA) (hereafter Title IV Programs). These amendments modify the Secretary's Federal Family Education Loan (FFEL) Program default reduction initiative and implement default prevention measures in the William D. Ford Federal Direct Loan (Direct Loan) Program. These regulations also streamline the limitation, suspension, and termination (L, S, and T) actions against an institution and prevent an institution from evading the consequences of a high FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate.

EFFECTIVE DATE: These regulations take effect July 1, 1996. However, affected parties do not have to comply with the information collection requirements in § 668.17 until the Department of Education publishes in the Federal Register the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control number notifies the public that OMB has approved these collection requirements under the Paperwork Reduction Act of 1995.

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SUPPLEMENTARY INFORMATION: On September 21, 1995, the Secretary published a Notice of Proposed Rulemaking (NPRM) for part 668 in the Federal Register (60 FR 49178). The NPRM included a discussion of the major issues surrounding the proposed changes which will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the NPRM on which a discussion of those changes can be found:

The Secretary proposed to define a measurement similar to the FFEL Program cohort default rate under the Direct Loan Program, a ''cohort rate'' for Direct Loans, and to establish institutional eligibility requirements, based on the repayment of Direct Loans by the institution's former students, that are similar to those in the FFEL Program (pages 49179–49181).

Further, the Secretary proposed that a Direct Loan institution with an excessive Direct Loan Program cohort rate or weighted average cohort rate be permitted to avoid a loss of participation by showing the existence of exceptional mitigating circumstances (pages 49182–49184).

The Secretary proposed to modify the cohort default rate appeal process and the exceptional mitigating circumstances under which an institution may appeal its statutory loss of eligibility to participate in the FFEL Program on the basis of its cohort default rate (page 49184).

Finally, the Secretary proposed to streamline the current L, S, and T procedures and to limit the grounds on which a hearing officer may decide when an L, S, and T action is unwarranted (pages 49182–49185).

The Secretary has combined in a separate new paragraph the provisions that were contained in § 668.17(d)(1)(iii) and (iv), (e) (5) through (11), and (f)(5) through (10). These paragraphs established an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, and weighted average cohort rate, respectively, when an institution changes status during a fiscal year. A change of status occurs, for example, when an institution merges with another institution or a branch of an institution joins a free-standing institution. These provisions have been consolidated into a new paragraph (g).

Substantive Changes to the NPRM

The following discussion reflects substantive changes made to the NPRM in the final regulations. The provisions are discussed in the order in which they appear in the proposed rules.

Section 668.17 Default Reduction and Prevention Measures

Participation Rate Index Formula

A change has been made to the formula used to determine the percentage of an institution's students who borrow under the FFEL or Direct Loan programs for calculating the participation rate index under § 668.17(c)(1)(ii)(A). The proposed rules provided that an institution would base the percentage of its students that borrow under the FFEL or Direct Loan programs on the number of students enrolled at least half-time at the institution.

The final rules have been changed to provide that an institution must base the percentage of its students that borrow under the FFEL or Direct Loan programs on the number of its ''regular students'' enrolled at least half-time. A ''regular student'' is a student who is enrolled or accepted for enrollment at an institution for the purpose of obtaining a degree, certificate, or other recognized educational credential offered by that institution. This definition is contained in 34 CFR 600.2.

Economically Disadvantaged Rate Formula

A change has been made to the formula used to determine the percentage of an institution's students who come from economically disadvantaged backgrounds under § 668.17(c)(1)(ii)(B). The proposed rules provided that the percentage of an institution's students coming from economically disadvantaged backgrounds would be based on all of the institution's students.

The final rules have been changed to provide that the percentage of an institution's students that come from disadvantaged economic backgrounds must be based on the institution's regular students.

Placement Rate Formula

A number of changes have been made to the formula used to calculate an institution's placement rate under § 668.17(c)(1)(ii)(B)(*2*). The formula contained in the proposed rules considered a former student who was initially enrolled full-time as successfully placed if, on the date the institution submits the appeal, the former student:

(1) is employed, or had been employed for at least 13 weeks, following his or her last day of attendance at the institution; or

(2) is enrolled or was enrolled for at least 13 weeks in a higher level program at another institution for which the institution's program provided substantial preparation.

The placement rate calculation has been revised to provide that: (a) only former regular students who were initially enrolled at least half-time be

considered in the placement rate; and (b) a student will be considered as successfully placed by the institution if the former student:

(1) has been employed in an occupation for which the institution's program provided training for at least 13 weeks within the 12-month period after the date of the student's last day of attendance; or

(2) is employed in an occupation for which the institution's program provided training on the day after 12 months following the date of the student's last day of attendance.

The final regulations provide that a student who is still enrolled in the institution on the day after 12 months after the date of the student's last day of attendance and is making satisfactory academic progress in the program in which he or she was initially scheduled to complete is excluded from the cohort of students used to determine the institution's placement rate. The proposed rules would have included such students in the placement rate.

Further, under the final regulations, a student or former student may not be considered successfully placed if the institution is the student's or former student's employer.

Finally, the final regulations provide that, in calculating the placement rate formula under § 668.17(c)(2), a student who is initially enrolled at least half-time, but less than full-time, will be considered to be scheduled to complete his or her program during the amount of time normally it would take that student to complete the program based on his or her initial enrollment.

Completion Rate Formula

A change has been made to the formula used to calculate an institution's completion rate under § 668.17(c)(1)(ii)(B)(*1*). The formula contained in the proposed rules would have based the institution's completion rate on all initially enrolled full-time students. The final rules have been amended to base the institution's completion rate on all initially enrolled full-time regular students.

Submission of Appeal Information

A change has been made to § 668.17(c)(1)(ii) to provide that an appeal on the basis of exceptional mitigating circumstances must be submitted to the Secretary in a format prescribed by the Secretary and must include data elements requested by the Secretary. The proposed rules identified specific detailed information an institution would have to provide in an appeal. The Secretary has removed this detailed information from the final regulations. Instead, the final regulations provide that any information an institution submits regarding an appeal must:

- be submitted in a format prescribed by the Secretary, and
- include information the Secretary has determined is necessary to evaluate the appeal.

The Secretary expects that institutions will be provided with the format in which the appeal must be submitted and the data elements that must be included when the institution is notified of its cohort default rate data in accordance with § 668.17(i).

The information that the Secretary may require in an appeal may include, but is not necessarily limited to, information relating to student enrollment, loan periods, expected family contributions (EFC), adjusted gross incomes, withdrawal dates, graduation dates, transfers, job placement, employer information, job titles, and dates employed. This information is the same information currently required of institutions submitting appeals. Institutions will likely be familiar with these data items since the Official Default Rate Guide (formerly Enclosure B), which is provided to institutions along with their cohort default rates, lists these data elements. The Secretary does not expect these items to change substantially.

Section 668.17(c)(6) of the final regulations has been revised to require the chief executive officer of an institution to certify, under penalty of perjury, that the appeal information is true and correct.

Completion and Placement Rate Appeals

In § 668.17(c)(1)(ii)(B), a change has been made to an institution's right to appeal using the exceptional mitigating circumstances appeal based on both the percentage of an institution's students that come from disadvantaged economic backgrounds and the institution's completion rate or placement rate. The proposed rules limited the exceptional mitigating circumstance appeal that included the completion rate to public and private nonprofit institutions, and limited the exceptional mitigating circumstances appeal that included the placement rate to proprietary institutions.

The final regulations have been revised to require degree-granting proprietary institutions as well as public or private nonprofit degree-granting institutions, to appeal using the completion rate component, whereas nondegree-granting institutions, public, private nonprofit, or proprietary, may only appeal based on the placement rate component.

Guaranty Agency Verification of Data

The final regulations have been changed in § 668.17(c)(8) to provide that an institution will not lose its eligibility to participate in the FFEL or Direct Loan programs during the appeal process if a guaranty agency does not respond in a timely manner to the institution's timely request to verify data included in the institution's FFEL Program cohort default rate that the institution believes is inaccurate. The proposed rules had provided that an institution would lose its eligibility to continue to participate in the appeal process if it did not submit all of its appeal information to the Secretary within 30 days following notification of the loss of eligibility.

Section 668.17(c)(1) now requires an institution that appeals on the basis of inaccurate data to inform the Secretary that it is appealing on this basis at the same time it submits its request to verify its FFEL Program cohort default rate data to the guaranty agency. Further, an institution must provide its verified data to the Secretary within five working days after it receives that data from the guaranty agency.

Independent Audit of Appeals

The final regulations have been changed in § 668.17(c)(7) to provide that an institution choosing to appeal its loss of eligibility on the basis of exceptional mitigating circumstances must provide a statement from an independent auditor that verifies the information included in the appeal within 60 days following the institution's notification of the loss of eligibility. The proposed rules provided that this information be submitted by the 30th day following notification of the loss of eligibility. The final rules continue to require that the rest of the appeal be submitted by that 30th day.

Further, the regulations have been amended to provide more specific guidance concerning the methodology that must be used by an independent auditor to determine if the information contained in the appeal is correct.

Data Period

The final regulations have been changed in § 668.17(c)(1)(ii)(B) to clarify that the 12-month period used to determine the percentage of the institution's student body that comes from disadvantaged economic backgrounds must be the same 12-month period the institution uses to determine its placement rate or completion rate. The proposed rules were read to allow the institution the option to choose a different 12-month

period for the placement rate or completion rate than the one used for the percentage of the institution's student body that comes from disadvantaged economic backgrounds.

Direct Loan Program Cohort Rate and Weighted Average Cohort Rate

The final regulations have been changed in §§ 668.17(e)(1)(ii) and 668.17(f)(1)(ii) to provide that a Direct Loan borrower who is in the income-contingent repayment (ICR) plan on his or her loan and, for 270 days, had scheduled monthly payments that are less than $15 and less than the interest that is accruing on the loan each month will be included in an institution's Direct Loan Program cohort rate or weighted average cohort rate. Under the proposed rules, such a borrower would be included in the Direct Loan Program cohort rate or weighted average cohort rate only if such conditions existed at the end of the fiscal year following the fiscal year the borrower entered repayment on the loan.

L, S, and T

The final regulations have been revised in § 668.17(a)(5) so that the Secretary will cease any L, S, and T action taken against an institution solely on the basis of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate if the institution successfully appeals under the exceptional mitigating circumstances. The proposed rules provided that the Secretary would withdraw an L, S, and T action against an institution's participation only in the FFEL Program if the institution successfully appeals under exceptional mitigating circumstances.

The final regulations have been revised in § 668.17(c)(1)(ii)(A) to provide that an institution with an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that exceeds 40 percent will not be eligible to appeal a loss of eligibility to participate in the FFEL or Direct Loan programs under the participation rate index.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 150 parties submitted comments on the proposed regulations. An analysis of the comments and the changes follows. Major issues are grouped according to subject, with references to the appropriate sections of the regulation. Technical and other minor changes, and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority, generally are not addressed.

General

Comments: Many commenters argued that the HEA requires that these regulations be subject to a negotiated rulemaking process.

Discussion: The Secretary does not agree with the commenters. Section 457 of the HEA requires the Secretary, to the extent practicable, to promulgate regulations that implement the provisions of Part D of the HEA (which authorizes the Direct Loan Program) through a negotiated rulemaking process. Although these rules will affect Direct Loan institutions, these regulations do not directly implement any provisions contained in Part D of the HEA. The HEA does not require the Secretary to institute a negotiated rulemaking process for every regulation that has an affect on the Direct Loan Program. Moreover, the HEA does not require negotiated rulemaking for amendments to existing regulations. In any case, it was not practicable to conduct negotiated rulemaking for these amendments.

Changes: None.

Comments: Many commenters believed that the comment period for this proposed rule was too short, especially due to the fact that the Secretary published six proposed rules during the same week. The commenters indicated that it would be more appropriate for the Secretary to provide a longer comment period to allow them to provide more complete responses to the proposed rules.

Discussion: In the six sets of proposed rules mentioned above, the Secretary proposed numerous improvements and necessary changes to the Student Financial Assistance Programs. The ''Master Calendar'' provisions contained in section 482 of the HEA require that regulations be published in final form by December 1 prior to the start of the award year for which they will become effective. Because of the importance of implementing these changes and improvements for the award year beginning July 1, 1996, the Secretary established a comment period that allows publication of these final regulations by December 1, 1995, as required by the ''Master Calendar'' timeframe. The Secretary always endeavors to provide as long a comment period as possible.

Changes: None.

Comment: A number of commenters representing proprietary institutions questioned the Secretary's decision to distinguish between non-degree-granting proprietary and public or private nonprofit institutions for purposes of calculating Direct Loan Program cohort rates and weighted average cohort rates. These commenters argued that there was no basis for this distinction because proprietary institutions offer the same programs as public institutions (such as community colleges), which offer job training in a broader educational context. These commenters criticized the proposal to include in the cohort default rate calculation for proprietary non-degree granting institutions, Direct Loans repaid through an ICR plan under which the borrower makes payments less than $15 a month and that payment results in negative amortization. Other commenters representing other types of educational institutions supported the distinctions included in the draft regulations.

Discussion: The Secretary believes it is appropriate to distinguish between different types of institutions in calculating cohort default rates. First, numerous reports by congressional committees (including the Senate's Permanent Subcommittee on Investigations) and the General Accounting Office, as well as the Department's own reviews of individual institutions, have concluded that many proprietary institutions (particularly non-degree-granting institutions) use promises of job training and placement to entice students to enroll and then the institutions fail to provide worthwhile services. Second, those commenters who urged the Secretary not to distinguish between different types of institutions are asking the Secretary to ignore the overwhelming evidence that student loan default rates (and the associated costs to students and taxpayers) are much higher in the proprietary sector than in any other sector of higher education. For example, among the institutions for whom cohort default rates were calculated for Fiscal Year 1992 (which are the most recent final rates available), 444 institutions were subject to loss of FFEL eligibility for the first time based on default rates over 25 percent for the three most recent fiscal years. Of those institutions, 396 (89 percent) were proprietary institutions. Similarly, of the 205 institutions whose loss of eligibility was extended based on excessive default rates, 186 (91 percent) were proprietary; and of the 376 institutions subject to limitation, suspension or termination from participation in all Title IV programs based on excessive default rates, 324 (86 percent) were proprietary. Propreitary institutions represented 44 percent of all institutions for whom

cohort default rates were calculated based on students and former students entering repayment on FFEL Program loans in fiscal year 1992.

Further, the Fiscal Year 1992 data show that proprietary institutions had default rates of 30.2 percent, twice the national average for all institutions, and that public two-year institutions had rates of 14.5 percent. These data do not support the commenters' arguments that public institutions that offer vocational programs similar to those offered by many proprietary institutions should be treated the same as proprietaries for purposes of calculating Direct Loan Program cohort rates or weighted average cohort rates.

In analyzing this information, the Secretary has concluded that non-degree-granting proprietary institutions present a particular risk to students and taxpayers. The Secretary believes that these institutions would have a particular incentive to encourage their student borrowers to request an ICR plan in an attempt to mask their failure to provide worthwhile training, which results in employment that only allows a borrower to make minimal loan payments while falling further behind on the loan through negative amortization.

Changes: None.

Comments: Many commenters responded to the Secretary's invitation to comment regarding whether the Secretary should implement measures to prevent an institution from evading the proposed rule under which a Direct Loan Program cohort rate and weighted average cohort rate are calculated for non-degree-granting proprietary institutions using an ICR component if such an institution switched to a nonprofit status. The commenters felt that the current Internal Revenue Service requirements to establish nonprofit status are sufficiently rigorous, costly, and lengthy so as to prevent an institution from switching from profit to nonprofit status to avoid the consequences of a high default rate. Commenters argued that this type of decision would more likely be made for business reasons rather than for the purpose of evading regulatory requirements.

Discussion: The Secretary has carefully evaluated the comments received on this issue and believes that further consideration is warranted prior to implementing any regulatory or procedural changes that would prevent an institution from switching from profit to nonprofit status to avoid the consequences of a high default rate.

Changes: None.

Comments: Many commenters responded to the Secretary's request for public comment regarding adding a measure to the default rate definition for borrowers for whom payment has been deferred for an extended period of time under the economic hardship or unemployment deferments, or a forbearance. The commenters argued that including borrowers whose payments had been deferred for an extended period of time in the default rate definition results in ''punishing'' an institution for informing students of their rights to defer or forbear payments in certain circumstances. Further, some commenters argued that the benefits to students of avoiding defaults through the use of deferments and forbearance would outweigh the potential for abuse by unscrupulous institutions that might try to artificially lower their default rates.

Discussion: The Secretary agrees with the commenters that the use of deferments and forbearances benefit students by preventing defaults. The Secretary believes that this issue warrants further consideration prior to implementing any changes. The Secretary will continue to monitor the use of deferments and forbearances in both the Direct Loan and FFEL Programs to determine if further action is needed.

Changes: None.

Comments: Many commenters suggested that if the Secretary was planning to provide Direct Loan Program institutions with tools, such as reports on delinquent borrowers, access to borrower information on a toll-free servicing telephone number, and free loan counseling materials for entrance and exit counseling, to help it reduce its default rate, similar tools should be provided to the FFEL Program institutions. The commenters stated that the Secretary has obligations to help reduce default rates in the FFEL Program.

Discussion: The Secretary assures these commenters that he is equally concerned about reducing defaults in both the FFEL and Direct Loan programs and agrees that it is in the best interests of institutions, borrowers, and taxpayers to help reduce the incidence of student loan defaults by providing institutions with default prevention tools. The HEA and the FFEL Program regulations provide FFEL institutions with numerous tools to reduce their default rates. The Secretary, guaranty agencies, and various institutional associations have offered institutions training opportunities and information designed to reduce FFEL Program cohort default rates. Direct Loan institutions will be treated similarly. Some commenters suggested specific measures that could be taken to assist institutions in reducing defaults. The Secretary will carefully consider these suggestions to enhance default prevention techniques in both the FFEL and Direct Loan programs.

Changes: None.

Section 668.17(a)(1)

Comments: Many commenters were concerned that the language in § 668.17(a)(1) implies that an institution will not be notified of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate if that rate is equal to or less than 20 percent. The commenters suggested that all institutions should be notified of their FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates.

Discussion: The Secretary notes that this language is in current regulations and was originally included in an NPRM published on February 28, 1994 (59 FR 9526, 9572) and that no commenters raised questions about this provision. The Secretary has traditionally provided default rate notices to all institutions and all institutions receive their default rate prior to publication under 34 CFR 668.17(j)(1) (ii) and (iii). However, it is most important that institutions with rates over 20 percent receive notice of their final rates since it is these institutions that may face sanctions based on their rate. The Secretary originally provided that only institutions with rates over 20 percent would be guaranteed to receive a notice because of the possibility that future budget reductions would require cuts in this area. The Secretary agrees with the commenters that, whenever feasible, all institutions should be notified of their FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates. The Secretary plans to notify all institutions of their rates.

Changes: None.

Section 668.17(a)(2)

Comments: Many commenters suggested that the Secretary should not take L, S, and T action against an institution that is appealing its loss of eligibility to participate in the FFEL or Direct Loan programs under exceptional mitigating circumstances until a final decision is made on the appeal. The commenters reasoned that it is unfair to eliminate an institution from participating in all of the Title IV programs before the institution has had a chance to prove to the Secretary that exceptional mitigating circumstances

justify the institution's continued participation in the FFEL or Direct Loan programs. Other institutions argued that it would be unfair to take L, S, and T action against an institution before the institution has had a chance to demonstrate to the Secretary that its rate is not accurate and that a recalculated rate would be equal to or less than 40 percent.

Other commenters suggested that the Secretary should not initiate an L, S, and T action against an institution that has few participants in the FFEL or Direct Loan programs.

Discussion: First, the Secretary notes that the initiation of an L, S, and T action is discretionary. The Secretary does not plan to initiate such action against an institution unless the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate on which the action is based is final. Moreover, institutions are further protected since the hearing officer will find that the action is not warranted if the rate is not final. The Secretary believes that these provisions will ensure that an institution will not be harmed from action taken against it on the basis of a cohort default rate that is not final.

The Secretary does not agree with the commenters that an institution should be exempt from L, S, and T action until an institution's appeal under exceptional mitigating circumstances is decided. However, the Secretary does agree with the commenters that if an institution successfully appeals its loss of eligibility based on its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate on the basis of exceptional mitigating circumstances, any L, S, and T action taken solely on the basis of that cohort rate should be withdrawn.

With respect to the commenter's concerns that an institution with few participants in the FFEL and Direct Loan programs should be exempt from L, S, and T action, the Secretary would like to assure the commenters that he does not intend to take L, S, and T action against an institution if that institution has less than five students borrowing under the FFEL and Direct Loan programs.

Changes: The final regulations have been revised in § 668.17(a)(5) so that the Secretary will cease any L, S, and T action taken against an institution solely on the basis of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate if the institution successfully appeals under the exceptional mitigating circumstances.

Comments: Many commenters believed that the Secretary should take L, S, and T action against an institution's participation in the Direct Loan Program if that institution has FFEL Program cohort default rates that are equal to or exceed 25 percent for three consecutive fiscal years. The commenters believed that this change is needed for comparability in the FFEL and Direct Loan programs, because the Secretary is proposing to take L, S, and T action against an institution's participation in the FFEL Program if it has a Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years.

Discussion: The Secretary does not agree with the commenters that a change is needed for purposes of comparability between the FFEL and Direct Loan programs. The statute provides the Secretary the authority to establish institutional participation requirements for the Direct Loan Program. Under the current Direct Loan Program regulations in 34 CFR 685.400, an institution is not eligible to continue to participate in the Direct Loan Program if it has an FFEL Program cohort default rate that equals or exceeds 25 percent for three consecutive fiscal years. The Secretary does not have the authority to establish similar institutional participation requirements for FFEL Program institutions. Therefore, the Secretary believes that the regulations already address the commenter's concerns.

Changes: None.

Section 668.17(c)

Comments: Many commenters suggested that the 30-day timeframe under which an institution may appeal a loss of eligibility under inaccurate data or exceptional mitigating circumstances be extended. The commenters argued that 30 days did not provide enough time to compile the data needed to support an appeal under exceptional mitigating circumstances, nor did it provide a guaranty agency enough time to verify any inaccurate data in the institution's rate. Many commenters also suggested that the proposed requirement to have an appeal under exceptional mitigating circumstances verified by an independent auditor would not be possible within the 30-day timeframe.

Discussion: The 30-day timeframe to appeal under exceptional mitigating circumstances or inaccurate data is mandated by section 435(a)(2) of the HEA. The Secretary does not have the authority to extend this timeframe. The Secretary believes that an institution and a guaranty agency should, in most cases, be able to comply with the 30-day timeframe, particularly in light of the draft cohort default rate review process.

However, the Secretary realizes that there may be exceptional cases in which a guaranty agency fails to respond to an institution in a timely manner. Therefore, the Secretary has decided to retain the current regulations and permit an institution to continue to participate in the FFEL Program during the appeal process when a guaranty agency's failure to respond to an institution's timely request results in the appeal being submitted later than 30-day deadline, provided the institution notifies the Secretary that it is appealing its FFEL Program cohort default rate data at the same time it requests verification of its cohort default rate data from the relevant guaranty agency(ies). An institution will be required to submit its verified data to the Secretary within five working days from the date it receives the verified data from such guaranty agency(ies).

Based on the comments received, the Secretary appreciates that an institution may have difficulty obtaining an independent auditor's verification of the information that must be submitted in the appeal within the 30-day timeframe. However, the Secretary believes that this verification is necessary. The Secretary has been persuaded that a 60-day timeframe would be more appropriate for submission of the independent auditor's verification. The institution must submit the appeal data within 30 days; only the auditor's attestation may be submitted after the 30-day deadline.

Changes: The final regulations have been amended in § 668.17(c)(8) to provide that an institution may continue to participate in the FFEL Program if that institution fails to submit an appeal based on inaccurate data by the 30-day deadline if that failure is the result of a guaranty agency's failure to respond to the institution's timely request for verification of its FFEL Program cohort default rate data. The final regulations have also been amended in § 668.17(c)(7) to provide that the independent auditor's verification of the information in the appeal must be submitted to the Secretary within 60 days after the institution is notified that it will lose its eligibility to participate in the FFEL or Direct Loan programs.

Comments: Many commenters suggested that an independent auditor should be able to verify the accuracy of the information submitted in an exceptional mitigating circumstances appeal based on a sample. The commenters indicated that this would

greatly assist them in meeting the appeal deadlines, as well as reduce the cost of an appeal.

Discussion: The Secretary believes that the verification process should be the same for all institutions. Further, the Secretary believes that requiring an independent auditor's statement on management's assertions in accordance with the Standards for Attestation Engagement #3 would ensure consistency and allow a sample as an acceptable means for an independent auditor to verify the information submitted in an appeal based on exceptional mitigating circumstances.

Changes: The final regulations have been amended in § 668.17(c)(7) to provide that an independent auditor must provide a statement on management's assertions that the information contained in the appeal is complete, accurate, and determined in accordance with the requirements of § 668.17. The examination level engagement must be performed in accordance with the Statement on Standards for Attestation Engagements #3. This authorizes an independent auditor to do whatever testing of management's assertions that the auditor feels is necessary. Sampling may be an acceptable technique for an auditor to use under this situation.

Comments: Some commenters suggested that the chief executive officer of an institution be required to certify under penalty of perjury that the information submitted in an appeal is true and correct.

Discussion: The Secretary agrees with the commenters. The Secretary believes that this additional certification is appropriate to help ensure that the information submitted in an appeal is correct. The Secretary's experience in reviewing such appeals based on exceptional mitigating circumstances has demonstrated that some institutions have submitted false or erroneous information in their appeals.

Changes: The final regulations have been changed in § 668.17(c)(6) to provide that an institution's chief executive officer must certify under penalty of perjury that the information included in the appeal is true and correct.

Section 668.17(c)(1)(ii)(A)

Comments: Many commenters suggested that the institution's participation rate index and the determination of the percent of students coming from disadvantaged economic backgrounds should be calculated based on the number of regular students at the institution rather than all the students enrolled at the institution. The commenters argued that, for purposes of the economically disadvantaged rate, it would be difficult to determine if a student who was not a regular student had an EFC of zero if that student did not apply for a Pell Grant or if the student was not eligible for a Pell Grant. Further, many of the commenters indicated that they do not maintain data relating to students who are not regular students, therefore, it would be difficult to provide data regarding such students in an appeal.

Discussion: The Secretary is willing to accommodate the commenters' concerns to the fullest extent possible and to minimize any burden associated with preparing an exceptional mitigating circumstances appeal when these changes do not undermine the integrity of the appeal process. The Secretary understands that it may be problematic for some institutions to obtain EFC data or other data relevant to an appeal for a student who is not a regular student. The Secretary believes that using data for regular students will provide an accurate assessment of an institution's students with economically disadvantaged backgrounds.

Also, the Secretary believes that it is appropriate to base the institution's participation rate index on the percentage of the institution's students who are eligible for loans and who actually borrow under the FFEL or Direct Loan programs. The Secretary agrees that the inclusion of students who are not eligible for loans would not contribute to a meaningful indicator of the percentage of an institution's students who participate in the loan programs.

Changes: The Secretary has amended the formula in § 668.17(c)(1)(ii)(A) for the participation rate index to base the index on regular students enrolled at least half-time at the institution. The Secretary has also amended the formula in § 668.17(c)(1)(ii)(B) for determining the percent of an institution's students that come from economically disadvantaged backgrounds to be based on regular students at the institution.

Comments: Many commenters objected to the Secretary's statement in the preamble of the proposed rule that only institutions with FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates equal to or less than 40 percent would be eligible to appeal under the participation rate index. The commenters argued that an institution with a high default rate but an extremely low percentage of students that borrow under the FFEL or Direct Loan programs was not abusing the loan programs. Commenters also argued that the establishment of the participation rate index would only help institutions with exceedingly low participation rates and, thus, would help very few institutions. For example, one commenter pointed out that an institution could have a 50 percent FFEL Program cohort default rate if, over three consecutive fiscal years, only two borrowers entered repayment and one of those borrowers defaulted.

Discussion: The Secretary does not agree with the commenters that an institution with an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, that exceeds 40 percent, but a participation rate index that is equal to or less than 0.0375 has such a low percentage of borrowers that it is likely the institution is not abusing the loan programs. An institution with a large number of students and a low student loan participation rate could still have a significant number of defaulters if the participation rate index were used without the 40 percent cap. For example, an institution with 10,000 students could have a low participation rate of 7 percent, which would equal 700 students. If 50 percent of these students defaulted in a given cohort that would represent 350 students. This would result in a participation rate index of 0.035. The Secretary considers this number of students to be significant. Further, given that the lowest annual loan limit is $2,625, 325 student defaults could represent hundreds of thousands of dollars in loss to the Federal government and U.S. taxpayers. The Secretary believes that it would represent an unreasonable risk to students and Federal taxpayers to permit such an institution to remain eligible to participate in the FFEL or Direct Loan programs.

Changes: The Secretary has added a provision to the final regulations in § 668.17(c)(1)(ii)(A) that prohibits an institution from appealing a loss of eligibility to participate in the FFEL or Direct Loan programs under the participation rate index criterion if that institution has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, that exceeds 40 percent.

Section 668.17(c)(1)(ii)(B)

Comments: Many commenters argued that the 70 percent threshold of an institution's students coming from disadvantaged economic backgrounds is too high. Many commenters cited a study that demonstrated that only 21.6 percent of postsecondary students received Pell Grants. The commenters believed that due to such a low national

percentage of postsecondary students receiving Pell Grants, the 70 percent threshold would be too high for an institution to meet.

Many commenters also argued that the 70 percent completion rate threshold component of an exceptional mitigating circumstances appeal is too high. The commenters argued that it is inappropriate for the Secretary to require institutions with longer programs to meet a completion rate threshold that is required by the HEA for a program of study that is less than 600 hours in length. The commenters pointed out that institutions offering longer programs of study most likely would not meet this standard.

Discussion: The Secretary does not agree with the commenters that either of these thresholds is too high. The study referenced by the commenters is based on the percentage of Pell Grant recipients across all postsecondary institutions. This study does not appear to be relevant to institutions that generally have high cohort default rates. Based on the Secretary's experience in processing exceptional mitigating circumstances appeals, many institutions will not have any difficulty meeting this threshold. Almost every institution that has applied under the exceptional mitigating circumstances provisions has met the requirement that two-thirds of its students are economically disadvantaged. Further, previous appeals show that the postsecondary institutions most likely to have high FFEL Program cohort default rates are institutions that have higher percentages of low-income students than those institutions with low default rates. Because the Secretary's experience in reviewing exceptional mitigating circumstances appeals has proven that many institutions can meet this standard, the Secretary does not believe that a 70 percent threshold is too high.

In regard to the completion rate threshold, the 70 percent completion rate standard that a short-term program must meet in order to participate in the FFEL Program is a minimum eligibility standard. This standard is unrelated to the institution's FFEL Program cohort default rate. The Secretary has chosen a 70 percent completion rate threshold as a component of an exceptional mitigating circumstance because he believes that an institution that has a high FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate must be able to demonstrate that it is properly serving a large majority of its students, as evidenced by their completion of their academic program, despite having consecutively high default rates. The Secretary reminds the commenters that the purpose of exceptional mitigating circumstances is to allow institutions to continue to participate in the loan programs even though more than one out of every four students who receive loans have defaulted and that has occurred for at least three years. To protect both students and taxpayers, only institutions that can truly demonstrate unusual circumstances should be allowed to continue to participate in the loan programs.

Changes: None.

Comments: A number of commenters suggested that the completion rate component of the exceptional mitigating circumstances be revised to mirror the proposed Student-Right-to-Know regulations regarding completion rates. These commenters urged the Secretary to issue regulations with as much consistency as possible.

Discussion: The Secretary is committed to reducing regulatory burden and providing consistency in program requirements wherever possible. The Secretary does not believe that using completion rates as calculated under the Student-Right-to-Know provisions is appropriate at this time for establishing exceptional mitigating circumstances for institutions with high cohort default rates. This is because the requirements of Student-Right-to-Know include certain statutory exclusions, specific timeframes, and definitions of which students are included in the calculation. Further, the Student-Right-to-Know provisions offer institutions flexibility in determining their completion rates, which are not appropriate for an institution that is appealing its loss of eligibility due to high FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates.

Changes: None.

Comments: Many commenters suggested that the completion rate and placement rate formulas be amended to include only students who were regular students. The commenters agreed that an institution would be unfairly penalized if its completion or placement rate included students who initially enrolled in the institution without the intention of obtaining a degree or certificate.

Discussion: After careful consideration of the many comments received on this issue, the Secretary has determined that an institution's completion or placement rate should not include students who are not enrolled for the purpose of obtaining a degree or certificate. The Secretary believes that an institution should not be held responsible for the completion or placement of a student who did not enroll in the institution with the intent to complete a degree or certificate program.

Change: The completion rate and placement rate formulas in section 668.17(c)(1)(ii)(B) (*1*) and (*2*) have been changed. The final regulations provide that the placement and completion rates will be based on the percentage of an institution's students who initially enrolled as regular students.

Comments: Many commenters suggested that the placement rate should only include students who have actually completed their training at the institution. These commenters do not think it is reasonable for an institution to be responsible for the placement of students who do not complete their educational programs. Other commenters suggested that the Secretary should provide a five percent allowance in the placement rate for former students at the institution who are not able to work due to an injury or pregnancy.

Many commenters also suggested that the Secretary should change the placement rate calculation to permit a student who has obtained employment in an occupation for which the training is intended while the student is still enrolled in the institution's program to be considered successfully placed. The commenters indicated that this often occurs with part-time students who work and go to school at the same time. The commenters do not believe that it is fair to exclude such a student from the placement rate calculation.

Discussion: The Secretary expects that a high percentage of an institution's students will receive a job related to the training or educational program undertaken at the institution. The formula under which the placement rate is calculated provides that an institution will meet this standard if only 50 percent of the institution's students receive employment in an occupation that is related to the training they receive. For an institution that is appealing a loss of eligibility to participate in the FFEL or Direct Loan programs on the basis that it places an exceptionally high percentage of its students, the Secretary believes that a 50 percent placement rate is reasonable.

Further, the Secretary does not agree that only students who complete their programs should be included in the placement rate calculation. The Secretary believes that the placement rate formula as written in the proposed rule does not need to provide any extra allowance for an institution's former

students who do not complete the program or are unable to work.

However, the Secretary agrees with the commenters who suggested that a student who obtains employment in an occupation related to the training he or she is receiving while enrolled at the institution should not be excluded from the former students an institution may consider as successfully placed. The Secretary realizes that students are often able to obtain employment in a field for which they are receiving training while they are still enrolled. This provision was included in the NPRM. However, an institution may not consider a student as successfully placed if the institution is the student's or former student's employer.

Changes: None.

Comments: None.

Discussion: In reviewing the comments received on the placement rate calculation, the Secretary concluded that it is unnecessary to include a student who transferred to a higher level program of study as successfully placed. The Secretary believes that this is unnecessary because the institutions that may appeal under this criteria will not be offering programs that prepare its students for higher level programs.

The Secretary further believes that in order to demonstrate the effectiveness of the training an institution provides, with respect to students obtaining employment, the Secretary has limited the timeframe during which a student or former student must have received employment, or have been employed for at least 13 weeks, in order to be considered successfully placed. Under the proposed rules, a former student would be considered as successfully placed if that student had been employed for at least 13 weeks between his or her last date of attendance and the date the institution submits the appeal, which could generally occur at least two-years after the student left the institution.

Changes: The Secretary has removed from the final regulations a provision contained in § 668.17(c)(1)(ii)(B)(*2*) of the proposed rule that provided that a former student of an institution may be considered successfully placed if that former student transfers to a higher level program at another institution. The final regulations provide that a student or former student may be considered as successfully placed only if the student or former student was employed in an occupation related to the training for at least 13 weeks before, or was employed on, the day after 12 months following the date of the student's last day of attendance.

Comments: Many commenters also suggested that students enrolled less than full-time should not be counted in the placement rate calculation. The commenters suggested that students enrolled less than full-time are less likely to complete their programs than full-time students.

Discussion: The Secretary does not agree with the commenters that students enrolled less than full-time should be excluded from the institution's placement rate. The Secretary believes that the inclusion of regular students who are enrolled on at least a half-time basis will provide the most complete portrait of the success of an institution's programs. The final regulations have been changed to provide that the placement rate calculation will be based on an institution's regular students who are initially enrolled on at least a half-time basis. This change is addressed in a previous comment.

Changes: None

Comments: Many commenters suggested that the Secretary should clarify in the regulations what constitutes a week of employment. The commenters indicated that the requirement that a student be employed for 13 weeks was too vague. The commenters wanted to know if there was a minimum number of days or hours during the week a student must be employed in order to constitute a week of employment.

Discussion: The Secretary does not agree with the commenters. The Secretary's experience in working with institutions regarding the placement rate element of an exceptional mitigating circumstances appeal has shown that this issue has not been an area of confusion nor have institutions needed clarification of this issue. Further, the Secretary does not believe that it is necessary to define in regulations what constitutes a week of employment.

Changes: None.

Comments: Many commenters objected to limiting the use of the completion rate component of the exceptional mitigating circumstances to public and private nonprofit institutions and limiting the use of the placement rate component to proprietary institutions. Many commenters indicated that it is more appropriate for a public vocational institution to appeal a potential loss of eligibility to participate in the FFEL or Direct Loan programs under the placement rate component. The commenters indicated that because these institutions provide training for their students to receive employment in specific occupations, they would more likely be able to meet the placement rate threshold.

Other commenters suggested that proprietary institutions of higher education that offer associate or baccalaureate degrees should be able to appeal under the exceptional mitigating circumstances criteria that include the completion rate component. These commenters argued that it is inappropriate to distinguish the educational programs at these institutions from their public and private nonprofit institution counterparts.

Many commenters suggested that an institution should be able to appeal under any of the exceptional mitigating circumstances.

Discussion: The Secretary disagrees with the commenters that an institution should be able to appeal under either the placement rate or completion rate components of the exceptional mitigating circumstances. The Secretary believes that it is appropriate for an institution to appeal under a criterion that is designed to measure the performance of its programs. The Secretary agrees with the commenters that the type of program offered by an institution should determine whether that institution should be able to appeal under the exceptional mitigating circumstances appeal that includes the placement rate or completion rate components. Placement rate is an appropriate measure for those institutions that are non-degree-granting, whereas completion rate is a more appropriate and relevant measure for institutions that offer degrees.

Changes: The final regulations have been amended in § 668.17(c)(1)(ii)(B) to permit only a non-degree-granting institution, whether it is a public, private nonprofit, or proprietary institution, to appeal under the exceptional mitigating circumstances criterion that includes the placement rate component. The final regulations have also been amended to permit only a degree-granting institution, regardless of whether it is a public, private nonprofit, or proprietary institution, to appeal under the exceptional mitigating circumstances criterion that includes the completion rate component.

Comments: Many commenters objected to some of the data elements that must be submitted to substantiate the percentage of an institution's students that come from disadvantaged economic backgrounds. Many commenters believed that the addresses of such students were not necessary.

Discussion: The Secretary is interested in minimizing the burden associated with an appeal and is reexamining the data elements that will be required in an appeal to ensure that

information is requested only if it is essential to the appeal and only if it is not available to the Secretary in existing databases. The Secretary will notify institutions of the specific information that must be included in the appeal in the ''Pre-Publication Review Booklet'' that is sent to institutions when the Secretary provides the institution the opportunity to review its draft FFEL Program cohort default rate data. This information will also be contained in the ''Official Cohort Default Rate Guide'' which is issued to an institution when the Secretary provides notification of loss of eligibility based on a final FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate.

The Secretary expects to require institutions to submit substantially the same information that is currently requested in the Official Default Rate Guide.

Changes: The Secretary has removed from the regulations the specific description of the information an institution must submit in an appeal. These information submission requirements were contained in the proposed rules in sections 668.17(c)(7)(ii) through (v). The Secretary will inform an institution of the information that is necessary to appeal a loss of eligibility when the Secretary provides an institution the opportunity to verify its cohort default rate data and when he notifies the institution of its final rate.

Section 668.17(d)

Comments: Many commenters suggested that the Secretary should amend the date an SLS loan enters repayment. The commenters suggested that the Secretary should establish in regulations, provisions that would define when an SLS loan enters repayment if that loan is ''linked'' to a Stafford loan.

Discussion: For purposes of calculating an FFEL Program cohort default rate, Congress has mandated the parameters for establishing the date an SLS loan enters repayment. Those parameters are also contained in the regulations in section 668.17(d)(1)(ii)(D). Consistent with the parameters established by Congress, the Secretary regularly provides guaranty agencies and institutions with the rules for the application of the definition of the date an SLS loan enters repayment for purposes of an FFEL Program cohort default rate. Institutions are now apprised of the rules at least twice annually through the ''Pre-Publication Booklet'' for cohort default rates and the ''Official Cohort Default Rate Guide.''

The Secretary has found the dissemination of the rules for the application of the definition of the date an SLS loan enters repayment through the ''Pre-Publication Booklet'' and the ''Official Cohort Default Rate Guide'' provides sufficient notice to the institutions, while simultaneously allowing the definition to be refined as needed based on upon Congressional changes to the definition and changes in the information collecting capacity of the Department. The Secretary further believes that it is also appropriate to disseminate the rules for linking SLS loans to Stafford loans through the ''Pre-Publication Booklet'' and the ''Official Cohort Default Rate Guide.''

Changes: None

Sections 668.17(e)(1)(ii) and (f)(1)(ii)

Comments: Many commenters objected to the Secretary's inclusion in a Direct Loan Program cohort rate or weighted average cohort rate a loan that is in repayment under the ICR plan if the borrower's scheduled payments on that loan are less than 15 dollars and that 15 dollar payment is less than the interest that is accruing on the loan each month. The commenters argued that it is inappropriate to consider a loan that is not even delinquent as in default for purposes of an institution's Direct Loan Program cohort rate or weighted average cohort rate. Many commenters pointed out that most of the borrowers that choose ICR will be entry-level employees and will start out with low incomes that may result in the borrower having scheduled payments of 15 dollars or less, which may be less than the interest that is accruing on the loans. The commenters suggested that this would unfairly penalize institutions since ICR is a legitimate payment option for all students and an institution cannot control a borrower's selection of a repayment plan.

A commenter pointed out that, under the proposed rules, if a borrower enters into ICR at the end of the fiscal year and that borrower's monthly payment is 15 dollars and that payment is less than the interest that is accruing on the loan, the borrower would be included in the institution's Direct Loan Program cohort rate or weighted average cohort rate. The commenter indicated that it would be more appropriate to include such a borrower in an institution's rate if that borrower was in ICR and had scheduled payments of less than $15 that are less than the interest accruing on the loan for 270 days; this would more closely mirror a default.

Discussion: The Secretary appreciates the commenters' concerns that many of the borrowers who choose ICR will be entry level employees and will likely have low payments. However, the Secretary believes that even entry level employees who have received a quality education or training from an institution will be able to obtain employment that will provide them with enough income to pay back at least the interest that is accruing on their loans each month.

The Secretary also appreciates the commenters' concerns regarding the inclusion of a loan in an institution's Direct Loan Program cohort rate or weighted average cohort rate that may not even be delinquent. However, the Secretary believes that this is an appropriate performance-based measure to assess both a borrower's ability to repay a student loan and an institution's quality of training. The Secretary is concerned that, without such a measure, an institution could have a low Direct Loan Program cohort rate or weighted average cohort rate when a large proportion of its former students are making only minimal or no payments on their loans. The Secretary is concerned that this is a potential area for abuse in the Direct Loan Program and believes that it is imperative to protect students and taxpayers from such abuse.

The Secretary agrees with the commenter that, to more closely approximate a default, a borrower should have been, by the end of the fiscal year following the fiscal year the loan entered repayment, for at least 270 days, in repayment under the ICR plan with scheduled payments that were less than 15 dollars per month and those payments result in negative amortization.

Changes: The final regulations have been revised to provide that a loan that is in the ICR plan will not be included in a Direct Loan Program cohort rate or weighted average cohort rate unless, for at least 270 days, the scheduled monthly payments on that loan have been $15 dollars or less and that payment is less than the monthly interest accruing on the loan.

Section 668.17(f)

Comments: Many commenters did not understand how the proposed weighted average cohort rate would be calculated when the institution had a borrower enter repayment on both a Direct Loan and FFEL Program loan in a fiscal year. The commenters believed that the Secretary should clarify the formula.

Discussion: The weighted average cohort rate is determined by comparing the number of borrowers, both FFEL and Direct Loan, who enter repayment in a fiscal year against those borrowers who default before the end of the following

fiscal year. Each borrower and each default is counted only once even if a borrower has both FFEL and Direct Loan program loans entering repayment in a fiscal year. This has been the Secretary's practice when a borrower with multiple FFEL Program loans enters repayment on those loans in a fiscal year. The Secretary does not believe that the regulations need to be clarified in this area.

Changes: None.

Section 668.17(h)

Comments: Many commenters suggested that institutions should be able to appeal their Direct Loan Program cohort rates or weighted average cohort rates on the basis of improper servicing. The commenters argued that the appeal criteria should be parallel to the FFEL Program. In addition the commenters believed that a loan that is improperly serviced should not be included in an institution's Direct Loan Program cohort rate or weighted average cohort rate and that an institution should be given a chance to verify that such a loan is not included in its rate.

Discussion: In the FFEL Program, Congress chose to provide high default rate institutions with an appeal from the loss of eligibility to participate in that program based on loan servicing. That decision was based, in large measure, on the existence of detailed Departmental regulations governing loan servicing by lenders and a number of instances in which large lenders failed to comply with those requirements with a demonstrable effect on institutional default rates. In the Direct Loan Program, those detailed servicing rules do not exist; instead, loan servicing is controlled by contracts between the Department and its contractors. Moreover, there is no history of abuse in the Direct Loan Program and the Department's contractors do not have the same incentive or opportunity to hide non-compliance as FFEL Program lenders. Accordingly, the Secretary does not believe it is appropriate or necessary to provide a loan servicing appeal for a Direct Loan Program cohort rate or weighted average cohort rate.

Changes: None.

Section 668.90

Comments: Many commenters objected to the removal of an institution's ability to demonstrate that it has diligently administered the provisions contained in appendix D of the Student Assistance General Provisions regulations as a defense to loss of eligibility. The commenters argued that the measures contained in appendix D have been proven effective in reducing defaults. Other commenters suggested that the use of appendix D as the only defense to an L, S, and T action provides a very powerful incentive to an institution that has a high cohort default rate to take action to reduce its default rate.

Discussion: The Secretary agrees with the commenters that the measures contained in appendix D, if diligently implemented by an institution, are effective in reducing the incidence of default. However, many of the most effective measures in appendix D have become specific regulatory requirements for most institutions. Moreover, the Secretary's experience has shown that the reviews of claims of appendix D compliance are very time-consuming and rarely helpful. In fact, the Secretary believes that the removal of the use of appendix D as a defense will provide a more powerful incentive for an institution to try to keep its cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate low.

Changes: None.

Executive Order 12866

These regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the title IV, HEA programs effectively and efficiently.

In assessing the potential costs and benefits, both quantitative and qualitative, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The potential costs and benefits of these final regulations are discussed elsewhere in this preamble under the following heading: Analysis of Comments and Changes.

Assessment of Educational Impact

In the NPRM published on September 21, 1995, the Secretary requested comment on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency of the United States.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Supplemental Educational Opportunity Grant Program; 84.032 Stafford Loan Program; 84.032 PLUS Program; 84.032 Supplemental Loans for Students Program; 84.033 College Work-Study Program; 84.038 Perkins Loan Program; 84.063 Pell Grant Program; 84.069 State Student Incentive Grant Program; and 84.226 Income Contingent Loan Program; 84.268, William D. Ford Federal Direct Loan Program)

Dated: November 24, 1995.

Richard W. Riley,

Secretary of Education.

The Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, and 1148, unless otherwise noted.

2. Section 668.17 is amended by redesignating paragraphs (f), (g), and (h) as paragraphs (h), (i) and (j) respectively, revising paragraphs (a) through (e), and adding new paragraphs (f) and (g) to read as follows:

§ 668.17 Default reduction and prevention measures.

(a) *Default rates.* (1) If the FFEL Program cohort default rate, Direct Loan Program cohort rate, or if applicable, weighted average cohort rate for an institution exceeds 20 percent for any fiscal year, the Secretary notifies the institution of that rate.

(2) The Secretary may initiate a proceeding under subpart G of this part to limit, suspend, or terminate the participation of an institution in the Title IV, HEA programs, if the institution has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or a weighted average cohort rate that exceeds 40 percent for any fiscal year.

(3) Unless an institution is subject to loss of eligibility to participate in the FFEL Program under paragraph (b)(1) of this section, the Secretary initiates a proceeding under subpart G of this part to limit, suspend, or terminate an institution's participation in the FFEL Program if the institution, for each of the three most recent consecutive fiscal years, has any combination of an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or weighted average cohort rate that is equal to or greater than 25 percent.

(4) The Secretary may require an institution that meets the criteria under paragraph (a)(2) of this section to submit to the Secretary, within a timeframe determined by the Secretary, any reasonable information to help the Secretary make a preliminary determination as to what action should be taken against the institution.

(5) The Secretary ceases any limitation, suspension, or termination action against an institution under this paragraph if the institution satisfactorily demonstrates to the Secretary that, pursuant to an appeal that is complete and timely submitted under paragraph (c) of this section, the institution meets one of the exceptional mitigating circumstances under paragraph (c)(1)(ii)(B) of this section.

(b) *End of participation.* (1) Except as provided in paragraph (b)(6) of this section, an institution's participation in the FFEL Program ends 30 calendar days after the date the institution receives notification from the Secretary that its FFEL Program cohort default rate for each of the three most recent fiscal years for which the Secretary has determined the institution's rate, is equal to or greater than 25 percent.

(2) Except as provided in paragraph (b)(6) of this section, an institution's participation in the Direct Loan Program ends 30 calendar days after the date the institution receives notification from the Secretary that for each of the three most recent fiscal years the institution has any combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that is equal to or greater than 25 percent.

(3) Except as provided in paragraph (b)(6) of this section, an institution's participation in the FFEL Program or Direct Loan Program ends under paragraph (b) (1) or (2) of this section respectively may not participate in that program on or after the 30th calendar day after the date it receives notification from the Secretary that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate exceeds the thresholds specified in paragraph (b) (1) or (2) of this section and continuing—

(i) For the remainder of the fiscal year in which the Secretary determines that the institution's participation has ended under paragraph (b) (1) or (2) of this section; and

(ii) For the two subsequent fiscal years.

(4) An institution whose participation in the FFEL Program or Direct Loan Program ends under paragraph (b) (1) or (2) of this section may not participate in that program until the institution satisfies the Secretary that the institution meets all requirements for participation in the FFEL Program or Direct Loan Program and executes a new agreement with the Secretary for participation in that program following the period described in paragraph (b)(3) of this section.

(5) Until July 1, 1998, the provisions of paragraph (b) (1) or (2) of this section and the provisions of 34 CFR 668.16(m) do not apply to a historically black college or university within the meaning of section 322(2) of the HEA, a tribally controlled community college within the meaning of section 2(a)(4) of the Tribally Controlled Community College Assistance Act of 1978, or a Navajo community college under the Navajo Community College Act.

(6) An institution may, notwithstanding 34 CFR 668.26, continue to participate in the FFEL Program or Direct Loan Program until the Secretary issues a decision on the institution's appeal if the Secretary receives an appeal that is complete, accurate, and timely in accordance with paragraph (c) of this section.

(c) *Appeal procedures.* (1) An institution may appeal the loss of participation in the FFEL Program or Direct Loan Program under paragraph (b)(1) or (2) of this section by submitting an appeal in writing to the Secretary by the 30th calendar day following the date the institution receives notification of the end of participation. An appeal or any portion of an appeal under this section will not be accepted after the 30th calendar day following the date the institution receives notification from the Secretary that it has lost its eligibility to participate in the FFEL or Direct Loan programs, except that an institution may submit an appeal under section (c)(1)(i) of this section later than the 30th calendar day if the appeal is submitted in accordance with paragraph (c)(8) and the information required by paragraph (c)(7) may be submitted in accordance with that paragraph. The appeal must include all information required by the Secretary to substantiate the appeal and all information must be submitted in a format prescribed by the Secretary. The additional 30-day period specified in paragraph (c)(7) of this section is an extension for the submission of the auditor's statement only and does not affect the date by which the appeal data must be submitted. An institution that is eligible for an extension under paragraph (c)(8) of this section must submit all required data within five working days following the agency's response to the institution's request for verification of data. The institution may appeal on the grounds that—

(i)(A) The calculation of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, for any of the three fiscal years relevant to the end of participation is not accurate; and

(B) A recalculation of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, with corrected data verified by the cognizant guaranty agency or agencies for the FFEL Program loans, or the Secretary for Direct Loan Program loans would produce an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or weighted average cohort rate for any of those fiscal years that is below the threshold percentage specified in paragraph (b) (1) or (2) of this section; or

(ii) The institution meets one of the following exceptional mitigating circumstances:

(A) The institution has a participation rate index of 0.0375 or less. The participation rate index is determined by multiplying the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate or weighted average cohort rate, by the percentage of the institution's regular students, as defined in 34 CFR 600.2, enrolled on at least a half-time basis who received a loan made under either the FFEL Program or Direct Loan Program for a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined. An institution that has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that exceeds 40 percent may not appeal its loss of eligibility under paragraphs (b) (1) or (2) of this section on the basis of its participation rate index.

(B) For a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is

determined, 70 percent or more of the institution's regular students, as defined in 34 CFR 600.2, are individuals from disadvantaged economic backgrounds, as established by documentary evidence submitted by the institution. Such evidence must relate to either qualification by those students for an expected family contribution (EFC) of zero for any award year that generally coincides with the 12-month period, or attribution to those students of an adjusted gross income of the student and his or her parents or spouse, if applicable, reported for any award year that generally coincides with the 12-month period, of less than the poverty level, as determined under criteria established by the Department of Health and Human Services; and,

(*1*) For a degree-granting institution, 70 percent or more of the institution's regular students who were initially enrolled on a full-time basis and were scheduled to complete their programs during the same 12-month period the institution has chosen to determine the percentage of its students that come from disadvantaged economic backgrounds under paragraph (c)(1)(ii)(B) of this section, completed the educational programs in which they were enrolled. This rate is calculated by comparing the number of regular students who were classified as full-time at their initial enrollment in the institution and were originally scheduled, at the time of enrollment, to complete their programs within the relevant 12-month period, with the number of these students who received a degree from the institution; transferred from the institution to a higher level educational program; or, at the end of the 12-month period, remained enrolled and were making satisfactory academic progress toward completion of their educational programs; or

(*2*) For a non-degree-granting institution, the institution had a placement rate of 50 percent or more with respect to its former regular students who remained in the program beyond the point the students would have received a 100 percent tuition refund from the institution. A student or former student may not be considered successfully placed if the institution is the student's or former student's employer. This rate is based on those regular students who were initially enrolled on at least a half-time basis and were originally scheduled, at the time of enrollment, to complete their educational programs during the same 12-month period the institution has chosen to determine the percentage of its students that come from disadvantaged economic backgrounds under paragraph (c)(1)(ii)(B) of this section. This rate does not include those students who are still enrolled and making satisfactory progress in the educational programs in which they were originally enrolled on the date following 12 months after the date of the student's last day of attendance. This rate is calculated by determining the percentage of all those former regular students who;

(*i*) are employed in an occupation for which the institution provided training on the date following 12 months after the date of their last day of attendance at the institution; or

(*ii*) were employed in an occupation for which the institution provided training for at least 13 weeks before the date following 12 months after the date of their last day of attendance at the institution.

(2) For purposes of the completion rate and placement rate described in paragraph (c)(1)(ii)(B) (*1*) and (*2*) of this section, a student is originally scheduled, at the time of enrollment, to complete the educational program on the date when the student will have been enrolled in the program for the amount of time normally required to complete the program. The ''amount of time normally required to complete the program'' for a student who is initially enrolled full-time is the period of time specified in the institution's enrollment contract, catalog, or other materials, for completion of the program by a full-time student, or the period of time between the original date of enrollment and the anticipated graduation date appearing on the student's loan application, if any, whichever is less. The ''amount of time normally required to complete the program'' for a student who is initially enrolled less than full-time is the amount of time it would take that student to complete the program if the student remained enrolled at that level of enrollment.

(3) The Secretary issues a decision on the institution's appeal within 45 calendar days after the institution submits a complete appeal that addresses the applicable criteria in paragraph (c)(1) (i) or (ii) of this section to the Secretary.

(4) The Secretary's decision is based on the consideration of written material submitted by the institution. No oral hearing is provided.

(5) The Secretary withdraws the notification of loss of participation in the FFEL Program or Direct Loan Program sent to an institution under paragraph (b) (1) or (2) of this section, if he determines that the institution's appeal satisfies one of the exceptional mitigating circumstances specified in paragraph (c)(1) (i) or (ii) of this section.

(6) An institution must include in its appeal a certification, under penalty of perjury, by the institution's chief executive officer that all information provided by the institution in support of its appeal is true and correct.

(7) An institution that appeals on the grounds that it meets the exceptional mitigating circumstances criteria contained in paragraph (c)(1)(ii) of this section must include in its appeal an opinion from an independent auditor on management's assertions that the information contained in the appeal is complete, accurate, and determined in accordance with the requirements of this section. The examination level engagement will be performed in accordance with Statement on Standards for Attestation Engagements #3. This opinion must be received by the Secretary within 60 days following the date the institution receives notification of its loss of eligibility under paragraph (b) of this section.

(8) An institution that appeals under paragraph (c)(1)(i) of this section will not lose its eligibility to continue to participate during the appeal process due to a guaranty agency's failure to comply with 34 CFR 682.401(b)(14) which requires the agency to respond to an institution's request for verification of data within 15 working days, provided the institution:

(i) requested such verification within 10 working days from the date it received notification of its loss of eligibility under paragraph (b) of this section; and

(ii) provided a copy of the request for verification of data to the Secretary at the same time it requested such verification by the relevant guaranty agency(ies).

(d) *FFEL Program Cohort Default Rate.* (1)(i) For purposes of the FFEL Program, except as provided in paragraph (d)(1)(ii) of this section, the term FFEL Program cohort default rate means—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on Federal Stafford loans or Federal SLS loans (or on the portion of a loan made under the Federal Consolidation Loan Program or Direct Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who default before the end of the following fiscal year; or

(B) For any fiscal year in which fewer than 30 of the institution's current and

former students enter repayment on Federal Stafford loans or Federal SLS loans (or on the portion of a loan made under the Federal Consolidation Loan Program or Direct Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on such loans in any of the three most recent fiscal years, who default before the end of the fiscal year immediately following the fiscal year in which they entered repayment.

(C) In determining the number of students who default before the end of that following fiscal year, the Secretary includes only loans for which the Secretary or a guaranty agency has paid claims for insurance, and Direct Consolidation Loan Program loans that repaid FFEL Program loans that entered default.

(ii)(A) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(B) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(C) Any loan that has been rehabilitated under section 428F of the HEA before the end of that following fiscal year is not considered as in default for purposes of this definition.

(D) For the purposes of this definition, an SLS loan made in accordance with section 428A of the HEA (or a loan made under the Federal Consolidation Loan Program or Direct Consolidation Loan Program, a portion of which is used to repay a Federal SLS loan) shall not be considered to enter repayment until after the borrower has ceased to be enrolled in an educational program leading to a degree, certificate, or other recognized educational credential at the participating institution on at least a half-time basis (as determined by the institution) and ceased to be in a period of forbearance or deferment based on such enrollment. Each eligible lender of a loan made under section 428A (or a loan made under the Federal Consolidation Loan Program, a portion of which is used to repay a Federal SLS loan) of the HEA shall provide the guaranty agency with the information necessary to determine when the loan entered repayment for purposes of this definition, and the guaranty agency shall provide that information to the Secretary.

(2) Fiscal year means the period from and including October 1 of a calendar year through and including September 30 of the following calendar year.

(e) *Direct Loan Program cohort rate.* (1) For purposes of the Direct Loan Program, except as provided in paragraph (e)(2) of this section, the Secretary calculates Direct Loan Program cohort rates using the following formulas:

(i) For public institutions, private nonprofit institutions, or proprietary degree-granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who are in default before the end of the following fiscal year; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on those loans in any of the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment.

(ii) For proprietary non-degree-granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on those loans who are in default before the end of the following fiscal year, or who, before the end of that following fiscal year, have, for 270 days, been in repayment under the income-contingent repayment plan with scheduled payments that are less than 15 dollars per month and those payments result in negative amortization; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on a Direct Loan Program loan (or on the portion of a loan made under the Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on those loans in the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment, or who, before the end of that following fiscal year, have for 270 days, been in repayment under the income-contingent repayment plan with scheduled payments that are less than 15 dollars per month and those payments result in negative amortization.

(2)(i) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(ii) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(iii) Any loan on which the borrower has made 12 consecutive monthly on-time payments under 34 CFR 685.211(e) before the end of that following fiscal year is not considered as in default for purposes of this definition.

(3) For purposes of an institution's Direct Loan cohort rate, a Direct Loan Program loan is considered in default when the borrower's or endorser's failure to make an installment payment when due has persisted for 270 days.

(f)(1) *Weighted average cohort rate.* For purposes of an institution that has former students entering repayment in a fiscal year on both Direct Loan Program and FFEL Program loans, except as provided under paragraph (f)(2) of this section, the Secretary calculates a weighted average cohort rate using the following formulas:

(i) For public institutions, private nonprofit institutions, or proprietary degree-granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter

repayment in that fiscal year on those loans who are in default before the end of the following fiscal year; and

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay such loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on such loans in the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment.

(ii) For proprietary non-degree-granting institutions—

(A) For any fiscal year in which 30 or more current and former students at the institution enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan or Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who enter repayment in that fiscal year on such loans who are in default before the end of the following fiscal year, or who, before the end of that following fiscal year, have for 270 days: been in repayment under the income-contingent repayment plan with scheduled payments that are less than 15 dollars per month and those payments result in negative amortization; or

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay those loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on those loans in any of the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment, or who, before the end of that following fiscal year, have for 270 days: been in repayment under the income-contingent repayment plan with scheduled payments that are less than 15 dollars per month and those payments result in negative amortization.

(2)(i) In the case of a student who has attended and borrowed at more than one institution, the student (and his or her subsequent repayment or default) is attributed to each institution for attendance at which the student received a loan that entered repayment in the fiscal year.

(ii) A loan on which a payment is made by the institution, its owner, agent, contractor, employee, or any other affiliated entity or individual, in order to avoid default by the borrower, is considered as in default for purposes of this definition.

(iii) Any Direct Loan Program loan on which the borrower has made 12 consecutive monthly on-time payments under 34 CFR 685.211(e) or has an FFEL Program loan that has been rehabilitated under section 428F of the HEA before the end of that following fiscal year is not considered as in default for purposes of this definition.

(3) For purposes of an institution's weighted average cohort rate, a Direct Loan Program loan is considered in default when a borrower's or endorser's failure to make an installment payment when due has persisted for 270 days.

(g) *Applicability of Rates to Institutions.* (1)(i) An FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(ii) An FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

(2)(i) For an institution that changes its status from that of a location of one institution to that of a free-standing institution, the Secretary determines the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, based on the institution's status as of October 1 of the fiscal year for which the rate is being calculated.

(ii) For an institution that changes its status from that of a free-standing institution to that of a location of another institution, the Secretary determines the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, based on the combined number of students who enter repayment during the applicable fiscal year and the combined number of students who default during the applicable fiscal years from both the former free-standing institution and the other institution. This rate applies to the new, consolidated institution and all of its current locations.

(iii) For free-standing institutions that merge to form a new, consolidated institution, the Secretary determines the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate based on the combined number of students who enter repayment during the applicable fiscal year and the combined number of students who default during the applicable fiscal years from all of the institutions that are merging. This rate applies to the new consolidated institution.

(iv) For a location of one institution that becomes a location of another institution, the Secretary determines the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate based on the combined number of students who enter repayment during the applicable fiscal year and the number of students who default during the applicable fiscal years from both of the institutions in their entirety, not limited solely to the respective locations.

3. Section 668.85 is amended by revising paragraph (b)(1)(ii) and revising paragraph (b)(3) to read as follows:

§ 668.85 Suspension proceedings.

* * * * *

(b)(1) * * *

(ii)(A) Specifies the proposed effective date of the suspension, which is at least 20 days after the date of mailing of the notice of intent; or

(B) In the case of a suspension action taken due to the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the proposed effective date of the suspension is no more than 30 days after the date of the mailing of the notice of intent.

* * * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and place. The date is at least 15 days after the designated department official receives the request. In the case of a hearing for an institution subject to suspension action because of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the hearing is set no later than 20 days after the date the designated department official receives the request. The suspension does not take place until after the requested hearing is held.

* * * * *

4. Section 668.86 is amended by revising paragraph (b)(1)(ii) and revising paragraph (b)(3) to read as follows:

§ 668.86 Limitation or termination proceedings.

* * * * *

(b)(1) * * *

(ii)(A) Specifies the proposed effective date of the limitation or termination, which is at least 20 days after the date of mailing of the notice of intent; or

(B) In the case of a limitation or termination action based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the proposed effective date of the termination is no more than 30 days after the date of the mailing of the notice of intent.

* * * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b)(1)(iii) of this section, the designated department official sets the date and place. The date is at least 15 days after the designated department official receives the request. In the case of a hearing for an institution subject to limitation or termination action because of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the hearing is set no later than 20 days after the date the designated department official receives the request. The limitation or termination does not take place until after the requested hearing is held.

* * * * *

5. Section 668.90 is amended by adding a new paragraph (a)(1)(iii)(D), and revising paragraph (a)(3)(iv) to read as follows:

§ 668.90 Initial and final decisions.

* * * * *

(a)(1) * * *

(iii) * * *

(D) For hearings regarding the limitation, suspension, or termination of an institution based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the 30th day after the conclusion of the hearing.

* * * * *

(3) * * *

(iv) In a limitation, suspension, or termination proceeding commenced on the grounds described in § 668.17(a) (2) and (3), if the hearing official finds that an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate meets the conditions specified in § 668.17(a) (2) and (3) for initiation of limitation, suspension, or termination proceedings, the hearing official also finds that the sanction sought by the designated department official is warranted, except that the hearing official finds that no sanction is warranted if the institution presents clear and convincing evidence demonstrating that the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate on which the proposed action is based is not the final rate determined by the Department and that the correct rate would result in the institution having an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that is beneath the thresholds that make the institution subject to limitation, suspension, or termination action.

(Authority:) 20 U.S.C. 1082, 1085, 1094, 1099c.)

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