DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 668

[Docket ID ED–2018–OPE–0041]

RIN 1840–AD39

Program Integrity and Improvement

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final rule; delay of effective date.

SUMMARY: The Secretary delays, until July 1, 2020, the effective date of selected provisions of the final regulations entitled Program Integrity and Improvement published in the **Federal Register** on December 19, 2016 (the 2016 final regulations). The Secretary is delaying the effective date of selected provisions of the 2016 final regulations based on concerns recently raised by regulated parties and to ensure that there is adequate time to conduct negotiated rulemaking to reconsider selected provisions of 2016 final regulations and, as necessary, develop revised regulations. The provisions for which the effective date is being delayed are listed in the **SUPPLEMENTARY INFORMATION** section of this document.

DATES: Effective June 29, 2018, the effective date for the amendments to 34 CFR 600.2, 600.9(c), 668.2, and the addition of 34 CFR 668.50, published December 19, 2016, at 81 FR 92236, is delayed until July 1, 2020.

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SUPPLEMENTARY INFORMATION: Based on concerns recently raised by regulated parties related to implementation of the 2016 final regulations, the Secretary delays, until July 1, 2020, the effective date of selected provisions of the 2016 final regulations (81 FR 92236). The Department is implementing this delay to hear from the regulated community and students about these concerns and to consider, through negotiated rulemaking, possible revisions to selected provisions of the 2016 final regulations.

Two letters in particular prompted this delay. The Department received a letter dated February 6, 2018 (February 6 letter), from the American Council on Education (*www.acenet.edu/news-room/Documents/ACE-Letter-on-State-Authorization-Concern.pdf*), which represents nearly 1,800 college university presidents from all types of U.S. accredited, degree-granting institutions and the executives at related associations. The February 6 letter stated that, ''students who are residents of certain states may be ineligible for federal financial aid if they are studying online at institutions located outside their states. This is related to the requirement imposed by the state authorization regulations that mandates institutions disclose to students the appropriate state complaint process for their state of residence. A number of states, including California, do not currently have complaint processes for all out-of-state institutions.''

On February 7, 2018, the Department received a letter from the Western Interstate Commission for Higher Education (WICHE) Cooperative for Educational Technologies, the National Council for State Authorization Reciprocity, and the Distance Education Accrediting Commission, all of which represent regulated parties (February 7 letter). In the letter, these entities stated that there is widespread concern and confusion in the higher education community regarding the implementation of the 2016 final regulations, particularly with respect to State authorization of distance education and related disclosures. The authors of the February 7 letter argued that the 2016 final regulations would be costly and burdensome for most colleges and universities that offer distance education and that some States have not implemented the student complaint policies and procedures required by the regulations. The authors also expressed that institutions need additional information from the Department to better understand how to comply with the 2016 final regulations. They stated, for instance, that the definition of ''residence'' in the preamble of the 2016 final regulations may conflict with State laws and common practice among students for establishing residency.

The authors of the two letters also asked the Department to clarify the format in which they should make public and individualized disclosures of the State authorization status for every State, the complaint resolution processes for every State, and details on State licensure eligibility for every discipline that requires a license to enter a profession. The authors suggested that the Department should delay the effective date of the 2016 final regulations and submit the issues to additional negotiated rulemaking or, alternatively, clarify the final regulations through guidance. We believe that these disclosure issues, particularly those regarding individualized student disclosures, also require further review and the consideration of whether more detailed requirements are necessary for proper implementation. Issues that need further consideration and clarification include the disclosures that may need to be made to a student when the student changes his or her residence, what factors would allow an institution to become aware that a student has changed his or her residence so that individualized disclosures could be made, and the length of time a student must reside at the new address to be considered a resident of that State for the purposes of State authorization disclosures. These clarifications are necessary because the handling of these situations may vary State by State and be further complicated by the fact that each State's definition of ''residence'' may have been originally developed for other purposes. Other issues in need of further clarification include what happens in the case of a student who enrolls in a program that meets the licensure requirements of the State in which the student was living at the time, but then relocates to a new State where the program does not fulfill the requirements for licensure as well as the obligation of the university if the program no longer meets the licensure requirements, due to the student's move, not a change in the program.

Finally, to add further complexity, students may not always notify their institution if they change addresses, or if they relocate temporarily to another State. While the preamble of the 2016 final regulations stated that an institution may rely on a student's self-determination of residency unless it has information to the contrary, there may need to be additional clarification or safeguards for institutions in the event that a student does not notify the institution of a change in residency.

The rule, as currently drafted, does not account for these complexities. Therefore, we believe that, among other things, a more precise definition of ''residence''—which can be defined by States in different ways for different purposes—should be established through rulemaking to ensure institutions have the clarity needed to determine a student's residence. We believe that we will need to provide institutions with significantly more detail to properly operationalize this term and will need to work with impacted stakeholders to determine

how best to address a concern that is complex and potentially costly to institutions and students.

For both of the residency and disclosure issues, guidance is not the appropriate vehicle to provide the clarifications needed. Due to the complexity of these issues, we believe that it is important to solicit the input of stakeholders who have been engaged in meeting these requirements in developing workable solutions. Further, guidance is non-binding and, therefore, could not be used to establish any new requirements. Lastly, the necessary changes may affect the burden on some regulated parties, which would require an updated estimate of regulatory impact. The Department therefore believes that the clarifications requested are so substantive that they would require further rulemaking including negotiated rulemaking under the Higher Education Act of 1965, as amended (HEA).

We believe that delaying the effective date of selected provisions of the 2016 final regulations will benefit students.

The 2016 final regulations are currently scheduled to go into effect in July. Many institutions and students ordinarily not significantly involved in distance education provide and take online courses in the summer. We believe the delay will especially benefit those students who are planning to take coursework via online programs during the summer months, or who may be making plans to participate in internships in other States. If the selected provisions of 2016 final regulations were to go into effect on July 1, 2018, an institution may be hesitant to offer these courses outside the State in which the institution is located, because the uncertainty of how to determine students' residency, and the associated requirements, may make a State unwilling to pursue State authorization in all of the possible locations its students may reside during the summer.

If selected provisions of 2016 final regulations were to go into effect on July 1, 2018, some institutions, especially those with limited resources, could determine that the costs of obtaining State authorization, ensuring the relevant States have complaint procedures, and assessing licensure requirements, are not worth the benefit of eligibility for title IV aid if only a small number of students enroll online from a particular State, and therefore may not obtain State authorization for all applicable States. Thus, some students might not be able to continue their education during the summer if during those months they must relocate to a State in which the institution does not have the required State authorization. Thus, if we did not delay selected provisions of the 2016 final regulations, students would potentially lose the opportunity to use title IV aid for these courses. Institutions that routinely provide distance education to large numbers of students from all 50 States may have already obtained State authorization and assessed the complaint systems and licensure requirements since the cost-benefit ratio favors such an action. As a result, the delay will not have any significant effect on students attending those institutions.

Further, the Department has provided guidance regarding student complaints and student consumer disclosures as related to distance education in a Dear Colleague letter issued on July 27, 2012 (DCL GEN–12–13),[1] ensuring that during this delay of selected provisions of the final regulations institutions will be aware of their existing obligations and that students will receive these protections. Under 34 CFR 668.43(b), an institution is required to provide to students its State approval or licensing and the contact information for filing complaints. In DCL GEN–12–13, in Questions and Answers (Q&A) 9 through 13, we provide guidance on how institutions may meet this requirement with respect to distance education. In Q&A 9, we clarify that an institution offering distance education in multiple States can satisfy the provisions of 34 CFR 668.43(b) requiring that it provide State contact information for filing complaints by providing a link to a noninstitutional website that identifies the contact information for multiple States so long as the link is accessible from the institution's website and the link is prominently displayed and accurately described. Q&A 9 also states that the institution should ensure the website link is functioning and accurate. Q&A 10 clarifies that, if an institution offering distance education in a State has only one student in that State, the institution must still provide contact information for that State. In Q&A 12, we make clear that if a student taking a program by distance education moves to another State, and the institution is aware of the move, the institution must ensure that the student has access to the State contact information or filing complaints in that State. Finally, in Q&A 13, we note that for a student who is taking distance education and is in the military, the contact information for the institution's main location is considered sufficient contact information when the student is given an assignment outside of the United States.

Based on the above considerations, the Department delays until July 1, 2020, the effective date of selected provisions of the final regulations in title 34 of the Code of Federal Regulations (CFR):

- § 600.2 Definitions (definition of ''State authorization reciprocity agreement'').
- § 600.9(c) (State authorization distance education regulations).
- § 668.2 (definition of ''Distance education'').
- § 668.50 (institutional disclosures for distance or correspondence programs regulations).

Public Comment: In response to our invitation in the notice of proposed rulemaking published in the **Federal Register** on May 25, 2018 (83 FR 24250) (NPRM), 39 parties submitted comments on the delay of the effective date. We do not discuss comments or recommendations that are beyond the scope of this regulatory action or that would require statutory change.

Analysis of Comments and Changes

An analysis of the comments and of any changes since publication of the NPRM follows.

Comment: Many commenters supported the proposed rule to delay the effective date of the 2016 final regulations until July 1, 2020, because they believed that non-regulatory guidance from the Department is unlikely to address the current gap between institutional understanding of the final regulations and the Department's expectations for compliance. Commenters supported the Department's plan to refer the 2016 final regulations to the review and consideration afforded by the negotiated rulemaking process. Commenters also stated that the delay is prudent given the potential impact on institutions, learners, and the State authorization process, and will make it possible to resolve any confusion for students, institutions, States, and accreditors about the requirements of the 2016 final regulations. One commenter noted that some parts of the 2016 final regulations are very onerous and expensive for institutions to implement and a delay would give institutions more time to plan and budget for the changes.

Discussion: We appreciate the commenters' support.

Changes: None.

Comment: Many commenters opposed delaying the effective date of the 2016 final regulations because of the potential

[1] Available at: *https://ifap.ed.gov/dpcletters/GEN1213.html.*

harm to students, as well as on procedural grounds.

Harm to Students

Comment: Commenters stated that delaying the effective date of the 2016 final regulations would negatively impact students because the consumer protections and disclosures that would have been available to students under the 2016 final regulations will not be available to students. A few commenters expressed concern that students' ability to file complaints against institutions would be impeded by delaying the effective date of the provisions in the 2016 final regulations related to the State complaint process.

Discussion: While we do not have specific data with regard to how many schools and States have come into compliance with the 2016 final regulations, based on the information we do have, we expect that many students will still receive disclosures regarding distance education programs during the period of the delay due to steps institutions have already taken. In addition, as also previously noted, DCL GEN–12–13 provides guidance regarding student complaints and student consumer disclosures as related to distance education, ensuring that during the delay institutions will be aware of their existing obligations and that students will receive the contact information needed in order to file a complaint against the institution. Under 34 CFR 668.43(b), an institution is required to provide to students its State approval or licensing and the contact information for filing complaints. DCL GEN–12–13 clarifies this requirement with respect to distance education as discussed above. We believe that these requirements will offer students protection during the delay.

With respect to other disclosures, we acknowledged in the NPRM that, as a result of the proposed delay, it is possible that students might not receive disclosures of adverse actions taken against a particular institution or program. Students also may not receive other information about an institution, such as information about refund policies or whether a program meets certain State licensure requirements. This information could help students identify programs that offer credentials that potential employers recognize and value; delaying the requirement to provide these disclosures may require students that desire this information to obtain it from another source or may lead students to choose sub-optimal programs for their preferred courses of study. We note, however, that the Department has never required ground-based campuses to provide this information to students, including campuses that enroll large numbers of students from other States. Thus, for students who attend on-ground campuses, the program they completed may meet licensure requirements in the State in which the campus is located but not licensure requirements in other States.

Changes: None.

Comment: Commenters also noted that the 2016 final regulations require State and Federal oversight of American institutions receiving Federal financial aid but operating in foreign locations, thereby ensuring core protections for students enrolled in campuses abroad, but that the Department offers no rationale for delaying the effective date of this component of the rule. Thus, the commenters believed that the effective date of these final regulations should not be delayed.

Discussion: We are persuaded by the commenters and, for the reasons they specify, are not delaying § 600.9(d) (State authorization of foreign locations of domestic institution regulations).

Changes: We are not delaying § 600.9(d) (State authorization of foreign locations of domestic institution regulations). These regulations will go into effect July 1, 2018.

Comment: Commenters also noted that the 2016 final regulations strengthen States' oversight capacity by ensuring that States that sought to regulate distance education would be able to identify and regulate schools offering distance education in their State. These commenters argued that delaying the effective date of the 2016 final regulations would undermine this State oversight of distance education programs and permit schools to use Federal funds for programs that operate outside of the oversight of State regulators. Some commenters noted that State approval boards and regulatory schemes vary from State to State and that States should be able to reject institutions that do not meet a State's higher standards. Some commenters also stated that a delay of the effective date of the 2016 final regulations would impede States from ensuring that distance education students have the same State-level protections as students enrolled at brick-and-mortar institutions, and limit States' ability to bring enforcement actions against schools offering online programs in their States.

Discussion: We believe that concerns about undermining State regulatory and enforcement efforts may be overstated. A State already has the authority to administer legal authorization to operate in the State as the State sees fit, whether it be to approve an institution to operate in-State, regardless of the physical location of the institution, or require an institution that is operating without approval in the State to cease such operations regardless of the physical location of the institution. There is also no requirement that a State join a reciprocity agreement, whether it is a State-to-State reciprocity agreement or a reciprocity agreement that is administered by a non-State entity. A State can also decide to leave any reciprocity agreement it had previously joined. States do not need additional Federal regulations in order to enforce their own laws if they choose to do so.

Changes: None.

Comment: Some commenters stated that the definition of ''State authorization reciprocity agreement'' in the 2016 final regulations is confusing, and noted particular concern about the part of the definition that says that such an agreement ''does not prohibit any State in the agreement from enforcing its own statutes and regulations, whether general or specifically directed at all or a subgroup of educational institutions.'' They stated that some entities are interpreting this text to mean that a State authorization reciprocity agreement that is acceptable to the Department must allow a State that is a member of the agreement to enforce its own statutes and regulations even if those statutes and regulations conflict with the provisions of an agreement into which the State entered. The commenters contended that delaying the effective date of the 2016 final regulations would undermine the ability of States to protect their residents because the States would no longer be able to enforce their own statutes and regulations if doing so were prohibited by a State authorization reciprocity agreement. Other commenters indicated that it was unclear whether this part of the definition allows enforcement of State regulations that conflict with the provisions of a reciprocity agreement.

Discussion: We view the confusion and concern about what constitutes a State authorization reciprocity agreement under the 2016 final regulations and how that current definition is meant to be operationalized to be additional reasons to delay the effective date of selected provisions of the 2016 final regulations so that this issue can be clarified.

Changes: None.

Procedural Concerns

Comment: Some commenters expressed concerns about procedural issues surrounding the proposed delay,

contending that the 15-day comment period does not allow enough time for meaningful comments. Commenters further stated that the Department did not provide adequate justification for delaying the effective date of the 2016 final regulations and that the Department could issue guidance, rather than delay the effective date. Some commenters also asserted that the Department must conduct negotiated rulemaking under the HEA to implement the proposed delay. They argued that the Department did not meet the criteria for an exemption from such rulemaking under the Administrative Procedure Act (APA), believing that the Department did not establish ''good cause'' to waive negotiated rulemaking. Commenters also opined that institutions have worked over the past 18 months to implement the 2016 final regulations, and their investments should not be wasted now by an unnecessary delay of the consumer protections and disclosures. Some commenters also stated that the proposed delay is overly broad and that since the Department justifies the delay based on only three issues, the Department should have proposed to delay only those three parts of the 2016 final regulations.

Discussion: The APA, 5 U.S.C. 553(c), requires an agency to provide interested parties an opportunity to comment on proposed regulations, but does not stipulate the length of the comment period. A 15-day comment period was necessary because the selected provisions of the 2016 rule are scheduled to take effect on July 1, 2018, and a final rule delaying the effective date must be published prior to that date. A longer comment period would not have allowed sufficient time for the Department to review and respond to comments, and publish a final rule.

We believe that we have adequately justified our decision to delay the effective date of selected provisions of the 2016 final regulations and that it would be inappropriate to issue guidance, rather than implement the delay. Guidance is not the appropriate vehicle to provide the clarifications needed related to the residency and disclosure issues. Guidance is non-binding and, therefore, could not be used to establish any new requirements. More importantly, due to the complexity of the issues and the substantive nature of the necessary clarifications, we believe that, in developing workable solutions, it is important to conduct negotiated rulemaking under the HEA in order to solicit the input of stakeholders who have been engaged in meeting these requirements. Additionally, the necessary changes may affect the burden on regulated parties, which would require an updated estimate of regulatory impact.

With regard to waiver of negotiated rulemaking, section 492(b)(2) of the HEA provides that the Secretary may waive negotiated rulemaking if she determines that there is good cause to do so, and publishes the basis for such determination in the **Federal Register** at the same time as the proposed regulations are first published. Negotiated rulemaking requires a number of steps that typically take the Department well over 12 months to complete. The Department could not have completed the negotiated rulemaking process between February 6, 2018 (the date the Department received the first of the two letters that were the catalyst for the delay) and the July 1, 2018, effective date . Thus, the Department has good cause to waive the negotiated rulemaking requirement with regard to this delay the effective date of the final regulations to July 1, 2020.

As stated, negotiated rulemaking requires a number of steps that typically take the Department well over 12 months to complete. First, the HEA requires the Department to hold public hearings before commencing any negotiations. Based upon the feedback the Department receives during the hearings, the Department then identifies those issues on which it will conduct negotiated rulemaking, announces those, and solicits nominations for non-Federal negotiators. Negotiations themselves are typically held over a three-month period. Following the negotiations, the Department prepares a notice of proposed rulemaking and submits the proposed rule to the Office of Management and Budget (OMB) for review. The proposed rule is then open for public comment for 30 to 60 days. Following the receipt of public comments, the Department considers those comments and prepares final regulations that are reviewed by OMB before publication. Accordingly, we would not be able to complete the negotiated rulemaking process until 2019, so regulations resulting from that process will not be effective before July 1, 2020 per section 482 of the HEA (20 U.S.C. 1089), also known as the ''master calendar requirement.'' The master calendar requirement specifies provides that a regulatory change that has been published in final form on or before November 1 prior to the start of an award year—which begins on July 1 of any given year—may take effect only at the beginning of the next award year, or, in other words, on July 1 of the next year.

In this instance, the catalysts for the delay are the February 6 and February 7 letters. While some commenters stated that the Department was aware of the same issues raised in these letters during the 2016 rulemaking and heard about these same issues in August and October 2017, we only more recently determined that further consultation in the form of negotiated rulemaking was the appropriate vehicle by which to clarify the 2016 final regulations, and it was the cited letters that changed our understanding of the extent of stakeholder concerns. Thus, based on this further understanding, we believe that negotiated rulemaking is necessary in order to make important, substantive clarifications, and that it is in the interests of institutions, States, and students for the effective date of the selected provisions of the final regulations to be delayed and the regulations reconsidered. The Department could not have completed the 12-month negotiated rulemaking process between February 6, 2018, and the July 1, 2018, effective date. Thus, the Department has good cause to waive the negotiated rulemaking requirement with regard to its proposal to delay the effective date of selected provisions of the final regulations to July 1, 2020, in order to complete a new negotiated rulemaking proceeding to address the concerns identified by some of the regulated parties in the higher education community. It would be confusing and counterproductive for the selected provisions of the 2016 final regulations to go into effect before the conclusion of this reconsideration process.

We do not believe the proposed delay is overly broad and that because the delay discussion only addressed three issues, the Department should only delay the effective date of those three parts of the 2016 final regulations. We have agreed with the commenters that § 600.9(d) (State authorization of foreign locations of domestic institution regulations) should not be delayed. Otherwise, it is unclear what parts of the regulations will be impacted by negotiated rulemaking and how these provisions could impact other parts of the regulations.

With respect to the comments that institutions have worked over the past 18 months to implement the 2016 final regulations, and their investments should not be wasted now by an unnecessary delay of the consumer protections and disclosures, we do not believe that these investments were a waste, as the results of these efforts will be helpful to students and information

from institutions that made those changes can inform the upcoming negotiated rulemaking process.

Changes: None.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined 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.

This regulatory action is a significant regulatory action subject to review by OMB under section 3(f)(4) of Executive Order 12866. The quantified economic effects and net budget impact associated with the delayed effective date are not expected to be economically significant. Institutions will be relieved of an expected Paperwork Reduction Act burden of approximately $364,419 in annualized cost savings or $5.2 million in present value terms for the delay period; though it is possible some institutions have already incurred these costs preparing for the current effective date.

We have also reviewed this final rule 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 upon 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.''

In choosing among alternative regulatory approaches, we selected the approach that would maximize net benefits. In particular, the Department believes avoiding the compliance costs for institutions and the potential unintended harm to students if institutions decide not to offer distance education courses to students who switch locations for a semester or do not allow students to receive title IV aid for such courses because the definition of ''residency'' needs clarification outweighs any negative effect of the delayed disclosures. Based on the analysis that follows, the Department believes that this delay of the effective date of selected provisions of the 2016 final regulations is consistent with the principles in Executive Order 13563.

Consistent with Executive Order 13771 (82 FR 9339, February 3, 2017), we have estimated that this final rule has a potential upper bound effect of estimated annualized cost savings of $705,737, or $10,081,963 in present value terms, using a 7 percent discount rate over a perpetual time horizon, in administrative and information disclosure costs. This is an upper bound estimate of these cost savings, since some institutions may have begun development of disclosures to meet the requirements of the 2016 final regulations. As a central estimate, the Department estimates institutions will be relieved of an expected Paperwork Reduction Act burden of approximately $364,419 in annualized cost savings or $5.2 million in present value terms for the delay period; though it is possible some States have already incurred these costs preparing for the current effective date.

Because of these savings, this final rule is considered an Executive Order 13771 deregulatory action. In the NPRM published May 25, 2018, the Department explicitly requested comments on whether these administrative cost savings and foregone benefits calculations and discussions are accurate and fully capture the impacts of this final rule. Some commenters disagreed with the Department's estimates, especially of the costs to borrowers of not receiving certain disclosures and protections, and those comments are summarized in the *Effects of Delay* section.

Effects of Delay

The Regulatory Impact Analysis of the 2016 final regulations stated that the regulations would have the following primary benefits: (1) Updated and clarified requirements for State authorization of distance education and foreign additional locations, (2) a process for students to access complaint resolution in either the State in which the institution is authorized or the State in which they reside, and (3) increased transparency and access to institutional and program information. In the NPRM, we acknowledged that the delay would result in students not receiving certain disclosures about licensure and adverse actions against programs, as well as information about a process for submitting complaints in their State. The Department also estimated that institutions would benefit from the delay by having more time before incurring the costs of compliance and an opportunity to get more clarity on the details of the State authorization requirements and how they fit their programs.

Several commenters responded to the Department's analysis, both from an institutional and a borrower and consumer advocate perspective. Several commenters representing various institutions, many of which supported the delay, appreciated the Department's willingness to reopen the issue and clarify requirements that institutions find unclear. They also reiterated that the December 2016 final regulations underestimated the costs of obtaining State authorization and complying with that rule, but did not specify what additional costs there would be or what

assumptions the Department should change to more accurately capture institutional costs. Therefore, we are not changing our estimates of institutional costs in the NPRM analysis, but reiterate our acknowledgement that these are representative cost estimates and the specific costs to individual institutions will vary based on the extent of their participation in distance education, their systems and staffing, and the way they pursue State authorization.

Another set of comments focused on the potential harms to students from the delay, noting that online education is the fastest growing segment of the postsecondary market and that most of the largest providers are proprietary institutions, several with recent or ongoing investigations. Several commenters offered a variety of statistics consistent with the Department's own information that proprietary institutions are key players in the distance education market. For example, one commenter noted that proprietary schools in the top 12 providers in 2016 accounted for approximately 40 percent of distance education students. Several commenters pointed to the higher cost of distance-education-only programs at proprietary institutions, citing a cumulative average Federal student loan debt for graduates of proprietary institutions of $31,298.60 compared to $28,482.20 across all sectors and $21,525.60 for those in programs that are not entirely online. Commenters also pointed out that 770,000 of the 2.1 million students enrolled online in 2015 attended programs outside their State of residence and deserve the same protections as students at campus-based programs. Several commenters noted that proprietary institutions have a greater share of their students who are low-income, minority, or first-generation students, something the Department has recognized, so delaying the disclosures would have a detrimental impact on students with potentially less resources to seek out information from other sources.

The Department appreciates the comments and analysis submitted. We recognize that the burden of the delay does fall on students and believe that the description of the effects of the delay reflects this. However, as noted in the *Analysis of Comments* section in this preamble, many students will still receive sufficient disclosures regarding distance education programs during the period of the delay due to steps institutions have already taken to comply with the 2016 final regulations. In addition, as also previously noted, DCL GEN–12–13 provides guidance regarding student complaints and student consumer disclosures as related to distance education, ensuring that during the delay institutions will be aware of their existing obligations and that students will receive these protections. The Department maintains its position that, in allowing reconsideration of the 2016 final regulations to provide institutions greater clarity on key issues, the benefits of the delay of the selected provisions are greater than the potential costs to students of the delayed disclosures and complaint processes that could already be accessible from other sources. The Department has modified its decision to delay the effective date of the 2018 final regulations and has decided not to delay § 600.9(d) (State authorization of foreign locations of domestic institution regulations).The analysis of the effects of the delay for the selected provisions has not changed substantially and is included below.

As a result of the delay, students might not receive disclosures of adverse actions taken against a particular institution or program. Students also may not receive other information about an institution, such as information about refund policies or whether a program meets certain State licensure requirements. Increased access to such information could help students identify programs that offer credentials that potential employers recognize and value, so delaying the effective date of the requirement to provide these disclosures may require students to obtain this information from another source or may lead students to choose sub-optimal programs for their preferred courses of study.

Additionally, the delay of the disclosures related to the complaints resolution process could make it harder for students to access available consumer protections. Some students may be aware of Federal Student Aid's Ombudsman Group, State Attorneys General offices, or other resources for potential assistance, but the disclosure would help affected students be aware of these options.

The Department also believes that, as a result of uncertainty as to the definition of ''residency'' and other aspects of the 2016 final regulations, institutions may refuse enrollment or title IV aid to distance education students as a safeguard against unintentional non-compliance—an unintended potential effect. For example, if a student pursues a summer internship and relocates to another State for the summer semester, institutions may choose not to allow them to take courses online because their residency is unclear. A student who is unable to take classes during the summer months may be unable to complete his or her program on time, especially if the student is working or raising children and cannot manage a 15-credit course load during the regular academic terms. The Department believes the possibility of this outcome and the disruption it could have to students' education plans supports delaying the effective date of the 2016 final regulations to prevent institutions from taking such actions while the Department conducts negotiated rulemaking to develop clearer regulations.

Delay may, however, better allow institutions to address the costs of complying with the 2016 final regulations. In promulgating those regulations, the Department recognized that institutions could face compliance costs associated with obtaining State authorization for distance education programs or operating foreign locations. But the Department did not ascribe specific costs to the State authorization regulations and associated definitions because it presumed that institutions were already complying with applicable State authorization requirements and because the 2016 final regulations do not require institutions to have distance education programs.

Although the Department did not ascribe specific costs to the State authorization regulations, it provided examples of costs ranging from $5,000 to $16,000 depending on institution size, for a total estimated annual cost for all institutions of $19.3 million. Several commenters stated that the Department underestimated the costs of compliance with the regulations, noting that extensive research may be required for each program in each State. One institution reported that it costs $23,520 to obtain authorization for a program with an internship in all 50 States and $3,650 to obtain authorization for a new 100 percent online program in all 50 States. To renew the authorization for its existing programs, this institution estimated a cost of $75,000 annually, including fees, costs for surety bonds, and accounting services, and noted these costs have been increasing in recent years. The Department believes this institution's estimate is credible; however, we requested comment on whether this example provides a typical or accurate level of expected compliance costs across a representative population, and the extent to which institutions have already incurred these costs. As discussed previously, several commenters mentioned that the 2016 final regulations underestimated the cost for institutions but did not include

specific numbers with which to update the estimate or discuss whether the $75,000 cost provided by the earlier commenter was in line with other institutions' costs. In practice, actual costs to institutions vary based on a number of factors including an institution's size, the extent to which an institution provides distance education, and whether it participates in a State authorization reciprocity agreement or chooses to obtain authorization in specific States.

Delay may also allow institutions to postpone incurring costs associated with the disclosure requirements. As indicated in the *Paperwork Reduction Act of 1995* section of the 2016 final regulations, those costs were estimated to be 152,405 hours and $5,570,403 annually.

Net Budget Impact

As noted in the 2016 final regulations, in the absence of evidence that the regulations would significantly change the size and nature of the student loan borrower population, the Department estimated no significant net budget impact from the 2016 final regulations. While the updated requirements for State authorization and the option to use State authorization reciprocity agreements may expand the availability of distance education, student loan volume will not necessarily expand greatly. Additional distance education could provide convenient options for students to pursue their educations and loan funding may shift from physical to online campuses. Distance education has expanded significantly already and the 2016 final regulations are only one factor in institutions' plans within this field. The distribution of title IV, HEA program funding could continue to evolve, but the overall volume is also driven by demographic and economic conditions that are not affected by the 2016 final regulations and State authorization requirements were not expected to change loan volumes in a way that would result in a significant net budget impact. This analysis is limited to the effect of delaying the effective date of the selected provisions of the 2016 final regulations to July 1, 2020, and does not account for any potential future substantive changes in the upcoming regulations.

Regulatory Flexibility Analysis

This final rule would affect institutions that participate in the title IV, HEA programs, many of which are considered small entities. The U.S. Small Business Administration (SBA) Size Standards define ''for-profit institutions'' as ''small businesses'' if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7 million. The SBA Size Standards define ''not-for-profit institutions'' as ''small organizations'' if they are independently owned and operated and not dominant in their field of operation, or as ''small entities'' if they are institutions controlled by governmental entities with populations below 50,000. Under these definitions, approximately 4,267 of the institutions of higher education (IHEs) that would be subject to the paperwork compliance provisions of the 2016 final regulations are small entities. Accordingly, we have reviewed the estimates from the 2016 final regulations and prepared this regulatory flexibility analysis to present an estimate of the effect on small entities of the delay of the effective date of the 2016 final regulations.

In the Regulatory Flexibility Analysis for the 2016 final regulations, the Department estimated that 4,267 of the 6,890 IHEs participating in the title IV, HEA programs were considered small entities—1,878 are not-for-profit institutions, 2,099 are for-profit institutions with programs of two years or less, and 290 are for-profit institutions with four-year programs. Using the definition described above, approximately 60 percent of IHEs qualify as small entities, even if the range of revenues at the not-for-profit institutions varies greatly. Many small institutions may focus on local provision of specific programs and would not be significantly affected by the delay of the effective date of the 2016 final regulations because they do not offer distance education. As described in the analysis of the 2016 final regulations, distance education is a growing area with potentially significant effects on the postsecondary education market and the small entities that participated in it, providing an opportunity to expand and serve more students than their physical locations can accommodate but also increasing competitive pressure from online options. Overall, as of Fall 2016, approximately 15 percent of students receive their education exclusively through distance education while 68.3 percent took no distance education courses. However, at proprietary institutions almost 59.2 percent of students were exclusively distance education students and 30.4 percent had not enrolled in any distance education courses.[2] The delay of selected provisions of the effective date of the 2016 final regulations, and the resulting uncertainty regarding State authorization requirements for distance education, may slow the reshuffling of the postsecondary education market or the increased participation of small entities in distance education, but that is not necessarily the case. Distance education has expanded over recent years even in the absence of a clear State authorization regime.

In the analysis of the 2016 final regulations, we noted that the Department estimated total State Authorization Reciprocity Agreement (SARA) fees and additional State fees of approximately $7 million annually for small entities, but acknowledged that costs could vary significantly by type of institution and institutions' resources and that these considerations may influence the extent to which small entities operate distance education programs. Small entities that do participate in the distance education sector may benefit from avoiding these fees during the delay period. If 50 percent of small entities offer distance education, the average annual cost savings per small entity during the delay would be approximately $3,280, but that would increase to $6,560 if distance education was only offered by 25 percent of small entities. This estimate assumes small entities have not already taken steps to comply with the State authorization requirements in the 2016 final regulations. In the NPRM, the Department welcomed comments on the distribution of small entities offering distance education, the estimated costs to obtain State authorization for their programs, and the extent to which small entities have already incurred costs to comply with the 2016 final regulations. One comment indicated that of the 1,800 institutions that participate in SARA (and thus are likely to offer distance education programs), 45 percent (810) enroll less than 2,500 students. That enrollment figure does not correspond to the Department's definition of a ''small entity,'' but it does indicate that many smaller institutions are participating in distance education programs, even if a significant share of students are enrolled in programs offered by large institutions.

The Department also estimated that small entities would incur 13,981 hours of burden in connection with information collection requirements with an estimated cost of $510,991

[2] 2017 Digest of Education Statistics Table 311.15: Number and percentage of students enrolled in degree-granting postsecondary institutions, by distance education participation, location of student, level of enrollment, and control and level of institution: Fall 2015 and Fall 2016. Available at *https://nces.ed.gov/programs/digest/d17/tables/dt17_311.15.asp?current=yes.*

annually. Small entities may be able to avoid some of the anticipated burden during the delay. To the extent small entities would need to spend funds to comply with State authorization requirements for distance education, the proposed delay would allow them to postpone incurring those costs. And although institutions may have incurred some of the $510,991 annual costs to prepare for the information collection requirements, it is possible that institutions could avoid up to that amount during the period of the delay.

Paperwork Reduction Act of 1995

As indicated in the Paperwork Reduction Act section published in the 2016 final regulations, the assessed estimated burden was 152,565 hours affecting institutions with an estimated cost of $5,576,251 for Sections 600.9 and 668.50. This final rule delays the effective date of selected provisions of the cited regulations.

Section 600.9(d) will go into effect on July 1, 2018, with an assessed burden of 160 hours and $5,848 in institutional costs. The maximum potential reduction in burden hours and costs from the delay are the 152,405 hours and $5,570,403 associated with sections 668.50(b) and (c).

The table below identifies the regulatory sections, OMB Control Numbers, estimated burden hours, and estimated costs of those final regulations that have not been delayed.

Regulatory section	OMB Control No.	Burden hours	Estimated cost $36.55/hour institution
668.50(b)	1845–0145	151,715	5,545183
668.50(c)	1845–0145	690	25,220
Total	.....	152,405	5,570,403
Cost savings due to delayed effective date.			

This final rule delays the effective date of selected provisions of the cited regulations.

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List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 668

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

■ Accordingly, the effective date for the amendments to 34 CFR 600.2, 600.9, 668.2, and the addition of 34 CFR 668.50, published December 19, 2016, at 81 FR 92236, is delayed until July 1, 2020.

Dated: June 28, 2018.

Betsy DeVos,

Secretary of Education.

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