

DEPARTMENT OF EDUCATION**34 CFR Parts 600, 668, and 690**

[Docket ID ED–2022–OPE–0062]

RIN 1840–AD54, 1840–AD55, 1840–AD66,
1840–AD69**Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10); Change in Ownership and Change in Control****AGENCY:** Office of Postsecondary Education, Department of Education.**ACTION:** Final regulations.

SUMMARY: The Secretary amends regulations for the Federal Pell Grant program (Pell Grants or Pell), institutional eligibility, and student assistance general provisions. First, we amend the regulations for Federal Pell Grants for prison education programs (PEPs), to implement new statutory requirements to establish Pell Grant eligibility for a confined or incarcerated individual enrolled in a PEP to implement the statutory change in the Consolidated Appropriations Act, 2021. Second, we amend the Title IV Revenue and Non-Federal Education Assistance Funds regulations (referred to as “90/10” or the “90/10 Rule”) to implement the statutory change in the American Rescue Plan Act of 2021 (ARP). We further amend which non-Federal funds can be counted when determining compliance with the 90/10 rule to align allowable non-Federal revenue more closely with statutory intent. Finally, we amend regulations to clarify the process for consideration of changes in ownership and control (CIO), to promote compliance with the Higher Education Act of 1965, as amended (HEA), and related regulations and reduce risk for students and taxpayers, as well as institutions contemplating or undergoing such a change.

DATES:

Effective date: The regulations are effective July 1, 2023.

Applicability date: The 90/10 regulations will apply to institutional fiscal years beginning on or after January 1, 2023, consistent with the effective date of the statutory changes to the 90/10 calculation.

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

These final regulations address three areas: Pell Grants for PEPs, the 90/10 rule, and institutional changes in ownership. The PEP final regulations, on which the Affordability and Student Loans Committee reached consensus, implement statutory changes that extend Pell Grant eligibility to confined or incarcerated individuals who enroll in qualifying PEPs. The 90/10 final regulations, on which the Institutional and Programmatic Eligibility Committee (Committee) reached consensus, implement statutory changes that require proprietary institutions to obtain at least 10 percent of their revenue from sources other than Federal education assistance funds and more closely align allowable non-Federal revenue with statutory intent. Finally, the changes to the current CIO regulations provide a clearer and more defined process for institutions undergoing changes in ownership and control.

Prison Education Programs

The PEP regulations provide to the Department and stakeholders, including students, correctional agencies and institutions, postsecondary institutions, accrediting agencies, and related organizations, a detailed and clear framework for how to implement the new section 484(t) of the HEA, which takes effect on July 1, 2023. The Department amended the regulations in §§ 600.2, 600.7, 600.10, 600.21, 668.8, 668.32, 668.43, and 690.62, and added part 668, subpart P. Section 484(t) of the HEA sets forth PEP requirements that include: (1) a prohibition on PEPs offered by proprietary institutions; (2) definitions of a “confined or incarcerated individual” and a “prison education program;” (3) the program approval process by the Bureau of Prisons, State department of corrections, or other entity that is responsible for overseeing the correctional facility (which we refer to throughout these final regulations as the oversight entity); (4) a credit transfer requirement for PEPs; (5) a prohibition against program offerings by institutions that are subject to adverse actions by the Department, their accrediting agency, or the relevant State authorizing agency; (6) requirements that PEPs offer educational programming that satisfies professional licensure or certification, as applicable; (7) student enrollment

restrictions for programs where ultimate licensure or employment would be prohibited; (8) the requirement that confined or incarcerated individuals be enrolled in an eligible PEP in order to access a Pell Grant; and (9) various Department reporting requirements for postsecondary institutions offering PEPs.

The final regulations clarify and implement these statutory requirements by setting clear standards for postsecondary institutions offering PEPs and outlining the requirements to develop and implement such programs to gain and maintain access to Pell Grant funds. The final regulations also ensure that institutions report necessary data to the Department to assist in assessing program outcomes, also consistent with statutory requirements under section 484(t)(5) of the HEA for an annual report by the Secretary regarding the impact of the new requirements. The final rule establishes important guardrails for confined or incarcerated individuals and taxpayers, to protect students from enrolling in programs that will not permit them to benefit by finding employment in the field after graduation and release, and to prevent taxpayer funds from financing such programs. It also outlines title IV program requirements for PEPs related to State authorizing agencies and accrediting agencies.

Section 484(t)(1)(B)(iii) of the HEA requires an oversight entity, defined in the final regulations as a State department of corrections or other entity responsible for overseeing correctional facilities or the Federal Bureau of Prisons, to determine that any PEP it approved is “operating in the best interest” of the confined or incarcerated individuals it supervises. Congress outlined indicators of “best interest”—both inputs and outcomes—which are explained below. Because oversight entities may not have previously assessed some of the “best interest” indicators outlined in statute, such as student earnings and job placement post-release, the final regulations clarify how to implement this requirement. To facilitate a thorough and well-informed program assessment, these final regulations require oversight entities to seek input from relevant stakeholders in making the “best interest” determination.

90/10 Rule

The final 90/10 regulations amend § 668.28 to change how proprietary institutions calculate and report to the Department the percentage of their revenue that comes from Federal sources, in accordance with section

487(a) of the HEA. Section 487(a) establishes the requirement that proprietary institutions derive not less than 10 percent of their revenue from non-Federal sources. Section 487(d) of the HEA: (1) defines how proprietary institutions calculate the percentage of their revenue that is derived from non-Federal sources; (2) outlines sanctions for proprietary institutions that fail to meet the requirement in section 487(a); (3) requires the Secretary to publicly disclose on the College Navigator website proprietary institutions that fail to meet the requirement; and (4) requires that the Secretary submit a report to Congress that contains the Federal and non-Federal revenue amounts and percentages for each proprietary institution.

The ARP amended these sections to require proprietary institutions to include other sources of Federal revenue, in addition to title IV revenue from the Department, in the calculation that proprietary institutions make to determine if they comply with the 90/10 rule. These final regulations codify this statutory change and inform proprietary institutions how to determine which Federal funds they must include in their calculations.

Additionally, the final regulations amend how proprietary institutions calculate 90/10 to address practices that some proprietary institutions have used to alter their revenue calculation or inflate their non-Federal revenue percentage. The final regulations also create a new requirement for when proprietary institutions must request and disburse title IV student aid funds to prevent them from delaying disbursements to the next fiscal year. The final regulations will also more closely align allowable non-Federal revenue with statutory intent by clarifying: (1) allowable non-Federal revenue generated from programs and activities that can count for the purposes of 90/10; (2) how schools must apply Federal funds to student accounts and determine the funds' inclusion in the Federal revenue percentage of 90/10; (3) which revenue generated from institutional aid can count as non-Federal revenue for purposes of 90/10; and (4) funds that institutions must exclude from the 90/10 calculation.

The final regulations also modify the steps that proprietary institutions must take if they fail to derive at least 10 percent of their revenue from allowable non-Federal sources by requiring them to notify students of the failure and of the students' potential loss of title IV aid at that proprietary institution. Additionally, the final regulations establish the process that proprietary

institutions must follow if they initially determine that they met the 90/10 requirement for the preceding fiscal year but subsequently determine that they did not. Lastly, the final regulations provide that a proprietary institution will be liable for repaying all title IV funds disbursed for the fiscal year after it becomes ineligible to participate in the title IV program due to failing 90/10.

Changes in Ownership

To address the risks that some changes in ownership of postsecondary institutions present to students and taxpayers and to address the growing complexity of those transactions, the Department, under the authority of section 498(i) of the HEA, amends regulations covering changes in ownership in §§ 600.2, 600.4, 600.20, 600.21, and 600.31. These changes modify the definitions of “additional location,” “branch campus,” “main campus,” and “nonprofit institution,” as well as the terms “closely-held corporation,” “ownership or ownership interest,” “parent,” “person,” and “other entities” in the context of changes in ownership that result in a change in control, where the individual or entity with control has the power to direct the management or policies of the institution.

Under the final regulations, we require institutions to provide a minimum 90-day notice to the Department when they are to undergo a change in control. The Department may apply conditions to the new Temporary Provisional Program Participation Agreement (TPPPA) after the change and until we issue a decision on the pending application for approval of the change. The final regulations also increase transparency for changes in ownership that do not constitute a change of control by increasing the reporting requirements to the Department on such transactions at lower percentages of ownership.

Summary of the Major Provisions of This Regulatory Action

The final regulations make the following changes.

- Update appropriate cross-references.

Prison Education Programs (PEPs) (§§ 600.2, 600.7, 600.10, 600.21, 668.8, 668.32, 668.43, 668.234 through 668.242, and 690.62).

- Extend access to Pell Grants for confined or incarcerated individuals in qualifying postsecondary education programs and define an eligible PEP based on the statutory requirements.
- Clarify that only public or private nonprofit institutions as defined in

§ 600.4, or vocational institutions as defined in § 600.6, may offer eligible PEPs and require that PEPs offered at a correctional institution be reported to the Department as an “additional location.”

- Amend requirements for postsecondary institutions to obtain and maintain a waiver from the Secretary to allow students who are confined or incarcerated to exceed 25 percent of the institution's regular student enrollment.

- For a PEP designed to meet educational requirements for a specific professional license or certification, require disclosures to students of typical State or Federal prohibitions on the licensure or employment of formerly incarcerated individuals.

- Prohibit institutions from enrolling a confined or incarcerated individual in a PEP that is designed to lead to licensure or employment in a specific job or occupation where State or Federal law would prohibit that individual from licensure or employment based on the type of the criminal conviction for which the student has been confined or incarcerated.

- Define the process and the factors that the oversight entity will use to determine if a PEP is operating in the best interest of the confined or incarcerated individuals they supervise, including consulting with interested third parties and conducting periodic re-evaluations.

- Define the requirements for approval from the Secretary and the Institutions of Higher Education's (“IHE's”) accrediting agency for the first PEP at the institution's first two additional locations at prison facilities.

- Require a postsecondary institution to obtain and report to the Department the release or transfer date of all confined or incarcerated individuals who participated in its PEP.

- Outline the process for winding down eligible programs for confined or incarcerated individuals that are not operating at a Federal or State correctional facility and are not approved as eligible PEPs, prior to July 1, 2023.

- Outline the process a postsecondary institution must follow to reduce a Pell Grant award that exceeds the confined or incarcerated individual's cost of attendance. Title IV Revenue and Non-Federal Education Assistance Funds (90/10 Rule) (§ 668.28)

- Amend the revenue calculation methodology in the 90/10 rule by changing references to “title IV revenue” to “Federal revenue” where appropriate to align with the statutory amendment that changes the 90/10

revenue requirement to include all Federal revenue.

- Outline how the Department will publish, and update as necessary, which Federal funds it requires proprietary institutions to include in their 90/10 calculation.

- Create a new requirement for when proprietary institutions must request and disburse title IV, HEA program funds to prevent them from delaying disbursements to reduce their Federal revenue percentage for a fiscal year in order to meet the 90/10 revenue requirement.

- Clarify the allowable revenue generated from programs and activities that can be counted as non-Federal revenue for purposes of the 90/10 revenue requirement to provide additional consumer protections.

- Revise how proprietary institutions apply funds to student accounts and determine the funds' inclusion in the 90/10 revenue requirement calculation to incorporate statutory changes, clarify how grants from non-Federal public agencies that include Federal funds must be treated, and add additional consumer protection measures.

- Revise the provisions governing which revenue generated from institutional aid can be included in the 90/10 revenue calculation to remove paragraphs that are no longer applicable, codify existing practices in regulation, promote consumer protection measures, and close potential loopholes related to Income Share Agreements (ISAs) or other alternative financing agreements issued by the institution or a related party.

- Revise the provisions governing which funds must be excluded from a proprietary institution's calculation of its revenue percentage to remove regulations that no longer apply and to limit certain types of revenues that some proprietary institutions have employed to alter their revenue calculation.

- Revise the steps that a proprietary institution must take to better protect students and taxpayers if it does not generate 10 percent or more of its revenue from allowable non-Federal sources in a fiscal year. The regulations provide reporting procedures for proprietary institutions that become aware, based on information received after the initial 45-day reporting period, that they failed the revenue requirement for the previous fiscal year.

Changes in Ownership (CIO) (§§ 600.2, 600.4, 600.20, 600.21, and 600.31)

- Clarify the definitions of "additional location," "branch campus," "main campus," and "nonprofit institution;" and for

nonprofit institution, we describe institutional characteristics that do not generally meet the definition of a "nonprofit institution."

- Require that institutions provide the Department with 90 days' notice of an impending change in ownership, ensure that accreditation and State licensure are in effect as of the day before the proposed change, and codify practices on submission of financial statements and provision of financial protection.

- Explain the terms by which a TPPPA may be extended to institutions seeking a change in ownership.

- Clarify what constitutes a change in ownership and, more narrowly, a change in control, distinguishing between natural persons and entities in § 600.21 and the conditions under which they constitute a change of control.

- Add "trust" to the definition of "person" and refine the definitions of the terms "ownership or ownership interest," "parent," and "other entities," as applied to changes in ownership."

- Add to the list of covered transactions the acquisition of another institution and clarify the application of the regulations in cases of resignation or death of an owner.

Costs and Benefits: As further detailed in the *Regulatory Impact Analysis*, the final regulations have significant impacts on students, borrowers, educational institutions, taxpayers, and the Department.

The PEP regulations benefit incarcerated individuals, taxpayers, and communities by creating higher employment and earnings, and lower recidivism rates, for those who enroll in higher education programs in prison, as described in the *Regulatory Impact Analysis*. Institutions that offer programs in correctional facilities and do not currently receive Pell Grants may bear some or all costs of that programming. Institutions that do not currently receive Pell funds for these programs benefit from these changes. Pell Grant transfers to institutions and students are estimated to increase by \$1.1 billion from these programs. These transfers are overwhelmingly the result of the statutory changes made by Congress to make incarcerated students eligible for Pell Grants again. There are increased costs for the Department due to various requirements in the final regulations including, but not limited to: data collection and dissemination, approval of PEPs, and required reporting to Congress and the public. There are increased costs to the oversight entity due to the required "best interest determination" defined in

§ 668.241. There are no direct costs to students. Completing the Free Application for Federal Student Aid (FAFSA®) is free (though there is some minimal burden associated with completing the form) and grants under the Pell Grant program do not need to be repaid. To qualify for a Pell Grant, the student must be charged tuition and the charges cannot be covered by another source. Generally, students do not pay anything to participate in these programs. However, there could be occasions where a student only qualifies for a partial Pell Grant and owes a balance to the postsecondary institution.

Under the final 90/10 regulations, military-connected students will benefit as proprietary institutions' incentive to aggressively recruit GI Bill and Department of Defense (DOD) Tuition Assistance recipients is greatly reduced because Federal assistance for those students will be treated the same as title IV funds in the 90/10 revenue calculation. The Department is aware that some proprietary institutions have sought to enroll additional Department of Veterans Affairs (VA) or DOD recipients because their dollars provide a larger cushion in their 90/10 calculation to pursue more title IV, HEA funds, sometimes to the detriment of those veterans and service members. The regulatory changes remove that incentive by counting all Federal education assistance funds on the 90 side of the 90/10 calculation. These changes produce some savings to the taxpayer in the form of reduced expenditures of title IV, HEA aid to institutions that are not able to adapt and lose title IV eligibility. As indicated in the *Regulatory Impact Analysis*, we estimate transfers are reduced by -\$292 million from the changes to the 90/10 provisions. These reduced transfers are mostly a result of the statutory changes made by Congress to amend the 90/10 provision. In as much as only repayment of principal on institutional loans and ISAs may be counted as revenue, the regulatory changes may further decrease proprietary institutions' incentive to rely on such potentially costly student financing options to meet 90/10 requirements. Costs to institutions include the need to ensure compliance with the regulations. For example, institutions unable to generate sufficient non-Federal revenues through their eligible programs may create programs that are not title IV eligible to generate revenue to meet 90/10 requirements.

The changes to the CIO regulations benefit institutions and the Department by clarifying requirements as well as providing timely feedback for institutions undergoing CIO

transactions. Students and borrowers benefit from the 90-day CIO notice requirement that provides students with timely information that impacts their education and enables them to make future decisions based on that knowledge. Costs to institutions include compliance and the paperwork burden associated with the increased reporting and disclosure requirements.

On July 28, 2022, the Secretary published a notice of proposed rulemaking (NPRM) for these parts in the *Federal Register* (87 FR 45432). These final regulations contain changes from the NPRM, which we explain in the *Analysis of Comments and Changes* section of this document.

Public Comment: In response to our invitation in the NPRM, 142 parties submitted comments on the proposed regulations.

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address technical or other minor changes or recommendations that are out of the scope of this regulatory action or that would require statutory changes.

Analysis of Public Comment and Changes: Analysis of the comments and of any changes in the regulations since publication of the NPRM follows.

General Comments Regarding the Negotiated Rulemaking Process

Selection of Negotiators and Negotiated Rulemaking Process

Comments: A few commenters wrote that there should have been other negotiators to represent other interests or sectors, including ISAs, proprietary institutions, and veterans. A few commenters stated that the Committee members were not sufficiently familiar with the issues involved in 90/10. One commenter questioned why the Department selected a Committee member whose employer was under investigation by the Department of Veterans Affairs (VA) Office of Inspector General. One commenter claimed that the Department did not provide adequate time for Committee negotiators to consider the Department's proposed language. Finally, one commenter stated that because 90/10 negotiations happened in caucus that the consensus language does not meet the statutory requirement that negotiations provide for a comprehensive discussion and exchange of information.

Discussion: Section 492 of the HEA provides that the Secretary "select individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity in the industry, presenting both large and small participants, as

well as individuals servicing local areas and national markets." The Department identified the relevant subjects to be negotiated and invited the public to nominate negotiators and advisors. The Department reviewed the qualifications of nominees and made selections for Committee members. Further, during the first negotiation session, negotiators had the opportunity to suggest additional Committee members by consensus. The Committee added one additional Committee member representing civil rights organizations through this process. We have used this process for many years and believe it meets the statutory requirements for selecting negotiators. Further, none of the commenters identified nominated individuals who should have been selected but were not.

On October 4, 2021, the Department published a *Federal Register* document announcing public hearings on 90/10 (86 FR 54666). We held those hearings October 26–27, 2021. The Department also accepted written public comments from October 4, 2021, through November 2, 2021. We then held three weeks of virtual negotiated rulemaking sessions on January 18–21, 2022, February 14–18, 2022, and March 14–18, 2022, that we livestreamed.

The Committee adopted by consensus a set of protocols that allowed any Committee member, including the Federal negotiator, to call for a caucus with other Committee members. The protocols also stated that the Department would provide its proposed language prior to the start of the week's negotiation sessions, which the Department did with its initial proposed 90/10 language. During the last week of negotiations, the Federal negotiator and the negotiator representing proprietary institutions called for caucuses to discuss possible 90/10 regulatory language with a small group of negotiators during the final session. The Federal negotiator presented this language to the full Committee for discussion and review before taking the consensus check. This process met the statutory requirements and provided ample time for discussion of the regulations.

Changes: None.

Public Comment Period

Comments: A few commenters asked the Department to extend the public comment period an additional 30 days. These commenters pointed out that there were several large regulatory packages that impact the higher education sector out for public comments at once, and the commenters also observed that Executive Orders

12866 and 13563 cite 60 days as the recommended length for public comment. One commenter asked the Department why the Department's proposed regulations related to Title IX received more time for public comment than these regulations.

Discussion: As discussed previously, the Department's negotiated rulemaking process provides ample time for public comment and engagement before the public comment period. Additionally, the proposed regulations for 90/10 were the same as the regulations agreed to by consensus in March 2021, providing the public with additional time to review the Department's proposed regulations. Further, the regulations related to Title IX are not subject to the negotiated rulemaking process, and therefore the public did not have the same opportunity to weigh in on the regulations before they were published for public comment. The Executive orders provide a recommendation for an appropriate time for public comment, but that timeline is not a requirement, nor does it take into account the Department's individual process for regulating under the HEA. The Department declines to extend the comment period for an additional 30 days.

Changes: None.

Prison Education Program (PEP) (§§ 600.2, 600.7, 600.10, 600.21, 668.43, 668.234 through 668.242, and 690.62)

General Support

Comments: Several commenters submitted general letters of support by noting that the regulations will benefit both taxpayers and incarcerated individuals and may ultimately lead to lower recidivism rates, which could lead to a smaller prison population.

Discussion: We thank the commenters for their support.

Changes: None.

General Opposition

Comments: Many commenters stated that the regulations will be bureaucratic, burdensome, and costly and that the additional proposed regulatory requirements go beyond the statutory framework.

Discussion: The Department disagrees with these comments and believes the regulations strike an appropriate balance between imposing requirements that will increase access to incarcerated individuals, improving the quality of PEPs, and limit administrative burden to schools, correctional agencies, and other stakeholders.

We also disagree that the regulations exceed the scope of the statutory

authority for PEPs. The Department has the authority to expand on and clarify statutory text, and we believe that the requirements in the final regulations are a logical outgrowth of the HEA. For example, the main concern from commenters was the prescriptive nature of the best interest determination and the accompanying requirement to assess PEP outcomes under § 668.241. While the HEA requires the oversight entity to determine if a PEP is operating in the best interest of the confined or incarcerated individual, it does not prescribe how often and when that process should be undertaken. The regulations supply that necessary clarification.

The statute also requires the oversight entity to approve PEPs, but we heard from non-Federal negotiators and from commenters that the oversight entities may not be equipped to make these determinations because they are not education experts. By identifying what factors to consider, who to consult, and how often to revisit the determinations, we created a formal process with clear measurements that will be consistent across all oversight entities.

We also believe that the oversight entity should continue to reassess PEPs operating in a correctional facility because a PEP will not always be operating in the best interest of its population. For example, changes over time in program offerings, instructors, academic counseling, transfer of credits, or labor market trends might impact a PEP, such that it no longer operates in the best interest of the confined or incarcerated individuals. We believe that mandatory periodic assessment will ensure that PEPs serve the programmatic and financial purposes for which they were authorized. We have set reasonable standards, with extensive public input, to ensure that the process is not overly burdensome to the oversight entity.

Commenters also raised concerns about the initial two-year approval period, accreditation requirements, and reporting requirements. We respond to those comments and other commenter concerns in the individual sections devoted to those topics below.

Changes: See the discussion under Best Interest Determination (§ 668.241) for changes the Department has made in the final regulations.

General Comments

Comments: One commenter requested that the Department require standardization of access to technology for confined or incarcerated individuals across the United States and within States.

Discussion: The Department does not have the authority to require postsecondary institutions or correctional facilities to standardize technology across all spaces. Further, technology requirements will vary between PEPs, and a one-size-fits-all approach could inhibit the flexibility of institutions to offer appropriate forms of technology in their PEPs.

Changes: None.

Comments: One commenter stated that the Department should extend Pell Grant eligibility to individuals who have been released from a correctional facility. That commenter also recommended that the Department increase the amount of the Pell Grant.

Discussion: Under existing law, individuals released from a correctional facility will qualify for Pell Grant funds if they otherwise continue to meet all applicable eligibility requirements and enroll in eligible postsecondary programs.

The Department does not have the authority to adjust the maximum Pell Grant award because that amount is established annually through Congressional appropriations.

Changes: None.

Comments: One commenter stated that all Pell Grant funding received by a confined or incarcerated individual must go directly to support the individual's education and should not be used to support the postsecondary institution's main campus or other non-PEP locations.

Discussion: The Department lacks the authority to adopt the commenter's suggestion. The Department maintains authority over the use of Pell Grant funds only to the extent that the grants are appropriately calculated, awarded, and disbursed to students. As long as the institution follows all applicable laws and Department regulations, once Pell Grant funds have been correctly disbursed, the Department does not control institutional budgets or how institutions use funds that have been correctly applied to institutional charges.

Changes: None.

Comments: One commenter noted that the subcommittee that discussed these regulations during negotiated rulemaking should have included greater representation from oversight entities (which are defined in § 668.235). The commenter requested that in the future any issue that does not fit well with the regulatory agenda should have its own negotiated rulemaking instead of discussing the topic in a subcommittee.

Discussion: We believe the subcommittee had appropriate

representation from oversight entities. The eight-member subcommittee included representatives from both State departments of corrections and State correctional education directors, and the representative from State departments of corrections was added during negotiated rulemaking specifically to ensure additional representation in that area.

Moreover, the Department has successfully used subcommittees during several prior rulemakings to gain additional critical feedback from specialists with experience related to the issues to be discussed. Use of a subcommittee during the Affordability and Student Loans Committee Meetings was appropriate and valuable because the eight subcommittee members provided substantial background on the topic of postsecondary education in carceral settings to the main committee, offered numerous recommendations that were adopted by the main committee, and ultimately expressed their support for the draft regulations to the main committee at the conclusion of the negotiations, all of which enabled the main committee to reach consensus on the proposed regulatory language. Three members of the subcommittee also had a seat on the main committee, including representatives for independent students, private nonprofit institutions, and State departments of corrections. An additional member of the subcommittee presented information to the main committee and was available during the November and December sessions to answer questions.

Changes: None.

Comments: Many commenters requested that the Department provide guidance to ensure smooth implementation of the regulations, including guidance or additional actions the Department should take on the following topics:

- The Second Chance Pell experiment under the Experimental Sites Initiative.
- How to apply for PEP, step-by-step.
- Overcoming barriers to completing the FAFSA® and verification of application information.
- Supporting students with delinquent or defaulted Federal student loans.
- Automatically enrolling confined or incarcerated individuals with Federal loan debt into income-driven repayment plans.
- Cancelling Federal student loans if the borrower is incarcerated for a minimum of five years.
- Supporting individuals post-release in collaboration with the Office of Career, Technical, and Adult Education.
- The grievance or complaint process for confined or incarcerated individuals.

- Protecting confined or incarcerated individuals who do not meet Satisfactory Academic Progress (SAP) standards for confined or incarcerated individuals.

- Monitoring issues related to lack of access to technology and accessing coursework online.

- Dependency overrides for confined or incarcerated individuals.

- Return of Title IV funds (R2T4) calculations for confined or incarcerated individuals.

- The conditions for Pell restoration in the event of closure of an institution.

- Releasing and making public an annual listing of PEPs by correctional facility and State.

- Developing an interagency communications process between the oversight entity, accrediting or State approval agency, and the Department.

- Establishing that correctional facilities that are additional locations need not be included in Clery Act campus reporting.

- The roles and responsibilities of accrediting and State approval agencies, especially regarding accreditation requirements in § 668.237.

- The timelines for reporting requirements under § 668.239.

- The best interest determination under § 668.241(a), including data sources or infrastructure that are available to stakeholders.

- The role of the advisory committee.

- The role of community-based organizations.

Discussion: The Department appreciates the recommendations for additional guidance and actions the Department should take to support confined or incarcerated individuals and address other implementation issues that may arise. The Department plans to publish guidance addressing many of the topics identified by commenters. The Department is also currently developing a dedicated landing page for PEP resources about prison education programs, and we have also created a central mailbox, *pep@ed.gov*, for ongoing PEP questions from stakeholders.

Changes: None.

Definitions (§ 600.2)

General Comments

Comments: One commenter requested definitions and clarification of several phrases in the preamble to the NPRM, including “greater oversight” and “high program standards.” The commenter also asked what metrics we will use to ascertain whether a PEP is providing confined or incarcerated individuals with education that meets high program

standards, and how frequently and through what mechanism we will evaluate and report on such high program standards.

Discussion: The Department elects not to provide definitions of these terms or to outline these operational processes in regulation. Instead, the Department will consider providing guidance to postsecondary institutions, accrediting and State approval agencies, and oversight entities, as appropriate.

Changes: None.

Additional Location

Comments: Several commenters requested that the Department remove juvenile justice facilities and jails from the definition of “additional location” and exempt programs offered at such facilities from statutory and regulatory PEP requirements. They argued that the “scale” and cost associated with the regulations will harm small programs.

Discussion: The Department declines to remove juvenile justice facilities and local jails from the “additional location” definition. The statute does not provide an exemption or waiver for such programs. To qualify for Pell Grant funds, the statute requires that all confined or incarcerated individuals be enrolled in an eligible PEP that adheres to statutory requirements. These regulations reinforce statutory protections for the benefit of all confined or incarcerated individuals by ensuring that PEPs also comply with requirements of the Department, the State authorizing agency, the accrediting agency or the State approval agency, and oversight entities.

Including juvenile justice facilities and jails as additional locations also allows the Department to track and monitor PEPs offered at these facilities and include them in data collection, trending, and reporting. This will help us better understand if certain PEPs need more oversight or supports, or both.

Finally, as noted in the NPRM, if an institution ceases all operations at a correctional facility (the additional location of the postsecondary institution) the confined or incarcerated individual may be eligible for Pell Grant restoration. 87 FR 45441. Without the inclusion of these facilities in the definition of an additional location, confined or incarcerated individuals may not be eligible for restoration of their Pell Grant if all PEPs at the correctional facility close.

Changes: None.

Comments: One commenter noted that some of their institution’s programs operating in a prison setting are extensions of their existing academic

programs and are not distinct programs operating at a correctional facility. The commenter asked if these types of programs would need to be reported as additional locations.

Discussion: Even if the program the postsecondary institution plans to offer at the correctional facility is an extension of a program offered either at the main campus or at another additional location, the program still must meet the definition of and be approved as a PEP. In addition, the correctional facility where that program is offered must be reported as an additional location.

Changes: None.

Comments: One commenter requested that correctional facilities only offering correspondence courses be removed from the definition of “additional location,” because the postsecondary institution would be unable to consistently review the facility or gain access to locations where the confined or incarcerated individuals complete their coursework.

Discussion: The Department declines to adopt the commenter’s request. We seek to hold all programs accountable to the standards outlined in these final regulations, regardless of the method of delivery. With the monitoring and oversight required under these regulations, the Department will be able to track and monitor PEPs offered at these facilities and include them in data collection, trending, and reporting. This will help us to better understand if certain PEPs need more oversight and supports.

The Department also noted in the NPRM that if an institution ceases all operations at a correctional facility (the additional location of the postsecondary institution), enrolled students may be eligible for Pell Grant restoration. 87 FR 45441. Without the inclusion of facilities where only correspondence courses are offered, confined or incarcerated individuals may not be eligible for restoration of their Pell Grant in the event all PEPs at the correctional facility close.

Changes: None.

Confined or Incarcerated Individual

Comments: The same commenters that requested removal of juvenile justice facilities and jails from the definition of “additional location” also requested removal of these facilities from the definition of “confined or incarcerated individual.” They argued that the “scale” of the regulations and cost associated with the regulations would harm small programs.

Discussion: The Department declines to make this change, for the reasons

described in the “additional location” discussion above.

Changes: None.

Comments: Several commenters suggested additions to the types of individuals who are not considered to be confined or incarcerated, including individuals in pretrial detention, individuals under correctional custody in temporary release programs, or individuals living in a halfway house.

Discussion: To be eligible for a Pell Grant, those meeting the definition of a “confined or incarcerated individual” must enroll in a PEP. Section 484(t)(1)(a)(i) of the HEA defines a “confined or incarcerated individual” as “an individual who is serving a criminal sentence[.]” An individual who is not serving a criminal sentence thus is not considered to be confined or incarcerated for the purposes of the PEP provision and would not be required to enroll in a PEP to establish eligibility for Pell Grant funds. The Department also notes that, under section 484 of the HEA, individuals living in a halfway house are not considered to be incarcerated and therefore would qualify for Pell Grant eligibility through enrollment in any eligible program, whether or not it is a PEP. While the Department did not amend the definition of “confined or incarcerated individual,” we plan to release guidance as necessary to assist postsecondary institutions with questions that may arise regarding student eligibility.

Changes: None.

Conditions of Institutional Eligibility (§ 600.7)

Comments: One commenter asserted that the waiver of the enrollment cap for incarcerated individuals under § 600.7(c) is overly narrow because the commenter believed it would only apply to a subset of PEPs that had already received an initial waiver. The commenter also believed that some of the considerations listed in § 600.7 may not be appropriate when determining whether to grant a waiver.

Discussion: The commenter appears to have misunderstood the application of § 600.7, which applies to any institution seeking a waiver to exceed the 25 percent enrollment cap on incarcerated individuals. As provided in the regulations, an institution that does not already have a waiver must wait at least two years from the date of its first approved PEP before applying for a waiver. We thank the commenter for making the Department aware of implementation considerations and note that we accepted a proposed revision from a different commenter below that will make the waiver language clearer.

While we do not anticipate a large number of applications that will exceed the 25 percent cap on enrollment of confined or incarcerated individuals, the Department intends to provide guidance for institutions that wish to exceed the 25 percent cap, as necessary. We also do not anticipate a large number of applications will exceed the 25 percent cap. The Department plans to provide direct one-on-one assistance to postsecondary institutions that wish to apply for the waiver to assist with regulatory compliance.

Changes: None.

Comments: One commenter asked whether non-profit institutions that exclusively provide educational services to students who are incarcerated will be required to apply for a waiver.

Discussion: The only automatic exemption in § 600.7(c) is for public institutions chartered for the explicit purpose of educating confined or incarcerated individuals. The Department declines to include private non-profit institutions in this automatic exemption. Public institutions are likely to be backed by the full faith of a State government, and there are stronger centralized administrative processes and support systems in place. We believe that these State processes will ensure that a postsecondary institution that is chartered for the purpose of exclusively providing educational services to confined or incarcerated individuals will receive a thorough review by an entity within the State government and be found capable of fulfilling the needs of confined or incarcerated individuals. Private non-profit institutions would thus have to apply for the waiver.

Changes: None.

Comments: One commenter noted that the draft language in § 600.7(c) refers to two 5-year waiver periods allowing expansion first to 50 percent and then to 75 percent incarcerated student enrollment, but that it is unclear what happens after the second five-year period has elapsed, specifically whether the Department would automatically extend the waiver if there was no reason to limit or terminate it.

Discussion: The Department will not automatically extend the waiver. At the end of the five-year period following the Department’s initial approval of the waiver, if the Department has not otherwise informed the institution that it is revoking the institution’s waiver, up to 75 percent of the institution’s regular enrolled students may be confined or incarcerated individuals. However, at each recertification, defined under § 668.13, the Department will review whether the postsecondary

institution is eligible to maintain its waiver. We believe that monitoring an institution’s administrative capability and financial health at recertification is important because the administrative capability and financial responsibility of an institution can fluctuate. Failures in either of those areas could call into question whether the institution is best situated to maintain its waiver or have it revoked. Additionally, the Department’s recertification evaluation provides an opportunity to evaluate whether the oversight entity has determined whether the program continues to be offered in the best interest of students and whether the program continues to meet all of the Department’s requirements for PEPs. We have the authority to review for compliance as a normal part of operational considerations and decline to include additional regulatory language to this effect.

The Department agrees, however, that certain language in proposed § 600.7(c)(4)(i)(B) is unclear regarding the extent of available waivers. That provision allows up to 75 percent of an institution’s students to be confined or incarcerated “for the five years” following the period described in § 600(c)(4)(i)(A) (which allows enrollment up to 50 percent). Because the regulations are intended to cap institutions at 75 percent enrollment of confined or incarcerated individuals, the cited five-year clause is unnecessary.

Changes: To clarify that enrollment of incarcerated individuals at postsecondary institutions will be capped at 75 percent enrollment, the Department amends § 600.7(c)(4)(i)(B) to clarify that, following the period described in paragraph (c)(4)(i)(A), no more than 75 percent of the institution’s regular enrolled students may be confined or incarcerated.

Comments: One commenter questioned the rationale for the 75 percent enrollment cap given that the Department has the authority to limit or terminate the waiver at any point if it determines the institution does not meet the waiver requirements.

Discussion: Section 102 of the HEA says that an institution of higher education is not an eligible institution for the purposes of the title IV aid if the institution has a student enrollment in which more than 25 percent of the students are incarcerated, except that the Secretary may waive the limitation for a public or nonprofit institution that provides a two- or four-year program of instruction (or both) for which the institution awards a bachelor’s degree, or an associate’s degree or a

postsecondary diploma, respectively. Because it is optional for the Secretary to waive the limitation, the Department has authority to set reasonable upward limits through regulation. A subcommittee member recommended the 75 percent limit on enrollment of confined or incarcerated individuals, and the Department formally adopted the recommendation, which was agreed to by the committee. The Department believes that the upper limit strikes an appropriate balance between increasing options to serve this population and the heightened demands and responsibilities of operating successful PEPs. Public postsecondary institutions that are specifically chartered for educating confined or incarcerated individuals are exempt from the 75 percent cap on enrollment.

Some postsecondary institutions currently have a waiver to exceed 25 percent enrollment of confined or incarcerated individuals. Institutions that received a waiver prior to the implementation date of these regulations are currently permitted to enroll up to 100 percent of confined or incarcerated individuals and are automatically granted a waiver. However, we will limit the growth of incarcerated enrollment at those institutions to ensure consistent program quality and adequate oversight. Beginning on the implementation date of July 1, 2023, enrollment of incarcerated individuals in any such institution will be limited to 50 percent in the first five years after the regulations take effect, and the cap will be raised to 75 percent if the institution is granted an additional waiver after the initial five-year period.

Changes: None.

Comments: One commenter asked whether the entire postsecondary institution becomes ineligible for the title IV, HEA programs, or if only the PEP would lose eligibility if the Secretary limits or terminates an institution's waiver of the limitation on the percentage of regular students who may be confined or incarcerated.

Discussion: Under § 600.7(c)(6), the entire postsecondary institution becomes ineligible at the end of the award period that begins after the Secretary's action, unless the institution comes back into compliance or reduces its enrollment of confined or incarcerated individuals to no more than 25 percent of its regular enrolled students.

Changes: None.

Comments: One commenter asked the Department to restructure § 600.7(c) to separate the waiver from the waiver denial.

Discussion: The Department agrees with the recommended edit and believes the change will improve the clarity of the regulations.

Changes: Paragraph (c)(1) will now be split into paragraphs separately addressing waiver grant and waiver denial.

Commenter: One commenter asked the Department to define "demonstrated program success" and explain what is meant by "expand the number of incarcerated students."

Discussion: The Department intends to provide details of the waiver application process, such as information about program success and expanding the number of an institution's confined or incarcerated students, in subregulatory guidance.

Changes: None.

Comments: One commenter asked how the Secretary will utilize the required reviews, assessments and reporting by the accrediting agencies and the oversight entity to approve, deny, or delay the waiver request and increase.

Discussion: The accrediting agency and oversight entity must provide approval at various points the throughout the process. We note here and under the preamble discussion for § 668.237 that the PEP is not eligible if either the oversight entity or the accrediting or State approval agency denies approval. The PEP must meet all regulatory requirements to be an eligible PEP. The Department plans to release more subregulatory guidance to postsecondary institutions wishing to apply for a waiver and to institutions that already have the waiver.

Changes: None.

Comments: One commenter asked for clarification concerning the Secretary's revocation and reduction of the waiver under paragraph (c)(6)(i).

Discussion: If the institution demonstrates to the Secretary that it met all the requirements under paragraph (c)(1) prior to the end of the award year that begins after the Secretary's action to limit or terminate the waiver, then the institution may keep the waiver and need not reapply or reduce its confined or incarcerated student enrollment.

Changes: None.

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

Comments: One commenter noted that there should be an "and" at the end of § 600.10(c)(1)(iii).

Discussion: The commenter is correct.

Changes: We have added an "and" to the end of § 600.10(c)(1)(iii).

Comments: One commenter stated that the Department should remove

§ 600.10(c)(1)(iv), which requires Department approval for the first eligible PEP offered at an institution's first two additional locations, because it is too burdensome given other requirements.

Discussion: The Department disagrees that the requirements under § 600.10(c)(1)(iv) are excessively burdensome to institution. We also believe that the requirements outlined in the final rule, including securing all necessary program approvals, will benefit confined or incarcerated individuals, by ensuring that PEPs serve their best interests and avoiding needless exhaustion of their Pell Grant eligibility. The requirements will benefit postsecondary institutions and oversight entities by providing a clear regulatory framework. Finally, the rules will benefit the taxpayer by ensuring that Pell Grant funds are directed to postsecondary institutions that are compliant.

Changes: None.

Student Eligibility General (§ 668.32)

Comment: Multiple commenters stated that the Department must consider in these regulations ways to prevent postsecondary institutions and oversight entities from applying additional eligibility restrictions that are unrelated to academic qualifications. Commenters suggested the regulations should stipulate that PEPs cannot bar people based on nature or length of their sentence, for example. Alternatively, the commenters suggested that, at a minimum, the Department must require postsecondary institutions and oversight entities to disclose to accreditors, the Department, and confined or incarcerated individuals any additional eligibility restrictions they intend to put in place, including but not limited to restrictions based on sentence, release date, convictions, and facility-based disciplinary infractions.

Discussion: The Department declines to add additional disclosures as requested for a few reasons. First, we do not have the authority to regulate an institution's admissions requirements. Additionally, the Department also does not have the authority to mandate how the oversight entity manages its internal operations, including restrictions on enrollment in postsecondary programs. If a confined or incarcerated individual is eligible for Pell Grant, meaning the individual has met all student eligibility requirements under the HEA and the regulations, and the individual has been accepted into a PEP, that individual cannot be denied the Pell Grant for which they are eligible. Furthermore, there is no statutory or regulatory

provision that would prohibit a postsecondary institution from enrolling or admitting a confined or incarcerated individual into a PEP due to nature or length or the individual's sentence. For example, an institution could choose to admit a student that is likely to be released within a year even if the student's program is two years in length.

Changes: None.

Comments: One commenter asked the Department to clarify that confined or incarcerated individuals enrolled in PEPs through correspondence are eligible for a Pell Grant.

Discussion: A confined or incarcerated individual who is enrolled in a correspondence course as defined in § 600.2 is eligible for a Pell Grant, as long as the standards for student, program, and institutional eligibility are met. It is important to note, however, that if an institution offers correspondence courses to a student that is confined or incarcerated at a correctional facility and the student can complete at least 50 percent of the program through such correspondence courses, the institution must add that facility as an additional location.

Changes: None.

Institutional Information (§ 668.43)

Comments: One commenter disagreed that postsecondary institutions should be responsible for providing information regarding whether an occupation typically involves State or Federal prohibitions on the licensure or employment of formerly confined or incarcerated individuals. The commenter asserted that responsibility for making and reporting this determination lies with the State correctional agency. The commenter stated that providing such information would be costly and time consuming because of the diversity of convictions and changes in State law.

Discussion: The Department disagrees with the commenter. The postsecondary institution is the entity offering the educational programming and, as such, needs to be aware of licensing and employment conditions in the field. Therefore, it is best situated to ascertain State or Federal prohibitions on licensure or employment. Moreover, if a postsecondary institution chooses to offer a PEP in a State, it already must comply with § 668.236(a)(7) and (8), which require the program to satisfy certain educational requirements for professional licensure or certification, and thus the additional requirements in § 668.43 are not significant.

The Department notes that postsecondary institutions are not required to be aware of State or Federal

prohibitions on licensure or employment in States where they do not offer a PEP, unless the postsecondary institution offers it in a Federal correctional facility. For a Federal correctional facility, the institution is only required to be aware of any prohibitions in the State where most confined or incarcerated individuals will reside post release. See discussion of § 668.236.

Changes: None.

Comments: A few commenters requested that the Department require postsecondary institutions to disclose the use of any third-party vendors involved in the development, management, maintenance, and provision of programs, as well as involvement in marketing, recruitment, and enrollment management of programs, regardless of the way in which the vendor classifies or identifies its services to clients or the public.

Discussion: Postsecondary institutions are subject to all applicable requirements under § 668.25, which pertain to contracts between an institution and a third-party servicer. Also, the Department plans to establish procedures for eligible PEP applications. Therefore, we decline to add specific regulations for PEPs. If the Department needs more information about third-party vendors, we have authority under § 668.239(a) to require the submission of reports.

Changes: None.

Comments: One commenter requested clarification on the word "other" in § 668.43(a)(5)(vi). The commenter stated that neither paragraph (a)(5)(vi) nor the preceding paragraph (a)(5)(v) refers to a specific State or group of States that would be distinguished from the "other" States referred to in paragraph (a)(5)(vi).

Discussion: The "other" States referenced toward the end of § 668.43(a)(5)(vi) are those not already identified earlier in the sentence through § 668.236(a)(7) and (8). Section 668.236(a)(7) and (8), respectively, require a PEP to meet any applicable educational requirements for professional licensure or certification, and not offer education that is designed to lead to licensure or employment for a specific occupation if there are prohibitions on licensure or employment, "in the State where the correctional facility is located, or, in the case of a Federal correctional facility, in the State where most of the individuals confined or incarcerated in such a facility will reside upon release[.]" The "other" State reference in § 668.43(a)(5)(vi) refers to any other

State that falls outside those states identified in § 668.236(a)(7) and (8).

Changes: None.

Comments: A few commenters stated that the Department should provide institutions with a central location where they can access information about licensure restrictions in a particular State or disclose information about licensure restrictions and update that information annually.

Discussion: State licensure restrictions will likely continue to change and there is no language in the HEA or regulations that requires institutions or other organizations to report licensure restrictions to the Department. Therefore, at this time we decline to create a central location to access such information. The Department endeavors to provide up-to-date resources and technical assistance to postsecondary institutions, but it is incumbent upon postsecondary institutions, prior to and while offering a PEP, to remain current with State and Federal licensure restrictions and ensure they are correctly implementing the requirements in § 668.236(a)(7) and (8).

Additionally, institutions can avail themselves of resources provided by other organizations. For example, the National Reentry Resource Center maintains a National Inventory of Collateral Consequences of Conviction at <https://niccc.nationalreentryresourcecenter.org> that may be useful to institutions and students.

Changes: None.

Comments: One commenter indicated that the Department should expand its requirement that postsecondary institutions provide information about PEPs that typically involve State or Federal prohibitions on the licensure or employment of formerly incarcerated individuals, to require similar information from all educational programs designed or advertised as leading to a required license for employment in a State. The commenter acknowledged that the request may not be a logical outgrowth of the PEP regulations.

Discussion: The Department agrees that this requirement would not be a logical outgrowth of regulations focused on PEPs and, therefore, declines to make the requested change.

Changes: None.

Definitions (§ 668.235)

Comments: One commenter requested that the Department eliminate the definitions of "feedback process" and the "advisory committee" due to the complexity and cost.

Discussion: Because the definitions of “feedback process” and “advisory committee” are tied to many concepts throughout subpart P, including the best interest determination in § 668.241, we decline to remove these definitions.

Changes: None.

Comments: A few commenters suggested that the Department define PEP and proposed this definition: “an education or training program that meets the definitions in § 668.236. The [PEP] is created exclusively for incarcerated individuals as defined in § 600.2 who are eligible for and will be awarded a Federal Pell Grant to pay for the program’s cost of attendance, as defined in 20 U.S. Code § 1087.”

Discussion: We decline to make this change because § 668.236 defines a PEP and believe that adding an additional definition would be redundant. We agree with the commenter, however, that a PEP is distinct from an institution’s other eligible programs, and that the definition of “confined or incarcerated individual” under § 600.2 only allows a PEP to be offered at locations that are classified as Federal, State, or local penitentiaries, prisons, jails, reformatories, work farms, juvenile justice facilities, or other similar correctional institutions.

Changes: None.

Relevant Stakeholder

Comments: Several commenters requested that the Department add various stakeholders to the definition, including community colleges, boards, commissions, associations, and departments at the State level that oversee, coordinate, or otherwise represent community colleges, employers, workforce development boards, industry associations and community-based organizations; community-based organizations that provide reentry services; employers who have demonstrated a commitment to hiring justice-involved individuals; and current and former confined or incarcerated individuals.

Discussion: We do not believe it is necessary to add additional members to the relevant stakeholder definition. We are not convinced that an oversight entity could feasibly gather information from all of the new groups that commenters proposed in a reasonable timeframe. This could create administrative burden that could limit the implementation of PEPs. We note that the Department’s definition permits the oversight entity to include additional stakeholders as appropriate.

Changes: None.

Oversight Entity

Comments: Several commenters suggested removing the Bureau of Prisons and State departments of corrections from the definition of “oversight entity” or expanding the definition to include other members.

Discussion: Section 484(t)(1)(B)(ii) of the HEA confers authority on “the appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities, or by the Bureau of Prisons” to approve PEPs at any correctional facility it oversees. The Department proposed using the term “oversight entity” as a short-hand reference for that statutory list. The Department does not have the authority to amend the list. While the statute allows for some flexibility by including “or other entity that is responsible” for oversight, it will be within the purview of the Bureau of Prisons, State departments of corrections, and the correctional facilities themselves to determine if a different entity also has the requisite level of control.

Changes: None.

Feedback Process

Comments: One commenter stated that the advisory committee mentioned in the definition of feedback process should be mandatory.

Discussion: The Department believes that relevant stakeholder input through the feedback process is sufficient. Requiring an advisory committee could also be too burdensome for some oversight entity systems. Additionally, the Federal Bureau of Prisons would likely need to follow the Federal Advisory Committee Act if it convened an advisory committee, which would significantly limit the development of PEPs.

Changes: None.

Comments: One commenter asked the Department to include examples of input that the relevant stakeholders can provide to the oversight entity to assist with PEP operation, including information on reentry services, services offered by a community-based organization that are available to confined or incarcerated individuals, and information on in-demand industries or occupations with career opportunities available to formerly incarcerated individuals.

Discussion: The Department believes that these are all excellent examples of input that the relevant stakeholders can provide to the oversight entity. We decline to prescribe these in regulation, however.

Changes: None.

Eligible Prison Education Program (§ 668.236)

Comments: One commenter suggested that the Department require all PEPs to partner with a community-based organization offering reentry services and counseling.

Discussion: As a part of the application process for the first PEP at the first two additional locations, the Department requests information about reentry services, see § 668.238(b)(5), and the Department strongly encourages institutions to offer reentry services to students enrolled in PEPs. However, the Department declines to require reentry services as a part of every PEP. Because the statute does not require reentry services and we are prohibited from regulating on educational program offerings, we believe that requiring each program to maintain such services is beyond our authority.

We also note that oversight entities are required to consider whether a PEP’s academic services, including in advance of reentry, are comparable to similar services that the institution offers to its on-campus students. We believe that this consideration will provide institutions with an incentive to create strong reentry services for students enrolled in their PEPs.

Changes: None.

Comments: One commenter was opposed to excluding proprietary institutions from offering PEPs under § 668.236(a)(1).

Discussion: The HEA specifically excludes proprietary institutions from offering PEPs. See HEA, section 484(t)(1)(B)(i) (limiting PEP offerings to institutions of higher education as defined in sections 101 or 102(a)(1)(B) of the HEA, which do not include proprietary institutions).

Changes: None.

Comments: Several commenters questioned whether every PEP would get a two-year initial approval, who gives the two-year initial approval, what the accrediting or State approval agencies must do for the initial approval process, on what basis the oversight entity should make the two-year initial approval, and finally, how the term “initial” is defined in different contexts in the regulations.

Discussion: Every PEP must be approved by the oversight entity, which will permit initial operation of the program for up to two years. Every PEP is eligible to be considered for initial approval by the oversight entity for two years. The oversight entity has sole authority to provide the two-year initial approval. Initial approval may be granted without making a best interest

determination. Specifically, to allow flexibility and time to build the PEP, there are no specific requirements for the initial approval, and the oversight entity can use whatever information it has available. After two years, the oversight entity must assess all PEPs using the requirements in § 668.241(a). The accrediting or State approval agency must follow the requirements under § 668.237. The Department intends to provide guidance to further explain the regulatory text, as necessary.

Changes: None.

Comments: One commenter asked what happens if a PEP is not approved after the initial two-year period.

Discussion: If a PEP is not determined to be operating in the best interest of confined or incarcerated individuals, the PEP would lose eligibility. The Department will provide additional information on the process for the loss of eligibility in future guidance, as necessary.

Changes: None.

Comments: One commenter suggested that the Department reduce the two-year initial approval period to one year because, in the commenter's opinion, two years is too long to remove a failing program.

Discussion: The Department declines to make this change, because we believe that one year is not sufficient time to make reasonable determinations about whether a program is operating in the best interests of students. If an oversight entity has concerns about the quality of a program in the initial two-year period, it has the authority at any time to revoke approval of a PEP to operate in a facility that it oversees, even after the oversight entity has approved the program. Additionally, the Department has the authority under part 668, subpart G, to terminate the eligibility of a program that it has determined does not meet our PEP regulatory requirements.

Changes: None.

Comments: Multiple commenters offered that the initial two-year approval period under § 668.236(a)(3) is too short. The commenters claimed that such a short period will disincentivize institutions from offering slow-growing or small programs and that the initial two-year period is not based in evidence or research.

Discussion: The Department noted in the proposed rule that the two-year timeframe would ensure confined or incarcerated individuals receive the protections of the best interest framework in a timely manner, while recognizing the need for some time to gather the necessary information to meet the statutory requirement for a data-informed decision by the oversight

entity. Two years is sufficiently long enough to assess outcomes for shorter programs and will ensure accountability for poorly performing programs.

During negotiations, in response to similar concerns, the Department amended its proposed language in § 668.241 to make the assessment of certain "best interest" indicators—namely program outcomes—permissive instead of mandatory. This change will relieve institutions of conducting outcome assessments at the two-year point where no data may yet be available, while retaining an assessment of program inputs to ensure the foundation for the program remains strong.

Finally, we note that a two-year assessment timeframe is used elsewhere in the title IV, HEA regulations to establish continuity of operations and experience at new institutions. In § 600.6(a)(5), for example, to establish institutional eligibility, a postsecondary vocational institution must be in existence for at least two years.

Changes: None.

Comments: Multiple commenters requested that the Department add language to § 668.236(a)(4) either requiring or encouraging transferability of credits to more than one institution in the State in which the correctional facility is located.

Discussion: The Department declines to make this change, because section 484(t)(1)(B)(iv) of the HEA states that credits from a PEP must transfer to "at least 1 institution of higher education[.]" A postsecondary institution, the oversight entity, or the accrediting or State approval agency could set higher standards. The Department strongly encourages institutions to ensure that credits earned by students in PEPs are transferable to more than one other eligible institution, thus providing students enrolled in such programs with as many options as possible for continuing their education following release from incarceration.

Changes: None.

Comments: One commenter stated that Pell Grant eligibility through a PEP should be expanded to include enrollment in liberal arts subjects.

Discussion: Neither the HEA nor the applicable PEP regulations prohibit enrollment in liberal arts subjects offered through a PEP.

Changes: None.

Comments: In regard to § 668.236(a)(6) and (b), one commenter wrote that the text itself specifies that an institution already offering one or more PEPs that are subject to an initiated adverse action may maintain eligibility for those existing PEPs, provided that

they submit a teach-out plan. However, when read together, these provisions state that "An eligible PEP means an education or training program that . . . [i]s offered by an institution that is not subject to a current initiated adverse action," which, according to the commenter, would seem to create a blanket policy of ineligibility for programs offered by institutions subject to an adverse action.

Discussion: We believe the paragraph is clear both in the general description of the program and in defining the limited situation in which a program loses approval to enroll new students while teaching out those who are currently enrolled.

Changes: The Department made non-substantive technical edits to restructure the paragraphs to improve the flow and clarity of the text.

Comments: One commenter suggested that the Department further regulate on the teach-out plan required under § 668.236(b)(2), to require that the plan include options for confined or incarcerated individuals beyond transferring to a postsecondary institution once they are no longer incarcerated.

Discussion: The definition of "teach-out plan" is in § 600.2 and the requirements related to teach-out plans and agreements for accrediting agencies are in § 602.24(c). The Department declines to establish additional requirements for teach-out plans. The Department has not generally regulated on the contents of a teach-out plan because they are not one size fits all. The postsecondary institution's accrediting or State approval agency could also set standards for the teach-out plan.

Changes: None.

Comments: One commenter asked what would happen when a fully informed student is aware of licensure restrictions in advance but, nevertheless, desires to earn that credential and attempt to overturn an unjust licensure restriction. The commenter also recommended providing resources to approved PEPs, State Higher Education Executive Offices (SHEEOs), community-based partners, and prospective employers to help them advocate for the removal of unjust licensure restrictions that prevent people with felony convictions from attaining their educational and career goals.

Discussion: There is no exception in the regulations to waive the requirements under § 668.236(a)(8). While the Department acknowledges the commenter's concern, § 668.236(a)(8) was adopted to protect confined or

incarcerated individuals from unnecessary exhaustion of their Pell Grant benefits, and to ensure PEP enrollees receive the full benefit of their education. These goals are undermined if time and money are spent pursuing training in an employment field barred to the student. If a State or Federal law prohibits licensure or employment of the formerly incarcerated individual in the State the correctional facility is located, or, for a Federal correctional facility, the State the most individuals will reside upon release, then that individual cannot enroll in the PEP. In general, the Department cannot lobby, recommend lobbying, or provide resources to aid in lobbying a State legislature for the purpose of removal or modification of laws.

Changes: None.

Comments: One commenter asked the Department to require oversight entities and postsecondary institutions to annually review collateral consequences relevant to education and workforce training pathways and add new pathways that align with confined or incarcerated individual's interests and labor market demands in the State and region under § 668.236(a)(8).

Discussion: The Department does not have the authority to mandate that a postsecondary institution offer a PEP or add new pathways that better align with students' interests and labor market demands in the State or region. It is the postsecondary institution's choice whether to offer a PEP.

For institutions that choose to offer a PEP, while we can prohibit them from enrolling students in programs for fields where they know their students will be barred, we cannot dictate how they otherwise structure the academic component of the PEP. The Department's authority in postsecondary education matters is limited to issues relating to Federal student aid, the use of Federal funds, and the specific programs administered by the Department. The Department is prohibited from exercising any direction, supervision, or control over curriculum or a certain type of PEP.

Changes: None.

Comments: One commenter suggested that we consider advising postsecondary institutions that, where they offer a vocational program affiliated with employment bans for a confined or incarcerated individual with certain convictions, the provider should offer another non-degree or degree program that does not lead to such licensure or employment prohibitions.

Discussion: The Department does not have the authority to require that postsecondary institutions offer a

confined or incarcerated individual specific prison education programming. We also do not have any regulations prohibiting a postsecondary institution from providing non-degree programs.

Changes: None.

Comments: One commenter stated that the requirement to meet "any applicable education requirements" in § 668.236(a)(7) and (c)(1) and (2) is too broad in scope and would not allow for the materiality of education requirements to be considered. The commenter stated that postsecondary institutions may not have the resources to make these decisions annually.

Discussion: The requirements in § 668.236(a)(7) and (8) (and corresponding requirements in § 668.236(c)(1) and (2)) are based in statute and further clarified through the regulation. The Department has the authority to set reasonable parameters in regulation. PEPs may not be widely accessible within a correctional facility and confined or incarcerated individuals may have to rely on the postsecondary institution's determinations regarding educational requirements for and prohibitions on licensure or employment to a greater extent than would individuals who are not incarcerated. A postsecondary institution is not required to offer a PEP in a State where it is unsure about educational or licensure requirements or where it does not wish to remain up to date regarding these requirements. The Department believes many postsecondary institutions will recognize the benefits of the regulatory framework for confined or incarcerated individuals.

Changes: None.

Accreditation Requirements (§ 668.237)

Comments: One commenter asked whether the regulations define the actions an accrediting agency should take to determine the academic quality of a program for an established PEP through the Second Chance Pell program, or whether an accrediting agency would be allowed to fully use their process and professional assessment standards in determining the academic quality of a program.

Discussion: The accrediting agency must evaluate the first PEP at the first two additional locations. Additionally, the accrediting agency must conduct a site visit at those locations to evaluate the first additional PEP offered by a new method of delivery. They must also approve the methodology for how the institution made the best interest determination under § 668.241. We fully specify the accreditation requirements for PEPs in these final regulations.

Changes: None.

Comments: One commenter called for the elimination of § 668.237 because accrediting and State approval agencies already have standards by which they evaluate educational programs, regardless of location. The commenter stated that prescribing additional program evaluations is unnecessary and burdensome and will discourage participation in PEPs.

Discussion: The Department disagrees with the commenter. First, we wish to make clear that the policies and standards of accrediting and State approval agencies differ, and the Department's regulations for agency recognition do not require the evaluation of every new program or location. Furthermore, PEPs are unique in that participants may only have one educational option at their correctional facility. The Department has chosen to mandate additional safeguards so that the PEP is beneficial to the confined or incarcerated individual. We also believe that requiring that the accrediting or State approval agency take a more proactive role in ensuring quality in PEPs is a logical outgrowth of the statutory requirements. Section 484(t)(1)(B)(v) of the HEA specifically provides, for example, that an institution offering a PEP cannot be subject to an adverse action in the last five years "by the institution's accrediting agency or association."

Finally, the Department has similar rules for other programs, such as direct assessment programs under § 668.10(a)(5), that require evaluation by the accrediting or State approval agency to establish eligibility for title IV purposes.

Comments: One commenter believed that programs offered via correspondence courses should be exempt from the Department's requirements for accreditation review because postsecondary institutions are already required to be approved for that method of delivery by their accrediting or State approval agency. The commenter stated that the accreditation requirements would add unnecessary burden to correctional facilities and postsecondary institutions.

Discussion: The Department disagrees with the commenter, as we seek to hold all programs regardless of the method of delivery to the standards outlined in these final regulations. The Department believes that offering educational programming through any method of delivery in a correctional facility for the first time may present various challenges that require creative thinking and collaboration amongst several stakeholders. A new method of delivery

in a correctional facility may also involve unique obstacles that institutions are unaccustomed to, which in turn could result in risks to confined or incarcerated individuals that may not have been addressed when the accrediting agency or State approval agency last approved the institution's use of distance education or correspondence courses. The accrediting and State approval agencies are uniquely authorized to confirm educational quality and we believe they must do so for all methods of delivery.

Changes: None.

Comments: One commenter asked the Department to require that any postsecondary institution offering a PEP at an additional location for a program that also exists on the postsecondary institution's main campus be included in any programmatic accreditation that may be held by the institution for that same program.

Discussion: The Department declines this recommendation because it can only require a postsecondary institution to hold accreditation by a nationally recognized accrediting agency for title IV purposes. We do not have the authority to require an institution to obtain programmatic accreditation for its PEPs.

Changes: None.

Comments: One commenter requested that, under § 668.237(b)(1), we require the accrediting or State approval agency, in addition to the oversight entity, to review and approve all PEPs.

Discussion: The Department disagrees with this commenter and believes that such a requirement would be overly burdensome to postsecondary institutions and accrediting and State approval agencies. If the PEP is a "significant departure from existing offerings or educational programs, or method of delivery," § 602.22(a)(1)(i) and (a)(1)(ii)(C) already require review and approval by an accrediting agency prior to implementation.

Further, by requiring the Secretary's approval of the first PEP at the first two additional locations the regulations mirror the requirements of the accrediting and State approval agencies. We believe that a postsecondary institution that can sufficiently demonstrate satisfactory standards need not seek direct approval from the accrediting or State approval agency for every PEP. The regulations do not preclude an accrediting or State approval agency itself from requiring every PEP to be approved, however.

Changes: None.

Comments: Several commenters stated that the Department should approve the PEP prior to the accrediting

or State approval agency approval required under § 668.237(b)(1).

Discussion: The Department disagrees with commenters because we must have a completed application to decide whether the PEP meets all regulatory requirements, particularly for the first PEP at the first two additional locations.

Changes: None.

Comments: One commenter asked for clarification on § 668.237(b)(1), specifically about the process for a postsecondary institution that has recently completed the accreditation process for the first or second additional location at a correctional facility and is in compliance.

Discussion: Rather than regulating on operational process, the Department intends to provide this information through guidance.

Changes: None.

Comments: Several commenters suggested that the Department remove the requirement under § 668.237(b)(3) for site visits, because postsecondary institutions have no control over correctional facilities. Instead, the commenters suggested that the Department require program evaluation, review of contact, and Learning Management System delivery.

Discussion: The Department disagrees with the commenters' suggestion. While the postsecondary institution does not have control over the correctional facility, it is important for the accrediting or State approval agency to ensure educational quality is still being achieved in unfamiliar or atypical settings. We believe that it is very important to have in-person on-site visits so that the accrediting or State approval agency can review how confined or incarcerated individuals are learning regardless of the method of delivery of the instruction.

Changes: None.

Comments: One commenter asked whether they could assume that the next site visit to a correctional facility would occur during the next accreditation cycle rather than no later than one year after initiating the PEPs in the first two additional locations, if an existing Second Chance Pell school's accrediting agency completed their site visit within 5 years of the July 1, 2023, regulations and found the institution to be compliant.

Discussion: Under the regulations, a site visit must occur no later than one year after initiating the PEP at the first two additional locations. The Department wants to ensure that the PEP complies with all applicable accreditation requirements in these final regulations. We also want to ensure that sites are visited shortly after a PEP

begins, to confirm that there are adequate faculty, facilities, student support systems, and other resources. The next accreditation cycle for an institution could potentially be years into the future and would be too long for an accrediting or State approval agency to wait to confirm that the PEP met their standards. It would also be too long for a PEP that was not providing quality education and could mean significant numbers of students exhaust sizable portions of their Pell eligibility in furtherance of a worthless credential from a low-quality program.

Changes: None.

Comments: Several commenters asked for clarification about how the accreditation requirements in § 668.237(b)(4) relate to the best interest determination in § 668.241(a)(1) and whether that requirement is an additional evaluation. The commenters also asked whether the accrediting agency has the authority to invalidate the oversight entity's best interest determination if the agency does not find the oversight entity's methodology sufficiently rigorous.

Discussion: These are two separate and unique approvals in the regulations. The Bureau of Prisons or the State department of corrections (oversight entity) conducts the best interest determination under § 668.241. The other is the review and approval by the accrediting or State approval agency of methodology used the oversight entity in making the determination that the PEP is in the best interest of the confined or incarcerated individuals under § 668.237(b)(4).

Under § 668.237(b)(4) the accrediting or State approval agency has reviewed and approved the methodology for how the institution, in collaboration with the oversight entity, determined that the PEP meets the same standards as substantially similar programs that are not PEPs at the institution for the elements listed under § 668.241(a)(1)(i) through (iv).

Finally, the PEP is not eligible if either the oversight entity or the accrediting or State approval agency denies approval. The PEP must meet all regulatory requirements to be an eligible PEP.

Changes: None.

Application Requirements (§ 668.238)

Comments: One commenter recommended the removal of § 668.238.

Discussion: The Department believes an application process is necessary to ensure that the PEP is able to comply with all applicable standards. We require a similar process for direct assessment programs under § 600.10(c).

The Department is not proposing to approve all PEPs, but only the first PEP at the first two additional locations. We believe this is a reasonable requirement.

Changes: None.

Comments: One commenter stated there need to be explicit timeframes for each step of PEP approval.

Discussion: The Department will work expeditiously to review and approve or deny applications, but we choose not to provide timeframes for those approvals.

Changes: None.

Comments: One commenter requested that any eligible programs that participated in the Second Chance Pell experiment under the Experimental Sites Initiative should be automatically approved to avoid a bottleneck of applications.

Discussion: The Department will not exempt any postsecondary institutions or programs from the application process. Approving the first PEP at the first two additional locations will ensure that the PEP is able to comply with all applicable regulations. The Department continues to consider options for institutions currently participating in the Second Chance Pell experiment to transition to the new statutory and regulatory requirements and will announce its transition plans for the experiment at a later date.

Changes: None.

Comments: One commenter noted that the way § 668.238(a) is written implies that after one postsecondary institution gets approval to offer a PEP at a particular correctional facility, another postsecondary institution would not need approval to operate a PEP at that correctional facility. The commenter suggested the paragraph be updated to read: "Following the Secretary's initial approval of an institution's prison education program, additional prison education programs offered by the same institution at the same location may be determined eligible without further approval from the Secretary . . ."

Discussion: The Department agrees that this will clarify the regulation. Every postsecondary institution, without exception, must have the first PEP at the first two additional locations where the postsecondary institution offers that PEP approved by the Department.

Changes: We have revised § 668.238(a) to provide that following the Secretary's initial approval of an institution's prison education program, additional prison education programs offered by the same institution at the same location may be determined eligible without further approval from the Secretary except as required by

§ 600.7, § 600.10, § 600.20(c)(1), or § 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.

Comments: One commenter suggested that the Department require a memorandum of understanding between the PEP and oversight entity that requires library services and resources.

Discussion: The Department does not have the authority to regulate library services or resources.

Changes: None.

Comments: One commenter stated that that people are leaving prison having earned a significant number of credits but have no pathway to an actual degree and have exhausted their Pell Grant eligibility. The commenter stated that postsecondary institutions should be required to submit to the Department and oversight entity a curricular plan that details how the program's course offerings will lead to a degree. The commenter requested that the Department amend § 668.238(b)(1) to add a clause at the end as follows: "A description of the educational program, including the educational credential offered (degree level or certificate), the field of study, and curricular plan or pathway for degree completion."

Discussion: The Department's authority in postsecondary education matters is limited to issues relating to Federal student aid, the use of Federal funds, and the specific programs administered by the Department. We are prohibited for exercising any direction, supervision, or control over curriculum. We cannot evaluate the PEP curriculum but would expect a review of curricula by accrediting agencies and State approval agencies.

Changes: None.

Comments: A few commenters stated that the oversight entity should be required to prove that it properly gathered input from all the relevant stakeholders. The commenters said the Department should add a rule that requires the oversight entity to disclose all the feedback it received from stakeholders to the postsecondary institution, accrediting agency or State approval agency, and the Department. The commenters also said the Department should require postsecondary institutions to include this documentation in their application to the Department.

Discussion: The Department declines to make this change, because we have language in § 668.241(f) that requires a postsecondary institution to maintain records related to the eligibility of a PEP, which includes ensuring that the oversight entity responsible for

determining that the PEP is being offered in students' best interest appropriately conducted outreach to stakeholders as part of its evaluation of the program.

Changes: None.

Comments: One commenter requested that the Department insert language into § 668.238(b)(4) encouraging PEPs to align their data collection methodology and metrics with those required by the Integrated Postsecondary Education Data System, to ensure comparability of data across programs and ease the burden of submission.

Discussion: The Department does not want to hinder flexibility and innovation by requiring the standardization of methods.

Changes: None.

Comments: One commenter stated that requiring the postsecondary institution to explain the oversight entity's methodology for approving the PEP in § 668.238(b)(4) is significant, overly broad, and not well defined.

Discussion: Upon further review, the Department acknowledges that the oversight entity will not have to make the best interest determination for the first two years of the prison education program and therefore the postsecondary institution could not detail the methodology the oversight entity used in making the best interest determination under § 668.241(a). The information that the Department will now request is simply any information from the postsecondary institution that the oversight entity used to approve the prison education program. The Department will not prescribe this information in regulation to allow the oversight entity and postsecondary institution flexibility to be innovative in the application.

Changes: The Department will amend § 668.238(b)(4) to provide that an institution's PEP application must provide information satisfactory to the Secretary that includes documentation detailing the methodology including thresholds, benchmarks, standards, metrics, data, or other information the oversight entity used in approving the PEP and how all the information was collected.

Comments: One commenter stated that the Department needs to be more specific about information on reentry services requested in the application under § 668.238(b)(5). The commenter proposed breaking the paragraph into academic counseling which refers to the educational and career support students receive to help guide their enrollment in the prison education program and beyond; academic reentry counseling which refers to the support students

receive to plan and prepare for continuing their education post-release from incarceration; and reentry counseling which refers to preparing students for all facets of reentry, including securing housing, parole preparation, merit release, etc.

Discussion: While we decline to make this change in regulation, any postsecondary institution seeking approval of a PEP is welcome to provide this type of information to the Department. Reentry services are not required in the definition of a PEP in § 668.236, but if they are offered, the Department would appreciate that information.

Changes: None.

Comments: One commenter requested that the Department make clear that postsecondary institutions can partner with community-based organizations that have expertise in the field of prison education to help provide orientation, tutoring, and academic counseling.

Discussion: In § 668.238(b)(5), the Department notes that it is aware that postsecondary institutions partner with community-based organizations to provide certain types of services. This is allowable as long as the postsecondary institution is following applicable rules regarding title IV aid, including those relating to written arrangements under § 668.5.

Changes: None.

Comments: One commenter stated that § 668.238(b)(9), which allows the Department to request “[s]uch other information as the Secretary deems necessary,” is too open-ended. The commenter stated that postsecondary institutions may not be able to comply with the Department’s request if the information and supported data are not collected through current information technology data systems.

Discussion: The Department needs to be able to ask applicants for more information if any area of an application is lacking. The Department does not intend to request information from postsecondary institutions that they cannot obtain, and if the Department does so, the postsecondary institution will have the opportunity to note that it cannot obtain the information and why.

Changes: None.

Comments: Several commenters asked that the Department create specific application requirements relating to correspondence PEPs, because the regulations would be burdensome, not feasible and cost prohibitive for those programs.

Discussion: As noted throughout the discussion section, the Department will hold PEPs offered through all methods of delivery to the same standards. The

Department therefore declines to adopt the commenter’s suggestion.

Changes: None.

Comments: One commenter asked whether a postsecondary institution may offer PEPs in States other than where its main campus is located.

Discussion: A postsecondary institution may offer PEPs in States other than where its main campus is located. Note that every correctional facility where a postsecondary institution offers a PEP and enrolls a confined or incarcerated individual must be reported as an additional location of the postsecondary institution, even if the prison education program is offered through distance education or correspondence courses.

Changes: None.

Reporting Requirements (§ 668.239)

Comments: One commenter asked the Department to mandate additional PEP reporting requirements including which PEP courses are equivalent to courses offered on the main campus and are eligible for credit transfer; the share of confined or incarcerated individuals accessing Pell grants who complete the course; and the share of confined or incarcerated individuals accessing Pell grants who fail to complete the course, indicating the reasons, including transfer or release.

Discussion: The Department will have information on completion and withdrawal rates in our internal systems or databases. While we decline to incorporate other information collection into the regulation, we will consider these suggestions when developing an information collection under § 668.239(a).

Changes: None.

Comments: A few commenters believe that the Department should not require postsecondary institutions to report information about transfer and release through an agreement with the oversight entity under § 668.239(c). One of those commenters suggested that the Department modify the National Student Loan Data System to allow the oversight entity to directly provide this information.

Discussion: While we appreciate the commenter’s input and emphasis on the most efficient method to collect this important data, the Department declines to remove the requirements for institutions to obtain this information. The HEA requires that the Department provide annual publicly available reports to Congress about PEPs. Some of that information is about outcomes, including earnings outcomes or individuals who continue their education post-release. The Department

needs information about transfer or release dates to fulfill the statutory mandate, and it is unclear whether the Department can collect such information from the large number of separate agencies and facilities that would otherwise be required.

The Department will also provide data through various systems to the oversight entity and postsecondary institutions to assist in completing the best interest determination.

We commit to continue to analyze the feasibility of information collection directly from oversight entities or correctional facilities, and the regulatory language allows for that option. If the Department ultimately decides to collect such information from oversight entities or correctional facilities, we will not require institutions to obtain the information separately. We also intend to provide guidance regarding how and where transfer and release date information must be reported.

Changes: None.

Comments: One commenter expressed concern regarding the potential reporting under § 668.239(a). This section allows the Department to publish a notice in the **Federal Register** requesting data from participating institutions. The commenter is concerned that the Department will require postsecondary institutions to report data beyond the specific data items prescribed in the HEA. The commenter was concerned that we will request additional data from the oversight entities and institutions that they may not typically collect. The commenter noted that postsecondary institutions may not have effective information technology systems that are capable of collecting some of the data that the Department may request.

Discussion: Because the Department is required to submit an annual report to Congress, we must be able to collect applicable data items. We cannot publish in regulation all of the data elements that we will need from participating institutions, because we may need to update data items. The Department must have the flexibility to amend, change, rescind, or further develop collection items. We have used similar processes in other contexts. For example, we publish an annual notice regarding the application verification of FAFSA® information. The Department has not always added verification criteria; in fact, in response to data analysis and feedback received, we removed several verification items over the years and endeavored to streamline requirements annually. We hope to do the same with any notice regarding PEPs.

Changes: None.

Limitation or Termination of Approval (§ 668.240)

Comments: One commenter stated that the scope of the Department's authority to limit or terminate a PEP for violating any terms of proposed subpart P is unreasonable, too restrictive, does not consider the materiality of violation observed, and does not provide a process to appeal and time to cure the violation. The commenter suggested we clarify term violation and related materiality and establish a process for an institution to appeal and a time to cure the violation.

Discussion: The Secretary's action to remove a PEP would be the same as an action to remove any other eligible program, meaning that the action would be taken under part 668, subpart G; through a revocation action under § 668.13(d) for a provisionally certified institution; or addressed during an institution's application for recertification.

The decision to terminate, revoke, or end the approval during recertification of a PEP will be based upon the Department's evaluation of the violation and in consideration of the institution's ability to administer the program. While the Department declines to create a separate process in regulation for removing PEPs, we acknowledge the commenter's concerns about materiality. We have changed the language to clarify these decisions will be made on a case-by-case basis. The Department will work with postsecondary institutions to resolve reasonable issues or minor violations throughout of the PEP requirements.

Changes: We have revised § 668.240(a) to state that the Secretary may limit or terminate or otherwise end the approval of an institution to provide an eligible prison education program if the Secretary determines that the institution violated any terms of the subpart or that the institution submitted materially inaccurate information to the Secretary, accrediting agency, State agency, or oversight entity.

Best Interest Determination (§ 668.241)

Comments: Many commenters submitted concerns regarding the required assessment of the PEP by the oversight entity. Commenters generally stated that the Department was proposing to regulate beyond congressional intent and the Department's statutory authority. The commenters noted that postsecondary institutions and oversight entities may choose not to offer PEPs due to the regulatory burden and cost. Commenters

argued that there was little research to support the requirement to assess items proposed in regulation.

Many commenters also noted that the oversight entity may not have the expertise, data, training, or resources in the postsecondary education to set thresholds and benchmarks for the indicators related to outcomes, such as earnings and job placement rates of formerly confined or incarcerated individuals who have been released. Several commenters stated that the regulations do not consider labor market biases or post-release employment barriers to formerly incarcerated students.

The following are recommendations made by commenters to improve the best interest determination:

- Make all best interest indicator assessments permissive instead of mandatory, by changing "must" to "may" assess.
- Remove the exception for exceptional circumstances from the assessment of transferability of credits to any location of the institution that offers a comparable program.
- Make all the indicators optional except transferability of credits and academic and career advising for at least four years due to lack of data.
- Replace the indicators with faculty contact hours, meaningful engagement with peers, and ability to engage in research.
- Replace the indicators with civic engagement, family reunification, and increased self-efficacy.
- Assess other dimensions including physical, mental, and emotional issues.
- Add as optional metrics information about reentry services, whether credentials gained align with current labor market needs for in-demand industry sectors, and credentials that confined or incarcerated individuals gain through their participation that led to in-demand careers.
- Add an optional metric of how much regular and meaningful involvement programs have between students, faculty, and program administrators at the correctional facility.
- Replace metrics with access to support services and academic resources, tutoring, library resources and services, and technology.
- Add additional indicators that include whether the mode of course instruction for the prison education program is substantially similar to the primary instructional format at the home institution, preferably weighting in-person over virtual instruction, whether the demographics of the confined or incarcerated individual

match the wider prison population, regardless of the main campus population of the home institution, and whether the prison education program staff and faculty represent or have experience or background working with or pertaining to underrepresented populations and groups, including individuals directly impacted by systemic racism, generational cycles of poverty and exclusion, or incarceration.

- Remove threshold requirements for the indicators related to outcomes.
- Modify the indicator related to earnings post release to include a succeeding sentence to outline if earnings data for individuals who graduated from the prison education program has been recorded, that data should carry more weight than a comparison to graduates of programs offered by the institution writ large.
- Clarify and rearrange indicators related to transfer.
- Specify how the earnings indicator is calculated.
- Revert to the statutory language for the assessment of earnings.
- Replace the oversight entity with the accrediting or State approval agency as the entity that determines best interest.
- Remove the oversight entity from the best interest determination.
- Replace the oversight entity with the relevant stakeholders for the best interest determination.

Discussion: The Department disagrees with commenters that we are regulating beyond congressional intent and the Department's statutory authority. We have the general authority to regulate on the HEA unless otherwise directly prohibited from doing so in statute. We thank the community for its feedback on the best interest determination section. However, we acknowledge the wide-ranging comments and suggestions about the proposed best interest indicators, in particular those indicators focused on student outcomes. Based on persuasive commentary, we have decided to make all outcomes indicators optional but maintain the requirement that the current input indicators must be assessed by the oversight entity. We believe the input indicators are foundational requirements. It is important that the oversight entity assess whether confined or incarcerated individuals are receiving these necessary supports as a part of the PEP.

The Department believes that assessment of inputs and outcomes is paramount in establishing a standardized framework for the oversight entity. We reiterate that the oversight entity is not required to deny a PEP if it fails to satisfy one of the

indicators. The oversight entity can take the totality of circumstances into account, which we have purposefully left undefined for flexibility in making decisions that are unique to each correctional facility and each PEP.

While assessment of outcomes indicators is optional, we encourage the oversight entity to assess as many of them as possible. As we stated in the NPRM, we intend to provide the oversight entity with data to assist in making outcomes assessments, and we will do so even if the oversight entity chooses not to assess one or more of the outcomes metrics. The Department also will assess outcomes, because the HEA requires the Department to provide a publicly available annual report to Congress that includes numerous outcomes measures.

The Department may:

- Publicly report on the rates of confined or incarcerated individuals continuing their education post-release. As the Department obtains transfer and release dates from postsecondary institutions, we could calculate rates of reenrollment using our internal data systems.
- Publicly report of job placement rates. The Department may be able to calculate and report on job placement rates through employment information that may be available via the College Scorecard using Internal Revenue Service (IRS) data or using the employment information of high school graduates from the U.S. Census Bureau.
- Publicly report on earnings of formerly confined or incarcerated individuals through program-level earnings via the College Scorecard using IRS data.
- Publicly report on rates of recidivism of PEP graduates through data obtained through reporting to the Department from States required by the Workforce Innovation and Opportunity Act. There may be additional data on recidivism from the Bureau of Justice Statistics and the U.S. Sentencing Commission that the Department may also be able to incorporate into a published analysis.
- Publicly report about rates of program completion of confined or incarcerated individuals. Postsecondary institutions currently report graduation rates to the Integrated Postsecondary Education Data System (IPEDS) and the Department produces completion rates of title IV recipients through the College Scorecard.

Finally, there may be other items that the Department reports on as required by statute or if the Department requests information from the postsecondary

institutions through a **Federal Register** notice as required in § 668.239(a).

With respect to the indicator related to transfers in § 668.241, the Department accepts the suggestion to remove the exception for exceptional circumstances surrounding the student's conviction. It is not our intention to encourage postsecondary institutions to deny admission to formerly incarcerated students that were once enrolled in PEPs, and we are persuaded by the commenter that such language could form the basis for an institution's decision for such a denial.

With respect to the earnings indicator related to earnings, we have amended the language to no longer suggest a comparison to the earnings of a typical high school graduate. Although the Department continues to believe that post-graduation earnings are an important indicator of quality in postsecondary programs, we are persuaded by commenters that due to the ongoing barriers to employment for formerly incarcerated individuals and the resulting discrepancies in earnings between typical high school graduates and such individuals, it is not appropriate to compare the earnings of confined or incarcerated students who complete programs and are released from incarceration and the earnings of high school graduates.

The Department declines to add additional indicators or to further edit the remaining indicators to the regulation, but the oversight entity in collaboration with the relevant stakeholders through the feedback process has the flexibility to add other pertinent indicators relevant to PEP success.

The Department also declines to replace the oversight entity with the accrediting agency or relevant stakeholders. Section 484(t) of the HEA is clear that the oversight entity has sole authority to approve a PEP and make the best interest determination.

With these changes, the Department is confident that there are sufficient existing guardrails in the final regulations to protect confined or incarcerated individuals from subpar prison education programs, support postsecondary institutions and oversight entities, and safeguard the taxpayer investment.

Changes: We have revised § 668.241(a) to make the three outcome indicators—postsecondary enrollment following release, job placement rates, and earnings for graduates—optional factors that an oversight entity may consider in its determination of whether a program is operating in students' best interest.

Comment: One commenter suggested requiring that PEPs transcript credits in the same way that they would transcript courses offered to students who are not confined or incarcerated individuals.

Discussion: The Department does not have the authority to regulate an institution's transcripts.

Changes: None.

Comments: One commenter suggested that the Department require the oversight entity to identify how it determines the appropriate stakeholders, including any applicable conflict of interest standards.

Discussion: Under the statute, the oversight entity has the authority to approve a PEP and determine that it is in the best interest of confined or incarcerated individuals. Relevant stakeholders provide nonbinding feedback to the oversight entity. The list of relevant stakeholders is reported to the Department under § 668.241(f). We decline to add additional requirements, but we do believe that these final regulations will create a more informed, holistic process.

Comments: One commenter suggested that the feedback process under § 668.242(b)(1) be open to the public.

Discussion: The feedback process allows relevant stakeholders to provide nonbinding input to the oversight entities. The Department does not intend to regulate further on the parameters of the feedback process, to allow the oversight entity flexibility to set up that process.

Changes: None.

Comments: One commenter suggested that the Department provide guidance on how many indicators a PEP is permitted to not meet under § 668.241(b)(2) but still be deemed as operating in the best interest of confined or incarcerated individuals.

Discussion: The statute allows the oversight entity to not only approve a PEP's operation in a correctional facility but also to determine that it is operating in the best interest of the enrolled confined or incarcerated individuals. Apart from identifying the factors that the oversight entity may and must consider in making its determination, the Department will provide flexibility to the oversight entity and not regulate further in this area.

Changes: None.

Comments: Several commenters suggested that the Department further articulate an appeal process under § 668.241(c) if the oversight entity declines to permit a PEP from operating at a correctional facility. The commenters suggested that the appeal process include an explanation for the rejection, timeframes for an appeal,

incorporating a vote from the relevant stakeholders and a mediation process with the Department.

Discussion: The Department agrees that an appeal process is a best practice and supports the use of an appeal process by oversight entities wherever possible. However, the oversight entities include the Federal Bureau of Prisons and the State departments of corrections, and the Department does not have the authority to directly regulate the process of another Federal or State agency.

Changes: None.

Comments: One commenter suggested that the Department note in regulation that it will review the standards utilized by the oversight entity at recertification or in program reviews to ensure consistency and compliance across the oversight entities.

Discussion: The Department will ensure that postsecondary institutions are complying with the regulations during program reviews and at recertification. As stated under § 668.241(f), the postsecondary institution must maintain documentation about the PEP, which can be used by the Department for program reviews or recertification reviews.

Changes: None.

Comments: One commenter suggested that the Department include language that permits an approved PEP to continue in approved status if the institution provides all required materials to the oversight entity for approval 240 days in advance of the expiration of the program participation agreement. Section 668.241(e)(1) requires an institution to obtain final evaluations of each PEP not less than 120 days before the expiration of the institution's Program Participation Agreement (PPA), but there is no provision for delays by the oversight entity. The commenter requested the addition of regulatory language that permits approved programs to continue to be approved if the institution provides all required materials to the oversight entity for approval 240 days in advance of the expiration of the PPA. This, according to the commenter, would put the onus on the oversight entity to act in a timely fashion.

Discussion: The Department will consider the totality of circumstances on a case-by-case basis during the recertification process. The Department will consider whether the postsecondary institution is actively working with the oversight entity and the oversight entity indicates that it is actively reviewing the PEP. The Department declines to regulate on a

formal process for case-by-case considerations.

Changes: None.

Comments: One commenter stated that the term "subsequent final evaluations" under § 668.241(e)(1) is not clear.

Discussion: "Subsequent final evaluations" refers to the requirement that the oversight entity make a best interest determination at least 120 days prior to expiration of the postsecondary institution's program participation agreement, in perpetuity, as long as the institution seeks to maintain the eligibility of the PEP.

Changes: We have removed the word "final" from § 668.241(e)(1).

Comments: One commenter inquired whether the cross-reference to paragraph (c) in § 668.241(e)(1) was correct.

Discussion: The cross-reference was incorrect. We updated the paragraph for clarity.

Changes: The paragraph will now state that after its initial determination that a program is operating in the best interest of students under paragraph (a), the institution must obtain subsequent evaluations of each eligible prison education program from the responsible oversight entity not less than 120 calendar days prior to the expiration of each of the institution's Program Participation Agreements, except that the oversight entity may make a determination between subsequent evaluations based on the oversight entity's regular monitoring and evaluation of program outcomes.

Comments: Under § 668.241(e)(2)(i), the regulation requires the postsecondary institution to submit data on "all" students for the oversight entity to determine continued approval. One commenter requested that the Department delete the word "all," because in limited circumstances, data may not be available to the postsecondary institution.

Discussion: The Department agrees in part with the recommendation. It is not our intent for an oversight entity to deny a PEP for reasons beyond an institution's control, because the institution may lack data that is unavailable, for example, or that was not part of the oversight entity's determination of whether the program was being operated in students' best interest. We do not agree, however, with the commenters who suggested that the regulation should not apply to all students. Instead, we believe that the regulation should require the institution to provide all applicable data for students who were enrolled in the PEP, which would exclude data that the

oversight entity did not require to make its determination and any data that are unavailable and cannot be obtained by the institution.

Changes: Section 668.241(e)(2)(i) will be updated to reflect application of "applicable" factors, providing that each subsequent evaluation must include the entire period following the prior determination and be based on the applicable factors described under paragraph (a) for all students enrolled in the program since the prior determination.

Comment: One commenter suggested to remove the word "for" before "public disclosure" in § 668.241(f)(1).

Discussion: The Department views this as a style preference and declines to make the change.

Changes: None.

Comments: One commenter suggested that all documentation related to records mandated under § 668.241(f) be made public.

Discussion: The Department believes that requiring the oversight entity or postsecondary institution to publish all documentation related to the decision-making process would discourage participation. There are also confined or incarcerated individual privacy considerations that would be particularly problematic given the small size of many of these programs. The oversight entity or postsecondary institution would not be able to publish data that would indirectly identify an individual from the information provided.

The HEA requires the Department to release an annual data report that is available to the public, and we believe that will provide valuable information to both institutions and other policymakers sufficient to evaluate prison education programs.

Changes: None.

Comments: One commenter stated that State departments of corrections will require financial assistance to offset material and human resources needed to implement the regulations in § 668.241.

Discussion: The HEA does not provide for an administrative cost allowance for oversight entities, and the Department does not have the authority to establish such an allowance.

Changes: None.

Comments: One commenter asked the Department to define several terms, including "unique constraints," "career advising," "substantially similar," and "overarching requirement." In addition, the commenter asked many technical questions regarding how the process of the best interest determination will work.

Discussion: The regulations establish a framework to implement the statutory provisions. While we believe this framework is sufficiently clear without providing additional defined terms and decline to provide technical guidance in this document, the Department intends to provide guidance to oversight entities and postsecondary institutions regarding the best interest determination, as required by section 484(t)(2) of the HEA.

Changes: None.

Transition to a Prison Education Program (§ 668.242)

Comment: One commenter requested that the Department specify the date on which a confined or incarcerated individual needs to be enrolled in a formerly eligible program in order to qualify for transitional eligibility. The commenter stated that it is not clear whether this provision applies to a confined or incarcerated individual who was enrolled in an eligible program outside a correctional facility prior to becoming incarcerated. The commenter also stated that it is unclear whether this provision restricts the ability of title IV-eligible institutions to offer non-Pell-eligible programs in correctional facilities.

Discussion: Section 668.242(b) provides that an institution is not permitted to enroll a confined or incarcerated individual on or after July 1, 2023, who was not enrolled in an eligible program prior to July 1, 2023, unless the institution first converts the eligible program into an eligible prison education program as defined in § 668.236.

This provision applies to any individual who is confined or incarcerated and who is enrolled in any program at a correctional facility in which the individual is receiving any title IV aid. For example, if an individual was enrolled in a distance education program prior to July 1, 2023, and subsequently becomes incarcerated after July 1, 2023, that individual can continue receiving a Pell Grant only until they have reached the time or eligibility limits under § 668.242(a), unless that distance education program becomes a PEP, which would include reporting the individual's correctional facility as an additional location.

Finally, the Department does not have the authority to restrict the ability of an eligible institution to offer programs that are not eligible for title IV aid, including Pell Grants, at correctional facilities.

Changes: None.

Calculation of a Federal Pell Grant (§ 690.62)

Comment: One commenter stated that the Department should insert language requiring PEPs to include the cost of obtaining required professional credentials for confined or incarcerated individuals in PEPs in their cost of attendance calculations.

Discussion: The Department will not regulate on cost of attendance with these final regulations. The Consolidated Appropriations Act of 2021 made changes to allowable costs that may be considered in a confined or incarcerated individual's cost of attendance, which are "only tuition, fees, books, course materials, supplies, equipment, and the cost of obtaining a license, certification, or a first professional credential[.]" Therefore, a postsecondary institution may include the cost of obtaining the first professional credential in the individual's cost of attendance. The Department will provide additional guidance on the changes to cost of attendance components established by the Consolidated Appropriations Act of 2021 in the near future.

Changes: None.

90/10 Rule (§ 668.28)

General Support

Comments: Many commenters supported the 90/10 regulations and the consensus reached on the regulatory changes. Commenters overwhelmingly supported including financial aid administered by the VA as Federal revenue in the 90/10 calculation. Additionally, many commenters supported the changes to allowable non-Federal revenue and encouraged the Department to enforce the regulations with the full intent of the law.

Discussion: The Department thanks commenters for their support. We intend to fully enforce the regulations.

Changes: None.

General Opposition

Comments: Several commenters opposed the proposed regulations on the basis that the regulations unfairly burden one sector of higher education and restrict academic choices of students. Several other commenters opposed the changes to the regulations because they stated that proprietary institutions will be disincentivized to enroll veterans because of the regulations and the significant cost of running a separate and distinct compliance program to remain eligible for VA funds. These commenters further stated that this will lead to decreased opportunities for veterans returning to

civilian life after their service. Other commenters opposed the 90/10 rule generally because they claimed that the rule will cause proprietary institutions to increase tuition, incentivize proprietary institutions to recruit students who can pay for tuition without Federal funds, and reduce learning opportunities for low-income students and American students by encouraging proprietary institutions to recruit international students. One commenter suggested that the Department exempt certain institutions, such as those that offer terminal degree programs, post-baccalaureate programs, or medical programs from 90/10 because these institutions are already held to a high standard by other oversight mechanisms and provide unique value by helping the country fill its need for medical providers.

Discussion: The ARP modified section 487(a) and (d) of the HEA to require proprietary institutions to count all Federal funds in the numerator of their 90/10 calculation. The Department's regulations for which funds must be counted in the numerator and the formula for how these institutions must calculate the percentage of their revenue derived from Federal funds are consistent with statutory requirements. Further, the statute does not provide a basis to exempt certain proprietary institutions from this requirement.

Changes: None.

Comments: Several commenters generally opposed the proposed changes to allowable non-Federal revenue. A few of these commenters requested additional facts, evidence, data, or other sources the Department employed as a basis for our assertion that proprietary institutions have maneuvered to game the system and that there is a need to modify allowable non-Federal revenue or other components of the 90/10 calculation, including creating a disbursement rule and disallowing the proceeds from the sale of accounts receivable, in response to these behaviors.

Discussion: As stated in the NPRM, the Department based its regulations on observations of 90/10 calculations, audit workpapers, program reviews, and other oversight activities.¹ Based on the Department's observations and its experience enforcing 90/10 (and previous enforcement of 85/15), the Department believes that the changes to allowable non-Federal revenue are necessary to uphold the statutory intent of the 90/10 calculation.²

¹ See 87 FR 45454 and 87 FR 45459.

² As an example, Kofeod (2020) demonstrates that proprietary institutions account for a

Changes: None.

Calculating the Revenue Percentage (§ 668.28(a)(1))

Statutory Authority and Congressional Intent

Comments: Several commenters stated that the 90/10 regulations exceed statutory authority and Congressional intent. Some of these commenters stated that the proposed regulations do not provide a definition for “Federal revenue,” and the lack of a definition gives the Department an amount of discretion that Congress did not intend. A few commenters suggested that the Department restart the negotiation process to define “Federal funds.”

These commenters further stated that it is clear that Congress intended for the Department to include VA and DOD education funds used to attend such proprietary institution as “Federal education assistance funds,” and clarified that they are not disputing that portion of the regulations. These commenters further stated that Federal agencies are required to point to clear grants of congressional authority in order to enact the regulations that are contemplated. Commenters requested clarification on the congressional authority that the Department believes allows it to include other types of Federal education assistance funds as Federal funds beyond DOD and VA funding.

Discussion: The ARP amended the HEA to state that proprietary institutions should include “all Federal education assistance funds” in the numerator of their 90/10 calculation. It is apparent that Congress intended for institutions to include all other Federal funds, in addition to title IV funds, used to pay for tuition, fees, and other institutional charges in the numerator of their 90/10 calculation based on this language, not just DOD and VA funds. Further, Federal appropriations for education assistance programs and disbursements to institutions may change from year to year. We do not want to inadvertently create an incentive for proprietary institutions to identify a large source of Federal funds not on the list and then target students that receive this funding.

The Department defines Federal funds in § 668.28(a)(1)(i) as title IV, HEA

disproportionate share of GI Bill spending while graduating relatively few veterans, which he attributes to the exclusion of GI Benefits from the 90/10 calculation. See Kofoed, Michael (2020). “Where have all the GI Bill dollars gone? Veteran usage and expenditure of the Post-9/11 GI Bill.” *Brookings Institute* report available at <https://www.brookings.edu/research/where-have-all-the-gi-bill-dollars-gone/>.

program funds and any other education assistance funds provided by a Federal agency directly to an institution or student including the Federal portion of any grant funds provided by or administered by a non-Federal agency, except for non-title IV Federal funds provided directly to a student to cover expenses other than tuition, fees, and other institutional charges. The ARP language is broad, and a broad regulatory definition aligns with statutory intent. We do not believe it is necessary to renegotiate the definition of Federal funds because the current definition implements the statutory change in the ARP.

Changes: None.

Comments: A few comments stated that in *W. Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022), the Court held that Congress did not grant a Federal agency the authority necessary to create a regulatory scheme that the agency had attempted to enact, and under a body of law, known as the “major questions doctrine,” the Court found that, given both the separation of powers principles and a practical understanding of legislative intent, an agency must point to “clear congressional authorization” for the authority it claims. These commenters questioned whether Congress provided clear authorization for the Department to make any changes to allowable non-Federal revenue in the proposed 90/10 regulations given that the ARP only modified what funds must be counted in the numerator. In addition, these commenters stated the proposed regulations violate the Administrative Procedure Act (APA) as the regulations are arbitrary and capricious.

Discussion: The ARP modified the statutory provisions in section 487 of the HEA governing which funds institutions must include in the numerator of their 90/10 calculation. The statute did not prohibit the Department from amending other portions of the 90/10 regulatory calculation related to allowable non-Federal funds. Further, it included a section directing the Department to amend the 90/10 regulations through the negotiated rulemaking process, without any new limitation on our authority to revise other parts of the 90/10 regulations, as has been done in prior years. The Department has the statutory authority granted by section 437 of the General Education Provisions Act to promulgate regulations that are consistent with statutory requirements and necessary for us to effectively administer the program using the negotiated rulemaking process required in section 492 of the HEA. Additionally,

our rulemaking to determine how to calculate the 90/10 statutory requirement is not of such political and economic consequence that involves a major question under *W. Virginia v. EPA*. Finally, we have provided our reasoned basis for these regulations in the proposed and final rules.

Changes: None.

Comments: A few commenters requested clarification on the authority upon which the Department relied for its proposal that it has the authority to publish, on a semi-regular basis, “updates” as to what Federal funds should be counted in the 90/10 calculation without any notice and comment rulemaking or negotiated rulemaking process given that the ARP requires that its amendments to section 487 of the HEA be subject to negotiated rulemaking. These commenters stated that we should provide the public with an opportunity to comment on the definition of Federal funds.

Several commenters stated the Department has no authority to enforce the proposed rule prior to the effective date of the regulations, and that the HEA states that a regulation related to title IV programs cannot take effect during the current award year. These commenters further stated the Department lacks the authority under the HEA to force proprietary institutions to early implement the regulation, and that the ARP stated that its statutory changes should follow master calendar. Several commenters questioned the statutory authority on which we relied to justify enforcing a title IV regulation prior to the effective date of the final rule. They requested further clarification on how we will reconcile its application of the proposed regulations to proprietary institutions with a fiscal year beginning on January 1, 2023, with the clear statutory authority set forth in 20 U.S.C. 1089(c). These commenters recommended that revenues subject to the regulation should only be counted after July 1, 2023, regardless of the institution’s fiscal year calendar. In addition, these commenters stated that the Department cannot retroactively apply these regulations. Some of these commenters requested that, if the Department contends that the regulations are not retroactively applied, the Department provide legal support for the assertion.

Finally, a few commenters requested that we clarify on which HEA provisions we relied in determining that certain proprietary institutions, but not all, would be required to comply with the changes to the 90/10 regulations on January 1, 2023.

Discussion: Section 668.28(a)(1) defines Federal funds. The updates published in the **Federal Register** would simply notify institutions about which types of specific educational assistance funds are covered by the regulatory language. This is similar to how the Department publishes annually in the **Federal Register** which components of the FAFSA® institutions must verify, and this type of guidance does not require notice and comment.³ Therefore, the Department's rulemaking activity has met the ARP's statutory requirements that the revisions to section 487 of the HEA be subject to public involvement and the negotiated rulemaking process.

Section 2013 of the ARP has two provisions related to the timing of this change. First, it requires that these changes be subject to master calendar requirements. It also states that the amendments to section 487 of the HEA, which describe funds that must be included in the numerator of the 90/10 calculation, apply to institutional fiscal years beginning on or after January 1, 2023. This is why the Department chose to implement the regulations when an institution's fiscal year begins rather than requiring all institutions to implement the changes on January 1, 2023. The regulations meet both requirements because the regulations will apply to institutional fiscal years beginning on or after January 1, 2023, and institutions will determine their compliance with the regulations and file their related audited financial statements after July 1, 2023. The Department would enforce any consequences of failing 90/10 after July 1, 2023, and the regulations are, therefore, not retroactive in their application. It is not correct to characterize this process as "early implementation" of the regulations because the audit submissions and compliance requirements go into effect July 1, 2023. Proprietary institutions that fail the 90/10 requirements for the 2023 fiscal year will not be impacted until early in 2024, and an institution must determine if it fails 90/10 within 45 days after the end of its fiscal year.

Changes: None.

Definition of Federal Funds

Comments: A few commenters supported our definition of Federal funds as only those used to pay for tuition, fees, and other institutional charges. These commenters also supported not including in the definition of Federal funds those that are expressly used for other purposes,

such as housing or books when those are not included in institutional charges.

Discussion: The Department thanks commenters for their support. Our definition most accurately reflects statutory intent.

Changes: None.

Comments: Several commenters urged the Department to publish the list of Federal funds as soon as possible so that proprietary institutions can begin developing systems and procedures to track these funds. These commenters emphasized that institutions also need adequate notice so that they can effectively manage any changes they might need to make regarding admissions and enrollment. A few commenters asserted that this lack of clarity on which Federal funds must be included in an institution's 90/10 calculation at this point of implementation deprives institutions of fair notice of laws they are supposed to follow. Many of these commenters urged the Department to delay implementation of the new 90/10 regulations for a year or publish an abbreviated list in the first year if we cannot publish the list in a timely manner.

Discussion: The Department recognizes the need to publish the list so that proprietary institutions know which funds they must include, and we plan to publish on a timeline that will provide adequate time to account for the full list of Federal funds in the first fiscal year that begins on or after January 1, 2023.

Changes: None.

Comments: One commenter asked if Chapter 31 of the Veteran Readiness and Employment program would be counted as Federal funds in the 90/10 calculation. A few commenters recommended the Department exclude scholarship aid awarded through the Health Professions Scholarship Program (HPSP), the National Health Service Corps (NHSC) Scholarship Program, and the Indian Health Service Scholarship (IHSS) Program from the definition of Federal funds that institutions must include in the numerator of their 90/10 calculation. These commenters further recommended that we recognize the unique nature of these competitively awarded programs and not consider this aid as Federal funds under these regulations.

Discussion: The Department will publish in the **Federal Register** the full list of Federal funds that proprietary institutions must include. We will publish on a timeline that provides institutions with adequate time to account for the full list of identified

funds. The statute defines Federal education assistance funds that institutions must count as Federal funds as funds disbursed or delivered to or on behalf of a student to be used to attend the institution. Therefore, the list will include all identified Federal education assistance funds that meet the definition in statute.

Changes: None.

Comments: Several commenters supported including Federal funds awarded directly to students as Federal funds in the 90/10 calculation. A few other commenters opposed including Federal funds paid directly to students in the numerator of the 90/10 calculation. A few of these commenters expressed concern with how proprietary institutions should account for funds disbursed directly to students if the agency does not provide this information to the institution, and they recommended that the Department should limit this to only funds that the institution receives notice of. One commenter recommended that the Department accept a proprietary institution's use of a certification from an agency or student that contains the details of Federal funds received as sufficient basis for the Federal funds it includes in its 90/10 calculation.

Discussion: The Department appreciates commenters' support for including Federal funds disbursed directly to students in the numerator of the 90/10 calculation. The ARP amended section 487(a) of the HEA to require proprietary institutions to include "Federal funds that are disbursed or delivered to or on behalf of a student," and, thus, it is a statutory requirement to include all Federal funds disbursed to a student in the numerator of the 90/10 calculation.

For purposes of 90/10, we understand that proprietary institutions need a basis to calculate the Federal funds disbursed directly to its students. The Department considers a certification from an agency describing the Federal funds that a student received as a sufficient basis for this calculation. In cases where an agency does not provide this information to an institution, we will evaluate on a case-by-case basis whether the institution made a good-faith effort to obtain this information, including if a student certifies that they received Federal funds and the amount of funds received.

Changes: None.

Comments: A few commenters requested clarification on whether proprietary institutions would only need to include revenues from new Federal sources when those funds paid for institutional costs for the fiscal year

³ 34 CFR 668.56.

starting after the Federal program has been identified on the published list. These commenters requested further clarification on how proprietary institutions should manage the termination of students based on projections that the students' enrollment and reliance on Federal funds may cause the institution to violate the 90/10 rule. Additionally, one commenter suggested that the Department allow proprietary institutions to exclude in their 90/10 calculation newly identified Federal funds that are added to the **Federal Register** notice that a currently enrolled student receives. A few commenters asked that we publish any updates to the list of Federal funds by November 1 of the preceding year for an institution to be required to include those Federal funds in its fiscal year beginning on or after July 1 of the following year, following the master calendar outlined in section 482 of the HEA. One commenter suggested revising the regulatory language to state that proprietary institutions will only be required to include newly added Federal funds that are added to the **Federal Register** notice at least six months before the start of an institution's fiscal year.

Discussion: As we stated in the preamble to the NPRM, in instances where the Department updates the initial **Federal Register** notice midway through an institution's fiscal year, the proprietary institution will be responsible for including those funds paid for institutional costs the fiscal year starting after the Federal program has been identified on the published list.⁴ This lead time is also adequate for institutions to begin accounting for Federal funds from currently enrolled students, and therefore it is not necessary to allow institutions to exempt counting newly identified Federal funds that these students receive. Likewise, it is unnecessary to publish updates by November 1 or at least six months before the start of an institution's fiscal year for institutions to include those funds in a fiscal year beginning on or after July 1 of the following year. Proprietary institutions are responsible for generating at least 10 percent of their revenue from allowable non-Federal sources. How to meet this requirement is up to the institutions, provided that they follow regulatory and statutory requirements. The regulations neither contemplate, nor require, institutions to terminate the enrollment of students if they would otherwise fail the 90/10 rule. The Department hopes that institutions make enrollment

decisions that are best for students and clearly communicate about potential issues in a clear and timely manner.

Changes: None.

Comments: A few commenters requested clarification upon what basis, elements, factors, and evidence will the Department evaluate whether an institution has made a "good faith" effort to identify all Federal funds. They further requested clarification of what process and procedures the Department will employ to make this determination and what appeal process proprietary institutions will be provided. A few commenters also requested clarification on how the Department will observe institutional due process protections during the determination and appeal procedures.

Discussion: We will evaluate the facts of a situation on a case-by-case basis to determine if an institution made a good faith effort to identify all Federal funds. This evaluation may include what information was readily available to an institution and the materiality of funds from that Federal source to an institution's 90/10 measure. Institutions have opportunities to resolve disputes with Department staff regarding the 90/10 measure (for example, providing additional information and/or documentation), or through an administrative process if a resolution is not reached.

Changes: None.

Appendix C

Comments: Several commenters recommended the Department clarify and streamline appendix C in the final rule, including by combining certain refund and adjustment categories and by combining title IV and Federal funds into one section. A few of these commenters suggested that the Department work with external certified public accountants to revise appendix C. Many of these commenters also requested that we include additional examples of adjustment and revenue categories in appendix C to allow institutions to reflect revenues more accurately in their 90/10 calculation. One commenter stated that it is confusing for appendix C to include an institutional matching payment as a subtraction from cash payments as usually it is treated as a non-cash write off. In addition to asking that we publish the list of Federal funds in the **Federal Register** at least six months prior the start of an institution's fiscal year, a few commenters asked the Department to publish any updates to appendix C at least six months before the start of an institution's fiscal year.

Many commenters recommended that as these 90/10 changes are implemented, we should be vigilant in monitoring the cash flows of institutions, through the calculations derived from the modified appendix C, to better understand how the new regulations changes institutional financial behavior and to ensure the regulations are strongly enforced to protect students and taxpayers.

Discussion: The Department intends to evaluate the impact of the new 90/10 regulations on institutional financial behavior, as supported in the comments. Thus, the Department declines to combine Federal funds and title IV, HEA funds in appendix C so that the Department can more easily observe how the inclusion of other Federal funds impacts 90/10 rates. Likewise, we decline to collapse and combine the title IV and Federal funds category to only require institutions to report a topline dollar amount for Federal funds received because that would make it difficult for us to ascertain the impact of our new regulations. The Department expects institutions to apply title IV funds before applying other Federal funds to student accounts for 90/10 purposes because these regulations relate to title IV eligibility, and the Department intends to evaluate how the inclusion of Federal funds effects institutions' ability to comply with 90/10 requirements.

We understand that appendix C does not include every type of adjustment an institution may need to make when calculating 90/10. Appendix C is intended to generally outline how institutions must calculate 90/10 by providing an example that cannot reflect every situation. Institutions may need to add other refund or adjustment categories that are not included in our example to calculate their own 90/10 compliance. We have shown a variety of common line items in an institution's 90/10 calculation, and therefore we decline to add additional line items in appendix C. We also clarify that institutions should include a general adjustment category that reflects one adjustment amount for Federal funds rather than calculating and attributing adjustments to specific sources of Federal funds. However, to comply with title IV administration requirements, institutions must track adjustments and refunds by category of title IV funds, and the Department expects that institutions to include this level of detail in their 90/10 calculation for title IV funds.

We also clarify why we included an example of an institutional matching payment as a subtraction from cash

⁴ See 87 FR 54453.

payments rather than a non-cash write-off. There are instances where institutional matches to programs are cash payments rather than non-cash write-offs, such as when institutions use state grant funds for matching payments. How an institution reflects institutional matches in its 90/10 calculation is dependent upon the source of the match.

As with publishing new Federal funds, institutions would only be required to comply with changes to appendix C the fiscal year after the changes are made to appendix C, which provides sufficient time for institutions to comply. Additionally, appendix C is an example of how institutions should calculate their 90/10 compliance, and generally we only change appendix C if there are statutory or regulatory changes to the 90/10 calculation, which do not happen often.

Changes: None.

Disbursement Rule (§ 668.28(a)(2))

Creation of a Disbursement Rule

Comments: Several commenters expressed support for the creation of the disbursement rule. A few other commenters stated that they do not believe such a rule is necessary, and few of these commenters stated that it is unnecessary because the funds will be included in the 90/10 calculation in the following fiscal year. These commenters also claimed that the disbursement rule conflicts with cash management regulations and forces proprietary institutions to make what they described as a false 90/10 calculation. A few commenters also recommended that the Department add a good faith phrase to the regulations to better ensure that unintentional and unavoidable delays, resulting from various extenuating circumstances, will not become the basis for administrative capability findings or other adverse findings or actions against an institution.

Discussion: We appreciate the commenters' support. The Department disagrees with comments that the rule is unnecessary. We have observed through our review of 90/10 calculations and audit workpapers that some proprietary institutions delay disbursements to students to the next fiscal year in order to avoid two consecutive 90/10 failures. The Department also disagrees with commenters that these regulations conflict with cash management regulations. Proprietary institutions can still establish disbursement timelines that are consistent with regulatory requirements (see § 668.14), and we will evaluate whether an institution made timely disbursements, deviated from its

standing policy, or created policies for the purpose of impacting its 90/10 revenue calculation. In this evaluation, the Department would also consider if there were factors outside of the institution's control that impacted its disbursement timelines, and therefore does not agree with commenters that there is a need to add this to the regulations.

Changes: None.

Revenue Generated From Programs and Activities (§ 668.28(a)(3))

Activities Necessary for the Education and Training of Its Students

Comments: A few commenters opposed the new requirement that allowable non-Federal revenue from activities conducted by the proprietary institution that are necessary for the education and training of its students be related directly to services performed by students. These commenters objected to the preamble of the NPRM citing sales of hair care products as an example of disallowed revenue because commenters claimed that developing sales skills is important for students' careers.

Discussion: We disagree with these commenters. Requiring that allowable revenue from these activities be related directly to services performed by students more closely aligns with the statutory intent of 90/10.

Changes: None.

Ineligible Education and Training Programs

Comments: Several commenters generally supported the changes to allowable non-Federal revenue generated from ineligible programs. These commenters encouraged the Department to monitor the percentage of non-Federal revenue that proprietary institutions derive from ineligible programs and publish this information.

Discussion: The Department thanks the commenters for their support. We intend to monitor non-Federal revenues that institutions include in their 90/10 calculations through appendix C submissions.

Changes: None.

Comments: Several commenters opposed the changes that ineligible programs must meet for proprietary institutions to be allowed to count revenue generated from these programs in their 90/10 calculation. These commenters observed that ineligible programs have quality oversight measures, including approval by relevant State agencies or accreditation by another entity, and the commenters encouraged the Department to recognize

the quality of these programs. These commenters further stated that other guardrails in the HEA, the existing 90/10 regulations, and the educational marketplace ensure that the ineligible educational programs are subject to consumer protection standards and that the programs prepare students for gainful employment.

A few commenters stated that the Department's proposed regulations concerning the curriculum and content of ineligible programs exceed our statutory authority. One commenter also asserted that our rationale for the proposed changes to allowable revenue from ineligible programs is conjecture and does not meet APA standards.

In response to the Department's request for feedback about how to provide flexibility to proprietary institutions to offer ineligible programs that provide value to students while ensuring appropriate guardrails, many commenters supported ensuring that proprietary institutions offer ineligible programs that provide value to students. These commenters stated current regulations have allowed proprietary institutions to provide student opportunities that not only support their academic pursuits but complement their skills development and there has been a push toward badging and micro-credentialing as a mechanism to affirm student skills. These commenters further stated that the current language in § 668.28(a)(3)(iii)(A) through (D) more adequately provides the flexibility for proprietary institutions to offer ineligible programs that provide value to students. Some of these commenters suggested that, if the Department wants to enact consumer protection measures, we may consider amending § 668.28(a)(3)(iii)(E) or using the *Guide For Audits of Proprietary Schools and For Compliance Attestation Engagements of Third-Party Servicers Administering Title IV Programs* to provide specific direction regarding the standards for industry-recognized credential or certification rather than the proposed changes to § 668.28(a)(3)(iii) introductory text and (a)(3)(iii)(A) through (D).⁵ These commenters stated that auditors could require that proprietary institutions provide evidence that a credential is, in fact, industry recognized by documenting job announcements requiring or preferring such qualifications. They cautioned us against a narrow definition that will

⁵ This guide and accompanying guidance documents can be found on the Department of Education's Office of Inspector General web page under Reports and Resources: <https://www2.ed.gov/about/offices/list/oig/nonfed/proprietary.html>.

limit student opportunities and maintain the current regulatory language. A few commenters did not support the idea that the programs need to be related to the proprietary institution's eligible programs, stated that this requirement is not stated anywhere in statute or regulations, and stated that the idea that ineligible programs cannot offer courses that are also offered in title IV-eligible programs contracts the idea that they must be related.

Discussion: We recognize that some ineligible programs have consumer protection and oversight measures, but others may not since ineligible programs may not be required to be approved by any entity. This is unlike title IV-eligible programs, which are all required to meet the standards of accrediting agencies, State authorizing agencies, and the Department in order to be eligible to participate in the title IV program. Previously, when the 90/10 calculation (and previously 85/15) has been changed, proprietary institutions have made changes to their programs and related activities to meet the new revenue requirements. Some changes likely strengthened the programs and provided better outcomes for students, while other changes were likely made to exploit ambiguities in the regulations and that provided questionable or no value for students. We expect that proprietary institutions will adapt to the statutory change that requires all Federal funds to be included in the numerator of the 90/10 calculation to remain compliant with 90/10 requirements. In response to this change, institutions may seek other ways to bring in non-Federal revenue. The Department wishes to ensure that those revenues are in line with the statutory intent of the 90/10 calculation, which is that an institution provides enough value in its programs to account for at least 10 percent of its revenues. Thus, the Department is implementing appropriate guardrails that provide value to students without limiting the ways that institutions may offer innovative and flexible programs. These guardrails for ineligible programs were developed through negotiations with Committee members and reflect consensus of the Committee.

We appreciate feedback from commenters regarding consumer protection measures. With the guardrails that the regulations enact, it is not necessary to modify or curtail ineligible programs that meet the requirements in § 668.28(a)(3)(iii)(E). The Department may further consider how we can help auditors and proprietary institutions define industry-

recognized credential in a meaningful yet appropriately broad manner.

These regulations neither prescribe nor limit the curriculum or content of ineligible programs. In addition, the regulations only apply to revenue generated from ineligible programs that the institution wishes to include in its 90/10 calculation.

The Department agrees with commenters that stated that ineligible programs are not required to be related to the proprietary institution's title IV programs in order to be counted in the 90/10 revenue calculation under the proposed regulation and that these programs may differ. We clarify that we do not expect that ineligible programs must be related to an institution's title IV programs, but we do expect it to meet the outlined requirements in § 668.28(a)(3)(iii).

Finally, these guardrails only apply to revenue included in the 90/10 calculation. Proprietary institutions can continue to offer ineligible programs that do not meet the criteria outlined in § 668.28(a)(3)(iii), but they cannot include revenue generated from these programs in their 90/10 calculation.

Changes: None.

Comments: Several commenters opposed modifying § 668.28(a)(3)(iii) to exclude revenue from ineligible programs that include courses also offered in eligible programs. These commenters opposed the change because they stated that many ineligible programs include general education courses or other content-specific courses that are also included in title IV-eligible programs, and it is more efficient for institutions to be able to offer the same course in both programs. One commenter stated that it is illogical to exclude these courses because revenue generated from the same courses would count in the 90/10 calculation if included in an eligible program. Commenters also asserted that it is unrealistic to expect proprietary institutions to not have any overlapping courses. Additionally, some of these commenters opined that title IV-eligible courses have demonstrated quality, and therefore the Department's regulations that do not allow students in ineligible programs to enroll in these courses do a disservice to these students. These commenters requested the Department explain the intention of modifying the non-title IV revenue requirements to prohibit programs that include courses offered in an eligible program.

A few commenters stated that they understood why the Department proposed to exclude revenue from ineligible programs that include courses also offered in title IV-eligible programs,

but they believed it would be more appropriate to limit the number of courses an ineligible program could incorporate from eligible programs rather than outright prohibiting these courses. A few commenters asked how the Department would define "course" for the purposes of § 668.28(a)(3)(iii).

Discussion: We recognize that some proprietary institutions will need to adapt to meet the new requirement that proprietary institutions must count all Federal revenue in the numerator of the 90/10 calculation. The Department is concerned this change may incentivize proprietary institutions to push students to enroll in ineligible programs that generate 90/10 revenues rather than programs that are eligible for title IV aid, perhaps even ineligible programs that are similar to, or piecemeal duplicates of, eligible programs if institutions are allowed to include revenue from ineligible programs that offer even a limited number of courses offered in eligible programs. As some commenters noted, there may be eligible programs that include general education courses, as well as more specialized content, and institutions might recruit students to take the specialized content courses that would not be eligible for title IV funds on a standalone basis. Revenues from students who only enroll in courses from an eligible program without enrolling in the eligible program will not be counted in the institution's 90/10 revenues to avoid instances where students eligible for title IV funds might be persuaded to pay for some courses out-of-pocket to alter revenues an institution would report in the 90/10 calculation. The Department is not preventing institutions from offering any ineligible programs and these requirements only apply when an institution wants to include revenue from the ineligible program in its 90/10 calculation.

Regarding the definition of course in the context of ineligible programs, the Department would determine on a case-by-case basis if an institution should not count in its 90/10 calculation revenue from an ineligible program because the ineligible program included content from an eligible program for purposes of § 668.28(a)(3)(iii).

Changes: None.

Comments: Several commenters requested clarification on proposed § 668.28(a)(3)(iii)(B) and language included in the preamble of the NPRM which stated that a non-eligible course would need to be taught by one of its instructors of an eligible program. These commenters believed that statement differs from the proposed regulatory language, which requires that the course

be taught by one of the institution's instructors. These commenters stated the proposed rule does not conform to the consensus language and that our interpretations as expressed in the NPRM preamble will reduce educational opportunities for students seeking to enter essential professions. These commenters further stated that the NPRM preamble describing the proposed changes to § 668.28(a)(3)(iii) arbitrarily incorporates new language that changes the requirement to one that requires the non-title IV eligible educational program's courses be taught by instructors of a title IV eligible program in order for the associated revenues to be included in the 90/10 calculation.

Discussion: We agree with commenters that the regulatory language means that the instructor must be employed by the proprietary institution, not that the instructor must be an instructor in a title IV-eligible program. The Department clarifies that courses in an ineligible program must be taught by one of the institution's instructors, and that instructor may or may not teach in a title IV-eligible program. We interpret this language to mean an instructor employed by the institution, not an instructor under independent contractor status.

Changes: None.

Comments: One commenter supported the proposed regulations that would allow institutions to include revenue from ineligible programs offered at an employer facility. Several commenters opposed the Department's proposed regulations which would disallow revenue from ineligible programs not offered at the institution's main campus, an approved additional location, another school facility approved by the appropriate State agency or accrediting agency, or an employer facility. One of these commenters observed that institutions can offer up to half of title IV-eligible programs at an unapproved location. A few of these commenters asserted that distance education is a beneficial mode of education and should be allowed when employers accept training offered through this modality or when the program is taught at a main campus approved by the appropriate State licensing or accrediting agency.

Discussion: The Department appreciates the commenter's support for allowing institutions to include revenue from an ineligible program offered at an employer facility. We disagree with commenters that we should allow proprietary institutions to count funds generated from programs offered at other unapproved locations or through

distance education as non-Federal revenue in their 90/10 calculations. The Department worked with the Committee to develop the language regarding the location of ineligible programs and believes that the regulations strike a balance between providing necessary consumer protections guardrails for purposes of 90/10, while allowing proprietary institutions to incorporate revenue from non-title IV programs of value to students at other approved locations that provide Title IV programs and from their main campus. The guardrails negotiated by the Committee require proprietary institutions to exclude revenue generated from ineligible programs offered through distance education. Restricting program revenues for 90/10 to sources from approved locations will better provide a nexus for those ineligible programs to be offered by the institution's instructors. This will also ensure that the programs are offered from locations that have authorization from an institution's accrediting agency and from the states in which they are located. Limiting these ineligible programs from distance education or from unapproved locations will also permit greater oversight of the reported revenues by the Department. After weighing the potential benefits and risks, the Department has determined that the risk of abuse outweighs the potential benefits. We decline to allow institutions to include revenue generated from these ineligible programs in their 90/10 calculations. We further note that these regulations only govern revenue generated from ineligible programs that an institution counts in its 90/10 calculation and does not exclude a proprietary institution's ability to offer these programs.

Changes: None.

Comments: A few commenters requested clarification that the appropriate State agency that can approve an ineligible program may be the agency responsible for the profession and not the State educational agency. Commenters stated educational programs not eligible for title IV funding frequently provide specialized training education in specific trades, including entry-level healthcare programs, electrical and plumbing programs, and commercial truck driving. The commenters further stated that in these cases, State agencies outside of the States' Department of Education are often charged with approving trade-specific education programs, such as Boards of Contractors, State Licensing Authorities, Departments of State, Departments of Transportation, or the State may contract out the certification

process to a third-party acting under the authority of the applicable State agency.

Discussion: The Department interprets the appropriate State agency to mean the agency responsible for approving or licensing the program, which may not be the State education agency.

Changes: None.

Comments: A few commenters expressed concern that the term "self-study" is ambiguous, and depending on the structure of certain courses, the term "self-study" might mean a course that does not follow a prescribed lecture format, a course that has little or no direct student or instructor interaction, a course of independent study, or an asynchronous distance education course. These commenters requested clarification from the Department for what constitutes "self-study." One commenter claimed the term is impermissibly vague.

Discussion: The Department disagrees with commenters that the term self-study is vague and believes the definition of self-study course is self-evident. Section 487(d) of the HEA states that institutions can count funds paid by a student or on behalf of a student for an ineligible program in their 90/10 calculation if the revenue is generated from an ineligible education or training program if it meets certain requirements related to industry credentialing or external approvals from a state or accrediting agency. Self-taught or similar types of self-directed programs often do not represent anything other than an off-the-shelf product to which the institution adds no value or enrichment for its students. Even in instances where they do not represent an off-the-shelf product, they still represent little value-added by the institution because they are self-taught or directed. One of the purposes of the 90/10 calculation is to show that what the institution offers is of sufficient value that students or others are willing to invest non-Federal money to attend that institution. Charging for an off-the-shelf product and counting that as non-Federal revenue does not reflect any value from the institution any more than revenues from unrelated products an institution might sell.

Changes: None.

Comments: A few commenters stated that the regulations should allow institutions to count in their 90/10 calculation revenue from programs that prepare students for initial licensure in a field because the proposed regulations allow them to count revenue generated by programs that help students maintain or supplement licensure.

Discussion: Ineligible programs that prepare students for licensure would

generally be considered programs that provide an industry-recognized credential or certification. Therefore, the Department would consider revenue generated from these programs as permissible non-Federal revenue for purposes of 90/10, as long as these programs meet the other criteria outlined in § 668.28(a)(3)(iii).

Changes: None.

Comments: A few commenters noted that the current 90/10 regulations permit institutions to include revenues from programs that prepare students to take an examination for an industry-recognized credential or certification issued by an independent third party to count as non-title IV revenue in their 90/10 calculation, and the proposed regulations remove this provision. These commenters recommended that the Department continue to allow this practice. A few commenters also disagreed with the Department's assertion that quality programs generally prepare students to sit for an exam without an additional test preparation program. A few commenters also stated that students may struggle with taking an exam for an industry-recognized credential and noted that these test preparation courses help those students.

A couple of comments also asked for clarification on the proposed language. They questioned if institutions could include revenue from ineligible programs that train students for an industry-recognized credential that is issued by a third party, not the institution, as non-Federal revenue in their 90/10 calculation. A few of these commenters provided examples of programs that they believe the Department should recognize as allowable revenue.

Discussion: Test preparation programs do not constitute education or training as required by section 487(d) of the HEA. These courses represent review material, rather than the substantive training provided to a student that is supposed to underpin the test preparation classes. Additionally, the Department does not want to inadvertently incentivize institutions to offer lower-quality education or training programs that would have to be supplemented by taking a test preparation course to pass the exam for an industry-recognized credential in order to generate institutional revenue from the test preparation class, or add additional requirements such as test preparation courses that might unnecessarily raise costs for students.⁶ Institutions may provide test

preparation classes so long as the revenues are not included in the 90/10 revenue calculation.

The Department clarifies that the institution itself is not required to provide the industry-recognized credential for the program to be included in the 90/10 calculation. We consider revenue generated from ineligible programs that provide education or training needed for an industry-recognized credential that is issued by a third-party, such as commercial truck driving or allied health professions, as allowable non-Federal revenue for purposes of 90/10.

Changes: None.

Application of Funds (§ 668.28(a)(4))

Presumption That Federal Funds Are Used To Pay Tuition, Fees, or Other Institutional Charges

Comments: One commenter recommended that the Department modify the presumption that Federal funds disbursed directly to a student are used to pay tuition, fees, and other institutional charges. The commenter recommended that we clarify that this presumption only applies if the student makes a payment to the institution and that institutions should limit the amount that they include as Federal revenue as the smaller amount of the Federal funds the student received or the payment that the student made to the institution.

Discussion: The regulations already clarify that proprietary institutions only make this presumption if a student makes a payment to the institution. In terms of limiting the payment to the lesser amount of the Federal funds received or the funds the student paid the institution, section 487(d) of the HEA states that the institution should presume that "any Federal education assistance funds that are disbursed or delivered to or on behalf of a student will be used to pay the student's tuition, fees, or other institutional charges." Therefore, it would be inconsistent with the statute to limit the presumption to be either the lesser of the payment or the Federal funds received.

Changes: None.

Grant Funds Provided by Non-Federal Agencies That Are Comprised of Federal and State Funds

Comments: Several commenters recommended that the Department not require proprietary institutions to obtain the breakdown of Federal and State portions of grant funds from non-Federal agencies because this would be a *de minimis* amount and would be unduly burdensome for the institution.

A few other commenters recommended that the dollar amounts would be so small that the Department should allow institutions to count the full grant from the non-Federal agency as funds that can satisfy a student's tuition, fees, or other institutional charges, even if those grant funds have some Federal dollars. A few commenters suggested that the Department reduce the burden on institutions by publishing the Federal and State percentages of grant funds from non-Federal agencies for institutions to reference. One commenter suggested that we allow institutions to exclude students from their 90/10 calculations if those students received grant funds from a non-Federal agency and the proprietary institution is unable to determine the breakdown of Federal and State funds for the grant. Finally, one commenter asked to what lengths an institution should go to obtain this breakdown of grant funds.

Discussion: The Department disagrees with assertions that it will be unduly burdensome for institutions to obtain the Federal portion of grant funds. Non-Federal agencies are required to follow strict accounting procedures for Federal funds, and proprietary institutions should be able to work with the relevant agencies to obtain this breakdown.⁷ Institutions, not the Department, are the best situated entities to be familiar with grants from non-Federal agencies and to work with those agencies to obtain additional information as necessary. The statute clearly intends for all Federal funds to be captured in the numerator of the 90/10 calculation, and it would be inconsistent with the statute to allow institutions to count certain Federal funds as reducing other Federal funds or to not count a student's other Federal revenue in limited situations where the institution cannot obtain the breakdown of Federal and non-Federal funds. The regulations clarify that in instances where the institution cannot determine the amount of Federal funds, the institution must exclude the entirety of the funds from the calculation.

Although institutions must exclude funds for which they cannot determine the breakdown, we expect institutions to attempt to determine the Federal and non-Federal breakdown of grant funds. The Department would evaluate whether the institution sufficiently attempted to determine the Federal and non-Federal components of grant funds on a case-by-case basis in when the

⁷ OMB Circular A-87, revised May 10, 2004: www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A87/a87_2004.pdf.

⁶ 87 FR 45456.

institution is unable to obtain this breakdown.

Changes: None.

Funds Allocated Under Workforce Innovation and Opportunity Act (WIOA)

Comments: A few commenters stated the classification of WIOA-type funds as Federal education assistance funds would violate section 487(d)(1)(C)(ii) of the HEA, which states that an institution can apply funds provided under a contractual arrangement with a Federal, State, or local government agency for the purpose of providing job training to select individuals to satisfy a student's tuition, fees, or other institutional charges before it applies Federal funds to those charges. The commenters further stated that we have long recognized that WIOA funds fit this definition because WIOA funds are provided under a job training contract funded for the purpose of providing job training to dislocated workers and individuals who are unemployed, underemployed, or disabled. They opined that the Department has long permitted proprietary institutions to apply WIOA-type funds to tuition and fees prior to applying title IV funds. The commenters suggested that even under the ARP, an institution must continue to apply first any WIOA-type funds to a student's tuition, fees, or other institutional charges. One commenter concluded that categorizing WIOA-type funds as Federal education assistance funds and as job training funds applied first would render the presumption rule superfluous as to WIOA-type funds, in violation of Supreme Court precedent.⁸

Discussion: Institutions can apply non-Federal portions of WIOA-type funds to tuition, fees, and other institutional charges. Section 487(d)(1)(C)(ii) of the HEA refers to the application of funds that the institution receives from a contract. The section does not categorize those funds as Federal and non-Federal. It would be inconsistent with the statutory change enacted by the ARP, which states that institutions must include all Federal education assistance funds in the numerator of their 90/10 calculation, to continue to allow institutions to first apply Federal portions of WIOA-type funds to tuition, fees, and other institutional charges before applying other Federal funds.

Changes: None.

⁸ The comment cited *McNeill v. United States*, 563 U.S. 816, 822 (2011) citing *United States v. Wilson*, 503 U.S. 329, 334 (1992) (“[A]bsurd results are to be avoided.”)

Revenue Generated From Institutional Aid (§ 668.28(a)(5))

Institutional Loans

Comments: Many commenters supported the Department's proposal to clarify that only principal payments on institutional loans count as non-Federal for 90/10 purposes. One commenter also supported the Department clarifying that institutional scholarships defined in § 668.28(a)(5) exclude funds from the institution, its owners, or affiliates.

Discussion: We thank the commenters for their support. We clarified appendix C to show how institutions should record this when calculating 90/10. We modified the line item for institution loans in appendix C to show how institutions should note the full amount they received from students repaying institutional loans in the first column, but institutions should calculate and only include the principal payment amount in the second adjusted amount column.

Changes: We revised the line item showing institutional loans in appendix C.

Income Share Agreements

Comments: Many commenters generally supported the Department's proposed guardrails that institutions must abide by in order to include revenue from ISAs in their 90/10 calculation. Many of these commenters also supported not allowing institutions to count proceeds from the sale of ISAs in their 90/10 calculation.

Discussion: The Department thanks these commenters for their support.

Changes: None.

Comments: Several commenters opposed the proposed requirement that only the portion of cash payments that represent “principal payments” on ISAs or alternative financing agreements should be included in 90/10 calculations. These commenters stated that because ISAs do not have principal balances or charge interest, and because the amount that students may ultimately pay under an ISA (if any) is indeterminable until after the end of the end of the ISA, no portion of any student's payment is a payment of principal, and there is no established methodology for imputing or inferring what amount of a student's payment can reasonably be attributed to “principal.” These commenters stated that, in its current form, the proposed rule unreasonably fails to provide sufficient guidance to proprietary institutions that provide ISAs to comply with the proposed requirements. They recommended that we should count the entirety of each payment until the total

amount of payments exceeds the amount financed and any amount exceeding the amount financed should not count as non-Federal revenue.

A few other commenters requested additional clarification on whether the principal payments on the income share agreement or other financing agreement must be aligned with current institutional charges, or whether principal payments made following matriculation, but still related to an institutional charge, may be counted. The commenters stated that this would arise in a situation in which the borrower has graduated, but the terms of the payment extend beyond the completion date.

Discussion: The Department does acknowledge the commenters' assertions that ISAs may be structured differently than traditional private loans and may use different terminology than “principal” and “interest” for similar concepts. In the normal course of business, an entity must record what portion of payments they receive from students is considered profit and what portion is considered a return of capital. For 90/10 purposes, a portion of student payments must be allocated to profit, and a portion must be allocated as a return of capital. Institutions must limit the return of capital included in their 90/10 calculation to the amount of capital originally applied to tuition, fees, and other institutional charges according to the application of payments for the 90/10 calculation. We revised our terminology to be broader in two paragraphs and also revised the ISA line item in appendix C to reflect that the total amount of student payments that an institution receives is not the same amount that it counts in its 90/10 calculation. We modified § 668.28(a)(5)(ii)(B) to provide that the agreement clearly identifies the maximum time and maximum amount a student would be required to pay, including the implied or imputed interest rate, any fees, and any revenue generated for a related third-party, the institution, or any entity described above for that maximum time period, and § 668.28(a)(5)(ii)(C) to provide that all payments must be applied with a portion allocated to the return of capital and a portion applied to profit and that revenue, interest, or fees would not be included in the calculation.

We continue to believe that institutionally-issued ISAs and other alternative financial products should be treated the same as institutional loans in the 90/10 calculation. Institutions may only count in their 90/10 calculation the principal payments made on private institutional loans, and it is appropriate

to have similar requirements for ISAs. If the Department allowed an institution to include the full payments on ISAs up to the amount of institutional charges, this may incentivize the use of ISAs because institutions would be able to count the student's full payment amount in their 90/10 calculation rather than only a portion of the payment.

The Department, the Truth in Lending Act (TILA), and its implementing Regulation Z⁹ require that institutions provide numerous disclosures on private institutional loans so that borrowers can make an informed financial choice. Students should be able to make meaningful comparisons between ISAs and traditional loans. ISAs and other alternative financial products should be required to provide similar disclosures so that students can compare the various financial options available to them. The Department declines to remove the disclosure requirements and believes that institutions base the imputed or implied interest rate it discloses based on the maximum time and amount that a student would be required to repay. These requirements only apply to revenue from ISAs or other alternative financing agreements that institutions wish to count in their 90/10 calculation, and these regulations do not apply to ISAs or alternative financing agreements that institutions do not wish to include in their 90/10 calculation or to ISAs or alternative financing agreements financed by an unrelated third-party that does not meet any of the criteria described in § 668.28(a)(5)(ii).

In response to questions about the application to tuition, fees, and other institutional charges, the Department clarifies that ISAs and other alternative financing products should be treated like institutional loans. This means that the relevant tuition, fees, and other institutional charges that the institution should identify in its agreement and consider when determining the portion of a student's payment that counts in its 90/10 calculation are those at the time the student signs the agreement. Institutions are also required to take into consideration the amount of payments for tuition and fees that were allocated to payments of Federal funds under the presumption in § 668.68(a)(4). The institution is responsible for keeping track of the relevant tuition, fees, and other institutional charges that were not deemed to be paid for with title IV funds to ensure that when the student begins making payments on the product, the institution does not count in its 90/10 calculation payments that exceed the

tuition, fees, and other institutional charges that were not paid by title IV funds. We have clarified that regulation to convey more clearly which institutional charges are relevant to the agreement.

Changes: We clarified § 668.28(a)(5)(iii)(A) to better communicate what stated institutional charges the agreement must not exceed. The Department revised § 668.28(a)(5)(iii)(B) to provide that the agreement clearly identifies the maximum time and maximum amount a student would be required to pay, including the implied or imputed interest rate and any fees and revenue generated for a related third-party, the institution, or any entity described above, for that maximum time period, and § 668.28(a)(5)(ii)(C) to provide that all payments are applied with a portion allocated to the return of capital and a portion allocated to profit and that revenue, interest, and fees are not included in the calculation. We also revised the line item in appendix C showing how institutions should count payments on ISAs covered by § 668.28(a)(5)(ii) in their 90/10 calculation.

Comments: Commenters stated that the Department lacks the legal authority to establish an interest rate limit, either real or imputed, on ISAs for 90/10 purposes or for any other purpose. These commenters stated that, even if the Department has such authority, the proposed regulation is arbitrary and favors more traditional private student loans over ISAs without any countervailing policy benefits. The commenters further suggested that, if the Department is correct in its concurrence with the Consumer Financial Protection Bureau's (CFPB's) assertion that ISAs are private education loans, then the Department has no more authority to restrict the imputed interest rates of ISAs than it has to restrict interest rates for more traditional private education loans. These commenters stated that interest rate limits on ISAs are regressive and opined that the regulation fails to fully define ISAs or alternative financing mechanisms. A couple of commenters asked if an institution could subsidize the interest rate if so that it would, in effect, be same as or lower than the comparable Direct Loan interest rate.

A few commenters stated that ineligible programs, by definition, are not eligible for title IV funding and noted there are situations in which individual students may not be eligible for title IV funds. Thus, they questioned the Department's rationale for requiring that the implied or imputed interest rate

of ISAs not exceed the interest rate on comparable Federal loans since students may not be eligible for those loans. They also recommended that we amend the section governing interest rates for ISAs to include all borrower types, and not just undergraduates and graduates.

Discussion: In light of the comments the Department received regarding the structure of ISAs, we have removed the proposed limit on the interest rate that ISAs can assess if they are included in an institution's 90/10 calculation. We have decided to remove this proposed requirement because, as commenters noted, the rate will vary from student to student and at various times over a students' payment trajectory if their income changes.

Changes: The Department removed the proposed limit on the interest rate for an ISA that an institution must disclose to a student if the ISA funds are included in its 90/10 calculation in § 668.28(a)(5)(ii)(D). As a technical change, we moved proposed § 668.28(a)(5)(iii) to § 668.28(a)(6)(vii), redesignated proposed § 668.28(a)(5)(iv) as § 668.28(a)(5)(ii), and redesignated proposed § 668.28(a)(6)(vii) as § 668.28(a)(6)(viii). We moved this paragraph because this provision is more appropriately included in the paragraph that outlines what funds must be excluded from an institution's 90/10 calculation.

Comments: A few commenters requested clarification on whether § 668.28(a)(5), specifically the paragraph about ISAs, applies to both eligible and non-eligible programs. These commenters observed that the example in appendix C of revenue generated from ineligible programs does not include an example of these payments. A few commenters urged the Department to be mindful of student affordability concerns and allow institutions to include payments on ISAs or other alternative financing agreements in their 90/10 calculations with appropriate guardrails.

Discussion: Institutions can generate non-Federal revenue from payments on ineligible programs from sources identified under § 668.28(a)(5). As previously stated, appendix C is an example and is not intended to reflect every line item an institution may include. Finally, we believe these regulations align with commenters who urged us to allow institutions to include ISAs with appropriate guardrails.

Changes: None.

Comments: A couple of commenters asked us how we would evaluate the relationship between a vendor and an institution and if the term limitation applies to both ISAs and private loans.

⁹ 12 CFR part 1026.

Discussion: We revised § 668.28(a)(5)(ii) to clarify the relationships covered by these regulations. The Department would evaluate if the relationship between a vendor and an institution meets these criteria to determine if the ISA or alternative financing agreement is covered by this section. ISAs and private loans must meet the Department's established criteria for private loans, and those would be the applicable term limitation for them. (See 34 CFR part 601.) We also note that TILA and Regulation Z outline additional requirements for private education loans.

Changes: The Department revised the relationships covered by § 668.28(a)(5)(ii) to include agreements with the institution only or with any entity or individual in the institution's ownership tree, or with any common ownership of the institution and the entity providing the funds, or if the entity or another entity with common ownership has any other relationships or agreements with the institution.

Comments: A few commenters asked the Department what we would consider to be an ISA or alternative financing agreement.

Discussion: We would generally consider an agreement with a student or prospective student that is not a traditional loan but involves the institution or related party, as defined in § 668.28(a)(5)(ii), paying or reducing tuition, fees, or other institutional charges with the anticipation that a student will repay that entity later using other defined repayment terms as an ISA or other alternative financing agreement.

Changes: None.

Institutional Scholarships

Comment: One commenter argued that the Department should include "tuition discount" in its definition of allowable revenue from institutional scholarships because that is included in section 487(a)(1)(D)(iii) of the HEA, which describes allowable revenue from institutional scholarships.

Discussion: The commenter is correct about the content of this HEA section. However, section 487(d)(1)(a) of the HEA requires that proprietary institutions calculate their revenue for purposes of 90/10 through cash basis accounting. Tuition discounting is not a cash payment on a student's ledger, and therefore it would not be able to be counted as allowable institutional revenue using this method of accounting.

Changes: None.

Funds Excluded From Revenues (§ 668.28(a)(6))

Institutional Matches and Returned Federal Funds

Comments: One commenter asked the Department to clarify if institutional matching funds for Federal programs that are not title IV programs are excluded from a proprietary institution's 90/10 calculation. The commenter stated that they assumed the Department means to treat institutional matching funds the same for both title IV and Federal programs. The commenter also requested that the Department clarify if it intends for proprietary institutions to exclude all Federal funds that are required to be refunded or returned, or if the Department intends only for institutions to exclude title IV funds that must be returned under § 668.22. Similarly, the commenter stated that they assume the Department means to treat Federal funds the same as title IV funds for purposes of exclusions.

Discussion: The commenter is correct, and we have changed § 668.28(a)(6)(iii) and (iv) to clarify our intent. The final rule excludes from the proprietary institutions' revenue calculation all funds provided by the institution as matching funds for all Federal programs. The exclusion is not limited to just title IV programs. However, we clarify that if institutions use any qualified outside funds, such as state grants, to satisfy institutional matching requirements for Federal funds, institutions can include those qualified funds in their 90/10 calculation. This is consistent with what we allow for institutional matching funds for title IV programs.

Likewise, the final rule excludes from proprietary institutions' 90/10 calculation the amount of all Federal funds, not just title IV funds, that must be returned to their respective granting agencies.

Changes: The Department changed § 668.28(a)(6)(iii) to provide that, for the fiscal year, the institution does not include the amount of institutional funds used to match Federal funds. Further, the Department changed § 668.28(a)(6)(iv) to provide that, for the fiscal year, the institution does not include the amount of Federal funds refunded to students or returned to the Secretary under § 668.22 or required to be returned to the applicable program.

Sale of Accounts Receivable

Comments: Several commenters supported the Department's proposal to exclude proceeds from selling accounts receivable in an institution's 90/10

calculation. Several other commenters supported allowing proprietary institutions to count proceeds from accounts receivable as non-Federal revenue in their 90/10 calculation. Many of these commenters indicated that the HEA does not authorize the Department to deny an institution from taking accelerated tuition payments, which they stated is what proceeds from the sale of accounts receivable represent. A few commenters observed that institutions are currently allowed to count revenue from accounts receivable in their 90/10 calculation and asked the Department to explain its rationale for changing current practice. A few commenters requested clarification whether § 668.28(a)(6) is intended to exclude any amount of this revenue, or only the portion of the sale that is not tied back to tuition, fees, and institutional charges.

Discussion: The Department disagrees with commenters that the proceeds from sales of accounts receivable represent payments of tuition, fees, or other institutional charges for the purposes of education or training. As stated in the NPRM, through program reviews and oversight activities, the Department has observed instances where sales of institutional loans were made at inflated prices to entities that were later identified as being parties to other business relationships with the institution.¹⁰ Even instances where the sales of accounts receivables are to unrelated business entities, the Department has determined that those proceeds should be excluded because they are not for tuition and fees provided by the institution that should be counted in the 90/10 revenues. These payments are from entities that are purchasing assets in an expectation that they may be able to profit from collecting on those debts. Since these sales to other parties are not made to pay tuition and fees for students, excluding these proceeds from the institution's revenues for the 90/10 calculation is consistent with intent of the statute.

Changes: None.

Sanctions (§ 668.28(c))

Requirement That a Proprietary Institution Notify Students if It Fails 90/10

Comments: Many commenters supported the Department's proposed regulations to require an institution to notify students if it does not pass 90/10. A few commenters recommended that the Department not require institutions

¹⁰ 87 FR 45459.

to notify students because it might encourage students to prematurely leave the school when the failure may be minor or a calculation error. One commenter recommended that § 668.28(c)(3) note that proprietary institutions, when informing students of the institution's 90/10 failure for a particular fiscal year, may also provide a statement about the institution's remedial plan for seeking to achieve 90/10 compliance in the next fiscal year. One commenter asked the Department to define what it considers a notification.

Discussion: We appreciate support from commenters who agree that an institution should notify students if it fails 90/10 in a fiscal year. The Department disagrees with commenters that do not think an institution should be required to notify students because students should have timely information about a potential loss of title IV eligibility at that institution so that they can make informed enrollment decisions. Nothing in the Department's requirement that institutions notify students prohibits institutions from describing the steps that they are taking or will take to address the 90/10 failure.

Institutions are the best judge of how to communicate information to their students, but we would generally expect that a notification would be published on an institution's website, emailed to students, and communicated in some medium that all students can and do access. Additionally, the notification should use plain language and clearly communicate that a consecutive failure would mean that students are no longer able to use their title IV funds at the school.

Changes: None.

Notifying the Department if an Institution Later Determines That It Failed 90/10

Comments: A few commenters requested clarification of § 668.28(c)(4) and what the Department considers immediate notification that the institution obtained additional information and calculated that it had failed the 90/10 calculation more than 45 days past the fiscal year end date. A few commenters recommended we include a timeframe with a specific number of business days instead of requiring an "immediate" notification.

Discussion: We decline to include a certain number of business days that an institution must notify the Department because we recognize that institutions may obtain new information under different circumstances, and it is more appropriate to maintain the flexibility to determine if the institution provided an

immediate notification. Generally, we would interpret the plain language reading to mean that institutions notify the Department as soon as they obtain this additional information.

Changes: None.

Liability for Title IV Funds Disbursed After Losing Eligibility Due to 90/10 Failure

Comments: A few commenters opposed the Department's proposal to institute full liability for title IV funds disbursed after an institution fails 90/10 and encouraged us to continue our current practice of using the estimated loss formula to assess liability. These commenters observed that initial determinations of 90/10 compliance made in good faith may be overturned months later after many loan disbursements have been made based on additional information the institution obtains. These commenters argued that if the institution acted in good faith, the Department should not gain a double recovery on loan payments from students and punish the school. One commenter opined that this proposal seems designed to close any proprietary institution that loses title IV eligibility due to failing 90/10.

Several commenters requested clarification for when an institution's liability begins. A few commenters stated that an institution can only be liable for funds it disburses after it determines that it failed 90/10.

Discussion: The Department clarified § 668.28(c)(5) that institutions are liable for title IV funds that they disburse beginning on the first day of the fiscal year immediately following their second consecutive 90/10 failure. Instituting full liability beginning on the first day of the fiscal year after an institution loses title IV eligibility due to two consecutive 90/10 failures will better protect the integrity of taxpayer dollars. Based on the Department's experience, institutions monitor their compliance with 90/10 throughout the fiscal year and are aware when they are going to fail, or are close to failing, the standards. Establishing full repayment liability is necessary to discourage institutions from disbursing title IV funds after losing eligibility or delaying conducting their 90/10 calculation in order to prolong title IV eligibility where the institution would otherwise benefit by having its students being responsible to repay the ineligible loan funds that the institution received on their behalf. The decision to continue disbursing funds when there is a loss of eligibility, or a high risk of a loss of eligibility, falls solely with the institution and therefore the institution should solely be

responsible for the repayment of those funds. The Department disagrees with commenters that claimed that we do not have the authority to assess liability for any part of a fiscal year before the institution determines that it fails 90/10. Section 487(d) of the HEA establishes that a failure of the 90/10 revenue requirements for two consecutive years makes the institution ineligible. The regulations try to mitigate any liabilities for title IV funds provided to ineligible institutions by requiring the institutions to monitor and report promptly when an institution fails the 90/10 requirement for a fiscal year. Institutions that are at-risk of losing title IV eligibility for a second consecutive 90/10 failure should monitor their funding closely, including making inquiries of students about the sources of aid they may be receiving from Federal sources. Further, institutions are required to submit their 90/10 calculation within 45 days of the end of their fiscal year and, in most situations, institutions know or should know within that window if they failed 90/10.

Changes: The Department added language to § 668.28(c)(5) clarifying when liability begins.

Change in Ownership (§§ 600.2, 600.4, 600.20, 600.21, and 600.31) (HEA Sections 101, 102, 103, 410, and 498)

General Support

Comments: A few commenters offered unqualified support for the Department's suggested changes to the change in ownership (CIO) regulations. Many commenters offered some support, if only for our intent to clarify and improve the CIO regulations and the need to create regulations to address what commenters described as significant problems, while also offering suggestions for or objections to some of the proposed changes.

Discussion: The Department thanks commenters for their support. We have attempted to clarify and otherwise improve the CIO process for all concerned parties.

Changes: None.

General Opposition

Comments: Some commenters expressed concern that the Department is over-regulating since CIOs are uncommon and suggested this overreach is a result of some large, prominent, and disruptive failed transactions. Commenters disagreed that the regulations would provide greater clarity as the Department argued. Other commenters expressed opposition to individual components of the CIO regulations. One commenter

recommended that, rather than promulgate these regulations, the Department should work with Congress to clarify the CIO provisions as Congress works to reauthorize the HEA.

Discussion: There are several reasons for the Department pursuing these changes to the CIO regulations, including to provide greater clarity in, and codification of, current practice, as well as address distinct problems identified by the referenced Government Accountability Office (GAO) report at <https://www.gao.gov/products/gao-21-89>. As noted in the NPRM, and as reported in 2020 by the GAO, between January 2011 and August 2020, of 59 changes of ownership (involving 20 separate transactions) involving a conversion from a for-profit entity to a nonprofit entity, one entire chain that comprised 13 separate institutions was granted temporary continued access to title IV, HEA aid but ceased operations prior to the Department reaching a decision on whether to approve the requested conversion to nonprofit status. Three-fourths were sold to a nonprofit entity that had not previously operated an institution of higher education, increasing the risk that students may not get the educational experience for which they are paying. One-third had what GAO termed “insider involvement” in the purchasing of the nonprofit organization (*i.e.*, someone from the former for-profit ownership was also involved with the nonprofit purchaser), suggesting greater risk of impermissible benefits to those insiders. Altogether, the 59 institutions that underwent a change in ownership resulting in a conversion received more than \$2 billion in taxpayer-financed Federal student aid in Award Year 2018–19.

Given the high impact that will likely result from these transactions, we believe these regulations are necessary to carry out our statutory obligation to prudently implement and oversee the title IV, HEA student assistance programs. We respond to specific comments about pieces of the CIO regulations in the appropriate sections.

Changes: None.

Comments: Some commenters requested further clarification regarding what they described as the insufficiency of the current regulatory framework and requested the Department provide further explanation of, and justification for, the regulatory changes. These commenters stated that the amended definitions do not provide sufficient clarity and that the definitional changes could result in profound disruption to institutions undergoing the CIO process. These commenters further stated the

Department does not sufficiently justify under the APA the need for the changes to the definitions and should provide actual, realistic, and evidence-based justifications.

Discussion: The GAO report on nonprofit conversions is sufficient justification for these regulatory changes. It demonstrated both a significant increase in the number of CIOs, as well as significant title IV funds flowing to institutions involved in CIOs (and as specifically reviewed in the report, conversions to nonprofit status). Moreover, in reviewing numerous CIO applications, we believe these regulations will provide necessary clarity about what will and will not lead to a successful CIO process. This clarity will in turn help institutions undertaking a CIO to meet the standards in these regulations more easily. We disagree that the definitions are unclear; for example, the amended definition of “nonprofit institution” adds a description of institutional characteristics that do not generally meet the definition, which will ensure that institutions do not reach an inaccurate interpretation. We also disagree that these amended definitions will contribute to the disruption of institutions going through changes in ownership. Instead, the regulations create a more structured process that includes deadlines for when the Department must receive certain information and clarifies the standards for what constitutes a CIO. We also increase the percentage of ownership interest that will, by definition, constitute a change of ownership and control, sparing institutions that previously may have had to undergo lengthy CIO reviews for certain ownership changes that did not in fact represent a change in control. Finally, 20 U.S.C. 1221e–3 and 3474 authorize the Secretary to promulgate regulations relating to programs administered by the Department and as the Secretary determines necessary and appropriate to administer and manage the functions of the Department.

Changes: None.

Value of CIOs

Comments: Some commenters emphasized that CIOs are often in the best interests of schools and taxpayers in that they allow for new investment in institutions or the continued healthy operations of institutions. These commenters further stated that CIOs typically occur because an interested buyer has more resources to inject into the school to strengthen it, the current owner is planning to retire or leave the industry, or an investment fund has

timed out. These commenters added that CIOs can prevent the closure of institutions that may be struggling, thereby preventing disruption to students’ educational programs, and saving both taxpayers and institutions from covering the cost of avoidable closed school discharges.

Discussion: The changes will not preclude CIOs, and the Department acknowledges, as some commenters have stated, that a CIO can be beneficial for a school. That is true in some, but not all circumstances, so the changes also strive to protect students and taxpayers.

Changes: None.

Regulatory Implementation

Comments: In response to questions from the Department about when to implement these regulations, several commenters recommended at least one full academic year to allow institutions an appropriate amount of time to implement the regulations. A few commenters suggested delaying the rule up to 3 years. Other commenters requested clarity on how the new regulations would apply to institutions currently in the process of a CIO. They argued that these regulations should not apply to transactions currently in process. Several other commenters argued for the need to address this pressing problem without commenting on a specific implementation date.

Discussion: In considering the implementation question further, the Department believes it is appropriate to follow the master calendar provision in section 482 of the HEA and have these regulations take effect on July 1, 2023. The Department is concerned that as the number of applications for CIOs continues to grow it is important to put in these rules clarifying the process as soon as possible. Doing so will help institutions put together transactions that are reviewed in a more efficient manner. We disagree with waiting one or as many as three years for the implementation of these regulations. Given that these regulations consider the structuring of transactions rather than the way institutions operate, we do not believe that institutions will need significant time to adjust the way they administer the title IV programs to meet these requirements. As such, we see no need to delay the implementation date.

Regarding CIOs that are underway, because these regulations will go into effect on July 1, 2023, any transaction that is slated to close on or after July 1, 2023, would be subject to the requirements in this regulation. However, the 90-day advance notice requirement would not go into effect

until July 1, 2023, as well. That means any transaction that is scheduled to close between July 1, 2023, and October 1, 2023, would not be subject to this 90-day requirement since that would require submitting a notice prior to the effective date of the regulations.

Changes: None.

GAO Report and Risk

Comments: Commenters requested clarification on the types of transactions that have proven extremely risky for students and taxpayers. Some commenters requested clarification on how the referenced GAO report that focused on nonprofit conversions informed the Department's approach to transactions that do not involve conversions.

Commenters stated that risk is an unavoidable part of any transaction and asked what level of risk we would be willing to accept. Commenters further stated that the Department provides no evidence of assessments of "imminent or excessive risk" to students and taxpayers and requested examples of previous transactions that constituted an unacceptable amount of risk.

Discussion: The GAO report explains the kind of risk that conversions entail and has been linked to. As noted above, the GAO report deals with conversions. However, all CIOs—whether they involve conversions or not—involve risk. When a new entity takes control of an institution, we are concerned with whether the institution has the ability and financial resources to operate the school. We have seen instances where a new institution either lacked the financial resources or was too burdened with debts or other obligations (whether to former owners or other creditors) to succeed. In other instances, an entity that has never operated a school struggles to maintain a school, or an entity that has operated a smaller school struggles to operate a larger school or to integrate additional campuses and locations into their operations. Because the concerns vary and are often case-specific, the Department believes that the regulations lay out a concrete process that will ensure we receive the information we need to make a thorough review of a CIO, discourage the instances that have been the most concerning in the past, and provide flexibility for institutions that may previously have been subject to a CIO review because they met the current 25 percent threshold, but the proposed transaction did not actually involve a change in control.

Evidence that we could adduce to support regulating in this instance is based on Department experience with a

wide variety of CIOs—each of which is fact-specific—and does not lend itself to exposition in this final rule.

Changes: None.

Definitions (§ 600.2)

Comments: Some commenters expressed concern related to the amended definitions for "additional location" and "branch campus" and asked why those definitions refer to "physical" facilities. These commenters questioned what impact these changes have on the definition of "prison education programs," which are considered additional locations but can be offered through distance education.

Commenters requested further clarification regarding these definitions on the inclusion of "separate" from the main campus when "geographically apart" is a more precise term. Some commenters asked what a location is called that has less than 50 percent of an academic program.

Finally, commenters suggested the Department define "ownership structure."

Discussion: We refer to additional locations and branch campuses as physical locations to emphasize that they are "brick and mortar" places of education. PEPs are similar in that they consist of actual locations where students are collectively located and receiving education together even if that is just, for example, a computer lab dedicated to distance education.

We agree that some precision might have been lost in the change to the word "separate" and have added back the word "geographically" in the definition of "additional location" and "branch campus."

"Ownership structure" refers to the entities and individuals involved in the ownership of an institution.

We do not define in regulation a special term for a location that offers less than 50 percent of a program.

Changes: We have changed "separate" to "geographically separate" in the definitions of "additional location" and "branch campus" in § 600.2.

Distance Education (§ 600.2)

Comments: Commenters stated that the amended definition of "distance education" is ambiguous and asked whether it is only relevant to the Department's internal reporting systems. These commenters contended that requiring distance education programs to be offered and approved from the main campus would create significant disruptions to students and unnecessary costs for institutions without a discernable benefit.

These commenters further stated that institutions have used the flexibility afforded under current regulatory guidance to offer distance education programs from locations that will benefit the most students and some students will lose eligibility for State grant funds if a distance education program can only be offered from a main campus that is in a different State.

Some commenters stated that requirements related to distance education should not be included in CIO regulations and should instead be promulgated in a distance education rulemaking package to ensure that affected institutions are aware of the proposed changes. Commenters recommended that we allow distance education programs to be offered from branch campuses. Some commenters recommended that if the proposed changes to the definition of "distance education" are finalized, we should alleviate institutional burden by grandfathering existing distance education programs and delaying the effective date for three years to allow students to graduate from existing programs. Some commenters also referred to waiving fees and costs whenever possible, presumably referring to fees that some States and accrediting agencies charge, because the Department does not charge fees.

Commenters stated the regulation does not take into account the varying State standards related to physical presence. They noted that many States have physical presence triggers that describe these standards, and whether institutions are physically located in a State or offer instruction in a State may or may not trigger a State licensure requirement under applicable State laws. Commenters requested clarification that an institution only needs to provide CIO approvals from States in which its operations trigger a license requirement and greater clarity on how "physically located" will be interpreted.

Discussion: As described in the NPRM, the Department's primary goal for updating the definition of distance education is to ensure equitable treatment to students enrolled in distance education, including for closed school discharges. However, we are persuaded by the commenters that the change we proposed could create significant unintended challenges for students and institutions that requires additional consideration. We also believe that there could be other ways to address programs that are offered fully through distance education programs. Therefore, we removed the proposed addition to the regulations

stipulating that distance education must be associated with an institution's main campus. However, we do not plan to change the Department's longstanding practice of associating distance education with an institution's main campus that we sought to codify in these regulations. Institutions should report to the Department any distance education programs offered that are not associated with the institution's main campus. The Department intends to explore this issue further.

Changes: We have removed proposed paragraph (6) from the definition of "distance education."

Nonprofit Institution (§ 600.2)

Comments: Some commenters supported the Department's position that we do not exclusively rely on the IRS to determine whether an institution is a nonprofit, as the IRS framework is not designed to implement title IV and fails to further title IV goals in certain respects. These commenters recommended that to reduce uncertainty, we should articulate a clearer rationale for the definition of a nonprofit institution. Other commenters expressed concerns that the expanded definition is beyond what is currently in statute.

Some commenters stated that only the IRS has the ability to determine the tax-status of an organization. Commenters further requested clarification on the statutory justification under the HEA for the Department to make a determination on the tax-status of an institution. Similarly, some commenters argued that we should not adopt tests on excess benefits that are more stringent than what the IRS requires. In addition, commenters requested clarification on the Department's experience making these determinations. Commenters also questioned whether we have legal authority to make a determination on the tax-status of an institution under *W. Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). Some commenters requested clarification on how we plan to treat institutions that do not meet the nonprofit definition but are owned by nonprofit entities under State law and are considered tax-exempt organizations for IRS and State tax purposes.

Some commenters stated "net earnings" in paragraph (1) is inconsistent with the statutory definition of nonprofit. Commenters also stated that the term "private shareholder" implies that the benefit can occur only between a nonprofit, tax-exempt entity and a for-profit entity, or between a nonprofit, tax-exempt entity and an individual. These commenters suggested statutory and regulatory

definitions demonstrate that it is improper to define a nonprofit institution by excluding an institution if any part of its net earnings "benefits" any "private entity" if that "private entity" is another 501(c)(3) organization.

Discussion: We agree with the commenters that it would not be appropriate to rely solely on IRS determinations of tax-exempt status to decide if an institution is nonprofit. Although tax-exempt status under the Internal Revenue Code (IRC) and the definition of nonprofit institution under the regulations for purposes of participation in HEA programs are related, these are not the same concepts. The Department does not determine the tax status of institutions or their owner entities. Having 501(c)(3) status is only one element of the definition of a nonprofit under the regulations. However, when we determine whether the institution's revenues provide an impermissible private benefit, we are also guided—but not bound—by authority developed by the IRS, as well as the tax court and other courts addressing the issue of private or excess benefit transactions. Through this final definition, we clarified what qualifies as a nonprofit institution for the purpose of HEA program participation and do so under the authority provided to the Secretary under 20 U.S.C. 1221e–3 and 3474 to promulgate appropriate regulations.

The Department is concerned about excess benefit transactions even when they benefit another nonprofit entity, because they remove funds from the institution that should benefit its students. We will consider these on a case-by-case basis.

Changes: None.

Comments: Some commenters asked for clarification on how we would treat a situation where an institution is deemed to be nonprofit at the state level but not by the Department. They asked if such an institution met a State-level requirement for nonprofit institutions but not for proprietary institutions, would the Department consider that institution to be out of compliance?

Discussion: The Department cannot determine that an institution is a nonprofit without the State also concluding that under its laws. However, the Department could conclude that an institution deemed a nonprofit under State law should still be treated as a proprietary institution for title IV aid. In either situation, the institution would need to abide by the State requirements for a nonprofit institution, and there is no conflict.

Changes: None.

Comments: Commenters argued that the HEA definition of a nonprofit institution borrowed language from the Internal Revenue Code to define a nonprofit, with the exception of an additional clause to say that no part of the net earnings "may lawfully inure" to the private benefit of a shareholder or individual. Commenters argued that the proposed definition of a nonprofit institution adopts a different test of what constitutes private inurement than what is contemplated in the HEA.

Discussion: The 501(c)(3) tax exempt status conferred by the IRS, while a single requirement under the regulations, is not the only requirement for nonprofit status to participate in the HEA programs.

Changes: None.

Comments: Commenters raised concerns that the lack of a definition of "entity" and requested greater clarity. One commenter argued that the lack of a definition could result in the Department fighting with more institutions about their tax status.

Discussion: The proposed changes to these regulations will provide greater clarity without including a definition for entity and we disagree this will foment disagreements. The Department refers to "entity" in its regulations at § 600.31 to mean a legal entity and does not believe there will be any confusion.

Changes: None.

Comments: A commenter suggested that the definition of a nonprofit should be revised to state that "nonprofits formerly structured as proprietary institutions cannot have net earnings that benefit a private entity or person." They argued that because the excess revenue is used for the mission of a nonprofit institution that a range of stakeholders at private nonprofit institutions, including parents, faculty, staff, board members, and others can have a beneficial stake in the revenue.

Discussion: The Department does not think it would be appropriate to limit the definition only to institutions that were previously proprietary institutions. We review many CIOs that are not conversions from proprietary to nonprofit status, and we believe we must have consistent rules for all of these reviews. The situation described by the commenters differs from what the Department addressed with net earnings requirements. An institution that invests excess net earnings in the improvement of its educational enterprise or building an endowment is not specifically benefiting a private individual in the ways described in paragraphs (2) through (4) of the definition. In addition, institutions that newly apply

to participate in HEA programs must also meet the definition.

Changes: None.

Comments: Some commenters thought that the word “generally” in the lead phrase “For example, a nonprofit institution is generally not an institution that . . .”, presents a loophole that would permit some institutions to maintain improper debts and arrangements with former owners after a change in ownership. Some commenters argued that including the word “generally” provided enough flexibility for the Department to address some limited situations where an institution should be approved as a nonprofit and that adding specific clarifications of what those situations could be in the rest of the definition created too many carve outs. Other commenters suggested that any agreement with a former owner, current or former employee, or board member should disqualify the institution from the definition of nonprofit, regardless of whether the payments and terms are reasonable. Along similar lines, commenters recommended removing carve-outs that permit revenue-sharing and other contractual arrangements with affiliates of former owners. A commenter also argued that we should further explain the instances in which we would not find this general definition. One commenter suggested that we add the same language to paragraph (2)(i) that is included in paragraph (2)(iii)(C) to allow for debt owed to a former owner of the institution or a natural person or entity related to or affiliated with the former owner in cases where the Secretary determines that the payments and terms under the agreement are comparable to payments and terms in an arm’s-length transaction at fair market value. The commenter also suggested clarifying in paragraphs (2)(ii)(C) and (2)(iii)(C) that the provision applies specifically to paragraphs (2)(ii)(A) and (B) and (2)(iii)(A) and (B), respectively. The commenter suggested these changes stating that they would strike a better balance between ensuring the transaction benefits students, institutions, and taxpayers without impeding the evolution of institutions. One commenter asked the Department to clarify whether nonprofit institutions may have debt arrangements with their former owners as long as they are reasonable based on the fair market value, and if so, whether we could explain the standards we will apply in evaluating those arrangements.

Discussion: We intentionally used the word “generally” in the proposed definition for nonprofit institution. The

Department has denied requests to convert to nonprofit status where debts to former owners are based on inflated or unsupported valuations and, therefore, do not permit an institution to meet the definition of a nonprofit.

As to the prohibition on a debt owed to a former owner, we have seen that those kinds of arrangements allow continuing direct or indirect control by that former owner. As such, we do not think the suggestion of applying a fair market test would be appropriate for that type of relationship.

A review may include a variety of factors when to assess whether there is an impermissible benefit to a private entity. These depend on the details of the transaction and what types of agreements are involved, particularly as to debt financing or servicing agreements. It would be imprudent to try to list them all or to codify them in the regulations at the risk of omitting some or giving the impression that those listed will necessarily be used and those left out will not. However, providing some specificity as to what those items may be is important for granting clarity, and we identified them in the regulatory language. The Department believes the additional paragraphs that follow the lead-in language that uses the word “generally” provide sufficient detail to clarify that exceptions to these requirements will be limited and unusual.

Changes: None.

Comments: Some commenters argued that the proposed definition of a nonprofit institution is internally inconsistent with other regulatory requirements for a CIO. They noted that becoming a nonprofit institution is the triggering event for the CIO process, but the proposed definition of a nonprofit would involve the Department determining if the institution is nonprofit. They argued this created inconsistency since the nonprofit status would trigger the CIO review, but the CIO review is now needed to determine the nonprofit status.

Discussion: The Department review is to determine whether the institution will be recognized as a nonprofit for purposes of the HEA programs, and this is not inconsistent having a CIO review triggered when a nonprofit entity under state law with an IRS tax-exempt status acquires an institution, or if the existing owner of an institution converts under state law from a for-profit corporation (or other legal entity) to a non-profit corporation (or other legal entity), without the institution actually undergoing a change in ownership through, for example, an asset sale or a membership interest or stock sale.

Changes: None.

Comments: Commenters stated that Congress did not intend for public institutions of higher education to be categorized as nonprofit institutions and the Department’s existing definition appropriately reflects that intention. These commenters further stated that if public institutions are included as “private shareholders,” we need to clarify the prohibition with former owners in paragraph (2) because public institutions do not have former owners. Similarly, these commenters suggested clarifying that paragraph (3) does not apply to public institutions.

Discussion: The Department disagrees. HEA section 101(a)(4) specifically defines an “Institution of higher education” as a public or “other” nonprofit. In referring to “other” nonprofit organizations, Congress made clear that the public institutions it was referring to were also nonprofit organizations. We also disagree that paragraphs (2) and (3) should not apply to public institutions. It is possible that there could be prior owners if an institution converts from proprietary to public status.

Changes: None.

Comments: One commenter argued that the Department should refer to nonprofit institutions as being “controlled” rather than “owned or operated” since nonprofit entities are not typically owned. They argued that it is more common for one nonprofit entity to exercise control over another rather than own it.

Discussion: Institutions are owned by entities regardless of whether a nonprofit entity that owns an institution is owned by others.

Changes: None.

Comments: One commenter recommended that if an institution can show that the transaction has been reviewed by a State agency that oversees nonprofit entities, this should suffice as proof that no excess benefit was provided to former owners. This commenter further stated that a fairness opinion that looks at transactions holistically should provide the Department with sufficient comfort that there is no excess benefit and that the transactions contemplated are at fair market value. The commenter provided suggested regulatory text for their suggestions.

Discussion: The Department disagrees with the commenter. The commenter provided an indication of one State that does such reviews. It is unclear, however, if that State’s review would examine the same situations that concern us. We seek to ensure that an institution is a nonprofit solely for the

purposes of the HEA programs that we administer. It is also unclear how many States conduct similar reviews.

The Department also disagrees with simply accepting a fairness opinion. The fairness opinion would not guarantee that it addresses all the issues that we need to consider in our review of the CIO for title IV purposes. We have sufficient expertise and resources to review and analyze materials submitted in support of a transaction (including market valuation or appraisals) and do not currently plan to defer to conclusions reached by outside parties.

Changes: None.

Comments: Several commenters argued for providing additional limitations on the situations in which agreements with prior owners would not be acceptable. They argued that the excess benefit should have to be material or provided to an owner who had a certain percentage ownership stake in the institution. Another commenter argued that there could be situations in which the net earnings of the institution benefit a prior owner, but it should not be unlawful. They provided an example of transactions in which a buyer pays the seller back over time or finances the purchase.

Discussion: If the relationship with the prior owner is a debt obligation, it precludes nonprofit status. Other agreements will be evaluated in the context of market rates or actual costs for any services and whether the agreement is at arm's length.

Changes: None.

Comments: Commenters requested clarification whether the Department will apply the same reasonableness standard to evaluate the revenue-sharing arrangements with the persons or entities referenced at paragraphs (2)(ii)(A) and (2)(iii)(A) and paragraphs (2)(ii)(B) and (2)(iii)(B). Some commenters requested clarification regarding why we use a different standard for market analysis of revenue-sharing arrangements than the standard for market analysis of leases and other agreements. These commenters also requested clarification on what each standard means and how the standards differ.

Discussion: The difference in the language between paragraphs (2)(ii)(A) and (2)(iii)(A) and paragraphs (2)(ii)(B) and (2)(iii)(B) is due to the difference between revenue-sharing agreements and other types of agreements. The same reasonableness standard will apply in both cases, but the differences in the types of agreements will affect the factors we review in making our determination.

Changes: None.

Comments: Commenters recommended excluding charitable grants and contributions from consideration as revenue sharing agreements, as fundraising can extend to personal financial contributions. They raised concerns that conditional pledges or matching commitments might be considered revenue sharing. Additionally, according to these commenters, board members and former employees can gift conditional contributions such as matching gifts, donor-advised funds, and split-interest agreements to nonprofit institutions.

Discussion: It is not clear why charitable grants and contributions would be considered revenue-sharing agreements, but we will review all relevant information when determining whether an institution meets the definition of nonprofit.

Changes: None.

Fair-Market Value Assessment (§ 600.2)

Comments: We received a number of comments related to determining fair market value, including how that relates to restrictions on agreements with former owners.

Some commenters stated the Department needs to further strengthen oversight over market price. Other commenters requested clarification on how we will determine "market price," what factors we will use to do so, what evidence we will use to evaluate reasonableness or fair market value, as well as to provide the relevant statutory authority. Some requested that we include the factors used to determine market price in the regulations. Relatedly, commenters recommended that institutions be able to submit specific documentation such as valuations, appraisals, and market studies to demonstrate fair market value while another asked for clarity on what documentation schools will be required to submit.

Some commenters suggested that the market assessment would pose a barrier to future business relationships or mergers between proprietary institutions and nonprofit or public institutions.

Some commenters recommended that the regulations should not require the Secretary to determine market price for arrangements or transactions between existing nonprofit institutions. These commenters stated the application of these regulations to existing nonprofit institutions outside the context of conversions will have a chilling effect on transactions between existing nonprofit institutions. They further recommended that all such agreements can be deemed permissible if there is a

determination that the terms are reasonable.

Discussion: As already noted, we have performed and will continue to perform a review of materials submitted by parties to a transaction so we can ensure that the transaction does not violate the Department's definition of nonprofit. To restrict our consideration to tangible assets alone is not tenable because intangible assets affect an institution's value and the reasonableness of consideration paid for a transaction. However, we will continue to carefully scrutinize inflated intangibles when analyzing valuation studies submitted to support requests for nonprofit status.

The Department does not intend to halt all valuations before further considering the GAO report. Moreover, the GAO report found that we had strengthened our CIO process.

Additionally, there are no current processes for the IRS to engage with us on specific cases when we conduct our review to determine whether an institution is a nonprofit for the purposes of participating in programs under the HEA. As noted in the GAO report, we have conducted a rigorous and substantive analysis since 2016 to determine whether an institution is a nonprofit for the purpose of participation based on the pertinent regulations and does not depend solely on whether an institution is a 501(c)(3) organization under the IRC—which is only one of the requirements under the existing regulations.

To remove the allowance for market-value agreements between institutions and affiliates of former owners would eliminate the possibility for arrangements that are beneficial for all parties, so we will retain that allowance.

The Department sees no persuasive evidence that expecting parties engaged in a CIO ensure that the sums being paid represent a fair market valuation will chill beneficial and appropriate requests for nonprofit status. Taking control of an institution can carry significant expense. Overpaying for a transaction in the short-term or through long-term could hamper the ability of the new owner to make any necessary investments in educational instruction and quality. We see no evidence that requiring parties to a transaction to demonstrate that the transaction is based on an assessment of fair value is a burdensome requirement. Moreover, this comports with standard expectations for due diligence in an arm's length transaction. We are eager to review ownership changes and requests for nonprofit status in a way that is fair and beneficial for all parties in the

transaction, as well as for students and taxpayers.

Changes: None.

Comments: Commenters argued that if the agreement is determined to be offered at or below the fair-market value the Department should not restrict how that price is financed. They argued that if the former owner offers better financial terms on a fair-market price transaction we should allow it, and the word “generally” should permit such cases and not rule out all debts to former owners.

Discussion: It is not unusual to see the pricing for a CIO to be structured in a way that long-term value accrues to the former owner through financing arrangements or through restrictive service agreements. While we will not approve owner-financed arrangements as nonprofit, we intend to evaluate other arrangements between the parties that impact the valuation of the CIO, including longer-term requirements that may limit an institution’s resources or inhibit its ability to enter into arm’s-length transactions with other parties.

Changes: None.

Comments: Commenters argued that the Department should not simply assume that a revenue-sharing agreement between an institution and a former owner is acceptable just because it is offered at a fair-market value. They argued that the concern about revenue sharing is not just the price, but the incentives it creates for the institution with respect to its former owner. They argued that the regulations should specifically state that there could be certain circumstances when revenue-sharing agreements that are at a fair-market price could still not be allowed. The commenters also suggested explicitly stating that debt agreements that are related to an institution’s profits or revenues are not allowable, nor would debt instruments that limit the institution’s ability to set policy or priorities be allowable.

Discussion: We agree that evaluating long-term arrangements between the seller and purchaser in a CIO is essential to evaluating the transaction. The examples the commenter highlighted are why the regulatory language intentionally uses the market price as an instance that may allow for an agreement for a prior owner. Because this language is not definitive it would provide the flexibility that the commenter requests for denying such arrangements if a thorough review of the specific details of the CIO merits it.

Changes: None.

Comments: Some commenters argued that the limitations on revenue sharing with prior owners should also be

extended to cover successor owners or assignees. They argued that without this criterion, a former owner would simply sell the agreement to another entity and continue to profit.

Discussion: We disagree with the commenters that any regulatory changes are needed to address this issue. The regulatory text captures any relationship with the prior owner. This would capture the assignment of the contract to another individual or entity.

Changes: None.

Comments: Commenters argued that the Department should apply a fair market test to all other agreements used by schools to ensure they are reasonable. One commenter pointed to agreements with football coaches who may be receiving private inurement and excess benefits as an example of a transaction to evaluate.

Discussion: We do not believe the commenters’ examples are analogous to other types of arrangements captured in the definition of a nonprofit. The commenter offers no evidence that the arrangements with football coaches would represent a revenue-sharing agreement or an obligor to a debt owed to a former owner.

Changes: None.

Comment: One commenter argued that we should eliminate the option for an allowable revenue sharing agreement with a former owner if it is based upon market price. They argued that the Department should specify that it be the *nonprofit* market price if we retain this option.

Discussion: We disagree with the proposal to eliminate the consideration of agreements based upon market price. With respect to the nonprofit market price, we do not think such a requirement is appropriate. We believe the requirement that the terms of the revenue-sharing agreement are reasonable based upon the market price and that price bears a reasonable relationship to the cost of the services or materials provided provides us enough flexibility to ensure that institutions are unable to engage in the kind of transactions we have seen in the past that has allowed former owners to impermissibly profit from a CIO.

Changes: None.

90-Day Reporting Requirement (\$ 600.20)

Comments: Some commenters supported the addition of a 90-day notice requirement. Others requested further clarification on how the Department determined the 90-day window for the notice requirement. Some commenters suggested that 90 days would not provide the Department

sufficient notice and adequate time to review proposed transactions. One of these commenters suggested that notice should be provided 120 days in advance. Commenters requested clarification on the elements, requirements, and provisions required for notifications to be compliant.

Other commenters requested clarification on the consequences of an institution failing to submit a notice or meet other application timelines.

Some commenters supported the 90-day notice requirement but wanted further clarification on how the Department will respond once it has received notice. Commenters requested clarification on whether this pre-acquisition review would be an abbreviated pre-acquisition review (APAR) or comprehensive pre-acquisition review (CPAR) and what happens if we do not respond within the 90-day period. Commenters asked how this requirement would alleviate the issues the Department has raised with regard to staffing and making timely decisions on transactions. Commenters also asked why we settled on 90 days as the amount of requested advance notice.

Commenters recommended that the Department issue a pre-acquisition review letter prior to the proposed closing date that identifies whether the new owner will be required to post a letter of credit and identifies any impediments to the approval of the change and conditions that the Department might impose if it approves the school’s eligibility under the new ownership or structure. Commenters suggested that having this information prior to closing benefits the current and future owners as well as students who may be harmed by adverse actions taken by the Department that may have been avoided if information was provided to parties prior to closing.

Commenters recommended that to avoid disputes occurring after a CIO has been closed, issues such as qualifications of a business appraiser, the appropriateness of a valuation methodology and then the acceptability of the results of a valuation process are all matters that a nonprofit buyer should be able to present to the Department in advance of the closing of the nonprofit buyer’s purchase of the assets of an institution without resetting the 90-day clock. The commenters also argued that these items should be added to a pre-closing validation review process. Some commenters stated that the proposed process has the potential to greatly prolong the transaction review and recommended the 90-day timeframe should only reset for a substantive

change. Another suggested that the clock should not reset if there is a change to the ownership structure.

One commenter suggested that the Department should provide a contingency that allows the waiving of the 90-day advance notice requirement for an institution that is in financial distress.

Discussion: The purpose of the 90-day notice is to prevent an institution from being in a situation where there is little time for the Department to consider the change in ownership and the institution is put into a title IV-ineligible status, even if temporarily. Ninety days is not the amount of time in which we will conduct a review of the proposed CIO. We believe the 90-day period is important for adding structure to the CIO process and setting proper expectations. Too often to date the Department has reviewed numerous proposed CIO options with an institution over a period of months, only to be presented with a completely new proposal just days before (or even after) a transaction closes. It is not unusual for an institution or its counsel to ask us for guidance on a proposed CIO just a few weeks or even days before a scheduled closing. Such an approach wastes resources for the Department and the institutions. It can also cause confusion over what elements have or have not been reviewed. Providing clearer structure and having institutions give the Department 90 days advance notice will make the CIO process work better for all involved. Failing to provide this timely notice could result in a period of title IV ineligibility for an institution.

Institutions that wish to have more information about what the Department expects may also submit a preacquisition review request separately from the 90-day notice—and may do so well in advance of the notice. Because we have ended CPARs, this would be an abbreviated review. See the September 15, 2022, Electronic Announcement on <https://fsapartners.ed.gov/knowledge-center> for more information. The abbreviated review would inform institutions whether a new owner letter of credit will be required to meet the requirements of a materially complete application.

The Department declines to provide any exceptions for the 90-day advance notice. In the Department's experience, it is highly unusual for an institution to face financial distress where the CIO plans are solidified at least 90 days prior to the CIO. The institutions that have financial struggles typically have been in situations where the CIO structure was unsettled prior to the transaction taking place.

The required elements for the 90-day notice are provided in paragraphs (g)(1)(i) and (iii) of § 600.20.

Institutions should include all relevant information available to them when they provide their initial notice. This will prevent the 90-day clock from resetting and prolonging the process; an institution would have an incentive to submit rough proposals that end up not resembling the ultimate transaction, which would defeat the purpose of the advance notification.

Changes: None.

Comments: A few commenters stated the 90-day advance notice and requiring the institution and its new owners to provide the materially complete application within 10 days after the CIO are duplicative. Commenters argued that some of the information requested for the 90-day advance notice is more detailed than it needs to be at this stage of the process. The commenters noted that we currently request a lot of detailed information even though we only evaluate if we are going to request a letter of credit based upon the new owner's financial statements. Similarly, a commenter argued that the Department should more clearly specify what we need for the 90-day advance notice versus the post-acquisition application. They also argued that information provided on the 90-day advance notice should not need to be duplicated on the post-acquisition application. For example, they argued that if the institution provided evidence of its State license in the 90-day advance notice then the post-acquisition should only need to show that such license remained in effect as of the day before the change in ownership.

Discussion: The Department does not think it is necessary to change to the regulatory text any further. Where an institution provides the same information on the 10-day post-acquisition application that it provided on the 90-day advance notice, it could submit copies of what it already provided. We do not think it would be difficult or burdensome for an institution to resubmit documentation that it has already provided. Additionally, it establishes that any changes to that information must be reported and ensures that all necessary documentation is in one place.

Changes: None.

Student Notification (§ 600.20(g)(4))

Comments: Some commenters stated that providing notice to students of a potential CIO would cause undue stress and confusion, noting most students are unaware of school ownership and are not interested in that information.

Commenters further stated that students may interpret the notice as negative news about the institution and therefore choose not to enroll or to withdraw without completing their program. These commenters recommended that the institution receiving a preacquisition review letter provide evidence to the Department within 10 days that it has either notified students of the proposed CIO or formally notified the Department that the proposed transaction is being terminated. Institutions often do not continue with the CIO, which according to these commenters, is another reason not to require student notification so early in the process. Other commenters recommended notice be provided on the earlier of 10 days prior to the CIO or within 10 days after receipt of any required pre-closing accreditation approval and receipt of a pre-acquisition review response. Another commenter suggested that the Department require notice to students closer to when the transaction will be completed but did not specify a date. A different commenter suggested the institution should inform the Department no later than 2 business days before closing and provide proof of student notification at the same time. Some commenters recommended that the Department eliminate any student notification requirement or require the notification after the transaction is complete.

Commenters also asked if a banner or other type of announcement on an institution's website would be sufficient to notify students.

Discussion: We disagree with the commenters that a notification to students is inappropriate. While many students may not be concerned with who owns their school, some are. We believe this notification is as necessary as those made to consumers who receive a notification that their mortgage is being transferred to a new lender. Students have a right to know where their money is going and, in this case, who owns the school they attend.

We appreciate the suggestions from the commenters about multiple options for when to require notice to students. However, we disagree with the suggestions to provide notice either after the transaction or just a few days before it occurs. Providing notice so late in the process diminishes the usefulness of the notification, would act as an unfair surprise to students, and would provide them little time to consider whether it affects their plans for enrollment.

We believe that it is best to align the student notification requirements with those for notifying the Department. Doing so ensures that institutions

provide consistent information and that students have more time to consider their options. As articulated elsewhere in this final rule, part of our goal with these regulations is to ensure that there is a more structured process for CIOs and fewer instances in which institutions have to resolve significant issues before closing transactions. We believe this approach will mean that agreements will be further along by the time institutions approach the Department and will contain greater detail than they might have in the past. This will also reduce the likelihood that institutions need to inform students about CIOs that do not occur.

Regarding the requirements for making the student notification, institutions must inform students individually via email or some other method of the proposed change in ownership. Electronic notifications provided directly to individual students would be acceptable, but a simple message on a web page would not be sufficient.

Changes: None.

Temporary Provisional Program Participation Agreements (§ 600.20)

Comments: Commenters supported clarifying the Department's ability to withdraw title IV eligibility based on a review of a change in ownership. They also supported the Department adding conditions to an institution's TPPPA when a prospective owner of the institution does not have sufficiently acceptable audited financial records. Commenters recommended that we include additional financial and regulatory conditions, such as heightened cash monitoring 1 or 2, into TPPPAs. Commenters further recommended that when for-profit institutions convert to nonprofit status, we should continue to consider them as for-profit institutions until the Department has made a decision on the conversion. The commenters noted that this should include being subject to 90/10 and meeting the statutory requirement to show that their programs prepare students for gainful employment in a recognized occupation. Some commenters recommended an institution may only participate under a provisional PPA for a total consecutive period of 3 years and at the expiration, the institution must have executed a non-provisional PPA with the Department.

Other commenters argued that institutions must know what conditions they would be subject to before an acquisition is completed and should receive notice of any TPPPA conditions prior to the transaction closing. They

said institutions would not be able to plan for unknown conditions and said such a situation would have a chilling effect on transactions. These commenters expressed concern that more limited pre-transaction review will only lead to more prolonged post-transaction review before ultimately issuing a provisional PPA. These commenters recommended institutions not subject to growth restrictions due to a CIO, or institutions that were subject to growth restrictions but have since provided acceptable new owner financial statements, may apply to remove such restrictions while the post-transaction review is pending. These commenters further recommended that we should review and act on substantive change applications in the ordinary course and without waiting to complete our CIO review.

Discussion: The nature of CIO reviews and the contents of TPPPAs depend on the unique aspects of each case. Because of this, automatic inclusion of certain conditions is not justified. However, the Department agrees that it makes sense that for-profit institutions seeking to convert to nonprofit status should remain as for-profit until we approve a conversion. The Department amended § 600.31(d)(7) accordingly. Making this change will result in any conditions that are associated with being a private for-profit institution, such as the 90/10 rule or demonstrating that programs provide gainful employment in a recognized occupation, will continue.

We believe it is beneficial to be able to issue new TPPPAs after the initial TPPPA for a CIO approval has ended on a case-by-case basis if the situation warrants it.

As we improve the CIO review process through these regulations, institutions should see increased efficiency and clarity in the process. The goal of these regulations is that by providing more detail in the regulations, the Department will be able to direct its resources toward reviews that result in a transaction ultimately occurring. This is in opposition to our current practice where it is not uncommon for the Department to conduct detailed reviews of multiple proposals for a single institution, none of which end up being what the final transaction looks like. Spending less time on reviews that do not result in a transaction will free up resources to expedite the overall review process and address the concerns of commenters about added delays.

As we discuss in various places in this rule, the CIOs the Department receives are increasingly complicated and require a significant amount of time to review. Accordingly, it would not be

feasible for us to inform institutions about what TPPPA conditions we might require based solely on the application received 90 days before closing. The Department notes the risks institutions mention here are no different than what exists today, where we must currently decide whether title IV aid should continue after the transaction and there is a possibility that we could terminate Federal financial aid after the transaction occurred.

We disagree with commenters that institutions that are subject to growth restrictions or request a substantive change should be able to apply to have those restrictions removed or the change approved while the post-acquisition review is ongoing. We are concerned that removing a growth restriction or approving such a change that may not ultimately allow title IV aid to continue would risk increasing the number of students who must then find another institution that accepts Federal aid or that institutions might then try to argue that disapproving aid would be unfair to the newly enrolled and existing students. Institutions are not entitled to operate at a particular size or make substantive changes while we review their CIO application.

Changes: We clarify in § 600.31(d)(7) that for-profit institutions undergoing a change in status to nonprofit will remain in for-profit status until the review is complete.

State Authorization and Accreditation Approvals (§ 600.20)

Comments: Commenters agreed with having the most recently granted State and accrediting agency approvals readily available for the Department's review of a materially complete application. However, they stated that the requirement to provide this information as of the day before the CIO is overly burdensome and may be hard to obtain from States or accreditors. Commenters recommended the Department require institutions certify that approvals they submitted are current, up-to-date, and not withdrawn.

Commenters requested clarification on what constitutes acceptable supplemental documentation demonstrating an approval was in effect the day before a CIO occurred. Commenters suggested a signed letter on agency letterhead would suffice, but the 10-day requirement would pose difficulties. Commenters recommended meeting this requirement with either an email from the agency or a screenshot from the agency's website obtained no earlier than the day before the CIO. Other commenters raised concerns about the ability to obtain this

documentation from multiple states since some require approval to be obtained after the transaction goes through. They provided regulatory text to address this concern.

Some commenters argued that the Department should only have to provide evidence of the most current grant of accreditation or State licensure. Others argued for an extension if the institution could show it tried to get the documentation but has yet to receive it from the agency.

Discussion: The Department will consider whatever documentation is presented by institutions to show the requisite approvals have been met. Section 600.20.(g)(3)(i) states that the day-before evidence of approval supplements the documentation the institution submits as part of a materially complete application.

We believe the commenter concerned with different State and accrediting agency approvals misunderstood the requirement. The Department is requiring documentation that the institution has the required State approval and accreditation as of the day before transaction—not documentation reflecting the CIO. The concerns about post-acquisition approval should not be relevant.

We believe the documentation showing the State licensure (or equivalent authorization) and accreditation were in effect the day before the transaction is critical to maintain. Doing so provides safeguards regarding the institution's eligibility that would not be present if such approvals had lapsed.

We disagree that we should provide for any extension if an institution attempts but has yet to obtain documentation. A CIO involves the potential continued flow of as much as tens of millions of taxpayer dollars a year. Institutions should obtain and submit all necessary documentation timely.

Changes: None.

Audited Financial Statements (§ 600.20)

Comments: One commenter argued that the requirement to submit audited financial statements for the last two completed fiscal years would force transactions to only occur during a set period. The commenter argued that institutions would not have audits finished until several months after the end of the fiscal year, depending on if the auditing schedule was under the institution's control. The commenter recommended instead that we require the two most recently completed financial statements plus an audited

current balance sheet if the Department desired.

Discussion: We disagree with the commenter. We are not persuaded that it is more important for an institution to be able to complete a transaction when it wants than for the Department to ensure that the continued flow of potentially tens of millions of taxpayer dollars is going to institutions in sufficient financial shape. Accepting the commenter's proposal would risk receiving financial statements that are months and perhaps close to a year out of date. For institutions that are highly dependent upon tuition and meeting enrollment targets, that time gap could result in a meaningfully different financial picture. Moreover, except in very rare cases where an institution is at risk of a precipitous closure, there is no reason to rush a change of ownership transaction. The CIO process will be better served if transactions are well thought through and developed. If doing so means waiting to ensure we have up-to-date financial information, we see no significant downside.

Changes: None.

Financial Protection (§ 600.20)

Comments: Commenters stated the Department should provide the elements, bases, and factors to determine the amount of financial protection. Commenters further stated the Department should provide the factors used to determine when a 25 percent or 10 percent surety is insufficient.

Several commenters recommended requiring at least a 50 percent letter of credit when an owner does not have prior audited financial statements. One commenter argued that it is legally required to ask for a 50 percent letter of credit. Commenters recommended raising letter of credit requirements from 25 percent to 50 percent for owners who cannot demonstrate financial responsibility.

Some commenters stated the proposed financial protections and past practices are unlawful because of financial responsibility requirements elsewhere in the HEA. These commenters stated neither 10 percent nor 25 percent equal the fifty 50 percent requirement set forth in the HEA, presumably referring to the 50 percent requirement for financial responsibility set forth in section 498(c)(3) of the HEA, which bases the surety amount on "prior year volume of title IV aid" rather than on "annual potential liabilities." One commenter said that the 10 percent or 25 percent amount for an LOC fails to account for the true costs of potential discharges, which often span well

beyond the "prior year" volume of title IV aid. Another commenter argued that the Department should require at least a 25 percent letter of credit for institutions that had one but not two years of audited financial statements and a 50 percent letter of credit for institutions that had no audited financial statements.

Other commenters argued that the Department should not allow for the possibility of requiring additional letters of credit after a transaction closes because it would chill transactions. They argued that the Department was not clear if institutions that have a CPAR or APAR pending or submitted after the rule change will be notified of an additional letter of credit during the pre-acquisition review.

Some commenters also objected to basing letters of credit on the volume of title IV aid received by institutions under common ownership. They argued that those institutions are not related to the transaction and that those other institutions are already subject to financial responsibility requirements.

Discussion: The 10 percent and 25 percent protection amounts codify the current practice by the Department to specifically address a new owner who does not have acceptable financial statements to meet the audited financial statement requirements for a materially complete application following a CIO. As noted in the NPRM, the Department believes that there may be situations where additional financial surety is needed to ameliorate financial or administrative risk based upon a case-by-case determination. This would reflect situations such as when a much smaller institution acquires a much larger one. For situations like that, a letter of credit requirement based only on the title IV volume of the smaller institution would severely underestimate the financial risk that the transaction presents. With respect to the comment that said the minimum requirement must be 50 percent, the financial protection addressed in the regulation is not the financial protection required when an institution fails to meet the financial ratios described in the HEA. As such, the Department does not consider the requirement to be either unlawful or insufficient—it requires a separate element of surety when a new owner does not have two years of financial statements to meet the requirements of a materially complete application. A failure to meet the financial ratios is addressed in the financial responsibility regulations in subpart L.

There is significant variation in CIOs, as no two deals will have the same

terms, ownership structures, or other elements. The variability in CIOs thus necessitates a more flexible approach than might exist for other situations, such as what kinds of conditions the Department should enforce when an institution fails a financial responsibility score. As a result, adding financial conditions, including heightened cash monitoring, depends on individual cases and is not appropriate for a rule that applies more broadly.

Changes: None.

Updating Application Information—5 Percent Reporting Requirement (§ 600.21)

Comments: Commenters suggested that the 5 percent ownership reporting requirement is unlikely to result in more meaningful visibility. Commenters requested further clarification on the determination that the cost of the reporting burden will be minimal. They stated that there are frequent and inconsequential changes to owners of institutions with low percentages of ownership, and such owners typically have no role in the operations of the institution. Commenters further stated that the low threshold of the reporting requirement will create compliance issues and additional administrative burden to update electronic applications. These commenters recommended that the requirement not apply to passive investors such as those individuals or entities who invest in a fund that is actively managed by a partnership. These commenters stated these investors have no role in the control or operations of an institution or any entity in an institution's ownership structure and recommended the Department maintain the current 25 percent reporting requirement. One commenter suggested that the 5 percent requirement should only apply to voting ownership. One commenter noted that such minor changes could occur a few times a month. Other commenters recommended the reporting requirement should be increased to 10 percent to better capture voting interests and not require reporting of purely financial interests.

Some commenters recommended the alignment of §§ 600.21 and 600.31 by incorporating details on change in control into § 600.31. The commenters suggested that the reporting requirements in § 600.21 could simply cross-reference the events described in § 600.31 that the Department wants an institution to report.

Commenters asked what specific evidence and experience the Department relies on about CIOs that

institutions seek to evade Department oversight.

Discussion: As has been noted, we expect the new 5 percent reporting requirement will increase visibility into the ownership of institutions in a way that is not burdensome. This will allow the us to obtain more information without greatly increasing burden on schools. When combined with the considerable decline in burden from the change to the 50 percent review threshold, we will have more insight while allowing for an overall burden reduction.

The Department disagrees with suggestions to limit reporting to non-passive investors or those with voting interests. We believe that would increase burden as it could result in arguments between schools and the Department about what constitutes a passive owner. Moreover, the Department believes a more complete view of all ownership is important. This type of reporting will also make it possible for the Department to see acquisition of ownership over time, such as someone who steadily acquires shares until they become a 50 percent owner.

While the Department maintains that this information is important, we agree that it is not critical to obtain it on the same timeline as other information mentioned in this rule. Accordingly, we are adjusting the reporting timeline for these types of changes to require institutions to report them every quarter.

Changes: We adjusted § 600.21(a)(6)(i) to shift the 10-day reporting requirement to quarterly based on the institution's fiscal year for changes representing at least 5 percent but under 25 percent (either on a single or combined basis). However, when an institution plans to undergo a change in ownership, all unreported ownership changes of 5 percent or more in the existing ownership must be reported prior to submission of the 90-day notice. Thereafter, any changes of 5 percent or more in the existing ownership must be reported within the 10-day deadline, up through the date of the change in ownership.

Automatic Recertification (§ 600.20)

Comments: Commenters requested clarification on the interaction between the proposed changes to § 600.20(h), which explains the requirements for an extension of a temporary provisional program participation agreement and § 668.13(b)(3), which provides an automatic recertification. Commenters stated the Department proposed deleting § 668.13(b)(13) in negotiated

rulemaking, but the deletion was not included in the proposed regulation.

Discussion: The month-to-month extension of the temporary approval for the duration of the review of the CIO application is unrelated to the provisional certification periods in § 668.13.

Changes: None.

Fifty Percent CIO Review Threshold (§ 600.31)

Comments: Commenters recommended the Department maintain the 25 percent CIO review threshold. These commenters stated that the Department should maintain the current review threshold because there are so few CIOs and owners might try to purposefully avoid scrutiny by acquiring an ownership interest just below the 50 percent threshold. They expressed concern that even at or below 25 percent, an owner or group of owners could exert effective control over an institution as long as no other owner has a similarly large ownership share. Other commenters stated that to determine whether any of the transactions at the 50 percent or above threshold are really hiding a genuine change of control, the Department will need to review them anyway and may not find the heightened limits alleviate the workload or sharpen the focus.

Some commenters stated that the Department has not sufficiently explained why the 50 percent threshold is appropriate. These commenters also noted that the assertion that a 25 percent threshold is too burdensome is not sufficient to justify a 50 percent threshold.

Although these commenters expressed concern related to loosening the standards, they recommended a 35 percent threshold, standing alone, or combined with a 20-percent standard for related parties, which is in line with the IRS. Other commenters recommended that we amend the regulations to better capture written voting agreements and include language to not include temporary proxies given for a particular meeting or part of a meeting.

Other commenters supported the 50 percent threshold and recommended eliminating the addition or removal of an entity that submits financial statements to satisfy financial responsibility requirements as an automatic CIO resulting in a change in control.

Discussion: It has been the Department's experience that changes in control typically do not occur at the 25 percent level. Therefore, we can eliminate considerable unnecessary

burden for the Department and institutions by increasing this threshold to 50 percent. This standard comports more with our experience than the current 25 percent standard or the suggested 35 percent IRS standard. Voting agreements and proxies are considered on a case-by-case basis. Moreover, the 50 percent threshold only mandates when a CIO review must occur. The regulations make clear that levels below 50 percent will be subject to the CIO regulations when a change of control occurs despite being under the 50 percent threshold. The enhanced reporting requirements under § 600.21 will allow the Department to monitor these potential shifts in control more closely.

The entity that submits financial statements is key to the financial strength of the institution. That is typically the highest level of unfractured ownership, but we want to ensure that we maintain flexibility for other circumstances.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an “economically significant” rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles stated in the Executive order.

The Department estimates the quantified annualized economic and net budget impacts to be \$835 million, consisting of an \$879 million net increase in Pell Grant transfers and \$–44.3 million reduction in loan transfers among students, institutions,

and the Federal Government, including annualized transfers of \$82.7 million at 3 percent discounting and \$81.9 million at 7 percent discounting. Most of these transfers are due to statutory changes made by Congress that are addressed by these regulations. Additionally, we estimate annualized quantified costs of \$3.4 million related to paperwork burden and \$1.1 million of administrative costs to the government. Therefore, this final action is “economically significant” and subject to review by OMB under section 3(f) of Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a “major rule,” as defined by 5 U.S.C. 804(2). Notwithstanding this determination, based on our assessment of the potential costs and benefits (quantitative and qualitative), we have determined that the benefits of this regulatory action will justify the costs.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of

OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We are issuing these final regulations to address inadequate protections for students and taxpayers in the current regulations and to implement recent changes to the HEA. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

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

As required by OMB Circular A–4, we compare these final regulations to the current regulations. In this regulatory impact analysis, we discuss the need for regulatory action, potential costs and benefits, net budget impacts, and the regulatory alternatives we considered.

1. Need for Regulatory Action

The Department has identified a significant need for regulatory action to address inadequate protections for students and taxpayers in the current regulations and to implement recent changes to the HEA.

Pell Grants for Confined or Incarcerated Individuals

In the Consolidated Appropriations Act, 2021, Congress added a new provision allowing confined or incarcerated individuals to access Pell Grants for enrollment in approved PEPs. Regulatory changes are necessary to implement the law and to ensure access to high-quality postsecondary programs for incarcerated individuals. Among existing higher education programs in prisons, there is considerable variation in available resources, operational requirements, and the depth of stakeholder partnerships they have established.¹¹ Research shows that high-quality prison education programs increase learning and skills among incarcerated students, and increase the likelihood of stable employment post-incarceration.¹² Individuals who were

¹¹ Castro, E.L., Hunter, R.K., Hardison, T., & Johnson-Ojeda, V. (2018). “The Landscape of Postsecondary Education in Prison and the Influence of Second Chance Pell: An Analysis of Transferability, Credit-Bearing Status, and Accreditation.” *The Prison Journal*, 98(4), 405–26. <https://doi.org/10.1177/0032885518776376>.

¹² *Ibid.*

formerly incarcerated face significant challenges in finding employment when returning to their communities. Many lack vocational skills and have little or no employment history, leading to high rates of unemployment and low wages for these individuals.¹³ In a study funded by the U.S. Department of Justice, researchers found that postsecondary correctional education programs are highly cost-effective, and can help incarcerated individuals reenter the employment arena and reduce recidivism.¹⁴

The Department has explored postsecondary education for incarcerated individuals through its Second Chance Pell experiment, first announced in 2015.¹⁵ The goal of the experiment has been to learn about how Federal Pell Grant funding expands postsecondary educational opportunities for incarcerated individuals and explore how such funding fosters other positive outcomes.¹⁶ Data reported to the Department indicate that recipients of Second Chance Pell Grants successfully completed a high percentage of the credits they attempted.¹⁷ The institutions participating in the Second Chance Pell experiment reported that their programs had positive effects related to public safety, as well as safe working and living conditions in their carceral facilities. Further research has illustrated that correctional education programs contribute to successful rehabilitation and subsequent reentry for those who were incarcerated, thereby improving safety within the facilities that offer postsecondary programming and recidivism and public safety outcomes overall.¹⁸

Correctional education can offer rehabilitation to incarcerated individuals, because the programs are able to capitalize on acquired education and skills. Soft skills in particular, such as communication and interaction with others, are a significant benefit of correctional education.¹⁹ In one study of correctional education in Delaware, the surveyed participants noted that the program provided “credentialing and a variety of skills . . . that they may not otherwise have obtained due to lack of confidence, missing opportunities to participate in educational programs offered in the community, [and] incapability of making time to commit to such programs outside of incarceration.”²⁰

The Department’s framework for PEPs will clarify and implement statutory requirements for the benefit of incarcerated individuals and other stakeholders, including correctional agencies and institutions, postsecondary institutions, accrediting agencies, and related organizations. Our final regulations clarify definitions of confined or incarcerated individuals and PEPs that align with the statute. These regulations clarify the processes that the oversight entity (including a State department of corrections or the Bureau of Prisons) will follow in determining whether a PEP is operating in the best interests of the students. Consistent with the statute, the final regulations will prevent proprietary institutions or institutions subject to certain adverse actions from offering PEPs. These final regulations also provide protections for incarcerated individuals against programs that do not satisfy applicable licensure or certification requirements or where such students are typically prohibited under Federal or State law from employment in the field due to the nature of a student’s conviction. Under the final rule, institutions must disclose whether their program is designed to lead to occupations in which formerly incarcerated individuals typically face barriers in other States. These final regulations are designed to clarify how oversight entities can meet statutory requirements, and to guide PEP educational institutions and

practitioners on access to, and eligibility for, Federal Pell Grants.

90/10 Rule

The ARP amended section 487 of the HEA to require that proprietary institutions count all Federal funds used to attend the institution as Federal revenue in the 90/10 calculation, rather than only counting title IV, HEA program funds. In FY 2021, proprietary institutions were eligible to receive funding from at least 26 non-title IV Federal programs. The largest two non-title IV, Federal programs with documented funding provided to proprietary institutions were Post-9/11 GI Bill education benefits, which accounted for approximately \$1.3 billion in FY 2021, and the DOD Tuition Assistance program, which accounted for \$185 million in that year. Some proprietary institutions have aggressively recruited service members and veterans in order to use funds from GI Bill education benefits and DOD Tuition Assistance to comply with the current 90/10 requirement since these funds helped offset title IV, HEA program funds in the calculation.²¹

In addition, the changes to § 668.28 modify allowable non-Federal revenue in the 90/10 calculation to better align the regulations with statutory intent and to address practices proprietary institutions have used to alter their 90/10 calculation or inflate their non-Federal revenue percentage. These combined changes include:

(1) Creating a new requirement for when proprietary institutions must request and disburse title IV, HEA program funds to prevent delaying disbursements to the subsequent fiscal year in order to reduce their Federal revenue percentage for the preceding fiscal year. The changes to the disbursement rules in § 668.28(a)(2) will prevent such practices.

(2) Clarifying the regulatory requirements that ineligible programs must meet in order to be included in the 90/10 calculation. The Department is concerned that these sources of non-Federal revenue may provide an incentive for institutions to create, offer, and market programs with little oversight or few consumer protections, or to create programs that bear little, if

¹³ Coady, N.M. (2021). A Qualitative Evaluation of Prison Education Programs in Delaware: Perceptions of Adult Male Returning Citizens. *ProQuest Dissertations Publishing*. Retrieved from www.proquest.com/openview/af55946da2d8d2213f500ffaa89a3102/1.pdf.

¹⁴ Davis, L., et al. “How Effective is Correctional Education, and Where Do We Go From Here?” Rand Corp. (2014). www.rand.org/pubs/research_reports/RR564.html.

¹⁵ Department of Education Experimental Sites Initiative site, Updated June 8, 2022. <https://www2.ed.gov/about/offices/list/ope/pell-secondchance.pdf>.

¹⁶ Second Chance Pell Fact Sheet. (n.d.). In U.S. Department of Education. <https://www2.ed.gov/about/offices/list/ope/pell-secondchance.pdf>.

¹⁷ U.S. Department of Education. (2020, August). *Experimental Sites Initiative Second Chance Pell: Evaluation Report for Award Years 2016–2017 and 2017–2018*. Federal Student Aid. Retrieved from <https://experimentalsites.ed.gov/exp/pdf/20162018SecondChancePellESIReport.pdf>.

¹⁸ Chesnut, K., & Wachendorfer, A. (2021, April). *Second Chance Pell: Four Years of Expanding Access to Education in Prison*. Vera Institute of Justice. Retrieved from www.vera.org/publications/second-chance-pell-four-years-of-expanding-access-to-education-in-prison.

¹⁹ Bennett, B. (2015). “An Offender’s Perspective of Correctional Education Programs in a Southeastern State.” *Walden Dissertations and Doctoral Studies*. 457. <https://scholarworks.waldenu.edu/dissertations/457>.

²⁰ Coady, N.M. (2021). A Qualitative Evaluation of Prison Education Programs in Delaware: Perceptions of Adult Male Returning Citizens. *ProQuest Dissertations Publishing*. Retrieved from www.proquest.com/openview/af55946da2d8d2213f500ffaa89a3102/1.pdf.

²¹ See, for example, Hollister K. Petraeus, “For-Profit Colleges, Vulnerable G.I.’s,” *The New York Times* (Sept. 21, 2011), www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html; and For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, U.S. Senate, Health, Education, Labor and Pensions Committee, Majority Committee Staff Report (Jul. 30, 2012), www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf.

any, relationship to eligible programs subject to the 90/10 revenue requirement in order to increase the amount of non-Federal funds proprietary institutions receive in a fiscal year to comply with 90/10. The changes to § 668.28(a)(3) will prevent such revenue from being included to inflate the amount of non-Federal funds.

(3) Creating guardrails for ISAs and other financing agreements between students and proprietary institutions. Payments made by students or former students on institutional loans or alternative financing agreements currently count as non-Federal revenue in a proprietary institution’s 90/10 calculation, and thus some proprietary institutions may have an incentive to encourage students to utilize these products, which may be more costly to borrowers and lack the same consumer protections as Federal student loans.²² The addition of § 668.28(a)(5)(ii) will mitigate incentives for institutions to use these products to meet the 90/10 revenue calculation.

(4) Modifying revenue that must be excluded from the 90/10 calculation. The Department is modifying allowable revenue generated from institutional aid and funds that cannot be included in the 90/10 calculation to prohibit proprietary institutions from including revenue from the sale of ISAs, alternative financing agreements, or institutional loans in their 90/10 calculation. The revenue to the institution from these transactions is for an asset sale and not a payment by that party for the education provided by the institution as intended under the 90/10 revenue requirement. Thus, the Department does not consider funds generated from these sales as representative of funds paid to the

institution for the purposes of education and training. The addition of § 668.28(a)(6)(vi) and (vii) will explicitly exclude proceeds from such sales from being counted as non-Federal revenue in the 90/10 calculation.

Finally, we also remove several outdated provisions, such as those related to the Ensuring Continued Access to Student Loans Act (ECASLA) of 2008.

Changes in Ownership

The Department has received a growing number of CIO applications in recent years. We processed over 150 transactions from October 2018 through the end of 2021; dozens more remain pending. Moreover, the CIO applications that we received and reviewed have been increasingly complex and require significant effort and expertise to review, particularly given that the current regulations are not always clear for institutions or the Department. Some of these CIOs include institutions converting from proprietary to nonprofit status, which further complicates the Department’s review and presents a greater risk to students and taxpayers. Given this changing landscape of CIO applications, the Department needs to further clarify and define the CIO process to better protect students and taxpayers from potentially risky transactions, restrain profit-motives at the expense of student outcomes, and to provide the Department and institutions with clearer processes and regulations to mitigate loss and noncompliance. These improvements will enable the Department to identify high-risk transactions and require financial protection as needed.

Accordingly, these final regulations clarify the requirements for institutions undergoing CIOs, including by requiring adequate advance notice of such transactions to ensure the Department can assess the requirements of continued participation in the title IV, HEA programs prior to completion of the transaction. Further, these regulations will increase transparency into CIOs to better enable the Department to identify individuals with control over the institution, while reducing the burden of reviewing transactions in which a change in ownership is unlikely to result in a change in control. These final regulations also clarify that the Department may apply terms for continued participation in the Federal financial aid programs to ensure that we are able to take appropriate steps to protect students and taxpayers from risky transactions. Changes to the definition of a “nonprofit institution” will clarify the requirements for operating such institutions to prohibit enrichments to private parties, ensuring that proprietary institutions are not able to receive approval as nonprofit institutions without sufficiently addressing their business practices and the profit interests of former owners.²³

To provide additional clarity to institutions and ensure consistency in the application of the regulations, the Department is also finalizing some technical changes to adjust the definitions of additional locations and branch campuses of the institution to conform with current practice and clarify how the Department views such locations.

2. Summary of Comments and Changes From the NPRM

Provision	Regulatory section	Description of change from NPRM
Pell Grants for Confined or Incarcerated Individuals		
Participation Percentage	§ 600.7(c)(4)(i)(B)	Following the period described in paragraph (c)(4)(i)(A), no more than 75 percent of the institution’s regular enrolled students may be confined or incarcerated.
Waiver	§ 600.7(c)	Waiver will now be split into paragraphs separately addressing waiver grant and waiver denial.

²² See, for example, Loonin, D. (2011). Piling On: The Growth of Proprietary School Loans and the Consequences for Students. Student Loan Borrower Assistance Program at the National Consumer Law Center. Retrieved from www.studentloanborrowerassistance.org/wp-content/uploads/File/proprietary-schools-loans.pdf and Consumer Financial Protection Bureau (Jan 20, 2022). Consumer Financial Protection Bureau to Examine Colleges’ In-House Lending Practices. Retrieved from www.consumerfinance.gov/aboutus/

[newsroom/consumer-financial-protection-bureau-to-examine-colleges-in-house-lending-practices](https://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-examine-colleges-in-house-lending-practices). Ritter & Weber 2021 *The Emergence of Income Share Agreements* Chapter 14 in Social Finance, Inc., Federal Reserve Bank of Atlanta, and Federal Reserve Bank of Philadelphia, Workforce Realigned: How New Partnerships are Advancing Economic Mobility. Risks identified include “deceptive marketing, high implied annual percentages rates in the event of high realized incomes, potentially insufficient protections for low incomes or

disruptive life events or low incomes, and potentially burdensome aggregate income shares for individuals who take on multiple ISAs or combine ISAs with loans.” Retrieved from <https://socialfinance.org/wp-content/uploads/Workforce-Realigned-Full-Book.pdf> on October 8, 2022. ²³ Shireman, R. (2020). How For-Profits Masquerade as Nonprofit Colleges, The Century Foundation. <https://tcf.org/content/report/how-for-profits-masquerade-as-nonprofit-colleges/>.

Provision	Regulatory section	Description of change from NPRM
Institution Location	§ 668.238(a)	Following our initial approval of an institution's PEP, additional PEP offered by the same institution at the same location may be determined eligible without further approval from the Secretary except as required by § 600.7, § 600.10, § 600.20(c)(1), or § 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.
Documentation	§ 668.238(b)(4)	Documentation detailing the methodology including thresholds, benchmarks, standards, metrics, data, or other information the oversight entity used in approving the PEP and how the information was collected.
Limitation or Termination of Approval ..	§ 668.240	The Secretary may limit or terminate or otherwise end the approval of an institution to provide an eligible prison education program if the Secretary determines that the institution violated any terms of the subpart or that the institution submitted materially inaccurate information to the Secretary, accrediting agency, State agency, or oversight entity.
Best Interest Determination	§ 668.241	Revised so all outcome indicators are optional but maintain that the current input indicators as mandatory to assess and removed "barring exceptional circumstances surrounding the student's conviction" from the assessment of transferability of credits.
Best Interest Final Evaluations	§ 668.241(e)(1)	After its initial determination that a program is operating in the best interest of students under paragraph (a), the institution must obtain subsequent evaluations of each eligible prison education program from the responsible oversight entity not less than 120 calendar days prior to the expiration of each of the institution's Program Participation Agreements, except that the oversight entity may make a determination between subsequent evaluations based on the oversight entity's regular monitoring and evaluation of program outcomes.
Period Following Best Interest Determination.	§ 668.241(e)(2)(i)	Include the entire period following the prior determination and be based on the applicable factors described under paragraph (a) for all students enrolled in the program since the prior determination.

90/10

ISA	§ 668.28(a)(5)(ii)	Clarified ISA agreements covered by the requirements in § 668.28(a)(5)(ii)(A) through (C).
Covered Institutional Charges	§ 668.28(a)(5)(ii)(A)	Clarified ISA or alternative financing agreement must identify what institutional charges the agreement covers, and those charges cannot be more than the stated institutional charges at the time the student signs the agreement.
Required Disclosures	§ 668.28(a)(5)(ii)(B)	Clarified that the ISA or alternative financing agreement must disclose: the maximum time and amount a student would be required to repay, the maximum amount a student would be required to repay, the implied or imputed interest rate, and any fees or revenue generated for a third-party.
90/10 Calculation	§ 668.28(a)(5)(ii)(C)	Clarified that revenue, interest, and fees are not included in the 90/10 calculation.
ISA Interest Rate	§ 668.28(a)(5)(ii)(D)	Removed the proposed limit on the interest rate for an ISA that an institution must disclose to a student if the ISA funds are included in its 90/10 calculation.
Federal Funds	§ 668.28(a)(6)(iii) § 668.28(a)(6)(iv)	Revised funds to be the amount of institutional funds used to match Federal funds. Revised language to state the amount of Federal funds refunded to students or returned to the Secretary under § 668.22 or required to be returned to the applicable program.
Institutional Loans and ISAs	Appendix C	Revised the line item for institutional loans to show that institutions should count the full payment amount in the amount column and only the amount of principal payment in the adjusted amount column. Revised the line item for payments on ISAs counted under institutional aid to show that institutions should count the full payment amount in the amount column and only the payment amounts that represent a return of capital in the adjusted amount column.

Change in Ownership

Definitions	§ 600.2	Eliminated proposed paragraph (6) from the "distance education" definition.
Definitions	§ 600.2	Revised definition of additional location and branch campus from "separate" to "geographically separate."
State authorization and accreditation approvals.	§ 600.20	Clarified that for-profit institutions undergoing a change in status to nonprofit will remain in the former until the review is complete.
Reporting changes	§ 600.21	Clarified that certain ownership changes at the 5 percent level can be reported quarterly instead of within 10 days.

3. Discussion of Costs and Benefits

3.1 *Pell Grants for Confined or Incarcerated Individuals:*

From the 1990s until the amendments made by the Consolidated Appropriations Act, 2021, the HEA prohibited students who are incarcerated in a Federal or State penal institution from participating in the Federal Pell Grant program, which provides need-based grants to low-income undergraduate and certain post-baccalaureate students to promote access to postsecondary education. This restriction prevents many otherwise eligible incarcerated individuals from accessing financial aid and benefiting from the postsecondary education and training that can be crucial to their successful reentry into society and their communities upon the completion of their sentences. The HEA was amended to eliminate this restriction for students who meet the definition of confined or incarcerated individuals and who enroll in eligible PEPs. The Department is implementing the statutory requirement to extend Federal Pell Grant eligibility to incarcerated individuals and increase their participation in high-quality educational opportunities.

Costs of the Regulatory Changes:

These final regulations will impose some additional costs on the Department, educational institutions, oversight entities, and accrediting agencies.

First, adding eligible Pell Grant recipients as provided for by Congress will expand the costs of the Pell Grant program for the Federal government. The Department expects these costs to be more than offset by the benefits noted in the benefits section, however, especially in the form of lower recidivism rates and increased employment opportunities. Research has found that the average cost to incarcerate an inmate in the United States totals more than \$33,000 per year.²⁴ However, participating in correctional postsecondary education programs reduces a former inmate's recidivism risk by 28 percent.²⁵

Second, the educational institutions offering in-prison instruction will face some additional costs of achieving and maintaining compliance with new, higher standards. Thus far, correctional education programs have not had to comply with the same requirements as

programs that receive title IV and Federal Pell Grant funding, although institutions that participate in the Second Chance Pell experiment have already met some of the program requirements for incarcerated individuals. Additional costs of meeting the higher standards may include the cost of seeking and obtaining approval of initial PEP offerings from the accrediting agency and the Secretary, as well as the costs of providing the data necessary for the oversight entity to determine whether the PEP is operating in the best interests of students. Correctional facilities may also face some increased costs related to providing appropriate facilities and resources, including staffing, to support the PEP as they partner with higher education institutions. Both institutions and correctional facilities would also face increased costs associated with required support services for their students, including appropriate academic and career counseling, as well as support to help prospective students complete the Free Application for Federal Student Aid®.

Additionally, oversight entities may incur additional costs to oversee the development and operation of eligible PEPs. For example, under §§ 668.236 and 668.241, the oversight entity must develop an appropriate process to approve PEPs and determine if they are operating in the best interest of students. The “best interest” determination will require assessment of several identified inputs and outcomes and will require collaboration with relevant stakeholders. All of these steps will increase costs for the oversight entity.

With the expansion of PEPs, additional costs will be incurred by the oversight entities to ensure that the programs are providing quality education and opportunities for incarcerated individuals. With more programs to evaluate, the oversight entities will need to account for additional time and complexity of the review process, as well as the potential need for new staff to accommodate a higher volume of PEP reviews and additional monitoring tasks related to the enhanced metrics that PEPs must submit. Additional costs may also arise from having to implement technological solutions to accommodate the higher and more in-depth review process and program monitoring, especially as PEPs continue to expand.

Accrediting agencies may also face costs related to the approval of PEPs and the required site visit. However, the accrediting agency may, in turn, require the institution of higher education to

cover the additional costs associated with the final regulations, transferring these costs from the accrediting agencies to institutions.

Finally, the Department will incur some additional burden and cost associated with its obligation to oversee PEPs and to support oversight entities and institutions. For instance, we offered to provide a significant amount of data to the oversight entities to assist them in making the best interest determination. The Department also intends to provide needed technical assistance to the field. We estimate that the costs of systems changes needed to reflect the regulatory requirements, oversight to ensure institutional compliance through program review functions, and training support to provide technical assistance to the field will total approximately \$1.1 million.

Benefits of the Regulatory Changes:

Many of the individuals in the growing prison population have lower levels of educational attainment compared to the general population. Research finds that “only 15 percent of incarcerated adults earn a postsecondary degree or certificate either prior to or during incarceration, while almost half (45 percent) of the general public have completed some form of postsecondary education”. The same study notes that about two-thirds of incarcerated adults have a high school diploma or equivalent.²⁶ This creates an opportunity for significant expansion of correctional education programs, including postsecondary educational programs, which would begin to address those unmet needs.

Extending Pell Grants to eligible PEPs will provide numerous economic and public safety benefits to incarcerated individuals, to their communities when they return, and to States and the Federal government in the form of more successful rehabilitation of imprisoned individuals, lower recidivism rates, higher employment rates, increased earnings, greater contribution to the economy, and ultimately cost savings for the government. These effects and benefits are enabled through increased educational attainment.

Numerous studies have shown that providing education programs to incarcerated individuals is a significant factor in successful rehabilitation and subsequent reentry. First, research demonstrates that correctional education is associated with higher self-confidence and self-worth for confined

²⁴ www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf.

²⁵ Bozick, R., Steele, J., Davis, L., & Turner, S. Does providing inmates with education improve postrelease outcomes? A meta-analysis of correctional education programs in the United States. *J. Experimental Criminology* 14, 389–428 (2018). <https://doi.org/10.1007/s11292-018-9334-6>.

²⁶ Ositelu, M. Equipping Individuals for Life Beyond Bars, *New America* (November 2019), www.newamerica.org/education-policy/reports/equipping-individuals-life-beyond-bars/.

or incarcerated individuals, which can lead confined or incarcerated individuals who attend postsecondary education to engage in fewer instances of misconduct than those who did not attend.²⁷ Postsecondary education programs in prisons also improve incarcerated individuals' cognitive skills, especially for individuals with learning disabilities, by teaching critical thinking skills, encouraging debate, and helping students apply course lessons to their own lives, all of which may help them better adjust to social values and expectations upon reentry.²⁸ This is a critical benefit, given that an estimated 30 to 50 percent of the adult prison population has a learning disability.²⁹ Correctional education programs also improve literacy levels for incarcerated individuals with limited past educational experience, which increases their post-release chances of furthering their studies and securing employment.³⁰ One of the most critical benefits correctional education programs provide to incarcerated individuals is the development of skills necessary for post-release employment. Those adults who participate in postsecondary education or job training programs while incarcerated are more likely to have higher literacy and numeracy proficiency than their peers who do not participate in such programs, helping to close the gaps in literacy and numeracy skills between the incarcerated population and the general public.³¹ A study conducted by the Education Division of the Indiana Department of Correction (IDOC) comparing the outcomes of incarcerated individuals who participated in a postsecondary education program in the correctional facility with those who did not found that employment rates and time employed following release was much higher for those who participated

in the program. Their incomes were also higher.³²

In addition to the benefits provided to PEP participants, there are also significant public safety benefits for their communities. Over the last two decades, numerous studies have been conducted on the impact of prison education on post-release outcomes for previously incarcerated individuals.³³ The recidivism rate represents the rate at which individuals who were previously incarcerated re-offend and are re-admitted to correctional facilities and is often used as a measure of success for correctional education programs. Aggregating the findings from 57 studies published or released between 1980 and 2017, one study found that confined or incarcerated individuals participating in correctional postsecondary education programs are 28 percent less likely to recidivate when compared with confined or incarcerated individuals who did not participate in correctional education programs.³⁴

Reducing recidivism also reduces economic, public safety, and personal costs, and correspondingly increases benefits in those categories, for correctional facilities, governments, and our Nation as a whole. Using a hypothetical pool of 100 inmates, a 2014 RAND study illustrated the powerful economic benefit of correctional education programs by comparing the direct costs of such correctional education programs with the costs of reincarceration. The study found that the direct costs of reincarceration were far greater than the direct costs of providing correctional education. For a correctional education program to be cost-effective or "break-even," it would need to reduce the 3-year reincarceration rate by between 1.9 and 2.6 percentage points. The study's findings indicate that participation in correctional education programs is associated with a 13-percentage-point reduction in the risk of reincarceration in the 3 years following release, far exceeding the break-even point thereby generating real benefits to society.³⁵

²⁷ Lahm, K.F. (2009). Educational participation and inmate misconduct. *Journal of Offender Rehabilitation*, 48, 37–52. www.tandfonline.com/doi/abs/10.1080/10509670802572235.

²⁸ Vandala, N.G. (2019). The transformative effect of correctional education: A global perspective. *Cogent Social Sciences*, 5(1). <https://doi.org/10.1080/23311886.2019.1677122>.

²⁹ Koo, A. (2015). Correctional education can make a greater impact on recidivism by supporting adult inmates with learning disabilities. *J. Crim. L. & Criminology*, 105. <https://scholarlycommons.law.northwestern.edu/jclc/vol105/iss1/6>.

³⁰ Jones Young, N.C., & Powell, G.N. (2015). Hiring ex-offenders: A theoretical model. *Human Resource Management Review*, 25(3), 298–312. www.sciencedirect.com/science/article/abs/pii/S1053482214000692?via%3Dihub.

³¹ Ositelu, M.O. "Equipping Individuals for Life Beyond Bars." *New America*, 4 Nov. 2019. www.newamerica.org/education-policy/reports/equipping-individuals-life-beyond-bars/.

³² Nally, J., Lockwood, S., Knutson, K., & Ho, T. (2012). An evaluation of the effect of correctional education programs on post-Release recidivism and employment: An empirical study in Indiana. *Journal of Correctional Education* (1974–), 63(1), 69–89. www.jstor.org/stable/26507622.

³³ Bozick, R., Steele, J., Davis, L., & Turner, S. Does providing inmates with education improve postrelease outcomes? A meta-analysis of correctional education programs in the United States. *J. Experimental Criminology* 14, 389–428 (2018). <https://doi.org/10.1007/s11292-018-9334-6>.

³⁴ Ibid., 389–428.

³⁵ Davis, L.M., et al., "How Effective Is Correctional Education, and Where Do We Go from Here? The Results of a Comprehensive Evaluation."

3.2 90/10:

The ARP amended section 487 of the HEA by modifying which Federal funds proprietary institutions must count in the numerator of their 90/10 calculation. The final regulations amend § 668.28 to reflect statutory requirements implemented in the ARP.

Additionally, these regulations modify allowable non-Federal revenue in the 90/10 calculation to better align the regulations with the statutory intent of the 90/10 calculation and address practices proprietary institutions have used or may be incentivized to use to alter their 90/10 calculation or inflate their non-Federal revenue percentage. Examples of such practices include: delaying disbursements to avoid failing 90/10 in two consecutive years, offering ineligible programs with little or no oversight or programs unnecessary to the education or training of students, and selling institutional loans or ISAs to count the proceeds from the sale in their 90/10 calculation. These regulations also create accountability protections and disclosure requirements. For instance, the regulations require proprietary institutions to notify students if the institution fails the 90/10 calculation in a fiscal year and notify students that they may lose title IV eligibility at that institution after another year of failing the calculation. These regulations also promote consumer protection and close potential loopholes related to ISAs and other alternative financing agreements. These changes will result in costs to certain proprietary institutions. Institutions unable to generate sufficient non-Federal revenues may seek to generate revenue to meet 90/10 requirements through such methods as creating programs that are not title IV eligible, a permissible source of revenue as long as these ineligible programs meet the requirements established in the regulations. They could also try to recruit more students who can pay without needing title IV financial aid. Students at proprietary institutions that fail the 90/10 calculation may no longer be able to attend due to lack of aid or school closure. However, according to research on similar sanctions, most of the students diverted from proprietary institutions will likely enroll in other institutions, often community colleges, which are typically lower cost.³⁶

Santa Monica, CA: RAND Corporation, 2014. www.rand.org/pubs/research_reports/RR564.html.

³⁶ Cellini, S.R., Darolia, R., & Turner, L.J. (2020). Where do students go when for-profit colleges lose Federal Aid? *American Economic Journal: Economic Policy*, 12(2), 46–83. <http://doi.org/10.1257/pol.20180265>.

Moreover, the study finds evidence that borrowing and default decline after students switch sectors. We anticipate that most students, proprietary institutions that provide programs that attract more non-Federal investment, public and nonprofit institutions, taxpayers and the Department will benefit from these regulations. Proprietary institutions that attract greater amounts of non-Federal investment, possibly because their programs are of greater value, will benefit because institutions that cannot secure as much non-Federal investment will either have to leave the title IV programs or need to refocus on providing better programs instead of devoting as much efforts to aggressively recruiting service members so they can manage their 90/10 rate. Similarly, public and private nonprofit institutions will benefit from not having to compete with institutions that are focused on avoiding issues with their 90/10 ratio, leading instead to greater competition over who offers programs with better returns. Taxpayers and the Department will benefit because ensuring greater levels of non-Federal investment in proprietary institutions will exert greater market forces on these institutions to deliver better value. The result is that the Federal investment will produce better returns.

Costs of the Regulatory Changes:

We expect that the changes to the 90/10 regulations will result in costs to the Department and proprietary institutions in several areas.

First, the regulations will result in some additional burden and compliance costs for proprietary institutions. For example, proprietary institutions will be responsible for identifying and counting more sources of Federal funds in their 90/10 calculation, including Federal funds delivered directly to students. These institutions will also need to adjust their 90/10 revenue sources and measures based upon the changes in the regulations. Additionally, institutions may need to make changes to programs to align with the new regulations, which will result in extra compliance costs for proprietary institutions. The Department expects that proprietary institutions seeking to meet the 90/10 requirements may improve the overall quality of their programs to attract and enroll more students who pay for courses with sources other than Federal funds. These improvements may include making changes to improve the quality and visibility of their programs; or partnering with employers willing to pay institutions with their own funds, ensuring alignment with labor market needs. Further, institutions may create

programs that are not eligible for title IV, HEA funds or other Federal funds to generate revenue to comply with the final 90/10 rule. As noted in the NPRM, we are concerned that allowing institutions to count funds from these ineligible programs may serve as an incentive for proprietary institutions to create and market low-quality ineligible programs.

Second, proprietary institutions that are unable to meet the 90/10 requirements will lose eligibility for Federal aid after failing for two consecutive years. This may cause an interruption in the academic program for some students. These students may also incur additional costs and burdens associated with identifying other educational opportunities and transferring across institutions, including searching for institutions that offer their desired program of study, paying to have their transcript sent to the new institution, and possibly losing progress toward their credential if the new institution does not accept all their previous coursework. However, the Department believes that—as in other cases where institutional accountability rules were strengthened—students are likely to transfer to higher-quality, and possibly more affordable, programs at other institutions.³⁷

Lastly, these regulations include other sources of Federal funds in addition to title IV, HEA funds as Federal sources of revenue for the purposes of calculating 90/10. Rather than specifying all Federal funding sources in the regulations, the Department opts to identify non-title IV, HEA Federal education assistance funds that must be included in the numerator of the 90/10 calculation in a notice published in the **Federal Register**, with updates as needed. We will incur minimal additional administrative costs related to the salary expenses of staff who identify Federal funds and update the **Federal Register** notice as needed.

Benefits of the Regulatory Changes:

The 90/10 rule benefits multiple groups of stakeholders, particularly military-connected students, proprietary institutions that offer programs of value to students and employers, public and non-profit institutions, and taxpayers.

First, military-connected students receive the most significant and immediate benefits from the regulations. The ARP amendment aimed to end some allegedly predatory practices to recruit service members and veterans

because their GI Bill and DOD Tuition Assistance education benefits could help proprietary institutions meet their non-Federal revenue requirements under the current 90/10 regulations.³⁸ Approximately 33 institutions would have failed the 90/10 requirements in 2018–19 if DOD and VA dollars were included as Federal funds. Seventeen institutions would have failed for two years in 2019–20, which would have resulted in their loss of title IV program eligibility. Most institutions (about 1,740 of approximately 1,800 institutions) would have passed in both years. Under these regulations, proprietary institutions at risk of failing the calculation no longer have an incentive to aggressively target GI Bill and DOD Tuition Assistance recipients because these programs are counted as Federal funds for purposes of 90/10. This revision also provides service members and veterans greater opportunities to consider their enrollment options at various institutions without potential undue influence or aggressive recruiting from proprietary institutions. Without such aggressive recruiting, military-connected students might be more likely to choose higher-value programs, generating potentially better employment and earnings gains for this population. This is especially true in light of the lower earnings gains for proprietary institutions noted elsewhere.

Other students who are considering enrolling in proprietary institutions will also benefit. For example, proprietary institutions will not be able to use temporary measures, such as delaying disbursements or selling institutional loans, to mask potential challenges with meeting the 90/10 requirements or to avoid losing eligibility following a failure of the 90/10 calculation during the fiscal year. All students will also benefit from the Department's assessment of institutional liability for all title IV funds disbursed after an institution becomes ineligible due to two consecutive 90/10 failures. This disincentivizes institutions to continue disbursing title IV funds after they lose eligibility. Consequently, students are less likely to receive title IV aid that

³⁷ Cellini, S.R., Darolia, R., & Turner, L.J. (2020). Where do students go when for-profit colleges lose Federal aid? *American Economic Journal: Economic Policy*, 12(2), 46–83, <http://doi.org/10.1257/pol.20180265>.

³⁸ See, for example, www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html; www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf; www.chronicle.com/article/for-profit-college-marketer-settles-allegations-of-preying-on-veterans/; www.insidehighered.com/quicktakes/2015/10/09/defense-department-puts-u-phoenix-probation; <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-itt-tech-lender-illegal-student>; and <https://files.eric.ed.gov/fulltext/ED614219.pdf>.

their school should not have disbursed. This preventive effort will also benefit taxpayers by decreasing improper payments that would occur if we were unable to collect the liability from the institution.

Next, the final regulations will promote consumer protection for prospective and currently enrolled students by requiring certain disclosures in institutional financing agreements. This provides additional protections for students accessing ISAs or alternative financing arrangements by increasing transparency about the terms of the arrangement and, in some cases, may result in better terms offered by the institution.

Lastly, students and taxpayers benefit when we more closely align allowable non-Federal revenue with the statutory intent of the HEA. By requiring proprietary institutions to bring in at least 10 percent of their revenue from non-Federal sources, such as tuition revenue, the final regulations require institutions to demonstrate a willing market beyond taxpayer-financed Federal education assistance and reduce their reliance on Federal subsidies. Institutions may have to attract more students who are willing to pay a greater share of program expenses with their personal funds, form more partnerships with employers, or take other steps to make non-Federal actors willing to invest their own money. Greater non-Federal investment could improve the return on Federal investments as the competition to attract non-Federal revenue will encourage better value. Institutions that do not comply with the 90/10 regulations lose eligibility for title IV, HEA funds. This may save some taxpayer dollars, depending on where the students who would have attended those institutions enroll and the relative price of those other institutions. These proprietary institutions will then need to operate without access to title IV, HEA financial aid dollars; identify and enroll students who pay with funds other than title IV funds, including by making any necessary changes to better market their programs; or partner with employers willing to pay institutions with their own funds, ensuring alignment with labor market needs and reducing the reliance on taxpayer dollars. Furthermore, a loss of access to title IV aid may also result in lower tuition prices at these institutions, as prior research has shown that proprietary schools that participate in title IV have higher tuition than similar

programs at institutions that do not participate.³⁹

3.3 *Change in Ownership (CIO):*

With the growing complexity of CIO transactions in recent years, the Department is finalizing regulations to ensure a clearer, more streamlined process for CIOs that ensures compliance with the HEA and related regulations. Addressing CIOs is important because they can affect the financial structure of institutions in ways that can limit their ability to invest in educational success. They can also affect the accountability structures that may or may not be attached to an institution that receives millions or tens of millions of dollars a year. Among the riskiest of those transactions for students and taxpayers are conversions from proprietary to nonprofit status. Between 2011 and 2020, there have been 59 such conversions, involving 20 separate transactions.⁴⁰ Of these, three-fourths of the institutions were sold to an entity that had not previously operated an institution of higher education; 13 institutions with a common ownership structure closed before we were able to decide whether to approve or deny the request for conversion.

A full, comprehensive CIO review—which can take between 7 months and 1 year, on average, for a CIO that includes a conversion, and 6 months for a CIO that does not—is a significant administrative burden for both the institution and the Department. Some institutions close transactions for the sale to a new owner but are unprepared to meet the regulatory requirements for a CIO, resulting in emergency situations where there is a potential loss of institutional eligibility and precipitous closure. These final regulations seek to reduce that risk by ensuring adequate notice is given prior to the sale closing date so that we can assess whether the institution can meet the regulatory requirements under the time constraints of § 600.20(g) and (h). This also provides sufficient time for the Department to request a letter of credit if the new owner does not have audited financial statements that satisfy the requirements of § 600.20(g)(3)(iv). In addition, these final regulations clarify the requirements for approval of a CIO

application and establish appropriate documentation requirements.

In addition to revising the CIO regulations, the ownership and control reporting regulations, and the definition of a nonprofit, these regulations also modify or add to definitions set forth in § 600.2. These regulations clarify definitions related to campus locations, such as “main campus,” “branch campus,” and “additional location.”

Costs of the Regulatory Changes:

The primary sources of costs with the CIO portion of these final regulations are increased burden for institutions from provisions that would enhance the Department’s review of CIOs and institutional participation in the Federal student aid programs. This final rule also provides for increased oversight of proprietary institutions seeking to convert to nonprofit status and increased reporting requirements for CIOs. The Department is not anticipating significant transfers to the Department from the CIO regulations, as this rule considers the structure under which an institution that is already participating in the title IV programs may continue to operate. Though a CIO could result in the Department not continuing title IV aid, we more often impose conditions. Where there is a requested conversion to nonprofit status, arrangements with outside parties preclude approval of nonprofit status.

Some of these regulatory provisions will not impose additional burden on affected institutions. For instance, although institutions must expend resources to submit a required notice to the Department at least 90 days in advance of the transaction, the information provided is principally the same as the information required for a materially complete application which must be submitted 10 business days following the closing of the transaction. Providing earlier notice will enable us to provide faster determinations related to any potential letter of credit requirement, and to avoid losses of eligibility for institutions that would be unable to meet the requirements of § 600.20(g) and (h) immediately after the transaction, as required by the regulations. Other aspects of the regulations simplify and codify existing Department practice, which do not increase burden to institutions.

However, some provisions require institutions undergoing CIOs after the effective date of the regulations to submit additional documentation and meet new requirements. For example, institutions must provide notice to their students of a forthcoming CIO at least 90 days in advance, requiring the

³⁹ Cellini, Stephanie Riegg, and Claudia Goldin. 2014. “Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges.” *American Economic Journal: Economic Policy*, 6 (4): 174–206.

⁴⁰ Government Accountability Office (GAO), Higher Education: IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions, December 2020. www.gao.gov/products/gao-21-89.

development of communications and resources for students. In addition, we currently require transactions to be reported to the Department only if the transaction affects at least a 25 percent ownership interest. These final regulations lower the reporting threshold for a CIO to cover changes of ownership interest of 5 percent or more. Accordingly, a greater number of institutions will need to meet these reporting requirements and affected institutions will incur some costs to meet them. We anticipate these costs will be modest as the process for reporting such a change will not be difficult or time consuming. However, these final regulations limit reviews of changes in control, which are more burdensome for the institution, generally to those involving a transfer of at least 50 percent control, rather than the current 25 percent. The Department believes that this will provide additional transparency benefits, while reducing the burden on institutions from more onerous changes in control reviews under circumstances where a change in control likely has not occurred. We believe these savings will outweigh the expense from the additional reporting. The Department anticipates the reporting burden cost range will be minimal due to the limited number of these events that occur and the minimal cost of the reporting. Additionally, any costs from the CIO regulations will only be associated with those institutions undergoing a CIO, which are relatively uncommon compared to the total number of institutions that participate in the title IV programs. The Department anticipates that the administrative costs to the agency of implementing these changes will be very limited, given the relatively small number of such transactions and the fact that many of these requirements are consistent with current practice.

Benefits of the Regulatory Changes:

The Department believes that the benefits and burden reduction that will result from the CIO regulations will outweigh these new costs. We anticipate the regulations will significantly benefit students, taxpayers, institutions, and the Department.

Students, taxpayers, institutions, and the Department will all benefit from the regulatory changes for CIOs, including those involving oversight of proprietary institutions converting to nonprofit status. Changes in ownership and control pose significant risk, especially when the transaction involves a significant amount of debt, a burdensome servicing agreement, the acquisition of a large institution or

chain, or a conversion to nonprofit status with ongoing and burdensome obligations to a former owner or other entity. Some cases resulted in school closures (and associated closed school discharges), requiring the investment of enforcement and oversight resources by States and the Federal government, and improperly exempting some institutions from regulations governing proprietary institutions—such as the 90/10 rule. Students, taxpayers, and the Department will benefit from increased transparency around a proposed transaction, providing more time for the Department to conduct oversight and ensure the transaction is properly conducted and does not result in an interruption of title IV, HEA funds. Institutions will also benefit from an earlier submission that allows us to provide feedback on whether the institution will be able to meet the requirements of a materially complete application before the CIO occurs. Knowing whether the Department requires an institution to submit a new owner letter of credit as part of the transaction can be critical. This advanced notice enables institutions to obtain a letter of credit with less time constraints and may also impact whether the institution will have a CIO.

Students and taxpayers will benefit from greater assurances that schools are complying with regulatory requirements in CIO transactions and meeting the definition of a “nonprofit institution.” Current and prospective students will benefit from the requirement that the institution provide notice to students at least 90 days prior to a CIO because the requirement will ensure that students receive important information that may impact their education in a timely manner, and that they are able to make future education decisions based on that knowledge. Students and taxpayers will also benefit from increased oversight of proprietary institutions converting to nonprofit status, including requiring that proprietary institutions continue to comply with regulatory requirements such as 90/10 unless and until they have met the requirements to be approved as a nonprofit institution by the Department. Taxpayers benefit from additional financial protection such as letters of credit when the required audited financial statements of a new owner are not available (consistent with current practice), as well as from any additional financial protections that may be deemed necessary by the Secretary based on the risk of the transaction.

Educational institutions will benefit from greater clarity as to how the rules apply to CIO transactions. The revised

definition of “nonprofit institutions” will ensure that institutions seeking such a designation are not using business arrangements that improperly benefit related parties. This can occur, for example, when a prior owner retains control of the institution through a contractual relationship, or when the prior owner continues to enjoy revenues generated by the institution through a debt obligation or a servicing agreement. This clarification will aid institutions in knowing how to comply, and complying, with the statutory and regulatory requirements for title IV HEA programs.

These final regulations will also enable a proprietary institution that seeks to convert to nonprofit status to understand the factors considered by the Department more clearly prior to submitting an application. As these institutions assess potential transactions, they will more easily be able to identify permissible and impermissible contracts and agreements with other private parties. The 90-day notice will also benefit institutions by ensuring that the Department can review owners’ audited financial statements to determine whether we require a letter of credit (or other financial surety) prior to the transaction closing. The Department may also provide notice prior to the CIO that we require additional financial surety to minimize financial or administrative risk that the institution may present to taxpayers on a case-by-case basis.

The Department will also benefit from clearer regulations and processes that are more easily interpreted and applied. Clearer definitions related to distance learning, including for “main campus,” “branch campus,” and “additional location,” will simplify and reduce the Department’s reviews of institutions and of CIO transactions by ensuring greater consistency. The Department will also benefit from the changes made to the reporting requirements, as lowering the threshold from 25 percent to 5 percent will increase transparency and enable more oversight of changes in control. This greater visibility into voting blocs and lower-level ownership changes will enable the Department to determine where institutions may have undergone a change in control, warranting greater scrutiny by the Department. These regulations will require reporting regardless of the type of corporate structure of the institution. These CIOs do not occur often, limiting the added burden from the reporting requirement. The Department will also experience less burden as a result of the change in the threshold for a change in control review from all changes in ownership

over 25 percent to a 50 percent or greater change in ownership and control or where we have reason to believe a change in control has occurred.

4. Net Budget Impacts

These final regulations are estimated to have a net Federal budget impact in savings of \$ – 44.3 million for loan cohorts 2025 to 2032, and \$879 million in net changes to Pell Grants. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. For the final regulations, the baseline was updated to include modifications for the PSLF waiver, the IDR waiver, the payment pause extension to December 2022, and the August 2022 announcement that the Department will discontinue up to \$20,000 in Federal student loans for borrowers who make under \$125,000 as an individual or \$250,000 as a family. This did not affect the net budget impact of these regulations as the impact on loans of the 90/10 provisions in these final regulations affects future cohorts only and the modifications affect past loan cohorts. Pell Grant estimates also affect

future awards and were not directly affected by the modifications in question. The budgetary effects of the regulations are primarily attributable to providing Pell Grants to confined or incarcerated individuals in qualifying prison education programs. The Department does not anticipate significant budgetary impacts related to the change in ownership provisions and anticipates a small Federal budgetary savings due to the 90/10 provisions. The specific effects for each provision are described in the following subsections covering the relevant topics.

Pell Grants for Confined or Incarcerated Individuals

The changes to the Pell Grant program to allow Pell Grants for confined or incarcerated individuals, as provided for by Congress, are expected to increase educational opportunities for confined or incarcerated individuals, while maintaining appropriate guidelines for program quality and requiring reporting for tracking the extent and performance of PEPs.

To estimate the potential increase in Pell Grant awards related to these changes, the Department assumed, based on current figures and previous experience with Pell Grant availability for incarcerated individuals, that 2 percent of the incarcerated population

of approximately 1.6 million individuals will participate in eligible PEPs. The size of the incarcerated population fluctuates and there are differing estimates of the number of incarcerated individuals, which is also affected by the pandemic. For example, the Department of Justice’s Bureau of Justice Statistics estimates a population of 1.4 million as of year-end 2019 with a decline to 1.2 million as of year-end 2020,⁴¹ while the Vera Institute of Justice estimates there are 1.8 million in prisons and jails as of mid-2020 and 1.77 million as of mid-2021.⁴² Given the uncertainty, the Department chose 1.6 million as a midpoint between estimates. We expect that most participating individuals will not have an opportunity to enroll full time due to the limited availability of courses in carceral settings. Due to these enrollment intensity constraints, incarcerated Pell recipients are unlikely to receive the maximum grant available. Based on experience from the Second Chance Pell experiment, where average awards were nearly 60 percent of the maximum award, the average award used to develop the estimate was prorated to approximately \$3,800 in the first year, generating the estimated costs in Table 1.

TABLE 1—ESTIMATED FINANCIAL TRANSFER EFFECTS OF PEPS
[\$millions]⁴³

Cost of Expanding Pell Eligibility to Incarcerated Individuals (PB23 Assumptions)						
	Academic year (AY) 2023–24	AY 2024–25	AY 2025–26	AY 2026–27	AY 2027–28	AY 2028–29
Discretionary Program Cost	96	100	101	101	102	103
Mandatory Program Cost	23	22	22	22	22	23
Total Program Cost	119	122	123	123	124	126
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Discretionary Outlays	32	63	99	101	101	102
Mandatory Outlays	11	23	22	22	22	22
Total Outlays	43	86	121	123	123	124
		AY 2029–30	AY 2030–31	AY 2031–32	AY 2032–33	10-year total
Discretionary Program Cost		104	104	105	104	1,020
Mandatory Program Cost		23	23	23	23	226
Total Program Cost		127	127	128	127	1,246
		FY 2029	FY 2030	FY 2031	FY 2032	10-year total
Discretionary Outlays		103	104	104	104	913

⁴¹ Bureau of Justice Statistics, Prisoners in 2020—Statistical Tables, December 2021, available at Prisoners in 2020—Statistical Tables (*ojp.gov*).

⁴² Vera Institute of Justice, People in Jail and Prison, Spring 2021, available at *www.vera.org/*

downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf.

⁴³ The Federal Pell Grant program has discretionary costs associated with the maximum award set in the annual appropriation and

mandatory costs associated with the additional award amount determined by statute. These changes affect both mandatory and discretionary costs.

	AY 2029–30	AY 2030–31	AY 2031–32	AY 2032–33	10-year total
Mandatory Outlays	23	23	23	23	214
Total Outlays	126	127	127	127	1,127

Based on these assumptions, the estimated cost of the regulatory changes related to Pell Grants for confined or incarcerated individuals is approximately \$1.1 billion over 10 years. The amount of Pell Grants awarded based on these changes will depend heavily on the number of institutions that choose to participate and the number of students that they enroll. Another factor that will affect the increase in transfers is how quickly institutions begin to offer PEP programs. We assume a fast roll-out since institutions will have been aware of these changes for several years before the regulations take effect, but the ramp-up could be more gradual, shifting the timing back and reducing the overall transfers.

90/10 Rule

To help estimate the effect of the final 90/10 regulations, the Department analyzed information about additional Federal aid received by institutions subject to the 90/10 requirements and found that an additional 92 institutions with \$524.8 million in Pell grants and \$1.09 billion in loan volume in AY 2019–20 would be above the 90 percent threshold, and 49 institutions would be above the 90 percent threshold for both 2018–19 and 2019–20, risking eligibility for title IV, HEA funds. The baseline update included the modifications for the Public Service Loan Forgiveness (PSLF) waiver, the Income-Driven Repayment (IDR) waiver, the payment pause extension to December 2022, and the August 2022 announcement that the Department will discharge up to \$20,000 in Federal student loans for borrowers who make under \$125,000 as an individual or \$250,000 as a family. However, these modifications did not

affect the net budget impact of the 90/10 provisions. These final regulations affect future cohorts only and the modifications affect past loan cohorts. However, the Department recognizes that institutions have historically managed to meet the 90/10 threshold, and we expect most institutions will be able to adapt to the new requirements. Additionally, students will still qualify for similar levels of aid even if they choose to attend a different institution or shift sectors. Therefore, we do not expect a 100 percent loss of loan volume and aid awarded for those institutions that we would otherwise estimate would be out of compliance under the final regulations. We estimate that the inclusion of additional types of Federal aid in the 90/10 calculation will decrease Pell Grants awarded by –\$248 million from AY 2024–25 to AY 2032–33 and have a net budget impact of \$–44.3 million from reduced loan volumes for cohorts 2025–2032.

The following tables demonstrate the expected change in Pell Grants awarded and loan volumes that resulted in the estimated net budget impact of \$–292 million. Our estimates are based on institutional data, including Post-9/11 GI Bill benefits and DOD Tuition Assistance programs. They do not account for funds that go directly to students to cover tuition, fees, or other institutional charges, and they do not include other sources of Federal funds disbursed by State or local entities.

To estimate the reduction in loan volume related to the change in the 90/10 regulations, the Department assumed that institutions with a 90/10 rate over 95 percent under the final regulations would not be able to reduce their rate below 90. While institutions in the 2018–19 and 2019–20 90/10 files used

for this estimate did not have the same motivations that will exist under the final regulations because the 90/10 calculation was different for them, no institution with a 90/10 rate above 95 in the first year was under 90 in the second year in the Department’s analysis. Seventeen institutions with \$94.9 million in Pell Grants and \$194.1 million in loans were above the 95 percent rate, representing between 0.2 percent to 3.3 percent of proprietary volume depending on the institution’s 2-year or 4-year level classification and grant or loan type. Student choice will affect the potential reduction, as students will be eligible to receive similar title IV amounts if attending a different institution. The Department has generally assumed a high percentage of students at schools that close or close programs because of 90/10 would pursue education and receive aid elsewhere. Additionally, a previous study has found that 60–70 percent enrollment losses at proprietary institutions due to sanctions were offset by increased enrollment at community colleges.⁴⁴ For this estimate, we assume that 60 percent of students would pursue their education elsewhere if their initial choice were not available due to the changes to the 90/10 regulations. Finally, we anticipate that the reduction in volume will decrease over the years as institutions over the threshold no longer participate and others adapt to the new threshold. To account for this, we reduced the percentage applied to the Pell Grant and loan volume by 30 percent in 2027–28 and 2028–29, 40 percent in 2029–30 and 2030–31, and 50 percent in 2031–32 and 2032–33. Table 2 shows the effect on Pell Grants of the final regulations.

TABLE 2—ESTIMATED REDUCTION IN PELL GRANT TRANSFERS FROM 90/10 REGULATIONS

	AY 2023–24	AY 2024–25	AY 2025–26	AY 2026–27	AY 2027–28	AY 2028–29
PB23 Baseline:						
Discretionary Cost (\$m)	24,342	27,581	28,041	28,509	28,994	30,385
Mandatory Cost (\$m)	5,310	5,670	5,754	5,840	5,934	6,246
Total Cost (\$m)	29,652	33,251	33,795	34,349	34,928	36,631
Recipients	6,380,000	6,990,000	7,113,000	7,237,000	7,372,000	7,656,000
	AY 2023–24	AY 2024–25	AY 2025–26	AY 2026–27	AY 2027–28	AY 2028–29

⁴⁴ Cellini, S.R., Darolia, R., & Turner, L.J. (2020). Where do students go when for-profit colleges lose

Federal Aid? *American Economic Journal:*

Economic Policy, 12(2), 46–83, <http://doi.org/10.1257/pol.20180265>.

TABLE 2—ESTIMATED REDUCTION IN PELL GRANT TRANSFERS FROM 90/10 REGULATIONS—Continued

	AY 2023–24	AY 2024–25	AY 2025–26	AY 2026–27	AY 2027–28	AY 2028–29
PB23 Baseline:						
Total Cost	29,652	33,251	33,795	34,349	34,928	36,631
% of Pell Grants at Institutions with 90/10 rates over 95 after 60% student adj applied		0.000%	0.134%	0.134%	0.094%	0.094%
Total Policy Cost			(45)	(46)	(33)	(34)
Discretionary Policy Cost			(38)	(38)	(27)	(29)
Mandatory Policy Cost			(8)	(8)	(6)	(6)
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Discretionary Outlays			(13)	(24)	(34)	(32)
Mandatory Outlays			(4)	(8)	(7)	(6)
Total Outlays			(17)	(32)	(41)	(38)

The reduction in loan volume was processed as a reduction in the baseline volumes by loan type and risk group. Student loan model risk group is a combination of institutional control and academic level with 2-year or less proprietary, 2-year or less private non-profit and public, 4-year first-year/sophomore, 4-year junior/senior, and

graduate students as the groups. In assigning the volume associated with 4-year programs to a risk group, we assumed 66 percent of volume will be in the 4-year first year/sophomore risk group and 34 percent in of volume the 4-year junior/senior risk group. Application of the adjustment factors to the loan volumes in the President’s

budget for FY 2023 baseline with modifications for the PSLF and IDR waivers, the December payment pause extension, and broad-based debt relief shown in Table 3 resulted in the \$ – 44.32 million loan estimate shown in Table 4.

TABLE 3—LOAN VOLUME ADJUSTMENT FACTORS

Cohort range	2025–2026 %	2027–2028 %	2029–2030 %	2031–2032 %
2-year proprietary:				
Subsidized	0.645	0.452	0.387	0.323
Unsubsidized	0.632	0.443	0.379	0.316
PLUS	0.265	0.185	0.159	0.132
4-year FR/SO:				
Subsidized	0.112	0.078	0.067	0.056
Unsubsidized	0.144	0.101	0.086	0.072
PLUS	0.004	0.002	0.002	0.002
4-year JR/SR:				
Subsidized	0.112	0.078	0.067	0.056
Unsubsidized	0.144	0.101	0.086	0.072
PLUS	0.004	0.002	0.002	0.002
GRAD:				
Unsubsidized	0.075	0.053	0.045	0.038
Grad Plus	0.008	0.005	0.005	0.004

TABLE 4—ESTIMATED 90/10 EFFECT ON LOANS
[\$mns]

	2025	2026	2027	2028	2029	2030	2031	2032	Total
Subsidized	-2.35	-3.18	-2.63	-2.50	-2.28	-2.21	-1.96	-1.89	-18.99
Unsubsidized	-2.58	-4.31	-3.76	-3.60	-3.30	-3.15	-2.81	-2.72	-26.22
PLUS	0.13	0.18	0.13	0.11	0.10	0.09	0.08	0.08	0.90
Total	-4.79	-7.31	-6.26	-5.99	-5.48	-5.26	-4.69	-4.54	-44.32

These reductions in transfers depend on institutional and student responses that are uncertain. In deciding whether to continue their education, students will depend on the availability of programs of interest at other institutions that fit their commuting or other

constraints. Fewer institutions may be able to get their rate below 90 or more students may decide not to pursue their education if the institution they would have chosen is not available. Both of those scenarios would further reduce Pell Grant and loan transfers. For

example, if the 49 institutions with rates above 90 under the final regulations in both years were assumed to not be able to get below the threshold, the estimated savings in Pell would be –\$521 million and in loans –\$84 million for a total of \$605 million in reduced transfers to

students. The mix of institutions and the volume they represent means the assumption about what rate or which institutions could adapt and get below the threshold does have a significant effect on the net budget impact.

Change in Ownership

The final regulations clarify the definitions of “additional location” and “branch campus,” which will promote clearer reporting and a common understanding regarding ownership structures within postsecondary education. The final CIO regulations will also increase reporting to ensure

greater transparency into CIO transactions and strengthen the Department’s review of changes in control. Increased oversight of CIO transactions and changes to the definition of a “nonprofit institution” may affect the distribution of title IV aid across sectors, as the Department will approve conversions from for-profit status to non-profit status only when institutions have met the requirements of a “nonprofit institution,” and some students’ choice of institution may be affected. However, the Department does not expect a significant budgetary impact from the CIO provisions and

would not estimate one without additional data demonstrating a clear effect.

5. Accounting Statement

As required by OMB Circular A–4, we have prepared an accounting statement showing the classification of the expenditures associated with these final regulations. This table provides our best estimate of the changes in annual monetized transfers as a result of these final regulations. Expenditures are classified as transfers from the Federal government to affected student loan borrowers.

TABLE 5—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES
[In millions]

Category	Benefits	
Increased access to educational opportunities for incarcerated individuals	Not quantified.	
Increased protection of military-connected students from aggressive recruitment and greater exertion of market forces on proprietary institutions.	Not quantified.	
Improved information about changes in ownership	Not quantified.	
Category	Costs	
Discount Rate	7%	3%
Costs of compliance with paperwork requirements	\$3.4	\$3.4
Increased administrative costs to Federal government to update systems to implement the regulations	\$11.1	\$11.1
Category	Transfers	
Reduced Pell Grants and loan transfers to students as some institutions lose eligibility from revised 90/10	7% \$ -27.1	3% \$ -28.3
Increased Pell Grant transfers to institutions providing educational opportunities to incarcerated individuals	\$109	\$111

6. Alternatives Considered

As part of the development of these regulations, the Department engaged in a negotiated rulemaking process in which we received comments and proposals from non-Federal negotiators representing numerous impacted constituencies. These included higher education institutions, consumer advocates, students, financial aid administrators, accrediting agencies, and State attorneys general. Non-Federal negotiators submitted a variety of proposals relating to the issues under discussion. Information about these proposals is available on our negotiated rulemaking website at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html>.

In response to comments received and further internal consideration of these final regulations, the Department reviewed and considered various changes to the proposed regulations detailed in the NPRM. We described the changes made in response to public comments in the Analysis of Comments and Changes section of this preamble. We summarize below the major

proposals that we considered but ultimately chose not to implement in these regulations. In developing these final regulations, we contemplated the budgetary impact, administrative burden, and anticipated effectiveness of the options we considered.

6.1. Pell Grants for Confined or Incarcerated Individuals:

With regard to Pell Grants for confined or incarcerated individuals, the Department considered establishing regulations that merely restated the statutory requirements. However, because the requirements were new to institutions, oversight entities, and other stakeholders, we believed the field would benefit from greater clarity and detail in the regulations. As a result, we opted to negotiate on the specific requirements in the regulations and were pleased to reach consensus on those items.

With regard to an oversight entity’s holistic determination that a PEP is operating in the best interest of students, the Department considered a variety of metrics, both from the HEA

and those more widely used within the higher education system.

The Department received many comments on the proposed regulations opposing the best interest determination made by the oversight entity. Many commenters contended that the best interest determination focused too much on outcomes and not enough on inputs. Commenters were concerned that the oversight entity would not have the expertise to assess outcomes, and that the assessment would be overly burdensome, complex, and costly. In response to these comments, in the final regulations, the Department changed the best interest determination to make an assessment of outcomes (earnings, continuing education, and job placement post release) permissive rather than mandatory. The Department believes that a review of inputs and an optional review of outcomes strikes a better balance between ensuring high-quality PEPs and minimizing undue burden on oversight entities.

The Department also considered allowing institutions to enroll students in eligible PEPs that lead to occupations that typically involve prohibitions on licensure and employment for formerly incarcerated individuals, if the affected individuals attest that they are aware of the restrictions. We are concerned, however, that such programs would not generally be a productive use of students' limited Pell Grant eligibility or time, or of taxpayer dollars. While we acknowledge that some individuals may be able to meet such restrictive licensure requirements, if the typical student in such a program would not be able to find employment or obtain licensure, we are concerned that students may enroll in programs that exhaust their Pell Grant lifetime eligibility before they are able to complete a credential that would allow them to earn a job in the field. The Department is aware that many States have engaged in efforts to reduce barriers to employment for formerly incarcerated individuals, which we strongly encourage. Our regulations ensure that institutions must regularly re-review State requirements to ensure they keep up with any such changes and make potential students aware.

6.2. 90/10 Rule:

In addressing the statutory changes to the 90/10 requirements made by the ARP, the Department considered including only DOD and Department of Veteran Affairs (VA) funds as additional Federal funds considered for 90/10 calculations, since these are the two largest programs with data that demonstrate a significant amount of funds flow to some proprietary institutions outside of title IV, HEA funds and because military-connected students have been targeted by some proprietary institutions in the past. The Department also considered including other large sources of Federal funds, such as WIOA, but excluding smaller sources. However, the Department determined to include all Federal education assistance programs, with the exception of funds that go directly to students that expressly cover costs outside of tuition, fees, and other institutional charges. The Department took this approach to be consistent with the statutory language in the ARP, which refers to "Federal education assistance funds" and because Federal appropriations for education assistance programs and disbursements to institutions may change from year to year. Consequently, the Department does not want to inadvertently create a new loophole where proprietary institutions identify a large source of

Federal funds, such as WIOA, and target students that receive this funding.

The Department considered including only Federal funds that go directly to proprietary institutions, to eliminate any burden on proprietary institutions to obtain timely information about funds that go directly to students, especially if a student needs to pay back an agency for funds received due to dropping a class, enrollment intensity decreasing, or other reasons. The Department also considered including all student funds, including those earmarked for purposes other than tuition and fees, such as housing. However, to be consistent with the ARP and HEA, the Department decided to include funds that go directly to students for tuition, fees, and other institutional charges. The Department did not include funds that go directly to students that are earmarked for purposes other than tuition, fees, and other institutional charges because this funding does not apply to institutional charges, as required by the HEA.

The Department considered listing all Federal educational assistance programs in the regulations. However, these programs and the underlying facts that determine institutional eligibility may change over time, so the Department instead decided to identify sources of funds that are to be included in a **Federal Register** notice, which gives greater flexibility to account for changes over time and can be updated as needed.

6.3. Change in Ownership:

The Department considered establishing a definition of "nonprofit institution" that would preclude all revenue-based or other agreements with a former owner, as opposed to just those that exceed reasonable market value. However, we determined that there could be agreements with a former owner that should not disqualify an institution from nonprofit status.

The Department considered maintaining the current definitions that require the Department to evaluate whether there has been a change of control at 25 percent of a change in ownership interest, rather than 50 percent, as under the final regulations. However, in general we have found that control below 50 percent is relatively rare. To accommodate concerns that institutions might begin to establish changes of control at, for example, 49 percent to evade the CIO requirements, we lowered the threshold for reporting changes in ownership to 5 percent from 25 percent and retained discretion for the Secretary to review and determine a change of control at a threshold below 50 percent based on information

available to the Secretary. While the Department also considered requiring reporting of all changes in ownership at any level, we instead determined 5 percent is appropriate to avoid unnecessary reporting on extremely minor changes and to limit unreasonable burden on institutions.

The Department considered whether to maintain the provision that requires the Secretary to continue an institution's participation in the title IV, HEA programs after a CIO with the same terms and conditions that governed its participation before the CIO. However, we are concerned that such terms may not adequately account for the added risk the institution may present to students and taxpayers as a result of the transaction. Based on our past review of CIO applications, we are aware of numerous cases in which the transaction fundamentally altered the operations of the institution. We believe that additional conditions and new terms are more appropriate for institutions undergoing a CIO and are accordingly including language that allows the Department to establish such appropriate terms.

7. Regulatory Flexibility Act

The Secretary certifies, under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that this regulatory action will not have a significant economic impact on a substantial number of "small entities."

The Small Business Administration (SBA) defines "small institution" using data on revenue, market dominance, tax filing status, governing body, and population. Most entities to which the Office of Postsecondary Education's (OPE) regulations apply are postsecondary institutions; however, many of these institutions do not report such data to the Department. As a result, for purposes of this final rule, the Department will continue defining "small entities" by reference to enrollment,⁴⁵ to allow meaningful comparison of regulatory impact across all types of higher education institutions.⁴⁶

⁴⁵ Two-year postsecondary educational institutions with enrollment of less than 500 full-time equivalent (FTE) and four-year postsecondary educational institutions with enrollment of less than 1,000 FTE.

⁴⁶ In previous regulations, the Department categorized small businesses based on tax status. Those regulations defined "non-profit organizations" as "small organizations" if they were independently owned and operated and not dominant in their field of operation, or as "small entities" if they were institutions controlled by governmental entities with populations below 50,000. Those definitions resulted in the categorization of all private nonprofit organization

TABLE 6—SMALL INSTITUTIONS UNDER ENROLLMENT-BASED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	328	1182	27.75
2-year	Private	182	199	91.46
2-year	Proprietary	1777	1952	91.03
4-year	Public	56	747	7.50
4-year	Private	789	1602	49.25
4-year	Proprietary	249	331	75.23
Total		3381	6013	56.23

Source: 2018–19 data reported to the Department.

Table 7 summarizes the number of institutions affected by these regulations.

TABLE 7—ESTIMATED COUNT OF SMALL INSTITUTIONS AFFECTED BY THE REGULATIONS

	Small institutions affected	As percent of small institutions
Pell Grants for Confined or Incarcerated Individuals	136	4.02
90/10	1,650	17.00
Change in Ownership	203	10.00

The Department has determined that the economic impact on small entities affected by the regulations will not be significant. As seen in Table 8, the

average total revenue at small institutions ranges from \$2.3 million for proprietary institutions to \$21.3 million at private institutions. These amounts

are significantly higher than the \$2,953 to \$4,593 in estimated costs per small institution for the regulations presented in Table 9.

TABLE 8—TOTAL REVENUES AT SMALL INSTITUTIONS

Control	Average total revenues for small institutions	Total revenues for all small institutions
Private	21,288,171	20,670,814,269
Proprietary	2,343,565	4,748,063,617
Public	15,398,329	5,912,958,512

Note: Based on analysis of IPEDS enrollment and revenue data for 2018–19.

The impact of the PEP regulations will be minimal to small institutions and will involve meeting disclosure requirements and complying with oversight entity and the Department requirements.

The changes to 90/10 will have a minor impact on proprietary institutions. These impacts include calculating the non-Federal revenue and providing a notification to students and the Department if an institution fails to comply with the 90/10 requirement.

While the CIO regulations have the potential to impact small entities, so there will be a minor burden on institutions that undergo a CIO to notify students at least 90 days prior to a proposed CIO. We believe this burden will be minor and the notification can be disseminated electronically. The reduction in the reporting threshold for changes in ownership from 25 to 5 percent will impact more small entities than in the past; however, the burden

associated with this increase in reporting is minimal and relatively uncommon. The Department anticipates that lowering the reporting threshold will not result in many institutions having to meet reporting requirements as the Department anticipates that even at the lower threshold, this is still not a common occurrence. In addition, the reporting burden is minimal for those who will have a reporting burden.

as small and no public institutions as small. Under the previous definition, proprietary institutions were considered small if they were independently owned and operated and not dominant in their field

of operation with total annual revenue below \$7,000,000. Using FY 2017 IPEDs finance data for proprietary institutions, 50 percent of 4-year and 90 percent of 2-year or less proprietary institutions

would be considered small. By contrast, an enrollment-based definition applies the same metric to all types of institutions, allowing consistent comparison across all types.

TABLE 9—ESTIMATED COSTS FOR SMALL INSTITUTIONS

Compliance area	Number of small institutions affected	Cost range per institution (\$)		Estimated overall cost range for small institutions affected (\$)	
Pell Grants for Confined or Incarcerated Individuals disclosure requirement	44	750	1,125	32,996	49,495
90/10 non-Federal revenue calculation	1,650	750	1,500	1,237,368	2,474,736
90/10 failure student notification	11	141	187	1,547	2062
CIO notification to students	71	188	281	13,313	19,967
CIO increased reporting burden	203	1,125	1,500	228,351	304,468

Paperwork Reduction Act of 1995

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

Sections 600.7, 600.10, 600.20, 600.21, 668.28, 668.43, 668.237, and 668.238 of this final rule contain information collection requirements. These final regulations include requirements for institutions to: obtain a waiver allowing them to enroll more than 25 percent of their students as incarcerated students; obtain approval to offer PEPs; submit an application seeking continued title IV participation for a change in ownership; report changes in ownership or control; and, for proprietary institutions, demonstrate compliance with the 90/10 rule. Under the PRA, the Department has or will at the required time submit a copy of these sections and an Information Collection Request to OMB for its review. For some of the regulatory sections, including those relating to PEPs, PRA approval will be sought via a separate information collection process. Specifically, the Department will publish notices in the **Federal Register** to seek public comment on these collections.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required

to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number. In the final regulations, we will display the control numbers assigned by OMB to the information collection requirements adopted in these final regulations.

Section 600.7—Conditions of institutional eligibility;

Section 600.10—Date, extent, duration, and consequences of eligibility;

Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification;

Section 600.21—Updating application information; and

Section 668.238—Application requirements.

Requirements: Under § 600.7(c)(1), the Secretary will not approve an enrollment cap waiver for a postsecondary institution's Prison Education Program (PEP) until the oversight entity is able to make the "best interest determination" described in § 668.241, which will be at least 2 years after the postsecondary institution has continuously provided a PEP.

Section 600.10(c)(1)(iv) requires an institution to obtain approval from the Secretary to offer the institution's first eligible PEP at its first two additional locations at correctional facilities.

Section 600.20(g)(1)(i) requires institutions to notify the Department at least 90 days in advance of a proposed change in ownership. This includes submission of a completed form, State authorization and accrediting documents, and copies of audited financial statements. It also includes reporting any subsequent changes to the proposed ownership structure at least 90 days prior to the date the change in ownership is to occur.

We are amending the reporting requirements in § 600.21(a)(6) to distinguish between reportable changes in ownership and changes of control

and between natural persons and legal entities.

Under § 600.21(a)(14), institutions must report initial or additional PEPs and locations for PEPs.

Section 600.21(a)(15) also requires reporting on changes in ownership that do not result in a change of control and that are not otherwise specified on the list of types of changes in ownership that must be reported, to ensure that novel ownership structures are covered under the regulations.

Section 668.238(a) requires postsecondary institution to seek approval for the first PEP at the first two additional locations as required under § 600.10. The application requirements for such PEPs are in § 668.238(b). For all other PEPs and locations not subject to initial approval by the Secretary, postsecondary institutions must submit the documentation outlined in § 668.238(c).

Burden Calculation: All of these regulatory changes will require an update to the current institutional application form, 1845-0012. The form update will be completed and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations. The burden changes will be assessed to OMB Control Number 1845-0012, Application for Approval to Participate in Federal Student Aid Programs.

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

Requirements: Section 600.20(g)(4) requires institutions to notify enrolled and prospective students at least 90 days prior to a proposed change in ownership.

Burden Calculation: We believe that this will result in burden for the institution. Based on the GAO report cited earlier, using the 59 institutional changes of ownership over a period of 9 years, we estimate that 7 institutions annually will require 20 hours to develop the required notice and create

and send an email message to all current and prospective students for a total of 140 hours (7 × 20 hours = 140 hours).

The burden change will be assessed to OMB Control Number 1845–NEW,

Change of Ownership Notification to Students.

CHANGE OF OWNERSHIP NOTIFICATION TO STUDENTS—OMB CONTROL NUMBER: 1845–NEW

Affected entity	Respondent	Responses	Burden hours	Cost at \$46.59 per hour for institutions
Proprietary	7	7	140	\$6,522.60
Total	7	7	140	6,522.60

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

Requirements: Section 668.28(a)(2) outlines how proprietary institutions calculate the percentage of their revenue that is Federal revenue and creates an end-of-fiscal-year deadline for proprietary institutions to request and disburse title IV funds to students. Additionally, in § 668.28(c)(3) we establish disclosures for proprietary institutions that fail to derive at least 10 percent of their fiscal-year revenues from allowable non-Federal funds.

Burden Calculation: We believe that the changes to § 668.28(a)(2) will result in burden for the institution. As of April 2022, there were 1,650 proprietary institutions eligible to participate in the

title IV, HEA programs. We believe that all proprietary institutions will be required to perform this calculation. We believe that it will take 1,650 institutions an estimated 24 hours each to gather information about the eligible students and payment information to perform the required calculations and request any required disbursements for a total of 39,600 hours (1,650 institutions × 24 hours = 39,600 hours). The estimated costs for institutions to meet this requirement are \$1,844,964.

We believe that the changes to § 668.28(c)(3), which requires institutions to notify students when the institution fails the 90/10 revenue test, will result in a burden for the institution. For the 2019–2020 Award

Year, there were 33 institutions that failed to meet the 90/10 revenue test when adding in Post 9–11 GI Bill and DOD Tuition Assistance funds. Using this number of institutions as representative of the number of institutions that would annually fail the 90/10 revenue test, we estimate that 33 institutions will require 4 hours to develop and post the required notice on the institution’s intranet and internet sites for a total of 132 hours (33 institutions × 4 hours = 132 hours). The estimated costs for institutions to meet this requirement are \$6,150.

The total burden assessed to OMB Control Number 1845–0096 is estimated at 39,732 hours and estimated costs of \$1,851,114.

STUDENT ASSISTANCE GENERAL PROVISIONS—NON-TITLE IV REVENUE REQUIREMENTS (90/10)—OMB CONTROL NUMBER: 1845–0096

Affected entity	Respondent	Responses	Burden hours	Cost at \$46.59 per hour for institutions
Proprietary	1,650	1,683	39,732	\$1,851,114
Total	1,650	1,683	39,732	1,851,114

Section 668.43—Institutional Information.

Requirements: Under § 668.43(a)(5)(vi), an institution must disclose if an eligible PEP is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation (as described in § 668.236(a)(7) and (8)). In that case, the postsecondary institution must provide information regarding whether that occupation typically involves State or Federal prohibitions on the licensure or employment of

formerly confined or incarcerated individuals. This requirement applies in the State where the correctional facility is located or, in the case of a Federal correctional facility, in the State where most of the individuals confined or incarcerated in such facility will reside upon release.

Burden Calculation: We believe that, of an estimated 400 institutions that will participate in PEPs, 20 percent or 80 institutions will have programs that will require such research and disclosure. We further believe that, of an estimated 800 programs at those institutions, 20

percent or 160 programs will require such research and disclosure. We anticipate that to fully research the licensure requirements in the required State or States and prepare documentation for students in the eligible PEP, an institution will need 25 hours per program for an estimated total burden of 4,000 hours (160 × 25 = 4,000). The burden of 4,000 hours will be assessed to OMB Control Number 1845–0156 with an estimated cost of \$186,360.

ACCREDITATION PARTICIPATION AND DISCLOSURES—OMB CONTROL NUMBER: 1845–0156

Affected entity	Respondent	Responses	Burden hours	Cost at \$46.59 per hour for institutions
Private, not-for-profit	14	28	700	\$32,613

ACCREDITATION PARTICIPATION AND DISCLOSURES—OMB CONTROL NUMBER: 1845–0156—Continued

Affected entity	Respondent	Responses	Burden hours	Cost at \$46.59 per hour for institutions
Public	66	132	3,300	153,747
Total	80	160	4,000	186,360

Section 668.237—Accreditation requirements.

Requirements: Section 668.237 requires program evaluation at the first two additional locations to ensure institutional ability to offer and implement the PEP in accordance with the accrediting agency’s standards. The final regulations require the accrediting agency to conduct a site visit no later than one year after the institution has initiated a PEP at its first two additional locations at correctional facilities. Additionally, the final regulations require accrediting agencies to review the methodology used by an institution in determining that the PEP meets the same standards for substantially similar non-PEP programs.

Burden Calculation: Of the current 54 recognized accrediting agencies, it is

estimated that 18 accrediting agencies may be called upon to perform such required reviews for institutions under their oversight. It is estimated that each of these accrediting agencies will require 8 hours per institution to evaluate the written applications for the first two PEP programs offered or any change in methodology review. With an estimated 400 institutions participating in the PEP program, accrediting agencies will require 3,200 hours to complete this initial review (400 institutions × 8 hours = 3,200 burden hours).

We estimate that, under the final regulations, accrediting agencies will require 50 hours to prepare for the site visit, perform the site visit, and report the findings. With an estimated 400 institutions participating in the PEP

program, accrediting agencies will require 20,000 hours to complete this initial review (400 institutions × 50 hours = 20,000 burden hours).

We estimate that accrediting agencies will require an estimated 8 hours to perform the methodology review under the final regulations. With an estimated 400 institutions participating in the PEP program, accrediting agencies will require 3,200 hours to complete this initial review (400 institutions × 8 hours = 3,200 burden hours).

The total estimated burden for accrediting agencies to perform these tasks for the PEP evaluations is 42,400 hours under the OMB Control Number 1840–NEW.

PRISON EDUCATION PROGRAM ACCREDITATION REQUIREMENTS—OMB CONTROL NUMBER 1840–NEW

Affected entity	Respondent	Responses	Burden hours	Cost \$46.59 per hour for institutions
Not-For-Profit Private	18	12,000	26,400	\$1,229,976
Total	18	12,000	26,400	1,229,976

Consistent with the discussions above, the following chart describes the sections of the final regulations involving information collections, the information being collected, the collections that the Department will submit to OMB for approval and public

comment under the PRA, and the estimated costs associated with the information collections. The monetized net cost of the increased burden for institutions and students was calculated using wage data developed using Bureau of Labor Statistics (BLS) data.

For institutions, we have used the median hourly wage for Education Administrators, Postsecondary, \$46.59 per hour according to BLS as of May 2021. www.bls.gov/oes/current/oes119033.htm.

TABLE 10—COLLECTION OF INFORMATION

Regulatory section	Information collection	OMB control No. and estimated burden	Estimated cost \$46.59 institutional unless otherwise noted
§§ 600.7, 600.10, 600.20, 600.21, and 668.238.	<p>§ 600.7(c)(1) specifies procedures for the Secretary to approve an enrollment cap waiver for incarcerated individuals at a postsecondary institution.</p> <p>§§ 600.10(c)(1)(iv) and 668.238(a) require an institution to obtain approval from the Secretary to offer the institution’s first eligible PEP at its first two additional locations at correctional facilities.</p> <p>§ 600.20(g)(1)(i) requires institutions to notify the Department at least 90 days in advance of a proposed change in ownership.</p> <p>§ 600.21(a)(6) specifies reporting requirements for changes in ownership and changes of control.</p> <p>§ 600.21(a)(14) requires institutions to report on PEPs.</p>	1845–0012; Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form.

TABLE 10—COLLECTION OF INFORMATION—Continued

Regulatory section	Information collection	OMB control No. and estimated burden	Estimated cost \$46.59 institutional unless otherwise noted
§ 600.20	§ 600.21(a)(15) requires reporting on changes in ownership that do not result in a change of control and that are not otherwise specified in the regulations. § 600.20(g)(4) requires institutions to notify enrolled and prospective students at least 90 days prior to a proposed change in ownership.	1845—NEW; 140 hours	\$6,522.60.
§ 668.28	§ 668.238(b) specifies the application requirements for PEPs. For all other PEPs not subject to initial approval by the Secretary, postsecondary institutions must submit the documentation outlined in § 668.238(c). § 668.28(a)(2) clarifies how proprietary institutions calculate the percentage of their revenue from Federal education assistance programs. § 668.28(c)(3) establishes disclosures for proprietary institutions that fail the 90/10 calculation.	1845—0096; 39,732 hours	\$1,844,964.
§ 668.43	§ 668.43(a)(5)(vi) requires a disclosure if an eligible PEP is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation.	1845—0156; 4,000 hours	\$186,360.
§ 668.237	§ 668.237 specifies how accrediting agencies will review PEPs..	1840—NEW; 26,400 hours	\$1,229,976.

The total burden hours and change in burden hours associated with each OMB Control number affected by the regulations follows:

Control No.	Total burden hours	Change in burden hours
1840—NEW	26,400	+26,400
1845—0096	39,737	+39,732
1845—0156	583,171	+4,000
1845—NEW	140	+140
Total	649,448	+70,272

We have prepared Information Collection Requests for these information collection requirements. If you wish to review and comment on the Information Collection Requests, please follow the instructions in the **ADDRESSES** section of this document. *Note:* The Office of Information and Regulatory Affairs in OMB and the Department review all comments posted at www.regulations.gov.

In preparing your comments, you may want to review the Information Collection Requests (ICRs), including the supporting materials, in www.regulations.gov by using Docket ID ED–2022–OPE–0062. These proposed collections are identified as proposed collections 1840–NEW, 1845–0096, 1845–0156, 1845–NEW.

If you want to review and comment on the ICRs, please follow the instructions provided below. Please note that the Office of Information and Regulatory Affairs and the Department review all comments posted at www.regulations.gov.

We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
 - Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
 - Enhancing the quality, usefulness, and clarity of the information we collect; and
 - Minimizing the burden on those who must respond. Comments submitted in response to this document should be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov by selecting Docket ID ED–2022–OPE–0062. Please specify the Docket ID and indicate “Information Collection Comments” if your comment(s) relate to the information collection for this rule.
- For Further Information:*
Electronically mail ICDocketMgr@ed.gov.

Consistent with 5 CFR 1320.8(d), the Department is soliciting comments on the information collection through this document. OMB is required to make a decision concerning the collections of information contained in these final regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by November 28, 2022.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. “Federalism implications” means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The final regulations do not have federalism implications.

Accessible Format: On request to one of the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs-education,

Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 668

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

34 CFR Part 690

Colleges and universities, Education of disadvantaged, Grant programs-education, Reporting and recordkeeping requirements, Student aid.

Miguel A. Cardona,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends parts 600, 685, 668, and 690 of title 34 of the Code of Federal Regulations as follows:

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

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

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

- 2. Section 600.2 is amended by:
 - a. Revising the definitions of “Additional location” and “Branch campus”.
 - b. Adding in alphabetical order a definition of “Confined or incarcerated individual”.
 - c. Removing the definition of “Incarcerated student”.
 - d. Adding in alphabetical order a definition of “Main campus”.
 - e. Revising the definition of “Nonprofit institution”.

The additions and revisions read as follows:

§ 600.2 Definitions.

* * * * *

Additional location: (1) A physical facility that is geographically separate from the main campus of the institution and within the same ownership structure of the institution, at which the institution offers at least 50 percent of an educational program. An additional location participates in the title IV, HEA programs only through the certification of the main campus.

(2) A Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or

other similar correctional institution is considered to be an additional location even if a student receives instruction primarily through distance education or correspondence courses at that location.

* * * * *

Branch campus: A physical facility that is geographically separate from the main campus of the institution and within the same ownership structure of the institution, and that also—

- (1) Is approved by the Secretary as a branch campus; and
- (2) Is independent from the main campus, meaning the location—
 - (i) Is permanent in nature;
 - (ii) Offers courses in educational programs leading to a degree, certificate, or other recognized education credential;
 - (iii) Has its own faculty and administrative or supervisory organization; and
 - (iv) Has its own budgetary and hiring authority.

* * * * *

Confined or incarcerated individual: An individual who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution.

An individual is not considered incarcerated if that individual is subject to or serving an involuntary civil commitment, in a half-way house or home detention, or is sentenced to serve only weekends.

* * * * *

Main campus: The primary physical facility at which the institution offers eligible programs, within the same ownership structure of the institution, and certified as the main campus by the Department and the institution’s accrediting agency.

* * * * *

Nonprofit institution: (1) A nonprofit institution is a domestic public or private institution or foreign institution as to which the Secretary determines that no part of the net earnings of the institution benefits any private entity or natural person and that meets the requirements of paragraphs (2) through (4) of this definition, as applicable.

(2) When making the determination under paragraph (1) of this definition, the Secretary considers the entirety of the relationship between the institution, the entities in its ownership structure, and other parties. For example, a nonprofit institution is generally not an institution that—

- (i) Is an obligor (either directly or through any entity in its ownership chain) on a debt owed to a former owner of the institution or a natural person or

entity related to or affiliated with the former owner of the institution;

(ii) Either directly or through any entity in its ownership chain, enters into or maintains a revenue-sharing agreement, unless the Secretary determines that the payments and the terms under the revenue-sharing agreement are reasonable, based on the market price and terms for such services or materials, and the price bears a reasonable relationship to the cost of the services or materials provided, with—

(A) A former owner or current or former employee of the institution or member of its board; or

(B) A natural person or entity related to or affiliated with the former owner or current or former employee of the institution or member of its board;

(iii) Is a party (either directly or indirectly) to any other agreements (including lease agreements) under which the institution is obligated to make any payments, unless the Secretary determines that the payments and terms under the agreement are comparable to payments in an arm's-length transaction at fair market value, with—

(A) A former owner or current or former employee of the institution or member of its board; or

(B) A natural person or entity related to or affiliated with the former owner or current or former employee of the institution or member of its board; or

(iv) Engages in an excess benefit transaction with any natural person or entity.

(3) A private institution is a "nonprofit institution" only if it meets the requirements in paragraph (1) of this definition and is—

(i) Owned and operated by one or more nonprofit corporations or associations;

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

(iii) Determined by the U.S. Internal Revenue Service to be an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

(4) A foreign institution is a "nonprofit institution" only if it meets the requirements in paragraph (1) of this definition and is—

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

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

authority to be a nonprofit educational institution; or

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

* * * * *

- 3. Section 600.4 is amended by:
 - a. Revising paragraph (a) introductory text; and
 - b. Removing the parenthetical authority citation at the end of the section.

The revision reads as follows:

§ 600. Institution of higher education.

(a) An institution of higher education is a public or other nonprofit educational institution that—

* * * * *

- 4. Section 600.7 is amended by revising paragraph (c) to read as follows:

§ 600.7 Conditions of institutional eligibility.

* * * * *

(c) *Special provisions regarding confined or incarcerated individuals.*

(1)(i) The Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section, upon the application of an institution, if the institution is a nonprofit institution that provides four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma and has continuously provided an eligible prison education program approved by the Department under subpart P of 34 CFR part 668 for at least two years.

(ii) The Secretary does not grant the waiver of the prohibition contained in paragraph (a)(1)(iii) of this section if—

(A) For a program described under paragraph (c)(3)(ii) of this section, the program does not maintain a completion rate of 50 percent or greater; or

(B) For an institution described under paragraph (c)(2) or (3) of this section—

(1) The institution provides one or more eligible prison education programs that is not compliant with the requirements of 34 CFR part 668, subpart P; or

(2) The institution is not administratively capable under 34 CFR 668.16 or financially responsible under 34 CFR part 668, subpart L.

(2) If the nonprofit institution that applies for a waiver consists solely of four-year or two-year educational programs for which it awards a

bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section for the entire institution.

(3) If the nonprofit institution that applies for a waiver does not consist solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section on a program-by-program basis—

(i) For the four-year and two-year programs for which the institution awards a bachelor's degree, an associate degree, or a postsecondary diploma; and

(ii) For the other programs the institution provides, if the confined or incarcerated individuals who are regular students enrolled in those other programs have a completion rate of 50 percent or greater.

(4)(i)(A) For five years after the Secretary grants the waiver, no more than 50 percent of the institution's regular enrolled students may be confined or incarcerated individuals; and

(B) Following the period described in paragraph (c)(4)(i)(A) of this section, no more than 75 percent of the institution's regular enrolled students may be confined or incarcerated individuals.

(ii) The limitations in paragraph (c)(4)(i) of this section do not apply if the institution is a public institution chartered for the explicit purpose of educating confined or incarcerated individuals, as determined by the Secretary, and all students enrolled in the institution's prison education program are located in the State where the institution is chartered.

(5) The Secretary limits or terminates the waiver described in this section if the Secretary determines the institution no longer meets the requirements established under paragraph (c)(1) of this section.

(6) If the Secretary limits or terminates an institution's waiver under paragraph (c) of this section, the institution ceases to be eligible for the title IV, HEA programs at the end of the award year that begins after the Secretary's action unless the institution, by that time—

(i) Demonstrates to the satisfaction of the Secretary that it meets the requirements under paragraph (c)(1) of this section; and

(ii) The institution does not enroll any additional confined or incarcerated individuals upon the limitation or termination of the waiver and reduces its enrollment of confined or

incarcerated individuals to no more than 25 percent of its regular enrolled students.

* * * * *

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

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

* * * * *

(c) * * *

(1) An eligible institution that seeks to establish the eligibility of an educational program must obtain the Secretary's approval—

(i) Pursuant to a requirement regarding additional programs included in the institution's Program Participation Agreement (PPA) under 34 CFR 668.14;

(ii) For the first direct assessment program under 34 CFR 668.10, the first direct assessment program offered at each credential level, and for a comprehensive transition and postsecondary program under 34 CFR 668.232;

(iii) For an undergraduate program that is at least 300 clock hours but less than 600 clock hours and does not admit as regular students only persons who have completed the equivalent of an associate degree under 34 CFR 668.8(d)(3); and

(iv) For the first eligible prison education program under subpart P of 34 CFR part 668 offered at the first two additional locations as defined under § 600.2 at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution.

* * * * *

■ 6. Section 600.20 is amended by revising paragraphs (g) and (h) to read as follows:

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

* * * * *

(g) *Application for provisional extension of certification.* (1) If a private nonprofit institution, a private for-profit institution, or a public institution participating in the title IV, HEA programs undergoes a change in ownership that results in a change of control as described in § 600.31, the Secretary may continue the institution's participation in those programs on a provisional basis if—

(i) No later than 90 days prior to the change in ownership, the institution provides the Secretary notice of the proposed change on a fully completed form designated by the Secretary and

supported by the State authorization and accrediting documents identified in paragraphs (g)(3)(i) and (ii) of this section, and supported by copies of the financial statements identified in paragraphs (g)(3)(iii) and (iv) of this section;

(ii) The institution promptly reports to the Secretary any changes to the proposed ownership structure identified under paragraph (g)(1)(i) of this section, provided that the change in ownership cannot occur earlier than 90 days following the date the change is reported to the Secretary; and

(iii) The institution under the new ownership submits a "materially complete application" that is received by the Secretary no later than 10 business days after the day the change occurs.

(2) Notwithstanding the submission of the items under paragraph (g)(1) of this section, the Secretary may determine that the participation of the institution should not be continued following the change in ownership.

(3) For purposes of this section, a private nonprofit institution, a private for-profit institution, or a public institution submits a materially complete application if it submits a fully completed application form designated by the Secretary supported by—

(i) A copy of the institution's State license or equivalent document that authorized or will authorize the institution to provide a program of postsecondary education in the State in which it is physically located, supplemented with documentation that, as of the day before the change in ownership, the State license remained in effect;

(ii) A copy of the document from the institution's accrediting agency that granted or will grant the institution accreditation status, including approval of any non-degree programs it offers, supplemented with documentation that, as of the day before the change in ownership, the accreditation remained in effect;

(iii) Audited financial statements for the institution's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23;

(iv)(A) Audited financial statements for the institution's new owner's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23, or equivalent financial statements for that owner that are acceptable to the Secretary; or

(B) If such financial statements are not available, financial protection in the amount of—

(1) At least 25 percent of the institution's prior year volume of title IV aid if the institution's new owner does not have two years of acceptable audited financial statements; or

(2) At least 10 percent of the institution's prior year volume of title IV aid if the institution's new owner has only one year of acceptable audited financial statements; and

(v) If deemed necessary by the Secretary, financial protection in the amount of an additional 10 percent of the institution's prior year volume of title IV aid, or a larger amount as determined by the Secretary. If any entity in the new ownership structure holds a 50 percent or greater direct or indirect voting or equity interest in another institution or institutions, the financial protection may also include the prior year volume of title IV aid, or a larger amount as determined by the Secretary, for all institutions under such common ownership.

(4) The institution must notify enrolled and prospective students of the proposed change in ownership, and submit evidence that such disclosure was made, no later than 90 days prior to the change.

(h) *Terms of the extension.* (1) If the Secretary approves the institution's materially complete application, the Secretary provides the institution with a temporary provisional Program Participation Agreement (TPPPA).

(2) The TPPPA expires on the earlier of—

(i) The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (h)(3) of this section apply;

(ii) The date on which the Secretary notifies the institution that its application is denied; or

(iii) The date on which the Secretary co-signs a new provisional program participation agreement (PPPA).

(3) If the TPPPA will expire under the provisions of paragraph (h)(2)(i) of this section, the Secretary extends the provisional TPPPA on a month-to-month basis after the expiration date described in paragraph (h)(2)(i) of this section if, prior to that expiration date, the institution provides the Secretary with—

(i) An audited "same-day" balance sheet for a proprietary institution or an audited statement of financial position for a nonprofit institution;

(ii) If not already provided, approval of the change of ownership from each State in which the institution is

physically located or for an institution that offers only distance education, from the agency that authorizes the institution to legally provide postsecondary education in that State;

(iii) If not already provided, approval of the change of ownership from the institution's accrediting agency; and

(iv) A default management plan unless the institution is exempt from providing that plan under 34 CFR 668.14(b)(15).

* * * * *

■ 7. Section 600.21 is amended by:

■ a. Revising paragraphs (a)

introductory text and (a)(6);

■ b. Adding paragraphs (a)(14) and (15); and

■ c. Revising paragraph (b).

The revisions and additions read as follows:

§ 600.21 Updating application information.

(a) *Reporting requirements.* Except as provided in paragraph (b) of this section, an eligible institution must report to the Secretary, in a manner prescribed by the Secretary no later than 10 days after the change occurs, any change in the following:

* * * * *

(6)(i) *Changes in ownership.* (A) Any change in the ownership of the institution, whereby a natural person or entity acquires at least a 5 percent ownership interest (direct or indirect) of the institution but that does not result in a change of control as described in § 600.31.

(B) Changes representing at least 5 percent but under 25 percent (either on a single or combined basis) must be reported quarterly (instead of within 10 days) based on the institution's fiscal year. However, when an institution plans to undergo a change in ownership, all unreported ownership changes of 5 percent or more in the existing ownership must be reported prior to submission of the 90-day notice required by § 600.20. Thereafter, any changes of 5 percent or more in the existing ownership must be reported within the 10-day deadline, up through the date of the change in ownership.

(ii) *Changes in control.* A natural person or legal entity's ability to affect substantially the actions of the institution if that natural person or legal entity did not previously have this ability. The Secretary considers a natural person or legal entity to have this ability if—

(A) The natural person acquires, alone or together with another member or members of their family, at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution;

(B) The entity acquires, alone or together with an affiliated natural person or entity, at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution;

(C) The natural person or entity acquires, alone or together with another natural person or entity, under a voting trust, power of attorney, proxy, or similar agreement, at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution;

(D) The natural person becomes a general partner, managing member, chief executive officer, trustee or co-trustee of a trust, chief financial officer, director, or other officer of the institution or of an entity that has at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution; or

(E) The entity becomes a general partner or managing member of an entity that has at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution.

* * * * *

(14) Its establishment or addition of an eligible prison education program at an additional location as defined under § 600.2 at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution that was not previously included in the institution's application for approval as described under § 600.10.

(15) Any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and is not addressed under paragraph (a)(6) of this section, including the addition or elimination of any entities in the ownership structure, a change of entity from one type of business structure to another, and any excluded transactions under § 600.31(e).

(b) *Additional reporting from institutions owned by publicly traded corporations.* An institution that is owned by a publicly traded corporation must report to the Secretary any change in the information described in paragraph (a)(6) or (15) of this section when it notifies its accrediting agency, but no later than 10 days after the institution learns of the change.

* * * * *

■ 8. Add § 600.22 to read as follows:

§ 600.22 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice will not be affected thereby.

■ 9. Section 600.31 is amended by:

■ a. In paragraph (b), revising the definitions of "Closely-held corporation", "Ownership or ownership interest", "Parent", and "Person";

■ b. Revising paragraph (c)(3);

■ c. Removing paragraph (c)(4);

■ d. Redesignating paragraphs (c)(5) through (7) as paragraphs (c)(4) through (6), respectively;

■ e. In newly redesignated paragraph (c)(5), removing the phrase "paragraph (d)" and adding, in its place, the phrase "paragraphs (c)(3) and (d)";

■ f. Revising paragraphs (d)(6) and (7);

■ g. Adding paragraph (d)(8);

■ h. Revising paragraph (e); and

■ i. Removing the parenthetical authority citation at the end of the section.

The revisions and addition read as follows:

§ 600.31 Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions.

* * * * *

(b) * * *

Closely-held corporation. Closely-held corporation (including the term "close corporation") means—

(i) A corporation that qualifies under the law of the State of its incorporation or organization as a statutory close corporation; or

(ii) If the State of incorporation or organization has no statutory close corporation provision, a corporation the stock of which—

(A) Is held by no more than 30 persons; and

(B) Has not been and is not planned to be publicly offered.

* * * * *

Ownership or ownership interest. (i) Ownership or ownership interest means a direct or indirect legal or beneficial interest in an institution or legal entity, which may include a voting interest or a right to share in profits.

(ii) For the purpose of determining whether a change in ownership has occurred, changes in the ownership of the following are not included:

(A) A mutual fund that is regularly and publicly traded.

(B) A U.S. institutional investor, as defined in 17 CFR 240.15a-6(b)(7).

(C) A profit-sharing plan of the institution or its corporate parent, provided that all full-time permanent employees of the institution or its corporate parent are included in the plan.

(D) An employee stock ownership plan (ESOP).

Parent. The legal entity that controls the institution or a legal entity directly or indirectly through one or more intermediate entities.

Person. Person includes a natural person or a legal entity, including a trust.

* * * * *

(c) * * *

(3) *Other entities.* (i) The term “other entities” means any entity that is not closely held nor required to be registered with the SEC, and includes limited liability companies, limited liability partnerships, limited partnerships, and similar types of legal entities.

(ii) The Secretary deems the following changes to constitute a change in ownership resulting in a change of control of such an entity:

(A) A person (or combination of persons) acquires at least 50 percent of the total outstanding voting interests in the entity, or otherwise acquires 50 percent control.

(B) A person (or combination of persons) who holds less than a 50 percent voting interest in an entity acquires at least 50 percent of the outstanding voting interests in the entity, or otherwise acquires 50 percent control.

(C) A person (or combination of persons) who holds at least 50 percent of the voting interests in the entity ceases to hold at least 50 percent voting interest in the entity, or otherwise ceases to hold 50 percent control.

(D) A partner in a general partnership acquires or ceases to own at least 50 percent of the voting interests in the general partnership, or otherwise acquires or ceases to hold 50 percent control.

(E) Any change of a general partner of a limited partnership (or similar entity) if that general partner also holds an equity interest.

(F) Any change in a managing member of a limited liability company (or similar entity) if that managing member also holds an equity interest.

(G) Notwithstanding its voting interests, a person becomes the sole member or shareholder of a limited liability company or other entity that has a 100 percent or equivalent direct or indirect interest in the institution.

(H) An entity that has a member or members ceases to have any members.

(I) An entity that has no members becomes an entity with a member or members.

(J) A person is replaced as the sole member or shareholder of a limited liability company or other entity that has a 100 percent or equivalent direct or indirect interest in the institution.

(K) The addition or removal of any entity that provides or will provide the audited financial statements to meet any

of the requirements in § 600.20(g) or (h) or 34 CFR part 668, subpart L.

(L) Except as provided in paragraph (e) of this section, the transfer by an owner of 50 percent or more of the voting interests in the institution or an entity to an irrevocable trust.

(M) Except as provided in paragraph (e) of this section, upon the death of an owner who previously transferred 50 percent or more of the voting interests in an institution or an entity to a revocable trust.

(iii) The Secretary deems the following interests to satisfy the 50 percent thresholds described in paragraph (c)(3)(ii) of this section:

(A) A combination of persons, each of whom holds less than 50 percent ownership interest in an entity, holds a combined ownership interest of at least 50 percent as a result of proxy agreements, voting agreements, or other agreements (whether or not the agreement is set forth in a written document), or by operation of State law.

(B) A combination of persons, each of whom holds less than 50 percent ownership interest in an entity, holds a combined ownership interest of at least 50 percent as a result of common ownership, management, or control of that entity, either directly or indirectly.

(C) A combination of individuals who are family members as defined in § 600.21, each of whom holds less than 50 percent ownership interest in an entity, holds a combined ownership interest of at least 50 percent.

(iv) Notwithstanding paragraphs (c)(3)(ii) and (iii) of this section—

(A) If a person who alone or in combination with other persons holds less than a 50 percent ownership interest in an entity, the Secretary may determine that the person, either alone or in combination with other persons, has actual control over that entity and is subject to the requirements of this section; and

(B) Any person who alone or in combination with other persons has the right to appoint a majority of any class of board members of an entity or an institution is deemed to have control.

* * * * *

(d) * * *

(6) A transfer of assets that comprise a substantial portion of the educational business of the institution, except where the transfer consists exclusively in the granting of a security interest in those assets;

(7) A change whereby the institution's ownership changes from an entity that is for-profit, nonprofit, or public to another one of those statuses. However, when an institution's ownership

changes from a for-profit entity to a nonprofit entity or becomes affiliated with a public system, the institution remains a proprietary institution until the Department approves the change of status for the institution; or

(8) The acquisition of an institution to become an additional location of another institution unless the acquired institution closed or ceased to provide educational instruction.

(e) *Excluded transactions.* A change in ownership and control timely reported under § 600.21 and otherwise subject to this section does not include a transfer of ownership and control of all or part of an owner's equity or partnership interest in an institution, the institution's parent corporation, or other legal entity that has signed the institution's PPA—

(1) From an owner to a “family member” of that owner as defined in § 600.21(f);

(2) As a result of a transfer of an owner's interest in the institution or an entity to an irrevocable trust, so long as the trustees only include the owner and/or a family member as defined in § 600.21(f). Upon the appointment of any non-family member as trustee for an irrevocable trust (or successor trust), the transaction is no longer excluded and is subject to the requirements of § 600.20(g) and (h);

(3) Upon the death of a former owner who previously transferred an interest in the institution or an entity to a revocable trust, so long as the trustees include only family members (as defined in § 600.21(f)) of that former owner. Upon the appointment of any non-family member as trustee for the trust (or a successor trust) following the death of the former owner, the transaction is no longer excluded and is subject to the requirements of § 600.20(g) and (h); or

(4) A transfer to an individual owner with a direct or indirect ownership interest in the institution who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer, either upon the death of another owner or by transfer from another individual owner who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer, upon the resignation of that owner from the management of the institution.

* * * * *

**PART 668—STUDENT ASSISTANCE
GENERAL PROVISIONS**

■ 10. The general authority citation for part 668 is revised to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c–1, and 1231a, unless otherwise noted.

* * * * *

■ 11. Section 668.8 is amended by revising paragraph (n) to read as follows:

§ 668.8 Eligible program.

* * * * *

(n) *Other eligible programs.* For title IV, HEA program purposes, *eligible program* includes a direct assessment program approved by the Secretary under § 668.10, a comprehensive transition and postsecondary program approved by the Secretary under § 668.232, and an eligible prison education program under subpart P of this part.

§ 668.11 [Redesignated as § 668.12]

■ 12. Redesignate § 668.11 as § 668.12.

■ 13. Add a new § 668.11 to subpart A to read as follows:

§ 668.11 Severability.

If any provision of this part or its application to any person, act, or practice is held invalid, the remainder of the part or the application of its provisions to any person, act, or practice will not be affected thereby.

■ 14. Section 668.14 is amended by revising paragraph (b)(16) to read as follows:

§ 668.1 Program participation agreement.

* * * * *

(b) * * *

(16) For a proprietary institution, the institution will derive at least 10 percent of its revenues for each fiscal year from sources other than Federal funds, as provided in § 668.28(a), or be subject to sanctions described in § 668.28(c);

* * * * *

■ 15. Section 668.23 is amended by:

■ a. Revising paragraph (d)(3); and

■ b. Removing the parenthetical authority citation at the end of the section.

The revision reads as follows:

§ 668.23 Compliance audits and audited financial statements.

* * * * *

(d) * * *

(3) *Disclosure of Federal revenue.* A proprietary institution must disclose in a footnote to its audited financial statement the percentage of its revenues

derived from Federal funds that the institution received during the fiscal year covered by that audit. The revenue percentage must be calculated in accordance with § 668.28. The institution must also report in the footnote the dollar amount of the numerator and denominator of its 90/10 ratio as well as the individual revenue amounts identified in section 2 of appendix C to this subpart.

* * * * *

■ 16. Section 668.28 is revised to read as follows:

§ 668.28 Non-Federal revenue (90/10).

(a) *General*—(1) *Calculating the revenue percentage.* A proprietary institution meets the requirement in § 668.14(b)(16) that at least 10 percent of its revenue is derived from sources other than Federal funds by using the formula in appendix C to this subpart to calculate its revenue percentage for its latest complete fiscal year. For purposes of this section—

(i) For any fiscal year beginning on or after January 1, 2023, Federal funds used to calculate the revenue percentage include title IV, HEA program funds and any other educational assistance funds provided by a Federal agency directly to an institution or a student including the Federal portion of any grant funds provided by or administered by a non-Federal agency, except for non-title IV Federal funds provided directly to a student to cover expenses other than tuition, fees, and other institutional charges. The Secretary identifies the Federal agency and the other educational assistance funds provided by that agency in a notice published in the **Federal Register**, with updates to that list published as needed.

(ii) For any fiscal year beginning prior to January 1, 2023, Federal funds are limited to title IV, HEA program funds.

(2) *Disbursement rule.* An institution must use the cash basis of accounting in calculating its revenue percentage by—

(i) For each eligible student, counting the amount of Federal funds the institution received to pay tuition, fees, and other institutional charges during its fiscal year—

(A) Directly from an agency identified under paragraph (a)(1)(i) of this section; and

(B) Paid by a student who received Federal funds; and

(ii) For each eligible student, counting the amount of title IV, HEA program funds the institution received to pay tuition, fees, and other institutional charges during its fiscal year. However, before the end of its fiscal year, the institution must—

(A) Request funds under the advanced payment method in § 668.162(b)(2) or the heightened cash monitoring method in § 668.162(d)(1) that the students are eligible to receive and make any disbursements to those students by the end of the fiscal year; or

(B) For institutions under the reimbursement or heightened cash monitoring methods in § 668.162(c) or (d)(2), make disbursements to those students by the end of the fiscal year and report as Federal funds in the revenue calculations the funds that the students are eligible to receive before requesting funds.

(3) *Revenue generated from programs and activities.* The institution must consider as revenue only those funds it generates from—

(i) Tuition, fees, and other institutional charges for students enrolled in eligible programs as defined in § 668.8;

(ii) Activities conducted by the institution that are necessary for the education and training of its students provided those activities are—

(A) Conducted on campus or at a facility under the institution’s control;

(B) Performed under the supervision of a member of the institution’s faculty;

(C) Required to be performed by all students in a specific educational program at the institution; and

(D) Related directly to services performed by students; and

(iii) Funds paid by a student, or on behalf of a student by a party unrelated to the institution, its owners, or affiliates, for an education or training program that is not eligible under § 668.8 and that does not include any courses offered in an eligible program. The non-eligible education or training program must be provided by the institution, and taught by one of its instructors, at its main campus or one of its approved additional locations, at another school facility approved by the appropriate State agency or accrediting agency, or at an employer facility. The institution may not count revenue from a non-eligible education or training program for which it merely provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study. The program must—

(A) Be approved or licensed by the appropriate State agency;

(B) Be accredited by an accrediting agency recognized by the Secretary under 34 CFR part 602;

(C) Provide an industry-recognized credential or certification;

(D) Provide training needed for students to maintain State licensing requirements; or

(E) Provide training needed for students to meet additional licensing requirements for specialized training for practitioners who already meet the general licensing requirements in that field.

(4) *Application of funds.* The institution must presume that any Federal funds it disburses, or delivers to a student, or determines was provided to a student by another Federal source, will be used to pay the student's tuition, fees, or institutional charges up to the amount of those Federal funds if a student makes a payment to the institution, except to the extent that the student's tuition, fees, or other charges are satisfied by—

(i) Grant funds provided by—

(A) Non-Federal public agencies that do not include Federal or institutional funds, unless the Federal portion of those grant funds can be determined, and that portion of Federal funds is included as Federal funds under this section. If the Federal funds cannot be determined no amount of the grant funds may be included under this section; or

(B) Private sources unrelated to the institution, its owners, or affiliates;

(ii) Funds provided under a contractual arrangement with the institution and a Federal, State, or local government agency for the purpose of providing job training to low-income individuals who need that training;

(iii) Funds used by a student from a savings plan for educational expenses established by or on behalf of the student if the savings plan qualifies for special tax treatment under the Internal Revenue Code of 1986; or

(iv) Institutional scholarships that meet the requirements in paragraph (a)(5)(iv) of this section.

(5) *Revenue generated from institutional aid.* The institution may include the following institutional aid as revenue:

(i) For loans made to students and credited in full to the students' accounts at the institution and used to satisfy tuition, fees, and other institutional charges, the principal payments made on those loans by current or former students that the institution received during the fiscal year, if the loans are—

(A) Bona fide as evidenced by standalone repayment agreements between the students and the institution that are enforceable promissory notes;

(B) Issued at intervals related to the institution's enrollment periods;

(C) Subject to regular loan repayments and collections by the institution; and

(D) Separate from the enrollment contracts signed by the students.

(ii) Funds from an income share agreement or any other alternative financing agreement in which the agreement is with the institution only or with any entity or individual in the institution's ownership tree, or with any common ownership of the institution and the entity providing the funds, or if the entity or another entity with common ownership has any other relationships or agreements with the institution, provided that—

(A) The institution clearly identifies the student's institutional charges, and those charges are the same or less than the stated rate for institutional charges;

(B) The agreement clearly identifies the maximum time and maximum amount a student would be required to pay, including the implied or imputed interest rate and any fees and revenue generated for a related third-party, the institution, or any entity described in paragraph (a)(5)(ii) introductory text, for that maximum time period; and

(C) All payments are applied with a portion allocated to the return of capital and a portion allocated to profit. Revenue, interest, and fees are not included in the calculation.

(iii) For scholarships provided by the institution in the form of monetary aid and based on the academic achievement or financial need of its students, the amount disbursed to students during the fiscal year. The scholarships must be disbursed from an established restricted account and may be included as revenue only to the extent that the funds in that account represent—

(A) Designated funds from an outside source that is unrelated to the institution, its owners, or its affiliates; or

(B) Income earned on those funds.

(6) *Funds excluded from revenues.* For the fiscal year, the institution does not include—

(i) The amount of Federal Work Study (FWS) wages paid directly to the student. However, if the institution credits the student's account with FWS funds, those funds are included as revenue;

(ii) The amount of funds received by the institution from a State under the LEAP, Special Leveraging Educational Assistance Partnership (SLEAP), or Grants for Access and Persistence (GAP) program;

(iii) The amount of institutional funds used to match Federal education assistance funds;

(iv) The amount of Federal education assistance funds refunded to students or returned to the Secretary under § 668.22 or required to be returned under the applicable program;

(v) The amount the student is charged for books, supplies, and equipment unless the institution includes that amount as tuition, fees, or other institutional charges;

(vi) Any amount from the proceeds of the factoring or sale of accounts receivable or institutional loans, regardless of whether the loans were sold with or without recourse;

(vii) Any amount from the sale of an income share agreement or other financing agreement; or

(viii) Any funds, including loans, provided by a third party related to the institution, its owners, or affiliates to a student in any form.

(b) [Reserved]

(c) *Sanctions.* If an institution does not derive at least 10 percent of its revenue from sources other than Federal funds—

(1) For two consecutive fiscal years, it loses its eligibility to participate in the title IV, HEA programs for at least two fiscal years. To regain eligibility, the institution must demonstrate that it complied with the State licensure and accreditation requirements under 34 CFR 600.5(a)(4) and (6), and the financial responsibility requirements under subpart L of this part, for a minimum of two fiscal years after the fiscal year it became ineligible;

(2) For any fiscal year, it becomes provisionally certified under § 668.13(c)(1)(ii) for the two fiscal years after the fiscal year it failed to satisfy the revenue requirement in this section. However, the institution's provisional certification terminates on—

(i) The expiration date of the institution's program participation agreement that was in effect on the date the Secretary determined the institution failed the requirement of this section; or

(ii) The date the institution loses its eligibility to participate under paragraph (c)(1) of this section;

(3) For any fiscal year, it must notify students of the possibility of loss of title IV eligibility;

(4) For any fiscal year, it must report the failure no later than 45 days after the end of its fiscal year, or immediately thereafter if subsequent information is obtained that shows an institution incorrectly determined that it passed the revenue requirement in this section for the prior fiscal year; and

(5) It is liable for any title IV, HEA program funds it disburses after the last day of the fiscal year it becomes ineligible to participate in the title IV, HEA program under paragraph (c)(1) of this section, excluding any funds the institution was entitled to disburse under § 668.26.

■ 17. Appendix C to subpart B of part 668 is revised to read as follows:

**Appendix C to Subpart B of Part 668—
90/10 Revenue Calculation**

**Section 1: Sample Student Account at the
Institution/Funds Applied in Priority Order**

SAMPLE STUDENT ACCOUNT LEDGER

Line	Date	Charge/Payment	Memo	Debit	Credit	Balance
1	12/31/2021	Federal Direct Loan			1,000.00	(1,000.00)
2	1/1/2022	Tuition and Fees		17,000.00		16,000.00
3	2/1/2022	Cash Payment			175.00	15,825.00
4	2/1/2022	Federal Funds 1			2,000.00	13,825.00
5	2/1/2022	FSEOG	(Fed. 375/Inst. 125)	500.00		13,325.00
6	5/1/2022	Cash Payment	(Federal funds 3)	500.00		12,825.00
7	7/1/2022	Federal Pell Grant			1,700.00	11,125.00
8	7/1/2022	Institutional Scholarship			500.00	10,625.00
9	7/1/2022	Federal Direct Loan			1,500.00	9,125.00
10	7/1/2022	Cash Payment	(Federal funds 4)	3,700.00		5,425.00
11	8/1/2022	Federal Funds 2			3,725.00	1,700.00
12	9/1/2022	City Grant			2,200.00	(500.00)
13	9/1/2022	Refund Check		500.00		

Line item in the sample	Amount in the sample
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Funds Applied First

12	Grant funds for the student from non-Federal public agencies or private sources independent of the institution. Funds provided for the student under a contractual arrangement with a Federal, State, or local government agency for the purpose of providing job training to low-income individuals. Funds used by a student from savings plans for educational expenses established by or on behalf of the student that qualify for special tax treatment under the Internal Revenue Code.	2,200.00
8	Qualified institutional scholarships disbursed to the student Adjustment: If the amount of Total Funds Applied First is more than Tuition and Fees, then Adjusted Total Funds Applied First is reduced by the amount over Tuition and Fees.	500.00
Total Funds Applied First		2,700.00

Title IV Aid

1	Prior Year Title IV Carried Over Credit Balance	1,000.00
9	Federal Direct Loan	1,500.00
7	Federal Pell Grant	1,700.00
5	FSEOG (subject to matching reduction) (\$500 – \$375 FSEOG and \$125 Institutional Match)	500.00
5	Federal Work Study Applied to Tuition and Fees (subject to matching reduction). Adjustment: The amount of FSEOG funds disbursed to a student and the amount of FWS funds credited to the student's account are reduced by the amount of the institutional matching funds. Adjustment: If the amount of Adjusted Total Funds Applied First + Total Student Title IV Revenue is more than Tuition and Fees, then Adjusted Total Student Title IV Revenue is reduced by the amount over Tuition and Fees. Adjustment: If Title IV funds are returned for a student under § 668.22, then Student Title IV Revenue is reduced by the amount returned.	- 125.00
Adjusted Total Title IV Aid		4,575.00

Other Federal Funds Paid Directly to the Institution

4	Federal Funds 1	2,000.00
11	Federal Funds 2	3,725.00
Adjustment: If the amount of Adjusted Total Funds Applied First + Adjusted Total Student Title IV Revenue + Total Other Federal Funds Paid Directly to the Institution is more than Tuition and Fees, then Adjusted Total Other Federal Funds Paid Directly to the Institution is reduced by the amount over Tuition and Fees.		
Adjusted Total Other Federal Funds Paid Directly to the Institution		5,725.00

Other Federal Funds Paid to Student

6	Federal Funds 3	500.00
10	Federal Funds 4	3,700.00

Line item in the sample		Amount in the sample
	Adjustment: If the amount of Adjusted Funds Applied First + Adjusted Student Title IV Revenue + Adjusted Total Other Federal Funds Paid Directly to the Institution + Total Other Federal Funds Paid Directly to Student is more than Tuition and Fees, then Adjusted Federal Funds Paid Directly to Student is reduced by the amount over Tuition and Fees.	-200.00
	Adjusted Total Other Federal Funds Paid Directly to Student	4,000.00
Cash Payments		
3	Student payments	175.00
5	Adjustment: The amount of FSEOG funds disbursed to a student and the amount of FWS funds credited to the student's account are added to cash for the institutional matching funds.	125.00
	Adjustment: If the amount of Adjusted Total Funds Applied First + Adjusted Total Student Title IV Revenue + Adjusted Total Other Federal Funds Paid Directly to the Institution + Adjusted Total Other Federal Funds Paid to Student + Total Cash and Other Non- Title Payments are more than Tuition and Fees, then Adjusted Total Cash and Other Non-Title Payments is reduced by the amount over.	-300.00
	Tuition and Fees	
	Adjusted Total Cash and Other Non-Title IV Aid	0
Adjusted Total All Federal and Cash Payments.	17,000.00.	

SECTION 2—REVENUE BY SOURCE—ONE STUDENT EXAMPLE

Line item in the sample		Amount disbursed	Adjusted amount
Student Title IV Revenue			
1	Title IV Credit Balance Carried Over from Prior Year	1,000.00	1,000.00
9	Federal Direct Loan	1,500.00	1,500.00
7	Federal Pell Grant	1,700.00	1,700.00
5	FSEOG (federal portion only)	375.00	375.00
	Total Student Title IV Revenue	4,575.00	4,575.00
Federal Funds Paid Directly to the Institution			
6	Federal Funds 1	2,000.00	2,000.00
10	Federal Funds 2	3,725.00	3,725.00
	Total Student Federal Funds Paid Directly to the Institution	5,725.00	5,725.00
Student Federal Funds Paid Directly to the Student			
4	Federal Funds 3	500.00	500.00
11	Federal Funds 4	3,700.00	3,700.00
13	Refunds Paid to Student		-200.00
	Adjusted Student Federal Funds Paid Directly to Student	4,200.00	4,000.00
	Adjusted Student Federal Revenue	14,500.00	14,300.00
Student Non-Federal Revenue			
12	Grant funds for the student from non-Federal public agencies or private sources independent of the institution.	2,200.00	2,200.00
8	Institutional scholarships disbursed to the student	500.00	500.00
3,5,13	Student payments	300.00	0
	Student Non-Title IV Revenue	3,000.00	2,700.00
	Total Federal and Non-Federal Revenue	17,500.00	17,000.00

SECTION 2—REVENUE BY SOURCE—CALCULATION

	Amount disbursed	Adjusted amount
Student Title IV Revenue		
Title IV Credit Balance Carried Over from Prior Year	45,000.00	45,000.00
Federal Direct Loan	1,500,000.00	1,500,000.00
Federal Pell Grant	400,700.00	400,700.00
FSEOG (subject to matching reduction)	11,500.00	8,625.00
Total Student Title IV Revenue	1,957,200.00	1,954,325.00
Refunds Paid to Students		-35,500.00
Student Federal Funds Paid Directly to Student		
Federal Funds 3	50,000.00	50,000.00
Federal Funds 4	3,700.00	3,700.00
Total Student Federal Funds Paid Directly to Student	53,700.00	53,700.00
Refunds Paid to Student		-200.00
Adjusted Student Federal Funds Paid Directly to Student	53,700.00	53,500.00
Adjusted Student Federal Revenue	3,575,625.00	3,517,050.00
Adjusted Student Title IV Revenue	1,957,200.00	1,918,825.00
Federal Funds Paid Directly to the Institution		
Federal Funds 1	200,000.00	200,000.00
Federal Funds 2	1,355,725.00	1,355,725.00
Federal Portion of Other Funds	9,000.00	9,000.00
Total Student Federal Funds Paid Directly to the Institution	1,564,725.00	1,564,725.00
Refunds Paid to Students		-20,000.00
Adjusted Student Title IV Federal Funds Paid Directly to the Institution	1,564,725.00	1,544,725.00
Revenue From Other Sources (Totals for the Fiscal Year)		
Activities conducted by the institution that are necessary for education and training	25,000.00	25,000.00
Funds paid to the institution by, or on behalf of, students for education and training in qualified non-Title IV eligible programs	143,000.00	143,000.00
Revenue from Other Sources	168,000.00	168,000.00
Adjusted Non-Federal Revenue and Revenue from Other Sources	587,800.00	559,500.00
Total Federal and Non-Federal Revenue	4,163,425.00	4,076,550.00
Student non-Federal revenue		
Grant funds for the student from non-Federal public agencies or private sources independent of the institution.		
—State Grant (9.0451 percent Federal Funds)	99,500.00	90,500.00
—ABC Scholarship	500.00	500.00
Funds provided for the student under a contractual arrangement with a Federal, State, or local government agency for the purpose of providing job training to low-income individuals.		
Funds used by a student from savings plan for educational expenses established by or on behalf of the student that qualify for special tax treatment under the Internal Revenue Code.		
Qualified institutional scholarships disbursed to the student	500.00	500.00
Student payments		
—Third Party Loans	50,000.00	50,000.00
—Third Party Loans-related Party/Institutional Loans	107,000.00	100,000.00
—ISA Institutional or Related Party	37,000.00	25,000.00
—ISA	75,000.00	75,000.00
—Student Cash	50,300.00	50,300.00
Student Non-Title IV Revenue	419,800.00	391,800.00
Refunds Paid to Student		-300.00
Adjusted Non-Federal Revenue	419,800.00	391,500.00

Numerator 3,517,050.
 Denominator 4,076,550 = 86.27 percent.

SECTION 3—CALCULATING THE REVENUE PERCENTAGE

Σ Adjusted Student Federal Revenue * \div Σ Adjusted Student Federal Revenue + Σ Adjusted Non-Federal Revenue and Revenue from Other Sources = 90/10 Revenue Percentage.

* Adjusted Student Federal Revenue = Adjusted Student Title IV Revenue + Adjusted Other Federal Funds Paid Directly to the Institution + Adjusted Other Federal Funds Paid Directly to Student

Σ Adjusted Student Federal Revenue = The sum of the amounts of all Federal funds, as adjusted, for each student at the institution during the fiscal year to whom the institution disbursed Title IV Aid and Other Federal Funds and Federal funds that students directly receive.

Σ Adjusted Non-Federal Revenue = The sum of the amounts of items applied first and adjusted cash payments for each student at the institution during the fiscal year whose non-Federal funds were used to pay all or some of those student's Tuition and Fee charges.

- 18. Section 668.32 is amended by:
 ■ a. Revising paragraph (c)(2)(ii); and
 ■ b. Removing the parenthetical authority citation at the end of the section.

The revision reads as follows:

§ 668.32 Student eligibility—general.

* * * * *

(c) * * *

(2) * * *

(ii) If the student is a confined or incarcerated individual as defined in 34 CFR 600.2, is enrolled in an eligible prison education program as defined in § 668.236;

* * * * *

- 19. Section 668.43 is amended by:
 ■ a. In paragraph (a)(5)(iv), removing the word “and” at the end of the paragraph;
 ■ b. In paragraph (a)(5)(v)(C), adding the word “and” at the end of the paragraph;
 ■ c. Adding paragraph (a)(5)(vi); and
 ■ d. Removing the parenthetical authority citation at the end of the section.

The addition reads as follows:

§ 668.43 Institutional information.

(a) * * *

(5) * * *

(vi) If a prison education program, as defined in § 668.236, is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation (as described in § 668.236(a)(7) and (8)), information regarding whether that occupation typically involves State or Federal prohibitions on the licensure or employment of formerly confined or incarcerated individuals in any other State for which the institution has made a determination about State prohibitions on the licensure or certification of formerly confined or incarcerated individuals;

* * * * *

- 20. Section 668.171 is amended by revising paragraphs (d)(4) and (f)(1)(vii) to read as follows:

§ 668.171 General.

* * * * *

(d) * * *

(4) For its most recently completed fiscal year, a proprietary institution did

not receive at least 10 percent of its revenue from sources other than Federal funds, as provided under § 668.28(c);

* * * * *

(f) * * *

(1) * * *

(vii) For the non-Federal revenue provision in paragraph (d)(4) of this section, no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(4).

* * * * *

- 21. Add subpart P to read as follows:

Subpart P—Prison Education Programs

Sec.

668.23 Scope and purpose.

668.235 Definitions.

668.236 Eligible prison education program.

668.237 Accreditation requirements.

668.238 Application requirements.

668.239 Reporting requirements.

668.240 Limitation or termination of approval.

668.241 Best interest determination.

668.242 Transition to a prison education program.

§ 668.23 Scope and purpose.

This subpart establishes regulations that apply to an institution that offers prison education programs to confined or incarcerated individuals. A confined or incarcerated individual enrolled in an eligible prison education program is eligible for Federal financial assistance under the Federal Pell Grant program. Unless provided in this subpart, confined or incarcerated individuals and institutions that offer prison education programs are subject to the same regulations and procedures that otherwise apply to title IV, HEA program participants.

§ 668.235 Definitions.

The following definitions apply to this subpart:

Additional location has the meaning given in 34 CFR 600.2.

Advisory committee is a group established by the oversight entity that provides nonbinding feedback to the oversight entity regarding the approval and operation of a prison education program within the oversight entity's jurisdiction.

Confined or incarcerated individual has the meaning given in 34 CFR 600.2.

Feedback process is the process developed by the oversight entity to gather nonbinding input from relevant stakeholders regarding the approval and operation of a prison education program within the oversight entity's jurisdiction. A feedback process may include an advisory committee.

Oversight entity means—

(1) The appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities; or

(2) The Federal Bureau of Prisons.

Relevant stakeholders are individuals and organizations that provide input as part of a feedback process to the oversight entity regarding the approval and operation of a prison education program within the oversight entity's jurisdiction. These stakeholders must include representatives of confined or incarcerated individuals, organizations representing confined or incarcerated individuals, State higher education executive offices, and accrediting agencies and may include additional stakeholders as determined by the oversight entity.

§ 668.236 Eligible prison education program.

(a) An *eligible prison education program* means an education or training program that—

(1) Is an eligible program under § 668.8 offered by an institution of higher education as defined in 34 CFR 600.4, or a postsecondary vocational institution as defined in 34 CFR 600.6;

(2) Is offered by an eligible institution that has been approved to operate in a correctional facility by the oversight entity;

(3) After an initial two-year approval, is determined by the oversight entity to be operating in the best interest of students as described in § 668.241;

(4) Offers transferability of credits to at least one institution of higher education (as defined in 34 CFR 600.4 and 600.6) in the State where the correctional facility is located, or, in the case of a Federal correctional facility, in the State where most of the individuals confined or incarcerated individuals in

such facility will reside upon release as determined by the institution based on information provided by the oversight entity;

(5) Is offered by an institution that has not been subject, during the five years preceding the date of the determination, to—

(i) Any suspension, emergency action, or termination of programs under this title;

(ii) Any final accrediting action that is an adverse action as defined in 34 CFR 602.3 by the institution's accrediting agency; or

(iii) Any action by the State to revoke a license or other authority to operate;

(6) Subject to paragraph (b) of this section, is offered by an institution that is not subject to a current initiated adverse action;

(7) Satisfies any applicable educational requirements for professional licensure or certification, including any requirements to sit for licensure or certification examinations needed to practice or obtain employment in the sectors or occupations for which the program prepares the individual, in the State where the correctional facility is located or, in the case of a Federal correctional facility, in the State where most of the individuals confined or incarcerated individuals in such facility will reside upon release, as determined by the institution not less than annually based on information provided by the oversight entity; and

(8) Does not offer education that is designed to lead to licensure or employment for a specific job or occupation in the State if such job or occupation typically involves prohibitions on the licensure or employment of formerly confined or incarcerated individuals in the State where the correctional facility is located, or, in the case of a Federal correctional facility, in the State where most of the individuals confined or incarcerated individuals in such facility will reside upon release, as determined by the institution not less than annually based on information provided by the oversight entity.

(b) With respect to the criterion in paragraph (a)(6) of this section—

(1) If an accrediting agency initiates an adverse action, the institution cannot begin its first or a subsequent prison education program unless and until the initiated adverse action has been rescinded; and

(2) If the institution currently offers one or more prison education programs and is subject to an initiated adverse action, the institution must submit a teach-out plan and if practicable, a

teach-out agreement, as defined in 34 CFR 600.2, to the institution's accrediting agency.

(c) With respect to the criterion in paragraph (a)(8) of this section—

(1) In the case of State and local correctional facilities, the postsecondary institution may not enroll any student in a prison education program if the student is prohibited or barred by any Federal law, or law in the State in which the correctional facility is located, from licensure or employment in the sectors or occupations for which the program prepares the individual based on any criminal conviction or specific types of criminal convictions; or

(2) In the case of a Federal correctional facility, the postsecondary institution may not enroll any student in a prison education program if the student is prohibited or barred by any Federal law, or law in the State in which more than half of the confined or incarcerated individuals in such facility will reside upon release, from licensure or employment in the sectors or occupations for which the program prepares the individual based on any criminal conviction or specific types of criminal convictions.

(3) Prohibitions on licensure or employment do not include local laws, screening requirements for good moral character, or similar provisions; State or Federal laws that have been repealed, even if the repeal has not yet taken effect or if the repeal occurs between assessments of the postsecondary institution by the oversight entity; or other restrictions as determined by the Secretary.

§ 668.237 Accreditation requirements.

(a) To be an eligible program under § 668.236, a prison education program must meet the requirements of the institution's accrediting agency or State approval agency.

(b) In order for any prison education program to qualify as an eligible program, the accrediting agency must have—

(1) Evaluated at least the first prison education program at the first two additional locations to ensure the institution's ability to offer and implement the program and that the program meets the agency's accreditation standards, and included it in the institution's grant of accreditation or pre-accreditation;

(2) Evaluated the first additional prison education program offered by a new method of delivery to ensure the institution's ability to offer and implement the program and that the program meets the agency's standards,

and included it in the institution's grant of accreditation or pre-accreditation;

(3) Performed a site visit as soon as practicable but no later than one year after initiating the prison education program at the first two additional locations; and

(4) Reviewed and approved the methodology for how the institution, in collaboration with the oversight entity, made the determination that the prison education program meets the same standards as substantially similar programs that are not prison education programs at the institution.

§ 668.238 Application requirements.

(a) An institution that seeks to offer a prison education program must apply to the Secretary to have its first prison education program at the first two additional locations determined to be eligible programs for title IV, HEA program purposes. Following the Secretary's initial approval of an institution's prison education program, additional prison education programs offered by the same postsecondary institution at the same location may be determined eligible without further approvals from the Secretary except as required by 34 CFR 600.7, 600.10, 600.20(c)(1), or 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency requirements.

(b) The institution's prison education program application must provide information satisfactory to the Secretary that includes—

(1) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;

(2) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the prison education program and has included the program in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency;

(3) The name of the correctional facility and documentation from the oversight entity that the prison education program has been approved to operate in the correctional facility;

(4) Documentation detailing the methodology, including thresholds, benchmarks, standards, metrics, data, and other information, the oversight entity used in approving the prison education program and how all the information was collected;

(5) Information about the types of services offered to admitted students, including orientation, tutoring, and academic and reentry counseling. If

reentry counseling is provided by a community-based organization that has partnered with the eligible prison education program, institution, or correctional facility to provide reentry services, the application also must provide information about the types of services offered by that community-based organization;

(6) Affirmative acknowledgement that the Secretary can limit or terminate approval of an institution to provide a prison education program as described in § 668.237;

(7) Affirmative agreement to submit all required reports to the Secretary pursuant to § 668.239;

(8) Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of confined or incarcerated individuals, which will be reported to the Department of Education; and

(9) Such other information as the Secretary deems necessary.

(c) For the second or subsequent eligible prison education program at a location, to meet the requirements under 34 CFR 600.21, an institution must submit—

(1) Documentation from the institution's accrediting agency noting that the institution complies with § 668.236(a)(6) and was not subject in the last five years to any final accrediting action that is an adverse action by the institution's accrediting agency;

(2) Documentation from the institution confirming that it was not subject in the last five years to any State action to revoke a license or other authority to operate; and

(3) Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of confined or incarcerated individuals, which will be reported to the Department of Education pursuant to § 668.239.

§ 668.239 Reporting requirements.

(a) An institution must submit reports, in accordance with deadlines established and published by the Secretary in the **Federal Register**.

(b) The institution reports such information as the Secretary requires, in compliance with procedures the Secretary describes.

(c) The institution reports information about transfer and release dates of confined or incarcerated individuals, as required by the Secretary, through an agreement with the oversight entity.

§ 668.240 Limitation or termination of approval.

(a) The Secretary may limit or terminate or otherwise end the approval of an institution to provide an eligible prison education program if the Secretary determines that the institution violated any terms of this subpart or that the institution submitted materially inaccurate information to the Secretary, accrediting agency, State agency, or oversight entity.

(b) If the Secretary initiates action limiting or terminating an institution's approval to operate an eligible prison education program, the institution must submit a teach-out plan and, if practicable, a teach-out agreements (as defined in 34 CFR 600.2) to its accrediting agency upon occurrence of the event.

§ 668.241 Best interest determination.

(a) An oversight entity's determination that a prison education program is operating in the best interest of students—

(1) Must include an assessment of—

(i) Whether the experience, credentials, and rates of turnover or departure of instructors for the prison education program are substantially similar to other programs at the institution, accounting for the unique geographic and other constraints of prison education programs;

(ii) Whether the transferability of credits for courses available to confined or incarcerated individuals and the applicability of such credits toward related degree or certificate programs is substantially similar to those at other similar programs at the institution, accounting for the unique geographic and other constraints of prison education programs;

(iii) Whether the prison education program's offering of relevant academic and career advising services to participating confined or incarcerated individuals, while they are confined or incarcerated, in advance of reentry, and upon release, is substantially similar to offerings to a student who is not a confined or incarcerated individual and who is enrolled in, and may be preparing to transfer from, the same institution, accounting for the unique geographic and other constraints of prison education programs; and

(iv) Whether the institution ensures that all formerly confined or incarcerated individuals are able to fully transfer their credits and continue their programs at any location of the institution that offers a comparable program, including by the same mode of instruction; and

(2) May include an assessment of—

(i) Whether the rates of recidivism, which do not include any recidivism by the student after a reasonable number of years of release and which only include new felony convictions, defined as each sentence of imprisonment exceeding one year and one month (*see* United States Sentencing Guideline section 4A1.1(a)), meet thresholds set by the oversight entity;

(ii) Whether the rates of completion reported by the Department, which do not include any students who were transferred across facilities and which account for the status of part-time students, meet thresholds set by the oversight entity with input from relevant stakeholders;

(iii) Whether the rate of confined or incarcerated individuals continuing their education post-release, as determined by the percentage of students who reenroll in higher education reported by the Department, meets thresholds established by the oversight entity with input from relevant stakeholders;

(iv) Whether job placement rates in the relevant field for such individuals meet any applicable standards required by the accrediting agency for the institution or program or a State where the institution is authorized. If no job placement rate standard applies to prison education programs offered by the institution, the oversight entity may define, and the institution may report, a job placement rate, with input from relevant stakeholders;

(v) Earnings for such individuals, which could include measuring such earnings against a threshold established by the oversight entity; and

(vi) Other indicators pertinent to program success as determined by the oversight entity.

(b) An oversight entity makes the best interest determination—

(1) Through a feedback process that considers input from relevant stakeholders; and

(2) In light of the totality of the circumstances.

(c) If the oversight entity does not find a program to be in the best interest of students, it must allow for programs to re-apply within a reasonable timeframe.

(d) After the two years of initial approval under § 668.236, the oversight entity must determine that the prison education program is operating in the best interest of students, under paragraph (a) of this section.

(e)(1) After its initial determination under paragraph (d) of this section that a program is operating in the best interest of confined or incarcerated individuals, the institution must obtain subsequent evaluations of each eligible

prison education program from the responsible oversight entity not less than 120 calendar days prior to the expiration of the institution's Program Participation Agreements. The oversight entity may also make a determination between subsequent evaluations based on the oversight entity's regular monitoring and evaluation of program outcomes.

(2) Each subsequent evaluation must—

(i) Include the entire period following the prior determination and be based on the applicable factors in paragraph (a) of this section for all students enrolled in the program since the prior determination;

(ii) Include input from relevant stakeholders through the oversight entity's feedback process; and

(iii) Be submitted to the Secretary no later than 30 days following completion of the evaluation.

(f)(1) The institution must obtain and maintain documentation of the methodology by which the oversight entity made each determination under this section and under § 668.236(a)(2) and (3) for review by the institution's accrediting agency, for submission to the Department for approval of the first program at the first two additional locations, to document input from relevant stakeholders through the oversight entity's feedback process in paragraphs (b)(1) and (e)(2)(ii) of this section, for reporting to the Department, and for public disclosure.

(2) The institution must maintain the documentation described in paragraph (f)(1) of this section for as long as the program is active or, if the program is discontinued, for three years following the date of discontinuance.

§ 668.242 Transition to a prison education program.

For institutions operating eligible prison education programs in a correctional facility that is not a Federal or State penal institution:

(a) A confined or incarcerated individual who otherwise meets the eligibility requirements to receive a Federal Pell Grant and is enrolled in an eligible program that does not meet the requirements under subpart P of this part may continue to receive a Federal Pell Grant until the earlier of—

(1) July 1, 2029;

(2) The student reaches the maximum timeframe for program completion under § 668.34; or

(3) The student has exhausted Pell Grant eligibility under 34 CFR 690.6(e).

(b) An institution is not permitted to enroll a confined or incarcerated individual on or after July 1, 2023, who was not enrolled in an eligible program prior to July 1, 2023, unless the institution first converts the eligible program into an eligible prison education program as defined in § 668.236.

PART 690—FEDERAL PELL GRANT PROGRAM

■ 22. The authority citation for part 690 continues to read as follows:

Authority: 20 U.S.C. 1070a, 1070g, unless otherwise noted.

■ 23. Section 690.62 is revised to read as follows:

§ 690.62 Calculation of a Federal Pell Grant.

(a) The amount of a student's Pell Grant for an academic year is based upon the payment and disbursement

schedules published by the Secretary for each award year.

(b)(1)(i) For a confined or incarcerated individual enrolled in an eligible prison education program, no Federal Pell Grant may exceed the cost of attendance (as defined in section 472 of the HEA) at the institution that student attends.

(ii) If an institution determines that the amount of a Federal Pell Grant for that student exceeds the cost of attendance for that year, the amount of the Federal Pell Grant must be reduced until the Federal Pell Grant does not exceed the cost of attendance at such institution and does not result in a title IV credit balance under 34 CFR 668.164(h).

(2)(i) If a confined or incarcerated individual's Pell Grant, combined with any other financial assistance, exceeds the student's cost of attendance, the financial assistance other than the Pell Grant must be reduced by the amount that the total financial assistance exceeds the student's cost of attendance.

(ii) If the confined or incarcerated individual's other financial assistance cannot be reduced, the student's Pell Grant must be reduced by the amount that the student's total financial assistance exceeds the student's cost of attendance.

■ 24. Add § 690.68 to read as follows:

§ 690.68 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice will not be affected thereby.

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