

DEPARTMENT OF EDUCATION**34 CFR Parts 600, 602 and 668**

[Docket ID ED–2018–OPE–0076]

RIN 1840–AD38

Distance Education and Innovation**AGENCY:** Office of Postsecondary Education, Department of Education.**ACTION:** Final regulations.

SUMMARY: The Secretary amends the general, establishing eligibility, maintaining eligibility, and losing eligibility sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA), related to distance education and innovation. In addition, the Secretary amends the Student Assistance General Provisions regulations issued under the HEA.

DATES: *Effective date:* These regulations are effective July 1, 2021.

Implementation date: For the implementation dates of the included regulatory provisions, see the *Implementation Date of These Regulations* section of this document.

FOR FURTHER INFORMATION CONTACT: For information on these Distance Education and Innovation regulations, please contact Greg Martin at (202) 453–7535 or by email at gregory.martin@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at (800) 877–8339.

SUPPLEMENTARY INFORMATION:**Executive Summary**

Purpose of This Regulatory Action: Through this regulatory action, the Department of Education (Department or we) amends the general, establishing eligibility, maintaining eligibility, and losing eligibility sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA), related to distance education and innovation. In addition, the Secretary amends the Student Assistance General Provisions regulations issued under the HEA. A more detailed summary can be found in the *Summary of the Major Provisions of This Regulatory Action* section.

Summary of the Major Provisions of This Regulatory Action

These regulations—

- Clarify that when calculating the number of correspondence students, a student is considered “enrolled in correspondence courses” if

correspondence courses constitute 50 percent or more of the courses in which the student enrolled during an award year;

- Limit the requirement for the Secretary’s approval to an institution’s first direct assessment program at each credential level;
- Require institutions to report to the Secretary when they add a second or subsequent direct assessment program or establish a written arrangement for an ineligible institution or organization to provide more than 25 percent, but no more than 50 percent, of a program;

- Require prompt Department action on any application an institution submits to the Secretary seeking a determination that it qualifies as an eligible institution and on any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for HEA programs;

- Allow students enrolled in eligible foreign institutions to complete up to 25 percent of an eligible program at an eligible institution in the United States; and clarify that, notwithstanding this provision, an eligible foreign institution may permit a Direct Loan borrower to perform research in the United States for not more than one academic year if the research is conducted during the dissertation phase of a doctoral program;

- Clarify the conditions under which a participating foreign institution may enter into a written arrangement with an entity that does not participate in the title IV, HEA programs;

- Provide flexibility to institutions to modify their curricula at the recommendations of industry advisory boards and without relying on a traditional faculty-led decision-making process;

- Provide flexibility to institutions when conducting clock-to-credit hour conversions to eliminate confusion about the inclusion of homework time in the clock-hour determination.

- Clarify the eligibility requirements for a direct assessment program;

- Clarify, in consideration of the challenges to institutions posed by minimum program length standards associated with occupational licensing requirements, which vary from State to State, that an institution may demonstrate a reasonable relationship between the length of a program, as defined in 20 U.S.C. 1001(b)(1), and the entry-level requirements of the occupation for which that program prepares students;

- Clarify that a student is not considered to have withdrawn for purposes of determining the amount of

title IV grant or loan assistance that the student earned if the student completes all the requirements for graduation for a non-term program or a subscription-based program, if the student completes one or more modules that comprise 49 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program;

- Remove provisions pertaining to the use and calculation of the Net Present Value of institutional loans for the calculation of the 90/10 ratio for proprietary institutions, because the provisions are no longer applicable;

- Clarify the satisfactory academic progress requirements for non-term credit or clock programs, term-based programs that are not a subscription-based program, and subscription-based programs;

- Clarify that the Secretary will rely on the requirements established by an institution’s accrediting agency or State authorizing agency to evaluate an institution’s appeal of a final audit or program review determination that includes a finding about the institution’s classification of a course or program as distance education, or the institution’s assignment of credit hours;

- Clarify that the Secretary may deny an institution’s certification or recertification application to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits in a timely manner; and

- Clarify that an institution is not financially responsible if a person who exercises substantial ownership or control over an institution also exercised substantial ownership or control over another institution that closed without executing a viable teach-out plan or agreement.

Costs and Benefits

As further detailed in the *Regulatory Impact Analysis*, the benefits of the regulations include—

- (1) Updating and clarifying definitions of key terms related to distance education, correspondence courses, direct assessment, and competency-based programs to support the continued development of these innovative educational methods;

- (2) Identifying a disbursement process for a subscription model for competency-based education so schools know how their students can access title IV aid for them, removing one potential barrier to growth of such programs; and

- (3) Eliminating references to outdated technologies and making the regulations

flexible enough to accommodate further technological advancements.

Institutions that choose to offer these programs will benefit from the clarifications of terms and processes involved in establishing and administering direct assessment programs and reduced barriers to entry. While those currently offering such programs or competency-based courses will be best positioned to offer new programs in the near-term, we expect additional institutions to take advantage of the opportunities to offer new programs. While it is more a function of continued evolution in the postsecondary market, removing the barriers to entry will increase competition and some institutions could face a cost associated with losing students to those that offer appealing new programs.

The emphasis on flexibility, workforce development, and innovative educational approaches will be beneficial to students. Students, especially non-traditional students that find the existing competency-based or distance education programs to be appealing for various reasons, can benefit from flexible pacing and different models for assessing progress. Additionally, while competency-based models are a relatively new segment of the postsecondary market, some evidence suggests that the self-pacing model and other efforts by institutions to accommodate other scheduling demands students have, and to recognize knowledge and skills gained elsewhere, may allow students to graduate with lower debt.¹ However, it is not clear how students will respond, and whether more traditional students will also be attracted to competency based programs as more institutions develop them.

These regulations involve a significant amount of monetary transfers among the Federal Government, students, and institutions through increased Pell Grants and Federal student loans. The Department assumes students in the existing baseline who switch from one program to another will receive similar amounts of Federal aid, thus these changes will not have a significant budget impact. We estimate that new students attracted to new competency-based or other programs developed, in part, because of the clarity created by these regulations will have a net Federal budget impact over the 2020–2029 loan cohorts of \$[-237] million in outlays in the primary

estimate scenario and an increase in Pell Grant outlays of \$1,021 million over 10 years, for a total net impact of \$784 million. The Department provides additional detail related to budget estimates in the *Regulatory Impact Analysis* section and provides burden estimates in the *Paperwork Reduction Act* section.

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

The Secretary is exercising her authority under section 482(c) of the HEA to designate the regulatory changes to regulations at title 34, parts 600, 602, and 668 of the Code of Federal Regulations included in this document for early implementation beginning on September 2, 2020, at the discretion of each institution, or each agency, as appropriate. The Department will implement the regulations as soon as possible after the implementation date and will publish a separate notice announcing the timing of the implementation. Otherwise, the final regulations included in this document are effective July 1, 2021.

Analysis of Comments and Changes

We developed these regulations through negotiated rulemaking. Section 492 of the HEA requires that, before publishing any proposed regulations to implement programs under title IV of the HEA, the Secretary must obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations, the Secretary must conduct a negotiated rulemaking process to develop the proposed regulations. The negotiated rulemaking committee reached consensus on the proposed regulations that we published on April 2, 2020. The Secretary invited comments on the proposed regulations by May 4, 2020, and 238 parties submitted comments. An analysis of the comments and of the changes in the regulations since publication of the notice of proposed rulemaking (NPRM)² follows.

We group major issues according to subject, with appropriate sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to

which they pertain. Generally, we do not address minor changes, technical changes, non-substantive changes, recommended changes that the law does not authorize the Secretary to make, or comments pertaining to operational processes. We also do not typically address comments pertaining to issues that were not within the scope of the NPRM.

General Support

Comments: Many commenters expressed support for the regulations and urged the Department not to modify them in a way that would weaken student protections. These commenters, including several students, expressed that they supported the regulation as a means of both reducing barriers to innovation and achieving greater responsiveness to workforce needs. Stating that the Department's regulations have not kept up with changing technologies, many commenters underscored the importance of these regulations considering the sudden move to distance education due to COVID–19.

Several students supporting the rule also urged instructors, institutions, accrediting agencies, or the Federal Government to do more to keep up with changing technologies, suggesting that the lessons learned during the pandemic would pay dividends in terms of better and more responsive academic programs after it is over. Several commenters said the regulations would reduce administrative burden, complement the changes made in the accreditation final rule,³ and properly balance support for innovation with protections for students and/or taxpayers.

A few commenters also—

(1) praised the move to a focus on competencies and skills, rather than seat time;

(2) suggested the regulation would have the benefit of reducing costs for students;

(3) acknowledged that distance education does not necessarily make a course high- or low-quality but suggested that outdated technology and teaching methods can be to blame for lower outcomes;

(4) asserted the rule would protect students from bad actors, especially during the pandemic, and noted approvingly that even the American Bar Association, which is typically resistant to distance education, has been forced by the pandemic to embrace distance learning, along with other flexibilities; and

¹ www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.

² 85 FR 18638.

³ 84 FR 58834.

(5) suggested more innovative learning methods could close educational disparities and, by extension, wealth disparities, which could lead to more American innovation, including patents and other ideas that could benefit humanity.

However, one commenter expressed that while many will see the benefits of distance education after the pandemic is over, that commenter cautioned that some programs would not be appropriate to conduct fully online and that flexibility should remain for blended learning along with research to evaluate efficacy.

Other commenters supported the rule, generally noting that they— (1) appreciated the safeguards to ensure regular interaction, which would reduce the need for instructors to assign “largely pointless work” to satisfy the standard; (2) praised the clarity of the regulations, particularly the definitions; and (3) suggested the regulations will benefit the education system by allowing programs to be more specifically tailored to each student’s individual needs.

One commenter said the rule would expand access to high-quality, affordable education options to a broader segment of students and that the proposals were generally fair to students, incentivized rather than punished innovation, focused quality assurance on outcomes, simplified eligibility requirements, and protected student and taxpayer investments.

One commenter supported the Department’s effort to realign the roles and responsibilities of the regulatory triad in postsecondary education: The Federal Government, State authorizing agencies, and accrediting agencies.

Another commenter noted that institutions have been slow to adopt competency-based education (CBE) programs, often due to Federal regulations, and further suggested these programs could particularly benefit veterans and military-connected students and hoped institutions would develop new CBE programs because of these regulations.

Discussion: The Department thanks these commenters for their support for these regulations, including the greater clarity provided in a number of definitions. We appreciate hearing from student commenters who shared their perspectives, especially as they relate to the impact of the COVID–19 pandemic on their educational experience, and we appreciate their efforts to embrace innovation, and the optimism they expressed that these regulations will help them and students to follow. The Department agrees with many

commenters that it is best to allow institutions to better serve students utilizing the latest technology and to do so now, given the challenges many students and institutions are facing.

The Department agrees that the proposed rule appropriately balances the need for innovation with strong protections for students and taxpayers. We also agree with the commenter who suggested that some disciplines may require at least some in-person instruction and noted that instructors, institutions, and accrediting agencies are in the best position to determine whether distance, blended, or ground-based instruction is most appropriate. The Department agrees that additional research could help it make even more informed decisions in the future. We also agree that veterans, military-connected students, and many other students can benefit from CBE programs and that more students will benefit from these programs because of these regulations.

Changes: None.

Comments: One commenter praised the negotiation process, calling it open, engaging, thorough, and fair, resulting in regulations that provide better clarity and protections for students. The commenter stated that the subcommittee, which made a complete set of recommendations to the main committee, engaged in active and informed interaction.

One commenter supported the Department’s effort to select negotiators representing diverse perspectives. The commenter expressed gratitude for the significant time and effort negotiators spent on this rulemaking. This commenter and several others also praised the work of the negotiators and the Department in reaching consensus.

One commenter supported the consensus agreement and the proposed rule for clarifying and reaffirming the appropriate role of accrediting agencies in ensuring the integrity of distance education programs. The commenter also asked that the Department not include additional provisions that were not negotiated.

Discussion: We appreciate the support from commenters and agree that one benefit of these regulations is to ensure clarity of the role of accrediting agencies in matters related to distance education. We note that the Administrative Procedure Act (APA) does not permit us to include additional provisions that were not subject to the rulemaking effort.

Changes: None.

Comments: Many commenters urged the Department to maintain consensus language in the final rule and not make

changes that would weaken protections for students.

Discussion: We appreciate these commenters’ suggestion and agree that the final rule should maintain the consensus language to the greatest extent practicable. The Department is leaving most of the consensus language in the proposed rule unchanged. As discussed elsewhere, the Department is making some changes at the request of commenters, including to permit the use of asynchronous clock hours offered through distance education and subscription-based disbursement for programs not offered through direct assessment programs. As discussed in this document, the Department believes the benefits of these changes outweigh any risks. However, the Department believes the final rule will maintain the important protections for students presented in the NPRM.

Changes: None.

Comments: Several commenters acknowledged that the COVID–19 pandemic necessitates some flexibility in the short-term but greater oversight in the long-term regarding distance education.

Discussion: The Department believes, as detailed elsewhere, that the regulations appropriately consider both protections for consumers and taxpayers as well as the need for innovation. While we did not know during rulemaking sessions that a pandemic was in our future, these regulations address the needs of both institutions and students in response to COVID–19 and serve as additional evidence that the rulemaking effort resulted in a needed and meaningful modernization of our prior regulations. The Department also believes that there need not be a tradeoff between consumer protection and innovation.

Changes: None.

Comments: Several commenters supported many of the provisions of the proposed rule while suggesting that the lack of safeguards generally, or with regard to distance education in particular, may have downsides that necessitate strong consumer protections to protect students and some groups of students in particular (including veterans and military-connected students, low-income students, students of color, and those lacking academic preparation).

Additionally, several commenters suggested that proprietary institutions would be especially likely to treat students unfairly.

Discussion: The Department agrees that students should select programs that align well with their prior academic preparation, their learning style, and

their lifestyle. Additionally, we believe that all educational programs must continue to have proper oversight by the Department, States, and accrediting agencies. While protections for all students are important, the benefits of a program should not be denied to some students simply because the program is not the right choice for others. The Department notes that the growth of adaptive learning and artificial intelligence tools in recent years have allowed institutions to provide more personalized academic supports, at scale, that may be even better than what would be available in a traditional classroom, particularly in traditional large lecture courses. These technologies may facilitate more regular and effective faculty-student interaction than a traditional classroom format enables.

The Department believes the enforcement of provisions protecting students is vital and should occur without regard to the tax status of the institution in question unless Congress directs the Department otherwise. The Department takes all allegations of harm to students seriously and does not condone improper conduct by any type of institution whether public, private non-profit, or proprietary.

Changes: None.

Comments: One commenter urged the Department to avoid provisions that would create unintended consequences for osteopathic clinical education programs, including students completing out-of-State clinical rotations. The commenter further requested that the Department avoid new financial and administrative burdens during the COVID-19 pandemic.

Discussion: The Department considered clinical education programs in this rulemaking as well as the accreditation rulemaking, which covered issues related to State authorization of distance education and are effective July 1, 2020. These distance education and innovation regulations become effective July 1, 2021, allowing institutions and others adequate time to plan for their implementation. Early implementation is optional. We do not anticipate that these regulations will create unique burdens on osteopathic clinical education programs, which may elect to not integrate or expand distance learning opportunities within those programs. The Department sought to reduce financial and regulatory burden overall during this rulemaking. The Regulatory Impact Analysis and Paperwork Reduction Act sections of this final rule contain additional information about cost and burden.

Changes: None.

General Opposition

Comments: Several commenters expressed opposition to the final regulations because of concerns over whether they would weaken existing regulatory requirements on distance education programs. Other commenters opposed the final regulations because they worried about the potential negative impacts on colleges, universities, and the learning environments of all students. One of these commenters suggested that the cumulative effect of the proposed rule would allow for drastic and unnecessary changes in the name of efficiency and innovation, while sacrificing students' learning and protection in the process, leading to further damage to students and taxpayers. Many of these commenters expressed similar concerns that the proposed changes would expose students and taxpayer-funded Federal aid dollars to undue risk.

Discussion: We thank the commenters for expressing their concerns, and we have considered their objections. We do not share their apprehension about the predicted consequences of these final regulations. In fact, we believe that this final rule properly balances the need to protect student interests and guard taxpayer dollars, while also providing innovators the tools to deliver high-quality, distance education for students in the 21st century. We do not believe these goals must necessarily come at the expense of one another.

Changes: None.

Comments: Some commenters stated that the Department should rescind the proposed regulations and redraft new regulations that protect educational quality, the interests of students and taxpayers, and the general higher education community.

Another commenter agreed that the proposed regulations should be rescinded, in part, because the Department did not conduct reasoned rulemaking as required by the APA. This commenter suggested that some negotiators did not understand the rules and that the Department "stacked the deck" with an unmanageable agenda, created negotiating committees stacked heavily in favor of industry, and starved the committee of any real data or information to inform the rulemaking. Further, the commenter stated that the Department "bullied" negotiators who "dared to oppose the Department's proposals and threatened others with promises of worse regulations if they refused to accede." The commenter concluded that the result was an "illegitimate" vote of consensus. The

same commenter added that the Department reneged on its historic consensus and changed the final regulations without sufficient factual justification. The commenter stated that the Department relied on "little more than anecdotes, industry proposals, and ideology" in its original proposals. The commenter also added that the Distance Education subcommittee should have more fully included student and taxpayer voices and interests and that the Department failed to follow its own agreed to protocols by not providing a preamble to members to review and comment on prior to publication. Similarly, a different commenter remarked that student veterans were not sufficiently represented, and more similar individuals should have been added to the negotiating committees.

Another commenter argued that the livestreaming was not open to the public and that the consensus vote on the regulations could not be considered either valid or indicative of general support from any of the communities around the negotiation table. Further, the commenter stated that the data provided to the negotiators was disjointed and insufficient and that the Department should incorporate additional reporting requirements for distance education purposes, specifically reporting about the distance education status of students who take Federal loans.

A group of commenters objected to the rulemaking process, stating that the Department appointed negotiators who appeared to have been selected, not for their subject-matter expertise, but for their ties to the for-profit college industry.

Discussion: As we stated in the final regulations on student assistance general provisions, the Secretary's recognition of accrediting agencies, and the Secretary's recognition procedures for State agencies published on November 1, 2019, we disagree with the commenters who said that the Department's rulemaking process was flawed.⁴ It is not uncommon for the Department to address multiple topics with a single negotiated rulemaking committee, nor was this the first time that the Department utilized non-voting subcommittees to delve into a specific topic and provide recommendations to the main committee. The subcommittee's recommendations were not binding on the members of the main committee, who were free to discuss the issues in as much detail as they required to come to a consensus agreement. The Department notes that we added an

⁴ See: 84 FR 58836.

additional negotiator, and an additional negotiating session at the request of negotiators, to represent all relevant constituencies and in hope of reaching consensus.

The Department disagrees with the commenter that our efforts to achieve consensus were inappropriate. Contrary to the commenter's assertions, the Department compromised countless times, moved away from its initial proposals, and accepted negotiators' request for substantially more time to negotiate.

Regarding the makeup of the subcommittee, the process of negotiated rulemaking ensures that we consider a broad range of interests in the development of regulations. Specifically, negotiated rulemaking is designed to enhance the rulemaking process through the involvement of all parties significantly affected by the topics for which we will develop the regulations.

Accordingly, section 492(b)(1) of the HEA, 20 U.S.C. 1098a(b)(1), requires that the Department choose negotiators from groups representing many different constituencies. The Department selected individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity of higher education interests and stakeholder groups, large and small, national, State, and local. In addition, the Department selected negotiators with the goal of providing adequate representation for the affected parties while keeping the size of the committee manageable. At the request of negotiators, the Department agreed to add a representative of State Higher Education Executive Officers on the main committee. In addition, a representative of the New York Attorney General was added as a member to the subcommittee.

Students and consumer protection advocates were represented by non-Federal negotiators on the full committee and the subcommittee—student veterans were well-represented on the full committee—with primary and alternate representatives for each of these constituencies. Moreover, the Department conducted three public hearings before the negotiated rulemaking began and provided time for public comment on each of the 12 days that the main committee convened.

We disagree with the commenters who stated that the Department failed to provide data or evidence, or stated that the data was disjointed or insufficient, to support the need for the proposed regulatory changes during negotiated rulemaking. The Department was unable to fulfill several data requests made by

negotiators because the information was not available, but we do not believe the absence of those data prevented negotiators from considering reasoned proposals.

We appreciate the commenter's proposal to add reporting requirements to the final regulations, but we do not adopt their proposal. The Department is comfortable with the current regime of reporting requirements for distance education and does not wish to create new burden on institutions that rely on or integrate distance education technology in their education programs.

We acknowledge that there were temporary connectivity issues with the livestreaming of the distance education subcommittee. While we regret the interruption, the Department worked quickly to restore the connection to ensure that interested parties could view the discussion. The sessions were also recorded and can be viewed on the Department's YouTube channel.⁵ The proceedings of the main committee can be viewed at edstream.ed.gov.

We based the proposed regulatory changes on many factors, including public feedback, research outlined in greater detail in the NPRM, and emerging trends in postsecondary education. Specifically, the Department developed a list of proposed regulatory provisions based on advice and recommendations submitted by individuals and organizations as testimony in a series of three public hearings in September of 2018, as well as written comments submitted directly to the Department.

Changes: None.

Comments: One commenter provided statistics showing the types of institutions that are active in the online education industry and on the growing expansion of online education. This commenter concluded that growth has not correlated with increased access to minority and non-traditional students or more quality programs. The commenter also referenced lawsuits against online education providers and outlined arguments against distance education.

Discussion: We appreciate the information provided by the commenter, as well as the outline of the arguments against distance education. We note, however, that institutions from all sectors—regardless of whether they provide online or in-person classroom instruction—have been the subject of lawsuits and borrower defense claims. We reaffirm that legal action and the borrower defense process remain available to all students,

notwithstanding these distance education regulations.⁶

The Department acknowledges the commenter's reference to litigation against online education providers, but those legal actions do not direct the Department's regulatory work. We also acknowledge the arguments against distance education, but the Department does not advocate for one type of education delivery system over any other. The Department supports education innovation that is rigorous, meets students' needs, and assists students in achieving their educational goals. These final regulations assist in removing unnecessary barriers to that innovation, while also assuring that online programs remain academically rigorous, well-planned, and appropriate.

Changes: None.

Comments: One commenter remarked that the Department has led taxpayers to believe that changes to the distance education regulations will allow students to “fast-track their education and save money” and that the taxpayer will eventually pay the bill. The commenter also wrote that CBE and career technology training is the “adult version of Common Core.”

Another commenter stated the proposed regulations are intended to create tax breaks and ease burdens on wealthy taxpayers.

Discussion: The Department is confused by the commenter who suggested that the intended purpose of the final rule was to create tax breaks and ease the burden on wealthy taxpayers. The Department is not empowered to create tax breaks.

We are similarly confused by the commenter who stated that CBE and career technology training is the “adult version of Common Core.” The Department is not attempting to dictate academic content or establish national content standards, so we are unclear on any similarity to a set of elementary and secondary English language arts and mathematics standards. While some students may be able to complete their program more quickly, the Department disagrees that this will result in some sort of “balance” that must be covered by taxpayers. The Department also never stated that the final rule would allow students to “fast-track” their education. We believe that students should be able to access educational services that are appropriate to their needs, provide them with high-quality training and education, and meet the requirements of the HEA, as amended.

Changes: None.

⁵ U.S. Department of Education YouTube page, www.youtube.com/user/usedgov/videos.

⁶ 84 FR 49788.

Comments: One commenter stated that any weakening of the protections included in the consensus language would present a serious risk to all students, especially Latino students, who, according to the commenter, are overrepresented at institutions that, on average, produce worse outcomes for students. Another commenter similarly remarked that non-traditional students would be negatively impacted by the final regulations.

Discussion: We appreciate the commenters' submissions and share their desire for all students—men, women, minorities, under-represented populations, and non-traditional populations—to have access to high-quality education services.

The Department rejects the notion that student protections are weakened in the proposed rule or that any such weakening disproportionately impacts one student population over another. As we stated in the Program Integrity: Gainful Employment final regulations, the Department believes that more must be done to improve outcomes for high-risk students, and more options must be made available to students for whom college—and, especially, the traditional college experience—is not the best or preferred option.⁷ We believe that high-quality distance education programs, like the ones envisioned by the members of the subcommittee, can and do meet students' unique needs and expand educational opportunities to students previously underserved.

Changes: None.

Comments: A group of commenters stated that the Department is attempting to use its deregulatory agenda to override congressional intent to ensure program quality and to protect students, taxpayers, and the integrity of the Federal financial aid programs. The commenters also suggest that the Department abused its rulemaking authority by rolling back legislative protections that guard the integrity of the student financial aid system. The commenters argued that the Department's actions further jeopardize students' opportunities to access a higher education system that promotes economic mobility. Finally, the commenters concluded that the Department's agenda is proof of its intent to disregard its obligation to responsibly administer Federal Student Aid (FSA) programs.

Discussion: The Department thanks the commenters for their submission. We share their concern for protecting students, taxpayers, and the integrity of Federal financial aid programs. The

consensus language reflects that concern. The Department notes that it is not within our regulatory authority to roll back legislative protections; our regulations—and these final regulations specifically—must fall within the parameters authorized by statute.

We disagree with commenter's suggestion that the final regulations jeopardize opportunities to access higher education. This final rule promotes more high-quality, distance education opportunities for students who are not otherwise capable of attending traditional classroom-based courses. In fact, much of our work is animated by the desire to expand opportunities through education for economic mobility and advancement.

The Department takes its responsibility to administer the title IV programs seriously and strenuously seeks to guard taxpayers' dollars in the operation of those programs. We disagree with the commenters' suggestions otherwise.

Finally, legislators have the ability to further clarify their intent through future legislative action. We look forward to working with Congress on any such actions to promote educational opportunities for all students.

Changes: None.

Comments: One commenter wrote that the intent of the final regulations is to loosen the restrictions on institutions offering distance learning. The commenter stated that allowing schools to have more latitude over certain rules leaves room for schools to cut corners to save money at the expense of quality. The commenter added that the Department's contention that the reduction in regulation will increase the number of programs offered by institutions is exactly what predatory, for-profit, and fraudulent institutions want and that it will inevitably make it easier for such institutions to access financial aid funds at the cost of the students and taxpayers. Finally, the commenter said that loosening restrictions would allow a school to recycle pre-recorded lectures, give the student a test, and issue unwarranted degrees if the student passes. The commenter was concerned that such an outcome would greatly impact instructors' financial well-being and the quality of the workforce.

Discussion: The intent of the final regulations is not to loosen restrictions on any type of institution. The Department will continue to hold all education providers accountable. The Department does not condone the behavior of those who wrongfully cut corners to save money, take advantage of students, misrepresent the selectivity

of their online programs, engage in pay-to-play admissions schemes, engage in predatory advertisement or enrollment activities, or fraudulently misrepresent their educational programs—and likely student outcomes. We will take necessary actions to hold institutions accountable, regardless of their tax status or organizational structure.

The Department appreciates the commenters concerns and addresses the point regarding the use of recycled or pre-recorded lectures in the appropriate sections below. However, we note that such a concern is not limited to distance learning modalities.

Changes: None.

Comments: Many commenters asked the Department to rescind the proposed rule or, alternatively, delay its implementation, to maintain existing rules protecting the role of faculty and student interaction and restricting outsourcing. This would allow Congress and the public to better assess the needs of students and institutions. One of these commenters wrote that the Department has a responsibility to avoid making changes to distance education that would open the door to instruction without interaction between students and faculty, leaving students entirely reliant on software, apps, games, and prerecorded video. This commenter also wrote that the proposed rules would “undermine meaningful instruction by replacing it with standardized exams.” The commenter concluded that further deregulation in the distance education environment did not make sense and that it would be dangerous to students and faculty who are trying to design high-quality programs to weaken the consensus language by expanding CBE programs.

Discussion: The Department disagrees with the commenter's suggestion. We see no compelling reason, nor has one been provided through the public comment process, to rescind or delay the final regulations. We also note that reauthorization of the HEA is many years overdue, and statute currently references technologies that are sorely outdated. Therefore, we cannot rely solely on Congress to respond to the need for higher education to adapt and evolve to serve the needs of students.

While we understand that some may oppose the growth of distance education, largely because of concerns about what this means to the job prospects of current and future educators, those concerns are misplaced. The role of the instructor is critical in high-quality distance education, as explained in the appropriate section below, and these regulations reaffirm the importance of

⁷ 84 FR 31433.

regular and substantive interaction as a key element that distinguishes between distance learning and correspondence education.

We do not agree that the proposed rule would undermine meaningful instruction by replacing it with standardized exams and are confident that these final regulations do the opposite.

Changes: None.

Comments: One commenter suggested that the Department should only allow some types of programs to offer distance education courses. The commenter advocated for a rigid classification, reviewed by the Department, of subject matter areas that would be eligible for remote classes. The commenter stated that the basis for such a proposal is that some careers, such as nursing and teaching, require real world experiences and that the value that professors bring to their students is not the same in an online program.

Discussion: The Department thanks the commenter for this proposal, but we do not adopt this change. While we recognize that the experiences of online learning and traditional classroom learning can be very different, the Department believes that high-quality learning is possible in both environments. We do not wish to forestall students interested in nursing and teaching to be kept out of those fields because they are not able to attend traditional, in-person classes. In many instances, distance learning opportunities are limited to students who are already working in fields such as teaching or nursing, and who do not need additional hands-on experiences. In many instances, distance learning enables practicing professionals to complete post-graduate certificates or graduate degrees. Moreover, for many occupations, accrediting agencies and State licensing boards restrict the use of distance learning within certain programs.

As we have seen during the COVID-19 pandemic, some accrediting agencies and State licensing boards are beginning to recognize the opportunities presented by distance learning and are permitting certain portions of programs to be provided through distance modalities. We will continue to rely on accrediting agencies and State licensing boards to determine when and if distance learning opportunities meet the education and training needs of students in particular fields.

Changes: None.

Comments: Many commenters referenced COVID-19 in their submissions to the Department and

remarked upon the expanded prevalence of distance education.

One commenter suggested that the proposed rule should be deliberated and commented on after the pandemic is over because the “last thing on American’s [sic] minds” is the accreditation of online schools.

Many commenters concluded that a 30-day comment period during a pandemic was not sufficient to thoroughly review the proposed rules. These commenters requested that the Department delay the implementation of the proposed rules.

A group of commenters stated that, at this pivotal moment and informed by institutions’ experiences during the pandemic, any weakening of strong protections for students and taxpayers would open the door for predatory actors to repeat past abuses, putting the most vulnerable students at even greater risk.

One commenter stated that the Department cannot, in good faith, move forward with any of the issues in the final regulations without first grappling with the massive changes that the COVID-19 crisis will bring to online education.

A group of commenters proposed that the Department reopen the rulemaking process or postpone the enactment of the final regulations to allow for additional comments. Many of these commenters noted potential difficulty in responding to the NPRM because of COVID-19. One commenter suggested that military and veterans’ communities should be allotted extra time to provide comments. Another commenter noted the need for the Department to put the needs of our nation’s college students before the needs of “distance education opportunists.”

Discussion: While we acknowledge that the NPRM may not have been top-of-mind for most Americans during the COVID-19 pandemic, the Department is confident that the 30-day public comment period was an adequate time period for interested parties to submit comments. Because we reached consensus during negotiated rulemaking, the proposed regulatory language was available to the public at the conclusion of the final negotiating session approximately one full year before the comment period began, which afforded interested parties additional time to begin formulating their comments.

Prior to issuing the proposed regulations, the Department conducted three public hearings and four negotiated rulemaking sessions, where stakeholders and members of the public had an opportunity to weigh in on the

development of much of the language reflected in the proposed regulations.

In addition, the 30-day public comment period was necessary to allow us to meet the HEA’s master calendar requirements. Under those requirements, the Department must publish final regulations by November 1, 2020, for them to be effective on July 1, 2021. Delaying the effective date of these regulations would unnecessarily delay the realization of the benefits associated with these changes.

Changes: None.

Correspondence Courses: Definition and Limitations (§§ 600.2 and 600.7)

Comments: Two commenters expressed support for the proposed definition of the term “correspondence course.” One of those commenters specifically supported the elimination of the reference to self-pacing in the previous definition of “correspondence course” and indicated that the proposed definition makes it clearer that self-paced programs are not necessarily correspondence programs. One commenter also expressed support for the clarification regarding the definition of a “correspondence student” in proposed § 600.7(b)(2), indicating that the specificity in the new definition would support new and innovative academic models.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Several commenters opposed the Department’s proposed changes to the definition of “correspondence course,” arguing that the changes would make the distinction between distance education and correspondence courses less clear. These commenters stressed the importance of maintaining that distinction given the more limited amount of support by qualified instructors in correspondence courses and past abuses associated with correspondence study. Another commenter indicated that the existing definition of “correspondence course” already adequately distinguished correspondence education from distance education and did not need to be changed.

Discussion: We agree with the commenter about the importance of support by qualified instructors, especially given the emphasis of that concept in the statutory definition of “distance education,” which requires “regular and substantive interaction” between students and instructors. We also agree that it is important for the regulatory definitions of distance education and correspondence courses

to be sufficiently distinct, both to implement the statutory distinction between the terms and to ensure that institutions are able to design programs in a way that maintains compliance and avoids audit or program review findings with respect to their online programs. However, we disagree that the proposed changes will blur the distinction between the two terms.

The most significant change made to the definition of “correspondence course” in these regulations is the removal of the concept of self-pacing, which is not vital to the distinction between correspondence courses and distance education. The HEA also does not mention the concept of self-pacing, nor does it express that such a condition would require a course to be treated as offered through correspondence education rather than through distance education. We believe that the aspects of the definition of “correspondence course” that have been maintained in the definition—for example, that interaction in such a course is limited, not regular and substantive, and primarily initiated by the student—are more than adequate to preserve the important regulatory distinction between distance education and correspondence courses.

Changes: None.

Comments: One commenter objected to the proposed definition of “correspondence student” under proposed § 600.7(b)(2), asserting that the definition weakens the distinction between distance education and correspondence courses and could result in a larger number of participating institutions and students engaging in correspondence study.

Discussion: We disagree that the proposed changes to § 600.7(b)(2) will weaken the distinction between distance education and correspondence courses or result in a greater number of institutions or students engaging in correspondence study. The only impact of the changes is to clarify how to calculate the number of correspondence students for the purpose of determining whether an institution has exceeded the statutory limitation on the number of correspondence students that may be enrolled at an eligible institution during an award year. The other relevant statutory and regulatory restrictions on correspondence study that discourage institutions from offering correspondence programs—for example, the institutional eligibility limitations, the restriction to half-time enrollment status for purposes of calculating Pell Grant disbursement amounts, and the limitations on the components of cost of attendance for students enrolled solely

in correspondence study—would remain unchanged.

Changes: None.

Definition of Academic Engagement (§ 600.2)

Comments: Many commenters supported the Department’s proposed definition of “academic engagement.” Several commenters noted that by moving key concepts on attendance and academic activities from the Return of title IV funds (R2T4) regulations (under § 668.22) to a new definition of “academic engagement” in § 600.2, the Department emphasizes the importance of active student participation in other parts of the regulations. One commenter also noted that the definition would expand academic quality and accountability. Two commenters specifically stressed their support of the Department’s acknowledgement within the definition that student academic engagement can take on different forms, including interactive online courses and computer instruction.

Two commenters specifically expressed support for the Department’s inclusion of § 600.2(2)(iv), “Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction,” in the definition. The commenters indicated that they believe this inclusion will help clarify the role adaptive learning and other technologies can play in providing academic engagement.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Several commenters requested that the Department include new categories of activities under the definition of “academic engagement.” Two commenters asked that the Department add a category for education offered through virtual and augmented reality because those modalities are becoming more commonly used in higher education.

One commenter suggested that the Department include as a category under “academic engagement” instruction through computer-mediated adaptive instruction that alters the learning experience for each student based on that student’s needs. Another commenter requested that the Department clarify that instructor interaction does not have to occur exclusively with a human instructor.

Discussion: As the Department discussed in the preamble to the NPRM (85 FR 18638–18702), we consider “other interactive computer-assisted instruction” to include the use of artificial intelligence or other adaptive learning tools where the student is

receiving feedback from technology-mediated instruction. Computer-assisted instruction would also include instruction through virtual or augmented reality, or any other form of instruction in which a student actively participates in a computer-based or computer-mediated learning environment, with or without the presence of a human instructor. An explicit goal of this rulemaking has been to reduce the need for updates to regulation when new technologies are developed, and so this definition is also inclusive of technologies that are in their infancy or not yet invented as long as they meet the regulation’s other requirements. Therefore, because the types of learning described by the commenters (and others) are already accommodated in the proposed definition of “academic engagement,” we do not believe it is necessary to add additional categories.

Changes: None.

Comments: One commenter expressed concern that the proposed definition of “academic engagement” would require more than simply actively logging into a website. The commenter indicated that this could cause undue burden for students who were unable to academically engage during normal hours or afford the technologies required by institutions to demonstrate academic engagement as defined.

Another commenter voiced a concern that paragraph (3)(iv) of the proposed definition, which states that academic engagement does not include participating in academic counseling or advisement, could discourage instructors from taking the time to speak with students about their academic future or professional goals. The commenter mentioned that depending on the nature of the course, it may be difficult at times for instructors to differentiate between interacting with students about “academic matters,” which qualify as academic engagement, and “academic counseling and advisement,” which does not qualify. The commenter requested that the Department remove the exclusion of academic counseling or advisement from the definition of academic engagement.

Discussion: We disagree that the definition of “academic engagement” causes undue burden for students. Many institutions previously believed that, under the Department’s prior regulations, students were required to not only log in, but engage in an activity weekly for which the institution maintains documentation to prove that the student was engaged every couple of days. This was identified as a

burdensome requirement that significantly exceeds requirements for ground-based instruction, and that often requires students enrolled in distance education to make time for what is otherwise viewed as “busy work.” The new regulation clarifies that engagement must be meaningful in order to be used as the basis for complying with the Department’s related requirements (such as identifying a student’s withdrawal date), but does not require, for example, students to post a non-substantive blog post each week simply to “check the box” on documenting participation.

The definition does not require a student to log in or participate in a course or learning environment at a particular time, nor does it require or incentivize institutions to demand the use of expensive technologies to demonstrate academic engagement. The definition does rely on the concept of active participation by a student in his or her learning, which the Department believes is a necessary requirement for academic engagement. This concept of active participation—which cannot be demonstrated merely by documenting that a student has logged into an online system—is also vital to other regulatory requirements, including for purposes of determining a student’s withdrawal date under the R2T4 regulations.

For similar reasons, we also decline to remove the exclusion of academic counseling and advisement from the definition of “academic engagement.” While the Department views advisory activities related to a student’s academic or career trajectory as an important component of many postsecondary programs, such advising by itself does not demonstrate that a student is participating or engaged in his or her academic program. Negotiators agreed that to the extent a qualified instructor is providing advising relevant to a specific course—for example, explaining where a student can find answers to content-related questions, or recommending a particular approach to a writing assignment for the course—academic engagement is taking place. However, general academic or technical advising that is provided outside of a specific course, and that is often provided by someone who does not qualify as an instructor for the course in which the student must be academically engaged—for example, guidance regarding which classes the student plans to take in the future, or technical support with instructional technology—does not constitute academic engagement.

Changes: None.

Comments: Several commenters asked the Department to clarify its position

regarding asynchronous academic engagement. The commenters indicated that while the Department specifically mentions synchronous instruction in the definition, it does not mention asynchronous instruction even though asynchronous instruction is referenced elsewhere, both in the “distance education” definition in § 600.2 and as part of the new “week of instruction” definition in § 668.3. One commenter specifically suggested including “or asynchronous” after “synchronous” in paragraph (2)(i) of the definition to clarify that asynchronous attendance and participation in the classroom is included when documenting academic engagement in an online program. Another commenter asserted that though certain asynchronous activities, such as engagement in interactive forms of computer-assisted instruction, might be read into the listed activities in paragraph (2)(iv) of the definition, the omission of a direct reference to asynchronous instruction makes it difficult to have confidence in such an interpretation.

Discussion: The Department’s intent was not to exclude asynchronous participation in learning activities from the definition of academic engagement. Asynchronous academic engagement could occur under any of the categories described in the definition except for the category described under paragraph (2)(i) that describes attendance at a synchronous lecture, recitation, or field or laboratory activity. For example, a student can work on an academic assignment—described under paragraph (2)(ii) of the definition—at the time of his or her choosing, and submission of that assignment is an asynchronous learning activity that does not require real-time interaction with an instructor. Similarly, a student could demonstrate academic engagement under paragraph (2)(iv), “participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction,” by engaging in a presentation through a virtual or augmented reality system or by participating in an online learning activity that uses artificial intelligence or adaptive learning. We do not believe that it is necessary to add the word “asynchronous” to the definition given the incorporation of this concept in each of these activities. We also decline to remove the word “synchronous” from paragraph (2)(i), since in that context it is used to describe a particular type of learning activity that is performed in real time with an instructor.

Changes: None.

Definition of Additional Location (§ 600.2)

Comments: One commenter requested clarification about the addition of a definition of “additional location.”

Discussion: We did not seek comment on the “additional location” definition in the NPRM that we address in this final rule. Instead, we sought comments on that definition in an NPRM published in the **Federal Register** on June 12, 2019 (84 FR 27404). That NPRM included Accreditation-related definitions, including the definition of “additional location.” We published a final rule that included the definition of “additional location” in the **Federal Register** on November 1, 2019 (84 FR 58834) in which we addressed comments we received related to the definition.

Changes: None.

Definition of a Clock Hour (§ 600.2)

Comments: Numerous commenters voiced disagreement with the provisions in the Department’s proposed definition of the term “clock hour” that require each clock hour in a distance education program to include synchronous instruction where students have an opportunity to interact with instructors and asked the Department to reconsider this requirement.

Several commenters indicated that the proposed clock hour definition regarding distance education was too restrictive and should conform to the Department’s definition of “distance education,” which allows for “regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.” The commenters asked the Department to reconsider whether clock hours could be earned through asynchronous instruction, noting that several educational platforms are already capable of monitoring a student’s participation and clocking the student out if active engagement ceases.

One commenter noted the Department’s reluctance to support asynchronous distance education (ADE) instruction within the clock hour definition was most likely due to the concern as to whether a clock hour student’s required “seat time”—50 minutes in a 60-minute period—could be validated. The commenter indicated that current technology already provides effective tools which, if properly incorporated into an asynchronous distance education platform, marry effective program instruction with effective “seat time” validation. As explained by the commenter, an

electronic synchronous distance education platform would include such components as sign-in assurance, time monitoring through trackable digital media assets, automated sign-off for inactivity, live student to student and student to instructor activities and automated Q & A, and testing processes. Based on this information, the commenter requested that the Department modify its proposed definition of a “clock hour” to permit instruction provided via electronic synchronous distance education.

One commenter stressed that permitting the development of asynchronous instruction in clock hour programs allows for the kind of instructional flexibility needed for career and technical education providers to use new methods of simulated, technology-mediated instruction without constraint or fear of compliance findings.

Several commenters voiced a strong desire to afford the same flexibilities to students enrolled in clock hour distance education courses as students enrolled in credit hour distance education programs. To that end, one commenter indicated that program structure (clock hours or credit hours) is often based on institutional or State governance and has no relationship to the quality or content of a program. The commenters asserted that students enrolled in clock hour programs should not be penalized merely due to institutional structure.

Another commenter stated that limiting clock hour distance education coursework to synchronous online classes would limit the convenience and flexibility to students of access to course content at any time or place. Several commenters expressed concerns that limiting distance education clock hour eligibility to synchronous activities could limit innovation and discourage institutions from creating more flexible and accessible learning experiences which could reduce potential barriers to access and completion of postsecondary programs and promote a more diverse student population.

Several commenters stressed that the Department authorizes postsecondary institutions to offer eligible postsecondary programs in a distance learning format as approved by the institution’s accrediting agency and that the exact same standards, quality assurance, integrity and accountability measures used to approve traditional on-campus programs are also applied to the distance education programs approved by the accrediting bodies.

Several more commenters indicated that current technology in higher education attendance monitoring

provides systems that monitor participation, proctor exams, verify attendance and provide tools for students to interact with instructors at the time and place of their choosing. The commenters further explained that online content is most often used to supplement in-person training or lab work and that asynchronous instruction can now be monitored by a school through many educational platforms, students can be clocked out for inactivity, and instructors and students have a variety of ways to interact with each other and review various course materials. Many commenters expressed a belief that current technology available to students and educators allow for the same objectives to be met in an asynchronous format, while allowing for more flexibility to overcome challenges related to geography, learning preferences, work or family obligations, disabilities, or resources. One commenter suggested asynchronous learning could include the recording of classes to be viewed within a specified time with periodic class meetings to answer questions.

Several commenters urged the Department to allow asynchronous instruction via distance education if approved by State and accrediting agencies as long as an institution could clearly demonstrate instructor engagement with the student during each clock hour through a variety of means, which could include technology such as adaptive learning and artificial intelligence.

Two commenters indicated that the synchronous format described in the proposed definition is too limiting and would not be broad enough to allow students to engage in certain types of projects or assignments such as reviewing written or recorded lectures outside of regular classroom hours. Another commenter stated that the critical variable is not coordinated schedules or designated time, but a learning environment with diverse and engaging learning activities and faculty involvement.

Two commenters supported the inclusion of distance education into the Department’s clock hour definition, arguing that distance learning technology has sufficiently advanced to permit institutions to conduct remotely synchronous instruction with students and to monitor the exact amount of time that students spend participating in these learning sessions. However, the commenters urged the Department to provide more clarification and greater flexibility under paragraph (3) of the clock hour definition which states that an institution must be capable of

monitoring a student’s attendance in 50 out of 60 minutes for each clock hour. Specifically, the commenters requested that the Department clarify that the new clock hour definition not require an institution to have live instructor involvement with a student each hour, so long as the institution can monitor a student’s participation during 50 minutes of each hour and the institution can otherwise demonstrate academic engagement (per the Department’s definition) by utilizing suitable technology as demonstrated to the appropriate State and accrediting agency. The commenters stressed that requiring “face-to-face” contact each hour or at least one live touch by an instructor per clock hour for synchronous or asynchronous instruction would ignore the direction that the Department’s Proposed Rule is heading to expand recognition of the capabilities of technological advances to monitor student academic engagement and impose an undue hardship on students who need maximum scheduling flexibility in completing clock hours by means of distance education.

One commenter objected to the proposed clock hour definition and suggested the definition be reworded to account for students who may have relocated to a different time zone from their institution, and therefore might not be able to attend a class session in real time or interact with the instructor during the normal period of attendance. The commenter indicated that they currently attend a class in a different time zone and often have to watch recordings of the class and do not want these types of situations to be excluded from being counted towards a student’s academic progress.

One commenter requested that the Department clarify if it indeed intended to limit distance education clock-hour eligibility to only synchronous learning experiences but instead grant more flexibility to correspondence courses. The commenter was concerned that, given the limitations on correspondence students and courses applied to correspondence education, institutions would prefer to designate courses as distance education rather than correspondence whenever appropriate.

One commenter urged the Department to extend the temporary flexibilities for online instruction for clock hour programs due to the current coronavirus crisis as outlined in the Department’s guidance for COVID–19. The commenter noted that the Department’s temporary flexibility allows schools to offer synchronous or asynchronous online clock hour programs as long as the

school can demonstrate student academic engagement through various online learning platforms and systems or based on school data or the instructor's own knowledge. The commenter indicated that extending these flexibilities would allow institutions to determine on a local basis how to transition back to on-ground education and clarify that clock hour schools are permitted to offer hybrid programs—partially on-ground and partially online—through this period to provide maximum flexibility to meet the health and safety needs of employees and students.

Several commenters specifically requested that the Department modify paragraph (1)(iv) of the proposed clock hour definition to include both attendance in a synchronous or asynchronous class for distance education coursework, while one commenter asked the Department to include “participation through asynchronous academic engagement” or similar language to the distance education eligibility criteria in paragraph (1)(iv) of the clock hour definition.

In addition, several commenters asked the Department to consider modifying paragraph (1)(iv) to read, “In distance education, 50 to 60 minutes in a 60-minute period of attendance in a ‘computer-assisted’ class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students”, while other commenters simply requested that the word “synchronous” be removed from paragraph (1)(iv). The commenters explained that removing the word synchronous from the definition would allow institutions who wish to offer clock hour programs synchronously or asynchronously, or a combination of both, the flexibility and opportunity to prepare the twenty-first century workforce in engaging and innovative ways.

Discussion: We are persuaded by the comments that preventing institutions from offering instruction by asynchronous means is unnecessarily restrictive and counter to the purposes of this rulemaking. The emergence of the COVID-19 pandemic has illustrated the need for institutional and student flexibility with regard to the time and place that coursework is completed, and a number of licensing agencies are also creating new flexibilities for the use of asynchronous learning in clock hour programs. Asynchronous learning allows students to design their own learning schedules around the demands of work and family that often interfere with class activities offered only at

prescribed times. This flexibility can also greatly benefit students with health concerns for whom participation is contingent upon treatment schedules and feeling well enough to perform required tasks. The individual pacing made possible by asynchronous learning allows for a more tailored educational experience that promotes mastery of subject matter over attendance in scheduled activities. Moreover, the availability of asynchronous learning allows for mixed model learning reflective of non-title IV eligible programming with theory learned asynchronously and specific practical tasks through synchronous instruction.

The Department does not wish to impede technological innovations at institutions that can help students overcome barriers to access and completion.

The existence of the “regular and substantive interaction” requirement related to clock hours offered through distance education and the requirement that clock hours meet the requirements of an institution's accrediting agency and State provide the safeguards that ensure that students have access to quality instruction and instructor support. Given these baseline requirements, it is not necessary to require students to interact with instructors synchronously to earn clock hours.

We also believe that commenters have made a strong case that, given current technology, clock hours completed asynchronously can be adequately supervised and monitored, provided the institution maintains the appropriate technological resources and internal controls. We disagree with commenters who indicated that learning technology is not yet capable of monitoring student engagement in this manner, especially since the Department has already reviewed and approved clock hour programs that used online learning platforms that are capable of the required monitoring.

The Department remains concerned about the possibility that clock hours offered asynchronously could be used as a means to complete unsupervised homework assignments rather than coursework that otherwise would have occurred in the classroom, which is prohibited under the Department's longstanding policy for clock-hour programs. Our position is that the requirement for supervision of a clock hour in an asynchronous learning environment is met when the institution is capable of documenting the specific form of academic engagement associated with the activity—for example, asynchronous participation in an

interactive tutorial or webinar online or a learning activity involving adaptive learning or artificial intelligence—and the institution has technological resources and policies and procedures that are sufficient to monitor and document the time each student spends performing that activity. If either of these conditions are not met, an institution would not be permitted to include time spent on an online activity toward completion of a clock hour for purposes of the title IV, HEA programs.

We also agree with the commenters who argued that clock hours offered asynchronously should involve academic engagement, as defined elsewhere in these regulations, since that concept involves active participation in learning activities rather than passive consumption of knowledge or merely logging into an online system. An institution should establish, in accordance with its policies and those of its accrediting agency or State, what it considers to be academic engagement in a clock hour program in order to clearly demonstrate that students have spent the recorded time performing an activity.

Institutions are permitted to offer clock hour programs both through correspondence or distance education, and the Department declines to opine on which type of program is most appropriate or best suited to the needs of individual students. However, institutions offering clock hour programs using distance education continue to be subject to the general requirements in the definition of “distance education,” which requires regular and substantive interaction between students and instructors. In such programs, some, but not all, clock hours would need to involve substantive interaction between students and instructors.

Changes: We have modified paragraph (1)(iv) of the “clock hour” definition to express that a clock hour includes a synchronous or asynchronous class, lecture, or recitation where there is an opportunity for direct interaction between instructors and students. We also added a new subordinate paragraph to include, as part of the definition of a clock hour, 50 to 60 minutes of active participation in an asynchronous learning activity involving academic engagement in which a student interacts with technology that can monitor and document the amount of time that the student participates in the activity.

Comments: One commenter urged the Department to provide flexibility to institutions with distance education clock hour programs, whether taught in

synchronous or asynchronous learning environments, such that when monitoring clock hours, the institutions be given the flexibility to assign clock hours based upon the assignments provided to students as long as there is adequate communication between the instructor and students. The commenter mentioned that providing the flexibility to monitor that instructors are providing relevant assignments equal to the number of clock hours for which a student is enrolled would be adequate since the quality of the educational program has been reviewed and monitored by the school's accrediting agency.

Two commenters indicated that monitoring each student's time spent on academic engagement would be challenging given the cost and availability of current technology. One of those commenters indicated that it is currently impossible to properly monitor and track a student's attendance in 50 out of 60 minutes for each clock hour via distance education due to a lack of institutional means and technological uniformity. In addition, the commenter expressed a concern that the notion that technology has sufficiently advanced to permit institutions to conduct remotely synchronous, face-to-face instruction with students and to monitor the exact amount of time students participate in learning sessions is flawed because it is based on the premise that both the instructors and students can obtain, operate, and monitor the required devices needed to properly conduct distance education learning. The commenter asserted that the Department would be best served by dropping the new clock hour definition and instead, focusing on ensuring that an adequate amount of work is being completed rather than mandating a set amount of time be spent on coursework.

Discussion: While we agree that it should be possible for a student to earn clock hours through participation in asynchronous online learning activities, we disagree that an institution can measure such clock hours without monitoring a student's actual participation in those activities. A clock hour is a period of 50 to 60 minutes in a 60-minute period spent receiving instruction or actively participating in a particular educational activity, and institutions are responsible for measuring the amount of time that students spend in such activities. The Department has never permitted institutions to award clock hours based on estimates of completed work and does not intend to do so for clock hour programs offered through distance

education. We also disagree with the commenter that the technology needed to perform this monitoring does not exist or that it cannot be obtained by institutions and students. The Department has seen demonstrations of such technology by institutions that offer clock hour programs and was convinced that the technology was both viable and appropriate for use in monitoring clock hours completed asynchronously.

Changes: None.

Comments: One commenter asserted that the Department's proposed clock hour definition fell short of its stated goal in the NPRM "to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students." Specifically, the commenter suggested that the modern-day use of a calculation of seat time to measure student learning and progress is grounded on a false premise, especially considering today's online technologies, including artificial intelligence and adaptive learning tools. The commenter opined that since the definition of a "clock hour" is not defined in title IV, the Department should consider removing the definition of "clock hour" from § 600.2 and instead, rely on accrediting agencies, as the entities that set standards on academic quality, to provide academic oversight of institutions' policies relating to the measurement of student learning and progress.

Discussion: We disagree that the use of clock hours to measure a student's progress for purposes of the title IV, HEA programs prevents institutions from using innovative technology or instructional methods. We believe that it is vital for institutions to be able to award and disburse title IV, HEA assistance using clock hours as a measurement of student progress because that form of measurement still aligns with many Federal and State licensure requirements for a variety of professions. This alignment ensures that institutions that are already required to monitor and document a student's successful completion of clock hours for other purposes can use that monitoring to demonstrate that the student has made progress for purposes of the title IV, HEA programs rather than requiring such institutions to perform a cumbersome and potentially burdensome conversion of clock hours to credit hours or some other equivalent measure.

Changes: None.

Comments: One commenter expressed concern that the clock hour definition does not define student seat time

precisely enough. The commenter pronounced that a vague seat time requirement may cause undue challenges for an institution with rigorous accrediting agencies at the regional and/or professional level.

Discussion: The Department does not establish academic requirements for educational programs, including clock hour programs. Under the Department of Education Organization Act, such requirements remain within the purview of accrediting agencies and States, which are free to set requirements they feel appropriate for what is considered successful completion of a clock hour in each program.⁸ This longstanding approach to the oversight of academic requirements recognizes the autonomy of postsecondary institutions and the unique qualifications of their accrediting agencies and States to respond to issues of academic quality.

Changes: None.

Comments: One commenter urged the Department to maintain the requirements listed under paragraph (3) requiring programs to meet all clock hour limitations or criteria established by school accrediting agencies, States, and applicable licensure bodies. The commenter also expressed support for limiting clock hours via distance education to synchronous programs in the final rule because monitoring a student's completion of a clock hour in an asynchronous program would be virtually impossible.

The commenter stated that monitoring asynchronous learning would diverge too much from the proposed clock hour definition and the Department would most likely be unable to assess the minimum technology needed for institutions to adequately monitor asynchronous distance education learning.

Discussion: We do not believe that it would be impossible for an institution to maintain the appropriate technology and procedures to monitor and document clock hours earned based on completing asynchronous educational activities. However, we agree that it is important to ensure that institutions comply with any requirements set by accrediting agencies or State licensing or approval agencies regarding clock hours and intend to retain that component of the clock hour definition.

Changes: None.

Definition of Credit Hour (§ 600.2)

Comments: Numerous commenters expressed their overall support for the proposed changes to the definition of a

⁸ See 20 U.S.C. 3403(b).

credit hour, with several of those commenters specifically asking that the Department make no changes to the consensus language agreed to by negotiators. Some of this support was qualified to varying degrees, ranging from observations that the credit hour is a less than ideal measure of student progress to a request on the part of two commenters concerned about the rule's enforceability that the Department restore the requirements in §§ 602.24(f) and 603.24(c) (84 FR 58931) requiring that accreditors and State agencies respectively, conduct review and evaluation of the reliability and accuracy of the institution's assignment of credit hours.

One commenter expressed opposition to the revised definition of "credit hour" based on concerns that changing the definition of "credit hour" to focus on student learning time may pose new risks to students and their privacy. The commenter offered that if recording of individual learning time becomes desirable initially for credit hour validation, it may become desirable for individual student measurement, and that the potential consequences of this should be available for public review.

Another commenter asserted that the Department should maintain the definition of "credit hour" in the NPRM but that the Department made proposals to change the definition without any evidentiary basis or support, rendering them legally insufficient under the APA. The commenter asserted that by failing to present evidence during the negotiated rulemaking that would justify a change, and by failing to suggest in the NPRM that the Department has support to justify those original proposals now, the Department has no choice but to maintain the consensus definitions included in the NPRM.

Concerned that the proposed definition of "credit hour" does not adequately account for transfer credits, one commenter offered revisions to the amendatory text in the NPRM that would change the characterization of a credit hour as, "an amount of student work" to "work by a student with average, but appropriate, preparation . . ." and include recognition and consideration of the importance and widespread usage of credit transfer among institutions. The commenter also suggested that the Department address a perceived disparity between workload expectations of students in on-campus courses versus those offered through distance education. The commenter proposed to stipulate the equivalent amount of work as required in paragraph (1)(i) of the definition of

"credit hour" for other academic activities as established by the institution be consistent, by institution and course, between requirements for on-campus and on-line monitoring of student work.

Discussion: We appreciate the general support for our proposal to broaden the definition of "credit hour" in a way that focuses on student learning rather than seat time and is flexible enough to account for innovations in the delivery models used by institutions. Even among those commenters whose support was tempered with reservations over the proposed definition of a "credit hour" either adhering too closely to the current definition or broadening it too much, there was strong agreement that no changes should be made to the consensus language in the NPRM.

In response to those commenters who expressed support for the proposed changes to the definition of "credit hour" but asked that the Department restore the requirements in current §§ 602.24(f) and 603.24(c), as previously explained in the preamble to the November 1, 2019 final rule on State Authorization and Accreditation (84 FR 58875), we continue to believe the agency review requirements are unnecessarily prescriptive and administratively burdensome without significantly improving accountability or protection for students or taxpayers. However, we note that the "credit hour" definition in both current and proposed § 600.2 requires that the amount of student work determined by an institution to comprise a credit hour be approved by the institution's accrediting agency or State approval agency. Moreover, nothing precludes an accrediting agency or State authorizing agency from examining or questioning an institution's credit hour policies either as part of a routine evaluation of that institution's academic programs or as the result of specific concerns.

We disagree with the commenter who opposed the changes to the definition of "credit hour" proposed in the NPRM on the basis that an increased focus on student learning time may pose new risks to students and their privacy. The definition of "credit hour" as proposed in the NPRM does not place an increased emphasis on learning time. Time-based requirements relative to classroom instruction and other academic activities included in the proposed definition of "credit hour" are those found in the current definition. Additional language in the proposed definition clarifies that, in determining the amount of work associated with a credit hour, an institution may consider a variety of delivery methods,

measurements of student work, academic calendars, disciplines, and degree levels. This new language actually deemphasizes the strict measure of learning time.

Although the Department takes seriously any identified risk to student privacy, the commenter was not specific as to what those risks are. Finally, with respect to the potential consequences of these proposed rules being available for public review, we believe the comment period following publication of the NPRM in the **Federal Register** provided such an opportunity.

We further disagree with the commenter who asserted that the Department made proposals to change the definition of "credit hour" without any evidentiary basis or support, rendering them legally insufficient under the APA, or that it failed to present evidence during the negotiated rulemaking that would justify changing the definition of "credit hour." In preparation for the subcommittee meetings on distance learning and innovation, the Department produced several position papers outlining its reasons and justifications for all proposed rule changes under consideration by that subcommittee, including those related to the definition of a credit hour. The proposed definition was discussed at length in the subcommittee and again at the negotiating table. A detailed, written discussion of the Department's reasons for proposing these changes is contained in the April 2, 2020 NPRM on pages 18646 and 18647. However, we appreciate the commenter's overall support for the consensus language.

In response to the commenter who expressed concern that the proposed definition of "credit hour" does not account for transfer hours, we note that credit hours, as they pertain to the title IV, HEA programs, are a measure of student workload necessary to determine enrollment status and award amounts. Credit hours that an institution accepts on transfer have no effect on making these determinations and are, therefore, not integral to the definition of a credit hour for title IV purposes. The commenter identified several problems with respect to transfer hours, including the disparity among institutions in how transfer hours are considered and accepted.

While we agree on the need to address challenges regarding transfer of credit, we do not believe that this definition is the appropriate place to do so or that the revisions to the proposed definition of "credit hour" suggested by the commenter would change the way transfer hours are treated by

institutions. With regard to any disparities that may exist between what is expected of students taking classes offered through distance education and what is expected of students enrolled in classes offered on campus, we do not agree with the commenter that these can be addressed by revising the proposed definition of “credit hour.” Institutions themselves set the academic standards for their programs. The definition of “credit hour” merely establishes a reasonable measure of student workload. We believe that the amendatory text, agreed to by negotiators, permitting an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels, accommodates a variety of modalities, including distance education.

Changes: None.

Definition of Distance Education

Comments: Numerous commenters expressed their support for the Department’s proposed definition of “distance education.” Many commenters thanked the Department for providing greater clarity and specificity to the definition. One commenter highlighted several recent audits by the Department’s Office of Inspector General (OIG) focusing on the requirements for regular and substantive interaction and pointed to the large amount of proposed liabilities in those audits as a reason that the definition of “distance education” needed to be clarified. Another commenter asserted that the changes modernize the definition and permits more flexibility for postsecondary institutions to offer educational programs.

Several commenters were appreciative of the Department’s efforts to eliminate references to outdated technology such as CD-ROMs. Other commenters indicated that the definition holds institutions accountable for providing students in distance education programs with communication and engagement with qualified instructors on a predictable and regular basis.

Many commenters supported the addition of the concept of “qualified instructors” who meet the instructional requirements of an institution’s accrediting agency. One commenter stated that the proposed definition would provide institutions with a single, clear definition of “instructor” for financial aid purposes, that could help prevent confusion during audits about which staff members can be

classified as instructors. One commenter also expressed support for the Department’s use of the plural “instructors” rather than “the instructor” because it would enable more people to teach as a team and provide more individualized attention to students.

Several commenters supported the Department’s proposed requirements for substantive interaction, indicating that the definition supports a variety of activities needed for teaching and learning. One commenter indicated that defining and clarifying what constitutes “substantive interaction” between students and faculty would give institutions the ability to innovate without fear of the loss of Federal student aid eligibility. Another commenter indicated that the requirements for substantive interaction are appropriately adaptable because they allow accrediting agencies to approve different types of instructional activities. One other commenter was supportive of the consensus language relating to substantive interactions, noting that while the Department’s original proposal had defined substantive interaction as an interaction that simply related to course material under discussion, negotiators opposed this language because it did not specifically address teaching and learning in the way that the consensus language does.

Several commenters also supported the Department’s requirements for regular interaction. One commenter indicated that the flexibility of the definition was important given variability across a wide range of program types and topics and helped limit administrative burden. Another commenter supported the ability for institutions to determine the number of substantive interactions that are appropriate based on the length and amount of content associated with a course. One commenter expressed strong support for requiring both predictable opportunities for interaction and the prompt and proactive monitoring of student engagement, indicating that the requirements would result in more affordable and accessible pathways for students while ensuring high-quality instruction.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Many commenters urged the Department to maintain the regulatory language agreed upon in consensus with non-Federal negotiators for regular and substantive interaction and the requirements for instructors in distance education programs. Several

commenters pointed out that the consensus agreement for the proposed definition of “distance education” reflected a thoroughly discussed compromise among negotiators.

Several commenters contended that it is imperative to clearly distinguish between distance education and correspondence courses and ensure that quality standards exist for distance education programs, especially given the history of abuses related to correspondence courses. The commenters asserted that diluting the proposed definition could result in online programs becoming eligible for Federal student aid even when the programs do not offer the same quality of education or degree of connection between students and qualified instructors. One of those commenters urged the Department not to revert to its original proposal to allow accrediting agencies alone to articulate requirements for regular and substantive interaction and instructors with minimal Federal guidelines. One commenter asserted that the Department’s original proposals for changing the definition, later rejected in the consensus language, would have undermined the requirements for regular and substantive interaction and for the qualifications for an instructor and urged the Department not to return to those proposals.

Other commenters pointed out that the requirements for regular and substantive interaction exist in law because of past abuses in correspondence programs, particularly of veterans seeking to use educational benefits. One of these commenters noted that after passage of the 1944 Servicemen’s Readjustment Act of 1944 (commonly known as the “GI Bill”) hundreds of thousands of servicemen used their education benefits under that law to enroll in correspondence courses, but only approximately 10.7 percent of those veterans completed their programs. That commenter also pointed out that Congress acted in the early 1990s to address similar types of abuses in correspondence courses related to the title IV, HEA programs. Another commenter noted that the OIG has repeatedly raised concerns about distance education and has characterized it as an area that poses significant risk to the integrity of the FSA programs.

One commenter referred to research that shows that Latino students enrolled in online education have lower academic and attainment outcomes than in face-to-face courses and that interviews with such students highlight the absence of a meaningful student-

instructor relationship as a contributing factor to those poor outcomes. Another commenter referenced research that suggests faculty-student interaction plays a key role in a quality online education and that underprepared and disadvantaged students tend to underperform and, on average, experience poor outcomes in such programs. That commenter also referenced research that suggests online students desire greater interaction with their instructors and that, in general, online education has not improved affordability, frequently costs more, and does not produce a positive return on investment. One commenter asserted that if the requirement for regular and substantive interaction is weakened, there is a risk that inequities will increase between those students who have access to substantive interaction with instructors and those who do not. That commenter expressed that this is an even more critical issue now that institutions are moving online because of the COVID-19 emergency.

Discussion: We agree that it is important for the regulations to clearly distinguish between the definitions of “distance education” and “correspondence courses” and believe that the proposed definitions accomplish that goal. Whereas the definition of a correspondence course describes interaction between students and instructors in such the course as “limited . . . not regular and substantive, and . . . primarily initiated by the student,” the definition of distance education requires regular and substantive interaction between students and instructors and clearly explains the requirements for each component of that definition. We also agree that it is important to adhere to the agreed-upon language of the members of the subcommittee and full committee, who were able to reach agreement on the definition of the term despite strong initial differences of opinion on the matter. We agree with the commenters who referenced the importance of regular and substantive interaction between students and instructors, particularly for students who are underprepared, and believe that the requirements for such interaction expressed in the definition strike the appropriate balance between assuring interaction with qualified instructors and allowing institutions the flexibility to offer programs using innovative, student-oriented pedagogical techniques.

Changes: None.

Comments: Several commenters opined on whether the Department should incorporate the concept of an

“instructional team” into the definition of “distance education.”

One of these commenters described the use of instructional teams as a practice that occurs in on-campus settings across various fields of study and that provides exceptional opportunity to students by allowing them to interact with several experts in a given course. Another commenter argued that explicitly addressing the concept of instructional teams in the definition would acknowledge the reality that distance education is an instructional team endeavor that does not rely upon arbitrary distinctions between an instructor and someone involved in facilitating the delivery of course content who is not considered an instructor.

One commenter argued that team-based instructional models could be complicated if substantive interactions could only be provided by individuals that met an accrediting agency’s requirements for instruction and noted that some types of interactions described under paragraph (3) of the definition, including assessing or providing feedback on a student’s coursework, could be provided by assessment specialists who do not meet the definition’s requirements for a qualified instructor.

Conversely, one commenter objected to the Department’s proposal to use the term “instructors” rather than “the instructor,” arguing that doing so would allow quasi-professionals to teach more advanced subject matter as part of a team. The commenter asserted that this situation could result in such instructors only tangentially monitoring student discussion rather than substantively engaging with students.

Discussion: The Department does not object to the use of instructional teams, regardless of the modality of the coursework. Indeed, we support innovative educational models that provide additional support, both academic and otherwise, to support student success. However, we believe that the current regulatory language accommodates the use of instructional teams and no change is necessary in order further encourage their use.

Regardless of the composition of an instructional team, the Department expects that such a team would include qualified individuals with subject matter expertise who are expected to instruct, guide, or otherwise respond to questions from students about the subject matter of a course or competency. Such individuals, assuming they meet accrediting agency requirements for instruction, are the staff members whose substantive

interaction with students can fulfill the requirements of the “distance education” definition for regular and substantive interaction between students and instructors. Note that accrediting agencies can choose to designate individuals as instructors who do not meet the traditional criteria for faculty, and many already do in instances, for example, where workforce experience may be more important to teaching and learning than an advanced degree. Accreditors are also permitted to designate an individual as an “instructor” meeting its requirements only in specific situations, for example, where a less-experienced individual is teaching in a team setting with an experienced instructor of record having responsibility for the course in general. Given this degree of flexibility, we believe that the regulation as written provides ample opportunity for distance education to occur with the use of instructional teams, but only when such use conforms with the requirements of an instruction’s accrediting agency.

Changes: None

Comments: Several commenters expressed concern with the Department’s proposal to replace the list of technologies in the definition of “distance education” with the phrase “other media.”

Two commenters indicated that the word “media” was not specific enough to limit the types of modalities that could be used in distance education. One of those commenters recommended that the Department add the phrase “and other types of media” after listing each type of technology. The other commenter recommended that the Department continue to add new media types to the definition rather than removing the existing types that were listed.

One commenter suggested that the Department eliminate the list of technologies that could be used to offer a program through distance education unless we plan to update the appropriate formats on a regular basis (for example, annually).

Another commenter expressed concern that replacing references to types of media with the phrase “other media” could cause institutional officials to interpret the phrase as the use of one type of media.

Discussion: We appreciate the commenters’ suggestions, but we do not plan to update the list of acceptable technologies at this time. The HEA currently prescribes the types of technologies that may be used for distance education, and in this rulemaking the Department is not making changes to the statutory

requirement, but is instead simplifying this list in the regulations by referring to “other media” rather than including all of the types of media that may be used to deliver distance education.

Changes: None.

Comments: One commenter suggested that the Department define “instruction” rather than “instructor” and use the definition of the former to inform requirements for the latter.

Discussion: The Department chose to clarify the requirements for an instructor for purposes of the definition of “distance education” because the term is specifically used in statute with reference to distance education. Moreover, we believe that it is beyond our purview to define the term “instruction” given its broad application in postsecondary education and the restrictions on the Department’s oversight of academic quality in the Department of Education Organization Act.

Changes: None.

Comments: One commenter expressed concern about the variability between accrediting agencies regarding their requirements for an instructor in the context of the definition of “distance education.” The commenter stated that each accrediting agency should have a strong definition of a quality instructor that includes requirements for qualifications to teach in the relevant competencies. Two commenters also recommended that in cases where students have multiple instructors, the students should be informed of which instructor is the instructor of record.

Discussion: We believe that accrediting agencies are the appropriate arbiters of academic quality for postsecondary education, including regarding the appropriate requirements for instructors. The Department is prohibited from creating regulations or other requirements regarding the academic quality of educational programs under the Department of Education Organization Act. Furthermore, while it is true that there may be variation among accrediting agencies regarding requirements for instructors, we believe this is appropriate given the different types of qualifications that may be needed depending on the types of programs and degree levels offered.

Changes: None.

Comments: Several commenters sought clarification regarding the Department’s requirements for “regular interaction.”

One commenter indicated that interactions in asynchronous courses may not be predictable and asked the Department to clarify by providing a

specific length of time that it considered to be “regular” for purposes of this definition.

Another commenter asked how institutions would monitor a student’s engagement in distance education, particularly when an interaction occurs during a videoconference where the instructor is working to develop the student’s understanding of a particular topic while also attempting to monitor the student’s engagement.

One commenter expressed concern that the regulations only require the opportunity for interactions with instructors when needed. The commenter indicated that this lack of mandatory proactive instruction, when combined with a lack of emphasis on faculty involvement, could lead to confusion about the distinction between distance education and correspondence courses. The commenter recommended that the Department delete the words “the opportunity” from paragraph (5)(i) of the definition and delete “when needed” from paragraph (5)(ii) in order to require proactive substantive interaction for every student.

Several commenters noted that the regulations describing “regular interaction” included a requirement for the interaction to be “regular,” which the commenters felt was redundant. Three of those commenters recommended that the Department replace the phrase “regular and predictable basis” with the phrase “scheduled and predictable basis.”

Discussion: Given the variety of distance education programs, coursework, instructional modalities, and course schedules, we do not believe it is practical to offer a specific timeframe for regular interaction. The Distance Learning and Innovation subcommittee strongly disagreed with that approach when it was presented, arguing that establishing such a timeframe would either be overly prescriptive or excessively complex. Similarly, an institution cannot be expected to ensure perfect attendance by students at each opportunity for interaction with an instructor, which is why the Department, the subcommittee, and the negotiating committee agreed to frame the requirement as an “opportunity” for interaction rather than a required interaction. This approach has the added benefit of allowing institutions to demonstrate compliance with the requirements at the program design level without documenting each and every interaction between students and instructors.

The requirements for regular interaction include monitoring a student’s “academic engagement and

success” with respect to a course or competency. This requirement is not intended to mandate that instructors personally monitor each student’s engagement throughout each class session while also instructing, facilitating discussion, or responding to questions from students. Instead, the requirement is intended to ensure that instructors are generally monitoring whether a student is engaged and successful throughout a given course or competency and takes appropriate action as needed. Such monitoring could include evaluating a student’s level of participation in synchronous class sessions, but it could also involve monitoring the student’s activity on course websites or materials; considering the quality of the student’s assignments or responses to questions about course materials; evaluating the level of the student’s understanding of course materials during conversations with instructors or performance on exams; or other forms of monitoring the student’s engagement and success in the course or competency.

We agree with the commenters that the word “scheduled” is more descriptive and provides greater clarity than the word “regular” for purposes of describing “regular interaction.” Furthermore, the Department believes that the word “scheduled” more clearly reflects the intent of the Distance Learning and Innovation subcommittee and the full negotiating committee to ensure that students are provided scheduled opportunities to interact with instructors for which the students can prepare in advance.

Changes: We have replaced the phrase “predictable and regular basis” with the phrase “predictable and scheduled basis” in paragraph (5)(i) of the definition.

Comments: One commenter explained that there are two types of distance education models that higher education has developed—synchronous and asynchronous—and that the asynchronous model better reflects the realities of working adults, differing levels of preparation, and the importance of assessment. The commenter pointed out that many new students in higher education are “non-traditional” and include a large number of veterans and students with families. The commenter asserted that these students have schedules that they cannot control and are better served by asynchronous courses that support their needs for flexibility, while the institution ensures that each student is evaluated based on the student’s demonstration of mastery of the competency or course. The commenter

recommended that the requirements for regular interaction point to interactions that are appropriate to the course modality and consistent with student success.

Discussion: We agree with the commenter that distance education may, in many cases, have the capability to address the needs of non-traditional students better than traditional classroom courses. However, we disagree that the regulatory definition needs to include a reference to the appropriateness of interactions with respect to course modality and student success for institutions to offer programs that are sufficiently flexible. Though the definition of “distance education” establishes certain requirements for interaction in online programs, the Department defers to institutions and their accrediting agencies regarding whether a program’s design involves interactions that are appropriate and tailored to the needs of students.

Changes: None.

Comments: A few commenters asked questions about the relationship between the Department’s final regulations and the COVID–19 pandemic.

One commenter asked the Department how its proposed definition of distance education would prepare institutions for future pandemics and whether institutions should be required to implement distance education training programs so that they are prepared to shift to an online modality if and when a pandemic prevents in-person instruction once again. The commenter asserted that new options for learning modalities would not prompt an increase in the number of students enrolling in distance education courses and asked how the Department’s proposal would reduce barriers to access for students given those trends.

Another commenter pointed out that the Department’s recent guidance for distance education related to the COVID–19 pandemic were inconsistent with the regulatory requirements for distance education in the proposed rule.

Discussion: Many institutions with limited distance education offerings at the time of the initial COVID–19 outbreak were unprepared for the impacts of the pandemic and did not have adequate resources or the expertise to quickly shift to an online learning modality. Though many institutions were able to shift to an entirely new modality, many were still faced with a complicated and confusing regulatory framework for distance education that they had never encountered before. The Department’s hope is that clarifying and expanding the definition of “distance

education” will offer a degree of certainty to institutions both familiar and unfamiliar with online learning and will make it easier for institutions to shift to an online modality in the event of a pandemic in the future.

The Department’s recent COVID–19 distance education guidance for institutions related to COVID–19 was intended to be temporary and was necessary to address the urgent need to shift instructional operations online very quickly. The Department has established a specific timeframe for that guidance and will expect institutions to again comply with regulatory and statutory requirements when the waivers and flexibility related to COVID–19 expire.

Changes: None.

Comments: Many commenters asked questions about the Department’s requirements for “substantive interaction” under the definition of “distance education.”

A few commenters asked the Department to clarify whether substantive interaction was required to occur regularly at the “instructor level” or the “course-competency level.” Two of those commenters expressed concern that if the definition were applied at the instructor level and not the course-competency level, it could exclude some aspects of an “unbundled” instructional model. One commenter offered the example of assessment experts whose skills and expertise are tailored toward developing and scoring assessment, as well as providing students with feedback, but who might not be considered to be “faculty.” That commenter argued that the Department should indicate that its intent was for substantive interaction to occur at the course/competency level.

Several commenters asked the Department to explain the interaction between the regulations requiring at least two types of substantive interactions and the requirements for such interactions to be “regular.” One commenter asked whether both types of substantive interaction were required throughout a semester, or whether an institution could engage in one or the other activities at any time to meet the requirements. A separate commenter asked whether the two forms of substantive interaction needed to be alternated on a regular basis or whether both forms of interaction were required in the same class session. That commenter recommended that the Department either clarify this point or strike the requirement for more than one form of substantive interaction, asserting that it could cause implementation challenges. Another

commenter requested that the Department remove the requirement for at least two types of substantive interaction because it was unclear how often each type of interaction needed to occur and such ambiguity could cause considerable confusion for institutions attempting to implement the requirements.

One commenter asked how instructors would calculate the time that they spend on substantive interaction when one of the categories of such interaction includes responding to questions about the content of a class.

Discussion: The Department’s requirements for regular and substantive interaction between instructors and students occurs at the course or competency level. The Department’s intent with this definition is to ensure that, for a given unit of study (for example, a class such as English 101 or a competency such as the ability to perform statistical analysis) a student has ample opportunity to substantively interact with an instructor and the instructor (or instructors) monitor the student’s engagement and performance, and provide scheduled opportunities for interaction with the student as needed on the basis of that monitoring. Additionally, the regulations must apply at the course or competency level because they are designed to distinguish distance education from correspondence courses for purposes of exempting distance education from the limitations on the percentage of correspondence courses that an institution may offer. Applying the regulatory requirements for distance education at the instructional unit level ensures that any online course or competency that is misclassified as distance education can be included in the calculation of the percentage of correspondence courses that the institution offers for purposes of the institutional eligibility requirements under 34 CFR 600.7.

The Department also applies the requirement for a substantive interaction to include at least two types of activities listed in the definition at the course or competency level. The definition of “distance education” lists several different types of interaction that can fulfill the requirements for “substantive interaction,” including direct instruction, assessment, responding to questions about the course materials, facilitating a group discussion regarding the course content, or other instructional activities approved by the institution’s accrediting agency. The definition requires an institution to perform at least two of those activities, and since we apply the regulation at the course or competency

level, we also require an institution to perform at least two of those activities over the period of time that the student completes the course or competency. We believe that requiring a specific timeframe, sequence, or frequency that the activities need to occur within that timeframe would be impractical and would extend beyond our purview under the Department of Education Organization Act.

The Department does not expect an institution to measure or document the exact amount of time that it or its students spend on any particular type of substantive interaction. An institution is expected to maintain academic policies or procedures that create expectations for faculty to substantively interact with students on a predictable and scheduled basis and to monitor each student's engagement and success and follow up with the student as needed.

Changes: None.

Comments: One commenter recommended that the Department add language requiring that institutions using distance education ensure the accessibility of the learning materials and remain compliant with Section 508 of the Rehabilitation Act. The commenter argued that technology can be a limiting factor for individuals with disabilities if the systems used are not accessible.

The commenter also asked the Department to add a requirement for instructors to be “flexible and work with the student to determine the most appropriate communication mode to maximize the student’s ability to participate.” The commenter indicated that because some students struggled with communication technology, instructors should customize their online programs to ensure that students are being evaluated for their knowledge of content rather than their ability to access technology.

Discussion: The Department does not believe it is appropriate to regulate the Rehabilitation Act using the definition of “distance education,” which is derived from the HEA. That said, we strongly support the intent of the Rehabilitation Act and expect every institution with a distance education program to adhere to that law’s statutory and regulatory requirements.

Changes: None.

Comments: Many commenters requested that the Department replace the “and” between paragraphs (5)(i) and (ii) of the definition with “or” in order to allow an institution to fulfill the requirement by taking either of the actions in paragraph (5)—providing the opportunity for substantive interactions with the student on a predictable and

regular basis or monitoring the student’s academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging with the student—as opposed to requiring the institution to take both of those actions. One of these commenters argued that the proposed regulations would require institutions to adhere to a time-bound model that may not be appropriate for the institution’s instructional modality or its students. Two other commenters indicated that the intent of the Distance Learning and Innovation subcommittee was to allow institutions to choose the type of “regular” interaction that best suited the academic program and recognized that some institutions have sophisticated technologies that monitor student engagement and success and alert instructors when students are not engaged or are struggling with material. These and other commenters also cautioned that requiring both components of the definition could result in a requirement that institutions adhere to a strict, time-bound schedule, which is counter to the format in many competency-based education programs. Many commenters also argued that many institutions lack the technology or resources needed to monitor a student’s engagement and success. Another commenter indicated that the “and” would limit the variety of instructional approaches that could be available to institutions if one or the other action fulfilled the requirement. One commenter also noted that reverting to “or” between those paragraphs would recognize the importance of a team approach to instruction and co-curricular activities. Several commenters argued that reverting to “or” would set expectations for distance education, including monitoring each student’s engagement, beyond what is expected or required for on-campus instruction. Several commenters also asserted that the change to “and” could push institutions to adopt learning analytics tools to track student progress, which could increase the cost of educating students and introduce privacy or other ethical concerns. One commenter pointed out that requiring institutions to implement both components of the requirements for regular interaction could prevent them from adjusting quickly to market demands and emerging technology. Finally, one commenter pointed out that the Department’s OIG would rely upon the new regulatory definition of “distance education” when assessing an institution’s compliance, suggesting that

additional flexibility in the definition was therefore preferable.

Discussion: As one commenter noted, the Distance Learning and Innovation subcommittee’s recommendation was to allow an institution to fulfill the requirement for regular interaction by either maintaining predictable and scheduled opportunities for interaction or by maintaining a system for evaluating a student’s engagement and progress and ensuring that an instructor followed up when appropriate. The subcommittee’s intent was to allow institutions with self-paced programs to use other techniques other than scheduling planned interactions, which in the past had led to perfunctory mandatory phone calls or class sessions that did not provide great benefit to students.

Despite the subcommittee’s concerns about requiring predictable opportunities for interaction, the full negotiating committee decided that it was important for both conditions to be met. The committee believed that the proposed definition, requiring both predictable interactions and student monitoring, offered sufficient flexibility regarding the number and frequency of scheduled interactions based upon the length and intensity of the student’s coursework. In a self-paced course or competency in which a student approaches the coursework at his or her own pace, the institution is not required to schedule, for example, weekly opportunities for interaction. Instead, the institution may decide that the appropriate timeframe for scheduled opportunities for interactions is bi-weekly or monthly, or a different frequency. Furthermore, by not requiring mandated interactions, the definition does not impose a bureaucratic requirement for a scheduled course session, but instead simply ensures that students are aware that there will be planned occasions that they will be able to interact with an instructor about course content.

Similar concerns were also raised by commenters about requiring more traditional class-based online programs to maintain a system for monitoring student engagement and interacting with the students on that basis. We disagree with several commenters that institutions would need to purchase expensive software to track and monitor each student’s online activities to determine whether the student was sufficiently engaged. While such software would meet the requirement if it were part of a system for monitoring and interacting with students when the need arose, it is not a required element for regular and substantive interaction.

The Department's expectation is that instructors take a proactive approach to determining when students need assistance and then offering that assistance, and this could be done either using sophisticated systems for monitoring student activity or more traditional person-to-person evaluation or through the use of tests and quizzes. The required "monitoring" could consist of evaluating each student's performance in regular online class sessions or in regular assignments that have been turned in. This type of monitoring is common to nearly all postsecondary programs and has been performed since before the internet existed.

Given all of these factors and the level of importance accorded by the negotiating committee to the use of "and" between paragraphs (5)(i) and (ii) of the definition, we decline to revert to the word "or" between those paragraphs.

Changes: None.

Comments: One commenter proposed that the Department should provide an outline of the new definition of "distance education" to offer clarity to government officials and citizens about the changes to the definition.

Discussion: We thank the commenter for this suggestion and agree that an outline could make the changes clearer. We plan to publish a clear description of each of the changes to the definition of "distance education" in the FSA Handbook after the changes become effective.

Changes: None.

Comments: Several commenters asked the Department to clarify whether interactions that were initiated by a student would meet the requirements for regular and substantive interaction between students and instructors. One of those commenters sought clarification regarding whether the Department intends to require evidence of instructor-initiated interaction, student-initiated interaction, or both.

Discussion: The Department does not consider substantive interactions initiated by students to meet the requirements for regular interaction in the definition of "distance education." An institution meets the requirement for regular interaction between students and instructors by, in part, providing the opportunity for substantive interactions with the student on a scheduled and predictable basis commensurate with the length of time and the amount of content in the course or competency. This requirement could be met if instructors made themselves available at a specific scheduled time and through a specific modality (e.g., an

online chat or videoconference) for students to interact about the course material, regardless of whether the students chose to make use of this opportunity or interact with the instructor at the scheduled time. However, if an institution does not offer such opportunities for interaction on a regular and scheduled basis in an online program and instead relies solely upon students to initiate interactions with instructors, it would not meet the requirements for regular and substantive interaction between students and instructors and the online program would be considered to be taught using correspondence courses.

Changes: None.

Comments: Several commenters asked how the Department would oversee various aspects of the definition of distance education. One commenter asked how the Department would assess whether an institution's instructional activities were approved by the institution's or program's accrediting agency in audits or program reviews. The commenter also asked whether accrediting agencies would be required to create a list of approved instructional activities or whether the Department would allow agencies to have more ambiguous standards that are applied on a case-by-case basis, which could result in most or all institutions meeting the requirements. Another commenter asked what oversight mechanisms the Department would use to verify the amount of substantive interaction reported by institutions.

Discussion: The Department's oversight of the requirements for regular and substantive interaction between students and instructors will focus on five critical factors that differentiate distance education from correspondence courses. The Department will seek to determine whether—

- The institution's online instruction is delivered through an appropriate form of media;
- The instructors with whom students regularly and substantively interact meet the requirements of the institution's accrediting agency for instruction in the subject matter;
- Instructors engage in at least two forms of substantive interaction meeting the regulatory requirements for the course or competency;
- The institution has established scheduled and predictable opportunities for substantive interaction between students and instructors and create expectations for instructors to monitor each student's engagement and substantively engage with students on the basis of that monitoring; and

- Instructors are responsive to students' requests for instructional support.

The Department will evaluate whether an instructor meets an accrediting agency's requirements by reviewing the agency's written standards and any communication between the agency and the institution regarding the agency's requirements or whether the instructors in question met such requirements. If the Department is unable to determine whether the instructor meets the agency's requirements by reviewing such written materials, it may contact the agency to seek a determination on the matter.

The Department does not require an institution to monitor or document every interaction between an instructor and a student to demonstrate that it has fulfilled the requirements for regular and substantive interaction. However, we encourage institutions to consider whether they have adequate means of monitoring online programs to ensure that they continue to meet all the conditions of the definition. In overseeing the requirements for regular and substantive interaction with instructors, the Department will determine whether an institution has established sufficient internal controls to demonstrate that it has established (1) appropriate academic policies and procedures for its instructors to implement these provisions; and (2) a system for monitoring or periodically evaluating its online programs to ensure that its instructors continue to observe such policies over time.

Comments: One commenter, arguing that direct instruction was at the core of higher education, recommended that the Department require "substantive interaction" to include direct instruction in addition to two other elements.

Discussion: The required elements for substantive interaction were determined in consensus with the negotiating committee, and the Department does not believe it would be appropriate to diverge from that agreement to narrow the types of program offerings that would meet the Department's definition of "distance education." Furthermore, we do not believe it is advisable to require regular direct instruction in all distance education programs given the proliferation of promising new educational models that do not rely on regularly scheduled instructional sessions. The Department wishes to remind the commenter that in the case of in-person classroom-based instruction, most schools are not required to take attendance. In the case of credit hour programs, it is the job of

the institution to provide the opportunity and it is the job of the student to take it.

Changes: None.

Comments: One commenter expressed dissatisfaction with the Department's proposed definitions of "correspondence course" and "distance education," stating that the requirement for "constant communication" initiated by the instructor in distance education was unfair and would hinder students who need flexibility with respect to the time and place that they interact with their instructors.

Discussion: The proposed definition of "distance education" does not require constant communication between students and instructors and in fact only requires scheduled opportunities for interaction with qualified instructors and a system for monitoring student engagement and success. We believe these requirements are reasonable and will permit substantial flexibility for institutions to create new educational models that place the student, rather than the instructor or the institution, at the center of the learning exercise.

Changes: None.

Comments: Several commenters emphasized the importance of improving the quality of information and oversight related to distance education.

One commenter said that while some information exists about distance education in the Integrated Postsecondary Education Data System (IPEDS), the data are not current and include only the number of students enrolled in distance education courses and completing distance education programs. The commenter also indicated that the National Center for Education Statistics (NCES) sample surveys collect some information about engagement with distance education, but because those surveys are based on samples and are not conducted annually, their usefulness in answering policy and research questions is limited. The commenter argued that the Department should improve timely data collection about distance education given the significant number of students who enroll in that format, the uncertainty about future reliance on distance education options, and the importance of evaluating regulations related to distance education. The commenter suggested adding a field for the distance education status of enrolled title IV recipients in the National Student Loan Data System (NSLDS). Another commenter suggested that the Department require institutions to establish a new location with the Department for exclusively online

students. That commenter also reiterated a proposal that had been proposed by one of the non-Federal negotiators during negotiated rulemaking: That the Department require institutions to report, for students who are enrolled in programs in which at least one course can be completed online, whether each recipient of title IV, HEA assistance is enrolled exclusively online, exclusively as a brick-and-mortar student, or as a hybrid student in both online and brick-and-mortar instruction. One commenter called for a demonstration program for competency-based education authorized by Congress that would test replacements for the credit hour and allow institutions to reasonably experiment with different models of interaction with students, but argued that in lieu of such a program no changes should be made to the consensus regulations.

Discussion: We agree with the commenters who suggested that additional data regarding the use of distance education would be helpful; however, we do not believe that collecting such data through the National Student Loan Data system is the appropriate vehicle for that data collection to occur. We will consider the feasibility of the other suggestions offered by commenters for collecting data related to students who are enrolled in distance education. The Department does not have the authority without action by Congress to develop a demonstration program with waivers that exceed the Department's authority under the Experimental Sites Initiative.

Changes: None.

Comments: One commenter recommended that the Department eliminate the regulatory definition of "regular and substantive interaction" for distance education entirely, arguing that there is no reason to impose additional requirements beyond what is in the statute given advances in technology that permit detailed monitoring of a student's online activities. The commenter suggested that the Department is not obligated to define "regular and substantive interaction" in a way that would prevent many on-ground courses from meeting those requirements. The commenter further advised that the Department's definition of "academic engagement" was sufficient to eliminate any confusion that had arisen about distance education because it is widely understood that "regular and substantive interaction" is a descriptive term for "academic engagement." Finally, the commenter noted that the Department is not required to follow or defer to its prior

sub-regulatory guidance, in particular Dear Colleague Letter GEN-14-23, which provides additional explanation regarding the meaning of "regular and substantive interaction" with respect to distance education.

Discussion: We disagree that the statutory requirements for "regular and substantive interaction" for a distance education program are sufficiently clear that a regulatory definition is not needed. For more than a decade since the statutory definition of "distance education" was first created, institutions have expressed confusion about the practical meaning of the term and have argued that the ambiguity of what constitutes regular and substantive interaction have hampered innovation as a result of fears of non-compliance and audit or program review findings. Moreover, the concept of "regular and substantive interaction" is an important differentiating factor between distance education and correspondence courses, which, if improperly understood, could result in institutional ineligibility for an institution that suddenly becomes aware that it has been offering more than half of its courses or enrolling more than half of its students through correspondence courses. We also disagree that the definition, as currently written, would be impossible to meet if it were offered in a classroom setting, since scheduling class sessions and performing ongoing monitoring of each student's performance and engagement in class are traditional teaching functions that do not require the use of sophisticated software systems.

We also disagree that the definition of "academic engagement" necessarily includes regular and substantive interaction between students and instructors and can be used in lieu of a description of those requirements in the regulations. While substantive interaction with an instructor related to a student's coursework is certainly a form of academic engagement, it is not synonymous with the broader concept of academic engagement.

Finally, the Department agrees that it is not required by law to continue to abide by the guidance in Dear Colleague Letter GEN-14-23, and plans to retract and revise aspects of that guidance as well as guidance in Dear Colleague Letter GEN-13-10, related to the application process for direct assessment programs, that will no longer apply upon the implementation of these regulations.

Changes: None.

Comments: One commenter recommended that the Department include the concept of "co-curricular" education in the definition of distance

education, in particular with regard to the requirements for substantive interaction. The commenter proposed that the definition be revised to express that distance education could be either curricular or co-curricular.

The commenter asserted that such revisions would recognize the importance of co-curricular activities, which the commenter defined as activities associated with and complementary of the curriculum. The commenter argued that, for many students who enroll in distance education programs, particularly adult learners, co-curricular learning plays a critical role in enhancing the student experience and helping to ensure student persistence and success and that such learning has also played a similar role in ground-based programs.

Discussion: The Department agrees with the commenter that co-curricular activities—which are generally aligned with and designed to complement the academic curriculum—are useful and often vital components of a postsecondary program that support student persistence and success. Because of the close ties between academic coursework and co-curricular activities, we believe that there may be occasions in which such activities are designated by an institution's accrediting agency as types of substantive interaction under paragraph (4)(v) of the definition of “distance education.” If an accrediting agency designates a co-curricular activity as a type of substantive interaction, interactions involving that activity would meet the requirements of the definition. However, we believe that including the concept of co-curricular activities in the definition would increase the scope of activities more broadly than intended by the negotiating committee, and therefore decline to add the suggested language to the text of the definition.

Changes: None.

Comments: Two commenters offered conflicting opinions on whether the Department should emphasize the concept of “faculty” rather than “instructors” in the definition of “distance education”.

One commenter argued that the current requirements for instructors left too much discretion to institutions and accrediting agencies. The commenter recommended that the Department should emphasize to accrediting agencies that faculty should be the primary “instructors” in postsecondary education, regardless of modality. The commenter was supportive of innovation and the use of artificial intelligence or other innovative

technologies but indicated that innovation could occur in the context of faculty interaction with students. The commenter expressed concern that the requirements for distance education in the proposed definition would not be the same as those for other modalities.

Another commenter expressed the opposite view, arguing that the Department's OIG had raised concerns about replacing the word “instructor” with the word “faculty” in the “Promoting Real Opportunity, Success, and Prosperity through Education Reform Act” (PROSPER Act), which was introduced in 2017. The commenter noted that the OIG believed that using the word “faculty” in the statutory definition of “distance education” would allow a school to qualify for full participation in the FSA programs based on email contact between students and faculty on matters unrelated to the subject matter of a program.

Discussion: Though we do not agree with the level of concern that was raised by the Department's OIG regarding the use of the word “faculty,” or that the use of that word in lieu of “instructor” would substantially undermine the definition of “distance education,” we believe that the word “instructor” is more appropriate in this context. Given the use of the word “instructor” in the statutory definition of “distance education,” we believe that it is appropriate to focus on a staff member's instructional function, rather than that person's faculty role, when making a determination about whether the staff person can fulfill the requirement for regular and substantive interaction with students. The function of instruction and the role of faculty are not necessarily synonymous; for example, many institutions hire research faculty that do not have teaching responsibilities.

Changes: None.

Comments: One commenter indicated that the proposed requirements for substantive interaction did not appear to require any direct instruction or group discussion. The commenter asked whether it would be possible for an institution to fulfill the requirements for substantive interaction without human engagement, e.g., through assessment and responses to students' questions through software or other non-human means. The commenter recommended that the Department include requirements for “engagement between students and instructors” rather than merely a reference to “engaging students” to make it clear that interactions need to be with human beings to meet the requirements.

Discussion: Only individuals responsible for delivering course content and who meet the qualifications for instruction established by an institution's accrediting agency can fulfill the requirements for regular and substantive interaction with students. The Department does not prohibit other forms of substantive interaction that do not involve qualified instructors, but under the statutory definition such interaction cannot meet the requirements in the definition of “distance education.” Interactions with artificial intelligence, adaptive learning systems, or other forms of interactive computer-assisted instructional tools qualify as types of “academic engagement,” but in this limited context those forms of engagement do not meet the statutory requirements for regular and substantive interaction between students and instructors.

While we agree with the commenter about the importance of human interaction in this definition, we do not believe the commenter's proposed changes are necessary because the definition currently requires regular and substantive interaction between students and instructors; substantive interactions with machines or other forms of technology that do not involve instructor would therefore not qualify.

Changes: None.

Comments: One commenter asked the Department to reconsider the need for the specific language regarding distance education in an accrediting agency's scope of recognition and, in doing so, recognize that distance education is a more global term regarding instructional delivery provided which can include online delivery of instruction and internships and field experiences, such as clinical rotations.

Discussion: While the Department recognizes that the term “distance education” is used to describe a wide variety of activities in higher education, the HEA requires a distance education program to be evaluated and approved by an accrediting agency with approval of distance education in the scope of its recognition by the Secretary.

Changes: None

Definition of Juvenile Justice Facility (§ 668.2)

Comment: One commenter supported the new definition of a juvenile justice facility to ensure that an otherwise eligible student is not prohibited from receiving a Federal Pell Grant solely because of confinement in such a facility.

Discussion: We appreciate the support from the commenter. The Department has received questions in the past about

whether these facilities are correctional institutions and whether students in the facilities are eligible for Federal Pell Grants. Neither the HEA nor our regulations previously defined the term “juvenile justice facility.” Therefore, we proposed to define this term in the regulations to codify sub-regulatory guidance published on December 8, 2014 (Dear Colleague Letter GEN 14–21). We also sought to clarify the term as referenced in the Department’s regulations and materials, including in the definition of “incarcerated student.” Accordingly, we aimed to clarify that students in juvenile justice facilities may receive a Federal Pell Grant if they are otherwise eligible.

Changes: None.

Comment: One commenter provided both support and opposition to the definition of “juvenile justice facility.” The commenter stated that the HEA does not allow those who are incarcerated in a Federal or State prison to receive a Federal Pell Grant and quoted the statutory language. This commenter then noted that our proposed HEA change would define “juvenile justice facility” as being included among the list of correctional facilities in the definition of “incarcerated student” for the purposes of Pell Grant availability. The commenter favored extending Pell Grants to students in juvenile justice facilities but opposed including juvenile justice facilities under the correctional institutions in the “incarcerated student” definition. The commenter believed that the Department’s proposed definition caused confusion about what constitutes an incarcerated student by including juvenile justice facilities within the “incarcerated student” definition. Finally, this commenter also noted that the Department did not include any evidence or studies from appropriate prison education experts on how this change would clarify the availability of Pell Grants to students in juvenile justice facilities.

Discussion: We proposed this new definition to clarify that a person incarcerated in a juvenile justice facility is not considered to be incarcerated in a Federal or State penal institution, regardless of who operates or has jurisdiction over the facility. This definition clarifies that students incarcerated in a juvenile justice facility continue to be eligible for Federal Pell Grants. We believe the commenter was mistaken. These regulations do not change or contravene the HEA. Additionally, the Department is unaware of available research on the interpretation of this term and is merely codifying current practice.

Changes: None.

Definition of Incarcerated Student (§ 668.2)

Comments: A couple of commenters expressed support for the revised definition of an incarcerated student. One commenter supported the emphasis on access to Federal Pell Grants while in a juvenile justice facility, noting the importance of funding to complete postsecondary education coursework and potentially obtain an academic credential. The commenter believed this change would not only help those in juvenile justice facilities, but society as a whole because education increases the likelihood of positive outcomes when students are released and reduces the likelihood those students will reoffend. Another commenter who supported the proposed change suggested that adding the term “juvenile justice facility” to the incarcerated student definition might imply that the Department is barring access to Federal Pell Grants to students serving in such a facility.

Discussion: We appreciate the commenters’ support for the revised “incarcerated student” definition. We do not agree that the revised definition implies a prohibition on eligibility for a Federal Pell Grant for those in a juvenile justice facility. In fact, we amended the definition of incarcerated student to clarify that those held in a juvenile justice facility are not considered to be incarcerated to ensure that these students continue to be eligible for Federal Pell Grants.

Changes: None.

Comment: One commenter indicated that some criminal juvenile activity and related records may be confidential and pointed out that individuals may be in a juvenile facility voluntarily or without a court requirement. The commenter suggested that privacy concerns call for the Department to reconsider adding “juvenile justice facility” to the incarcerated student definition. This commenter further noted that the Free Application for Federal Student Aid (FAFSA) does not include a question about incarceration and assumed that the Department would seek such information. The commenter asserted that continuing to exclude the phrase would simplify the regulation and avoid excluding necessary exceptions.

Discussion: The changes to the definition of “incarcerated student” do not substantively change our current practice. We revised this definition for clarity and to ensure access to Federal Pell Grants for those in a “juvenile justice facility.” We do not believe this revised definition requires access to confidential records or poses a privacy

risk, nor are we aware of any needed exceptions to the regulatory definition. As we will not exclude those in a “juvenile justice facility” from receiving the Federal Pell Grant, this change would not require an additional FAFSA question or the need for other information.

Changes: None.

Direct Assessment Programs (§§ 600.10 and 668.10)

Comments: Numerous commenters supported the proposed changes intended to simplify and clarify regulations for direct assessment programs. Commonly expressed among those writing in support, was the belief that the proposed changes strike an appropriate balance between supporting innovation, along with reducing the administrative burden on institutions, and ensuring a level of oversight necessary to promote program integrity.

Discussion: We appreciate the commenters’ support for these proposed changes.

Changes: None.

Comments: Several commenters expressed opposition to the proposed changes in § 600.10 requiring an institution to seek and obtain the Department’s approval of a direct assessment program only when the institution adds such a program for the first time, and when the institution offers the first direct assessment program at each level of offering (e.g., a first direct assessment master’s degree program or bachelor’s degree program) than what the Secretary had previously approved. Overwhelmingly, these commenters asserted that, in proposing not to require institutions to obtain approval for all direct assessment programs, the Department is acting contrary to the intent of Congress as expressed in section 481(b)(4) of the HEA and exceeding its statutory authority. In the opinion of the commenters, this will result in diminished oversight protection, which currently ensures that new direct assessment programs receive adequate scrutiny and that each new eligible direct assessment program is approved by the Secretary. One commenter further suggested the Department was attempting to “rewrite statute through regulation,” with another commenter offering that, “The Department does not have the authority to grant the Secretary discretion to approve some direct assessment programs and not others,” while another commenter expressed the opinion that in proposing these changes, the Department has acted without supporting evidence or basis in law.

Conveying disagreement with the Department's position, expressed in the NPRM, that once an institution demonstrates it can capably administer a direct assessment program, there is little risk that the same institution would not properly administer other direct assessment programs, a few commenters noted that programs of all types at the same institution, within the same credential level, can vary in quality and value, making it crucial for the Department maintain its oversight responsibilities consistent with its statutory obligations. One of those commenters also took issue with the Department's reasoning that, it "will review the institution's processes related to title IV aid administration but will not evaluate the academic content or academic quality of programs, except to confirm that an accrediting agency has specifically approved each program," arguing that the Department's accreditation regulations, published in November 2019, weaken the accreditor's review and allow an accreditor's senior staff, rather than the accreditor's appointed board of commissioners, to review, approve, and monitor substantive changes to direct assessment programs.

The same commenter offered that the Department failed to consider its OIG audits of accreditors of competency-based education programs that demonstrated why accreditors cannot be solely responsible for the evaluation and oversight of direct assessment programs. In the opinion of the commenter, the Department further failed to consider the OIG audits during the negotiated rulemaking or ask for public comment on how the audit findings may demonstrate whether accreditors' senior staff alone will be able to adequately assess the administration and effectiveness of direct assessment programs without the Department's review, as mandated by statute. Finally, referencing case law (*Connecticut Light & Power Co. v. Nuclear Reg. Comm.*, 673 F.2d 525, 528 (D.C. Cir. 1982)), the commenter suggested that, the Department has failed to provide an accurate picture of the reasoning that has led to the proposed rule, resulting in interested parties being unable to comment meaningfully upon the agency's proposals. The commenter additionally cited *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir.1973) for the proposition that, "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency."

A few commenters, in addition to asserting that the Department has a statutory obligation to approve each new direct assessment program, expressed the belief that direct assessment programs have access to a separate financing model from other types of credit-hour or clock-hour-based programs. This supports (in the opinion of the commenters) heightened oversight of direct assessment programs, achieved through requiring institutions to obtain Department approval for each such program.

One commenter maintained that the current regulations for determining direct assessment program eligibility should be unaltered because direct assessment programs are exempt from limitations on written arrangements. The commenter explained that, per § 668.10(e), direct assessment programs are exempt from the restriction that limits the percentage of learning resources that are provided by other entities, making the risks of inadequate oversight associated with such programs greater than they might otherwise be. In the commenter's opinion, under the Department's proposed regulations an institution that has already received approval for a direct assessment program at a given credential level would be able to stand up subsequent direct assessment programs at the same credential level where up to 100 percent of those programs is offered by outside entities without review from the Department regarding the program's eligibility.

Discussion: We disagree with the commenters who assert that the Department did not have adequate legal authority to require the Department's approval of a direct assessment program only when the institution adds such a program for the first time, and when the institution offers the first direct assessment program at each level of offering than what was previously approved. Section 481(b)(4) of the HEA states that "In the case of a program being determined eligible for the first time . . . such determination shall be made by the Secretary before such program is considered to be an eligible program." While Congress clearly intended for the Department to undertake an evaluation and approval of an institution's offering of direct assessment, whether or not the requirement applies on a program-by-program basis is not prescribed and, therefore, left to the Department.

We also disagree that requiring the Department's approval only for the first direct assessment program that an institution offers (or the first such program at a new level of offering) will

result in diminished oversight or undermine the integrity of the title IV, HEA programs. As we indicated in the preamble to the NPRM, the Department does not evaluate academic content or academic quality of programs, but instead focuses its review of a direct assessment program on the institution's title IV aid administration in such programs. Institutions typically use information provided by the Department in response to their initial approvals to inform subsequent applications for direct assessment programs. Thus, multiple evaluations of direct assessment at the same institution often results in the institution providing nearly the same information for each subsequent program, and results in an approval process that yields little value to students, the institution, or taxpayers. Moreover, the Department's regulations under § 668.10(a)(5) will still require an institution's accrediting agency to review and approve each direct assessment program and an institution's credit or clock hour equivalency methodology and institutions will be required to report new direct assessment programs to the Department in accordance with new § 600.21(a)(12), which will provide the Department with an opportunity to ensure that such programs have been appropriately reviewed and approved by an institution's accrediting agency.

The commenter who asserted that the Department did not consider the findings of its OIG when proposing the changes to the direct assessment programs is incorrect. In developing proposed regulations relating to direct assessment programs, we considered the findings in several of the Inspector General's audits⁹ over the past decade relating to direct assessment programs. In those audits, the Inspector General made a number of recommendations that have already been adopted by the Department's Office of Postsecondary Education and FSA, including ensuring that School Participation Division managers are fully informed of issues raised during the review of direct assessment program applications,

⁹ "Direct Assessment Programs: Processes for Identifying Risks and Evaluating Applications for Title IV Eligibility Need Strengthening to Better Mitigate Risks Posed to the Title IV Programs," published September 30, 2014; "The Higher Learning Commission Could Improve Its Evaluation of Competency-Based Education Programs to Help the Department Ensure the Programs Are Properly Classified for Title IV Purposes," published September 30, 2015; and "The Western Association of Schools and Colleges Senior College and University Commission Could Improve Its Evaluation of Competency-Based Education Programs to Help the Department Ensure Programs Are Properly Classified for Title IV Purposes," published August 2, 2016.

monitoring and evaluating accrediting agency approvals of direct assessment programs, and referring concerns about accrediting agency reviews of direct assessment programs to the Office of Postsecondary Education's Accreditation Group. The Department also included a new provision in these regulations, in consensus with negotiators, to require institutions to address how they avoid paying title IV, HEA program funds for credit that might be given students on the basis of prior learning or life experience in their direct assessment applications. We agree with the OIG that payment of title IV aid for credit earned through prior learning remains an ongoing risk that requires ongoing oversight and mitigation. We recognize that institutions offering direct assessment programs may use financing models that differ from credit hour versions of the same program; however, we believe that the risks associated with these models can be addressed in the institution's first direct assessment application and in requirements for institutions to report subsequent direct assessment programs to the Department. Furthermore, many competency-based programs, including direct assessment programs, use subscription-based financing models that are specifically addressed by the Department's proposed completion-based approach to disbursement of title IV, HEA program funds in subscription-based programs. The Department plans to continue monitoring use of the subscription-based disbursement system to determine whether additional changes are needed in the future.

Finally, the commenter who indicated that direct assessment programs are exempt from the restriction on the percentage of learning resources that are provided by other entities is correct, but we disagree that this exemption should prevent the Department from making the changes to the regulations agreed upon by the negotiating committee. The commenter argues that the Department will have no oversight over subsequent direct assessment programs added by an institution after its initial application, but that is inaccurate. Institutions will still be required to submit materials related to their direct assessment programs through the Department's reporting process under § 600.21(a)(12). This reporting requirement will permit the Department to continue to monitor the types of direct assessment programs that are offered by an institution after its initial application and take action if it determines that there are irregularities with a particular program or programs.

Changes: None.

Comments: One commenter objected to the use of the word "abilities" in the definition of "direct assessment," arguing that using the word "abilities" in this context poses new risks to students and their privacy. The commenter explained that abilities might include psychological information that is confidential and governed by healthcare information protection laws. Citing the need to legally protect psychological abilities data in ways that might differ from the information protection protocols applicable to other education data, the commenter suggested that the potential consequences be provided for public review and comment before the Department moves to make the change final.

Discussion: Nothing in the Department's regulations would permit an institution to violate applicable privacy laws, including healthcare laws, with respect to a student's psychological or cognitive abilities. The word "abilities" in these regulations refers only to the things that a student must demonstrate that he or she can do related to the competencies required in a direct assessment program.

Changes: None.

Comments: A few commenters, one of whom asserted that the NPRM failed to discuss reasonable alternatives, offered modifications they urged the Department to consider. One of these proposed the creation of a two-tier application process. The first tier would include all new programs and apply all of the application elements in the evaluation; the second tier would include additional programs offered at the same credential level, requiring only descriptions of the program under consideration and an explanation of how learning objectives are set and evaluated, without the necessity for the institution to provide information on the methodology for determining an equivalent number of credit or clock hours. Another suggested modification to what was proposed in the NPRM was that the Department require accreditors to utilize the Competency-Based Network (C-BEN) Quality Framework for Competency-Based Educational Programs in evaluating direct assessment programs so that both students and policymakers can be confident the program has been designed to meet quality standards. A further recommendation was the inclusion of additional language in the regulation which would require institutions to notify the Department and seek approval for substantively changed processes or policies within the

approved direct assessment model for the institution.

Discussion: We thank the commenter for the suggestion regarding a two-tier process for the Department's approval of direct assessment programs. Though we decline to adopt the suggestion, the process for the Department's evaluation of an institution's first and subsequent direct assessment programs will proceed in a similar fashion. An institution's first application for direct assessment, or its first application at a new level of offering, will undergo the Department's full approval process and the institution will not be permitted to disburse title IV, HEA program funds until it has received the Department's approval. Subsequent programs at the same level(s) of offering will be reported to the Department under new § 600.21(a)(12), and this reporting process will require the institution to submit to the Department a description of the program and evidence that its accrediting agency has approved the program and the institution's methodology for determining credit or clock hour equivalency for the program.

We also appreciate the commenter's suggestion regarding a requirement for an institution to notify the Department and seek approval for changed processes or policies for the institutions direct assessment offerings. Though we believe that it would be too burdensome to implement this suggestion any time such a change occurred, the Department will evaluate such changes, and all regulatory requirements for an institution's direct assessment programs, during an institution's application for recertification.

There was no discussion during negotiated rulemaking regarding a requirement for accrediting agencies to the use of C-BEN's Quality Framework for Competency-Based Educational Programs¹⁰ (Quality Framework) when approving new direct assessment programs, and we do not feel it is appropriate to introduce new requirements for accrediting agencies at this stage given that the Department has already published its final rule on accreditation. Additionally, though the Quality Framework includes helpful principles for the design and implementation of high-quality competency-based programs and we encourage institutions to consider these principles when planning to offer competency-based education programs, the principles may not be appropriate for all accrediting agencies in all

¹⁰ www.cbenetwork.org/wp-content/uploads/2018/09/Quality-Framework-for-Competency-Based-Education-Programs-Updated.pdf.

circumstances and imposing them on all accrediting agencies could undermine the autonomy of those entities and their oversight of academic quality, which is protected by the HEA. Therefore, we decline at this time to include a requirement for accrediting agencies to use the standards described in the Quality Framework when approving competency-based education programs, including direct assessment programs.

Changes: None.

Comments: A few commenters indicated concerns over the proposed requirement for an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit or clock hours. Expressing disappointment at the Department's continued reliance on clock or credit-hour equivalencies, one of those commenters stressed the very nature of direct assessment programs in utilizing direct assessment of student learning or recognizing the direct assessment of student learning by others in lieu of credit or clock hours as the measure of student learning, and offered that the Department's focus on equating each module in the direct assessment program to either credit or clock hours is inconsistent with the HEA, which merely requires that any such assessment is consistent with the accreditation of the institution or program utilizing the results of the assessment (20 U.S.C. 1088(b)(4)). The same commenter further asserted that requiring institutions to craft, implement, and explain methodologies for creating credit or clock hour equivalences is administratively burdensome and shifts the program's focus away from student learning in favor of seat time.

Another commenter suggested that the use of the term "module" in § 668.10(a)(3) as the period measure of learning in direct assessment programs is confusing since it is already used in § 668.22, and in the NPRM further limited to describe courses in standard and nonstandard-term programs in relation to the return to title IV funds. In order to avoid this confusion the commenter recommended that the Department remove the term "module" in the direct assessment context and instead require in § 668.10(a)(3) that "An institution must establish a methodology to reasonably equate each of its stated measures of learning in the direct assessment program to either credit hours or clock hours . . ." (85 FR 18698). This change, the commenter argues, would not alter the substance and meaning of the amendments in any way.

Discussion: We disagree with the commenters who asserted that it is not necessary for the Department to require an institution to clearly describe its methodology for developing credit or clock hour equivalencies for its direct assessment programs. This requirement is vital to the integrity of the title IV, HEA programs because the requirements for calculating awards and disbursement amounts under those programs is still performed using credit or clock hours. Though we acknowledge that the credit hour is an outdated method of measuring a student's workload based on seat time and that developing an equivalency system involves administrative burden, there is currently no widely-accepted alternative "currency" for learning and workload.¹¹ Without such an alternative, the Department will continue to use credit or clock hour equivalencies in order to ensure that an institution's choice of a unit of measurement for a direct assessment program does not result in an unfair or inflated determination of a student's eligibility for title IV, HEA funds. Such a "currency" is also important in enabling students to transfer credits between institutions.

The Department encourages institutions and accrediting agencies to consider options for measures of student learning and workload that do not rely on credit hours but can be widely accepted and understood by practitioners and adopted by accrediting agencies. If the use of such a measure becomes prevalent in postsecondary education, the Department will consider allowing institutions to rely upon that measure for competency rather than requiring an equivalency to credit or clock hours.

Though we agree with the commenter who indicated that it was possible that the use of the term "module" in this section could be conflated with the different usage of the term in the R2T4 regulations under § 668.22, we decline to make a change in this case. We believe that replacing the word "module" would require the use of another term that may result in a substantively different approach in the direct assessment regulations. Because we did not discuss such an approach with the negotiating committee, nor include discussion of the issue in the NPRM, we decline to make the change at this time. Additionally, we do not believe that any confusion regarding the word "module" will undermine the requirements in either § 668.10 or § 668.22 because of the different context

for the usage of the word in each section.

Changes: None.

Comments: One commenter offered that, while the proposed regulation states that title IV, HEA funds cannot be utilized for the portion of the direct assessment program that the student is awarded based on prior learning, it does not define what activities comprise prior learning. In the opinion of the commenter, this leaves the proposed regulation open to a variety of interpretations and may result in miscommunication and confusion between the Department and institutions. The commenter proposes that "prior learning" and "prior learning assessment" be defined as follows:

- Prior Learning—Learning obtained outside of an academic context (experiential, personal, professional, workplace, etc.) that has not been officially awarded as academic credit.
- Prior Learning Assessment—is the process that evaluates and recognizes prior learning and awards the appropriate level of academic credit based on established institutional/organizational standards. Assessment of prior learning may occur before and during (concurrently) credit bearing (title IV eligible) course and programs.

Discussion: We thank the commenter for the suggestions regarding how to define prior learning in the context of the direct assessment regulations. When the term "prior learning" is used in these regulations, it means learning that occurred prior to the student's enrollment at the institution or in a context other than the curriculum in which the student is enrolled (for example, the student's workplace or another academic institution). Prior learning includes learning associated with the transfer of credit from a prior institution, since the credits earned through transfer cannot be included in a student's enrollment status for purposes of calculating eligibility for title IV, HEA assistance. We agree with the commenter's definition of "prior learning assessment," which means a process for evaluating and recognizing prior learning and awarding the appropriate level of academic credit based on established institutional/organizational standards. We also agree that assessment of prior learning may occur prior to and during a student's enrollment at the institution.

Changes: None.

Comments: One commenter suggested that competency-based education, as a less mature field, may not be ready for expansion. However, the commenter indicated that it is important to make data available that might help

¹¹ www.luminafoundation.org/files/resources/cracking-the-credit-hour.pdf.

researchers, practitioners, and others understand the field better and provide research and information that help future efforts by the Department or Congress to enable innovation while protecting students and taxpayers. The commenter offered several suggestions for the Department to collect and share data about direct assessment programs that have been approved directly by the Department, including publication of a list of institutions that have been approved for direct assessment and collecting information about tuition, retention rates, and completion rates for each direct assessment program. The commenter also suggested disaggregating and identifying these programs on the College Scorecard. The commenter recommended against requiring the collection or sharing of data related to course-based competency-based education programs that do not require Department approval given the potential for increased burden.

Discussion: We thank the commenter for their suggestions regarding how to improve data on direct assessment programs and institutional accountability. We believe that the commenter's suggestion of publishing a list of approved direct assessment programs and the institutions that offer them is reasonable and we will evaluate whether it is possible to post a public list of such programs. However, because the number of direct assessment programs remains small, we do not believe that we should collect data for such programs exceeding what is collected for other types of programs, nor do we currently intend to provide data on the College Scorecard specifically related to direct assessment programs. We will consider doing so in the future if the number of direct assessment programs increases substantially.

We agree with the commenter that additional data is not needed for course-based competency-based programs. Because there is no consistent statutory definition of a competency-based program that does not use direct assessment, the Department does not feel that it is practical or useful to attempt to collect data about such programs, since the data would reflect a wide range of programs, many of which have in common only the competency-based learning modality.

Changes: None.

New Program Approval (§ 600.20)

Comments: Many commenters supported the removal of § 600.20(d)(1)(ii)(B), which provides that an institution that is submitting a notice in accordance with

§ 600.20(d)(1)(ii)(A) is not required to obtain approval to offer the additional program unless notified by the Secretary at least 30 days before the first day of class that the program must be approved. The commenters stated that these current regulations create an unnecessary burden, make it more difficult to quickly respond to the needs of employers, and duplicate the oversight of programs by State authorizing agencies and accrediting agencies. The commenters also supported the addition of provisions requiring that the Department take prompt action on any materially complete application under § 600.20(a) or (b). Two commenters also noted that it is very difficult for institutions to be expected to wait until 30 days prior to the start of the program to advertise or enroll students in the program. One commenter also underscored the benefits of reduced redundancy while supporting the effort to minimize the impact of delays by the Department in the program approval process.

Discussion: The Department agrees with the commenters. Removing § 600.20(d)(1)(ii)(B) will ease the process of approving new programs and allow institutions to offer new programs in a timely manner to meet both student demand and workforce needs. The Department agrees that the current provision creates significant uncertainty about whether an institution will be allowed to offer a program until the program has nearly begun, without a tangible benefit in terms of oversight. It is not reasonable to expect institutions to either enroll students in a program that may not be allowed to operate or expect students to wait to enroll in these programs until 30 days prior to the start of the program. The Department seeks to conduct proper oversight in a timely manner without undue impact to institutions or students. As many commenters noted, this oversight role may also be duplicative of what is overseen by accrediting agencies and State authorizing agencies.

Changes: None.

Comments: One commenter encouraged the Department to consider streamlining the proposed regulations and processes for institutions on provisional status. The commenter suggested the Department either modify the regulations or use its discretion to streamline approvals for institutions with a strong record of compliance and stability. The commenter emphasized that the COVID-19 crisis may force an increasing number of institutions to be placed on provisional status and that such institutions may need quick

assistance starting new and innovative programs.

Discussion: The Department thanks the commenter for the suggestion. The Department has already proposed important regulatory flexibilities without jeopardizing proper oversight. Further regulatory changes would risk violating the consensus agreement and weakening important oversight of program reviews. The Department currently considers the past record of an institution in these reviews but agrees that some administrative processes could be improved to provide more timely responses, better communication, and more consistent decisions. The Department has already evaluated what it would take to make such improvements and hopes to implement them soon but declines to make further regulatory changes as the commenters suggest. The Department also thanks the commenters for the suggestion on streamlining processes in regard to COVID-19, but we believe the impacts COVID-19 has on schools will not necessarily result in a larger number of institutions that are placed on provisional status.

Changes: None.

Comments: Several commenters disagreed with the Department's contention that the changes in § 600.20 restore functions related to program quality to accrediting agencies and State authorizing agencies. Instead, these commenters say that the approval process relates to the requirements related to access to title IV aid. Therefore, the commenters say, institutions should be required to report their intent to establish new programs to protect students and taxpayer funds. The commenters also assert that the elimination of the list of elements the Secretary will consider when reviewing an application under this section was not part of the consensus language nor was it explained in the NPRM and therefore the change should be reverted to the consensus language in the final rule.

Discussion: The Department disagrees with the assertions made by the commenters. While they are correct that the provisions of § 600.20 broadly relate to the Department's oversight of access to title IV aid, the overwhelming majority of these provisions are left unchanged. Institutions continue to be required to notify the Secretary of their intent to offer an additional educational program. The proposed regulations simply require the Department to act promptly and remove restrictions that unnecessarily prevent an institution from quickly developing new programs in response to requests by students,

employers, or others. It is to the benefit of both students and institutions that there be certainty well in advance that a planned program will be able to operate. The Department intended that the amendatory instructions in the NPRM would be consistent with the consensus language adopted during the negotiated rulemaking. The amendatory instructions that were published, however, contained errors, which the Department has corrected in this final rule. The description of the changes to § 600.20 in the preamble to the NPRM accurately reflected the consensus language.

Changes: None.

Comment: One commenter noted that the amendatory language appeared to contain drafting errors or changes that were not appropriately described, which differed from consensus language. The commenter urged the Department to reopen the NPRM for additional comment. The commenter noted that the proposed amendatory language would delete current § 600.20(d)(1)(ii)(E), a change that they would oppose on the basis that the elements in that section are important for any approvals the Secretary may consider. The commenter urged the Department to maintain current § 600.20(d)(1)(ii)(E) (which is redesignated as § 600.20(d)(1)(ii)(D)) and revise the reference in that section to paragraph (d)(1)(ii)(B), which was deleted in the consensus language, to instead refer to paragraph (d)(1)(ii)(C), which relates to the Secretary's approval of an additional educational program.

Discussion: The Department appreciates the commenter's close review of the proposed amendatory language. We did not intend to deviate from the consensus language of § 600.20 and identified and discussed each of the intended revisions in the preamble to the NPRM. We agree that the proposed amendatory language contained errors, especially related to the revised numbering of paragraphs in § 600.20(d)(1) and believe that the commenter's suggested revisions are reasonable.

Changes: We have revised the amendatory language to reflect the consensus language, and also revised the reference in redesignated paragraph (d)(1)(ii)(D) to refer to paragraph (d)(1)(ii)(C).

Subscription Period Disbursement (§§ 668.2 and 668.164)

Comments: Many commenters supported the Department's definition of a subscription-based program model within § 668.2. Two commenters indicated that the subscription-based

model addresses the unique nature of competency-based and other self-paced programs of study and further encourages institutions of higher education to innovate by creating learning modalities that allow students to learn at their own pace while remaining eligible for title IV, HEA program assistance. Another commenter opined that the proposed subscription-based system supports postsecondary access and affordability for working adults. One commenter stated that the proposed subscription-based model balances flexible timelines for students with completion requirements that maintain the integrity of the title IV, HEA programs. Another commenter was supportive of the changes in timeframes associated with disbursements for subscription-based programs and indicated appreciation for the ability for institutions to offer early disbursements in such programs, asserting that the model's completion requirements would be essential to encouraging and supporting students to complete their programs on time. Another commenter supported the changes because it would permit self-paced coursework to "float" beyond the end of a term until a student masters the learning objectives for that coursework. Several commenters expressed support for proposed definition of a "full-time student" under § 668.2 as it relates to subscription-based programs; one of those commenters indicated that it made sense to prevent a student from receiving a disbursement based on retaken coursework in a subscription-based program, and another stated that to do otherwise would be nonsensical.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: Two commenters, while supportive of the Department's proposed regulations regarding subscription-based programs, urged the Department to rely more heavily on data and evidence to oversee such programs. One of those commenters noted that the Department has not yet produced any findings from its CBE Experiment and asked the Department to produce the statutorily-mandated reports detailing the findings of its experiments.¹² This commenter also encouraged the Department to improve the collection of data from participating institutions in the future so that CBE experiments will be more useful in the future. The other commenter emphasized the importance of focusing on student outcomes to evaluate institutions and their impacts on students and the nation's ability to

develop the talent needed to address economic and social challenges. The commenter expressed that shifting to a more transparent, outcomes-focused accountability system depends on the ability of existing and new entities to access and use better data and emphasized the importance of equity and quality in any such system.

Discussion: We agree with commenters about the importance of using data and evidence in the Department's oversight of subscription-based programs, and that such information is an important component of an outcomes-based accountability framework. To those ends, the Department plans to monitor which programs use the subscription-based model and will evaluate student-level data, such as disbursement amounts, debt levels, and withdrawal rates for students who are enrolled in such programs. This evaluation will take the place of the Department's CBE Experiment, which will end on June 30, 2020. The Department will also publish a final report on the CBE Experiment that will offer more information to the public about the results of that experiment related to subscription-based programs.

Changes: None.

Comments: One commenter, while acknowledging appreciation for the Department's attempt to balance the subscription-based model's completion requirements with the likelihood that some students could struggle to make progress during a specific period, indicated concern that the lack of alignment between disbursements and payment periods could cause confusion amongst students, families, and (at least initially) institutions.

Discussion: We disagree that the subscription-based disbursement model is excessively complicated. Though the model does require an institution to carefully monitor a student's progress in order to ensure that he or she does not receive subsequent disbursements of title IV, HEA program assistance, each institution has the ability to clearly express to students the number of credits (or the equivalent) that must be completed by a given date in order to receive aid in the future. This facet of the subscription-based disbursement model has already been successfully implemented for many non-term programs under the existing disbursement system for such programs.

Changes: None.

Comments: Several commenters asked the Department to allow the subscription-based model to be used for programs that are not offered using direct assessment. One of those

¹² experimentalites.ed.gov/exp/approved.html.

commenters asked that the Department extend the ability to use the subscription-based disbursement model to any self-paced postsecondary program, arguing that doing so would provide for greater innovation while still tying access to Federal aid with student achievement. The commenter suggested that such a change would likely increase interest among institutions and software vendors to support innovation by using the new model.

Two commenters expressed a related concern about institutions that had been participating in the Department's CBE Experiment and asked if such institutions offering credit-hour CBE programs would transition following the end of that experiment, which had allowed institutions to use a form of this model on a limited basis.

One commenter, while supportive of the Department's proposed regulations for subscription-based programs, urged the Department not to expand the definition or weaken the flexibilities provided by such programs. The commenter noted that subscription-based systems are not without risk to students, since in such programs students are effectively committed to a single price based on the number of courses they expected to complete at the start of the semester, and this means that students who do not complete their programs quickly could overpay for an education that the student does not benefit from. The commenter emphasized that because tuition in subscription-based programs will be largely financed with student debts, students who do poorly in subscription-based programs could be at risk.

Discussion: The Department agrees with commenters who argue that the subscription-based method for disbursing title IV, HEA program assistance should be extended to programs other than direct assessment programs. The Department had originally intended to limit the applicability of those provisions to direct assessment programs in order to ensure that the disbursement method was used only in programs offered by CBE. However, many CBE programs are not offered using direct assessment and would thus be prevented from using the subscription-based model.

Commenters also make a strong argument that limiting the applicability of the requirements to direct assessment programs would sharply limit the use of the model and would discourage software providers from creating technology that assists institutions in disbursing title IV, HEA funds using this method. This, in turn, would prevent

the model from being effectively scaled at most institutions given the cost of incorporating the model into existing technology supporting the administration of title IV, HEA program funds.

Moreover, we did not intend to hamper or limit flexibility in disbursement of title IV, HEA assistance for institutions that had previously been participants in the Department's CBE Experiment, but recognize that many of those institutions measure student progress using credit hours rather than direct assessment, which would have precluded them from using the subscription-based disbursement model under the proposed rule. We believe that expanding the use of the subscription-based model to any institution using subscription pricing will permit institutions with CBE programs using such pricing to transition more easily into full regulatory compliance following the end of the CBE Experiment.

Finally, the Department believes that the subscription-based model includes safeguards for both students and taxpayers that limit the risk of expanding the use of the model more broadly. The model protects taxpayers by requiring students to complete courses or competencies before receiving subsequent disbursements of title IV, HEA program funds. The model also improves upon the existing non-term disbursement system for students by allowing students to switch between full-time and less-than-full-time versions of a program in order to limit the number of courses they are required to complete in order to receive subsequent disbursements of title IV, HEA program funds.

We share commenters' concerns that students in subscription-based programs could quickly accrue debt while falling behind in their coursework. This risk was specifically why we designed the model to require students to complete coursework before receiving subsequent disbursements of title IV, HEA program funds. Institutions and students will both have a strong incentive to act if a student finds a subscription-based program too challenging or fails to make progress. Faced with the possibility of a student losing access to aid, an institution may provide additional assistance or resources to the student or encourage the student to transfer into a version of the program at a reduced enrollment status better suited to the student's rate of progress. Similarly, the student may decide to seek additional support or transfer into a different program. In either case, the model's completion requirements prevent a

student from taking on too much debt if the student is unable to complete coursework in the program.

Finally, use of the model would still be limited to institutions that charge students on a subscription basis, a practice which is rare and primarily used by competency-based programs. The Department will evaluate the effectiveness of, and monitor risks associated with, the model as it begins to be used more broadly and will make any changes necessary to protect students and the integrity of the title IV, HEA programs.

Changes: We have removed the words "direct assessment" from the first sentence in the definition of "subscription-based program."

Comments: One commenter requested a correction to the definition of a subscription-based program by adding "(or the equivalent)" following "credit hours" in the first sentence of the definition paragraph. The commenter contends this would align the first sentence to the third and last sentences of the same paragraph where the parenthetical already exists.

Discussion: We agree with the commenter that referring to the equivalent of credit hour in the specified location would improve the consistency of the definition.

Changes: We have added the words "(or the equivalent)" following the words "credit hours" in the first sentence of the definition of "subscription-based program."

Comments: One commenter expressed support for the Department's decision to provide a student with some control over the pace of learning in his or her subscription-based program by selecting a program version at a specific enrollment status. The commenter indicated that allowing a student to change to different program versions no more often than once per year supports student flexibility and results in a manageable level of administrative burden. Conversely, another commenter asserted that the Department had not provided sufficient justification for preventing students from switching between versions of a subscription-based program no more than once per academic year.

Discussion: The limitation on the number of times that a student is permitted to switch between versions of a subscription-based program was agreed upon by the Distance Learning and Innovation subcommittee as a condition for the Department to waive the requirement for an institution to evaluate a student's pace for satisfactory academic progress purposes in a subscription-based program. We believe

that evaluating a student's pace is unnecessary if the program requires a particular rate of completion in order for the student to continue receiving title IV, HEA program assistance over time. This condition is met if the subscription-based program both requires the student to maintain a consistent enrollment status (*e.g.*, half-time or full-time) and the student does not regularly change that enrollment status, which in turn would adjust the number of credits the student was required to complete before receiving subsequent disbursements.

Allowing a student to frequently adjust enrollment status (*e.g.*, by switching between versions of the same program) would mean that, without requiring the institution to evaluate the student's pace toward completion of the program, the Department would have no mechanism for ensuring that the student completes his or her program in a timely manner. We believe that the greater flexibility associated with the ability to switch enrollment status would be offset by the substantially greater complexity associated with measuring a student's pace for satisfactory academic progress purposes. Therefore, the Department believes that not requiring pace evaluations, but limiting students to switching between versions of the same subscription-based program once per year, is the most appropriate way to ensure that the student maintains an appropriate pace (in the judgment of the institution) toward program completion.

Changes: None.

Comments: One commenter asked whether a student enrolled in a subscription-based program would be required to complete credits associated with a payment period that the student did not attend in order to receive subsequent disbursements of title IV, HEA program assistance.

Discussion: A student in a subscription-based program is not required to complete credit hours (or the equivalent) associated with a payment period the student did not attend. In a subscription-based program, the number of credit hours (or the equivalent) that a student is required to complete accrue only for payment periods in which the student attends at least one day. If an institution determines that a student did not attend a given payment period, the credit hours (or the equivalent) associated with that payment period would not accrue toward the student's future completion requirements.

Changes: None.

Comments: One commenter requested clarification regarding how a student would switch between versions of the same subscription-based program with

different enrollment status requirements. The commenter inquired whether a student would be held accountable for incomplete credits associated with one enrollment level after changing to a different enrollment level and asked whether the Department would leave this to the discretion of institutional policy.

To illustrate the question, the commenter sought the Department's viewpoint on an example of a student making such a change. In the commenter's example, a full-time student has completed six subscription periods, each of which is associated with 12 credit hours. Thus, the student would be required to have completed at least 60 credit hours (12 credit hours multiplied by five terms, excluding the first one that the student attended) before receiving title IV, HEA assistance for a future payment period. However, at the end of the sixth payment period, the student has only completed 52 credit hours. At that time, the student switches to a half-time version of the same subscription-based program. The commenter asked whether the student would still need to complete eight more credit hours (more than the six hours associated with half-time enrollment status) before receiving another disbursement of title IV, HEA funds in the next payment period.

Discussion: In the situation described, the student would be required to complete eight more credit hours before receiving a disbursement at half-time enrollment status for the following payment period. Such a student would then be required to complete a further six credit hours (in addition to the eight credit hours needed to gain eligibility for the next disbursement) in order to receive the following disbursement of title IV, HEA program funds for the payment period after that.

Any time that a student begins attendance in a payment period in a subscription-based program, the student must complete the credit hours (or the equivalent) associated with that payment period (except for the first payment period that the student attends) before receiving title IV, HEA program funds for the following payment period. When a student transfers between versions of the same subscription-based program, the student must first complete the hours associated with the student's enrollment status in the previous version of the program. Because the completion requirement in a subscription-based program is based on the number of payment periods that a student has attended, a student in such a program may only change his or her enrollment status at the beginning of

a payment period, and when doing so must complete all the hours accrued for that program before receiving a subsequent disbursement of title IV, HEA funds.

Note that a student who transfers from a subscription-based program to a non-term program, or a term-based program that does not use subscription periods, is not required to complete additional credit hours before receiving a disbursement in his or her new program. This includes cases in which the student transfers from a subscription-based version of a program to a version of the same program that does not use subscription periods.

Changes: None.

Comments: One commenter asked whether a student's Pell Grant enrollment status would need to be adjusted at the end of a subscription period to exclude any coursework for which the student did not begin attendance. The same commenter asked the Department to clarify whether a student could begin coursework used to establish the Pell Grant enrollment status after the subscription period for which the student was paid had ended.

Discussion: Normally, a student in a term-based program is required to attend each class that the institution uses to establish the student's Pell Grant enrollment status under the Pell Grant regulations under § 690.80(b)(2)(ii). Similar to a student enrolled in a nonterm program, a student in a subscription-based program is not required to attend all of the courses in a payment period that comprise the student's enrollment status. This is because the Department presumes that the student must attend a sufficient number of classes or demonstrate a sufficient number of competencies in order to earn the credit hours (or the equivalent) before receiving subsequent disbursements of title IV, HEA program funds.

Note that because a student in a subscription-based program is always treated as having the same enrollment status, there is also no need for an institution to establish a Pell Grant recalculation date under § 690.80(b)(2)(i).

Changes: None.

Comments: Two commenters asked the Department to clarify whether the use of the subscription-based disbursement model will be optional or required for an institution that offers a program that is billed by subscription period. Both commenters requested that an institution be given the option to use other disbursement methods—such as for standard term, nonstandard term, or nonterm programs—if the institution

otherwise meets the requirements to use those alternative disbursement methods. One of those commenters asked that institutions be permitted to continue using their current method for delivering title IV, HEA program funds while developing student-friendly plans to convert from one model to another and allowing software vendors to design, develop, and test the complex new disbursement model. The commenter argued that such flexibility would provide options for institutions wishing to “teach out” students who were already receiving title IV, HEA program funds using one of the existing disbursement systems.

Another commenter interpreted the proposed definitions of the terms “subscription-based program” and “full-time student” to require institutions that use a subscription-based pricing model to also use the subscription-based model for disbursing title IV, HEA program funds. The commenter disagreed with this perceived approach, explaining that an institution could use subscription pricing in a program that otherwise meets the requirements to be treated as a traditional term-based program. The commenter recommended that the Department allow an institution the flexibility to choose the type of disbursement method that best suits it even if it uses a subscription pricing model.

Discussion: The Department views the use of the subscription-based model for disbursing title IV, HEA programs funds as entirely optional. All programs that meet the requirements for the subscription-based disbursement model would also be permitted to use the existing framework for disbursing funds in a non-term program. Additionally, if a subscription-based program also meets the requirements for a term-based program—for example, students are required to begin and end all courses or competencies within the term start and end dates—the institution can disburse funds using standard terms or non-standard terms (as applicable) instead of the subscription-based format.

When the final rule is effective, an institution that wishes to adopt the subscription-based format may “teach out” students who had previously been provided aid under the existing term-based or non-term disbursement systems. The institution would then be permitted to begin enrolling new cohorts of students using the subscription-based format. An institution could also choose to withdraw students from their term-based or non-term programs and enroll the students under the subscription-based model. Students who transfer

from a term-based or non-term program into a subscription-based program will be treated like all other students who first enroll in subscription-based programs, *i.e.*, they will not be required to complete the credit hours (or the equivalent) associated with the first payment period of their enrollment in the program and will be required to complete the appropriate number of hours to receive subsequent disbursements thereafter. Note that students who transfer from one subscription-based program to another at the same institution, including transfers between versions of the same program, will not receive a “free” payment period when they transfer and must complete all the credit hours (or the equivalent) that have accrued in the prior program before receiving a disbursement in the program to which the student transferred.

Changes: None.

Comments: One commenter opposed the requirement for a student to complete a specific number of credit hours (or the equivalent) in order to receive subsequent disbursements of title IV, HEA program funds in a subscription-based program. The commenter also contended that institutions using innovative learning models rarely originate single-term loans, and that the requirement to make two equal disbursements of a single-term loan is difficult to understand and results in a frustrating student experience just prior to a student’s completion of a program. The commenter recommended that the Department allow one disbursement of a single term loan for single term loans with loan periods exceeding four and a half months in a subscription-based program.

Discussion: We appreciate the comments and the recommendation but do not plan to change requirements under the Direct Loan regulations, because those regulations were not discussed during negotiated rulemaking, nor published for comment in the NPRM. Additionally, the completion requirements are integral to the subscription-based disbursement system and help to ensure that students are making adequate progress in their programs. The requirements were agreed upon by both the Distance Learning and Innovation subcommittee and the full negotiating committee, and we do not plan to eliminate those completion requirements for students in subscription-based programs.

Changes: None.

Definition of Weeks of Instructional Time (§ 668.3)

Comments: Commenters expressed overwhelming support for the Department’s definition of a week of instructional time related to an academic year under § 668.3(a)(2)(ii) to include programs that use asynchronous coursework through distance education or correspondence. Several commenters acknowledged the Department’s efforts to create a definition that accounts for innovative non-traditional programs that are offered asynchronously, reflecting the unique nature of distance education modalities. Several commenters also noted that while time continues to be an important factor in awarding and disbursing title IV, HEA program funds, the new definition was a step away from a rigid conception of time-based, scheduled instruction, and a positive step toward emphasizing learning over time. One commenter also indicated that the new definition would provide clarity and transparency regarding regulatory thresholds for a week of instructional time.

Discussion: The Department thanks the commenters for their support.

Changes: None.

Comments: One commenter indicated that changing the definition of “a week of instructional time” is not necessary, because accrediting agencies are responsible for the content of instruction.

Discussion: We agree that accrediting agencies have authority over instructional quality at postsecondary institutions. However, we do not believe that such authority precludes or obviates the need for changes to the definition of a week of instructional time.

Changes: None.

Written Arrangements at Domestic Institutions (§ 668.5)

Comments: A few commenters supported the proposed changes to written arrangements because they believe the changes will promote innovation and workforce responsiveness. One commenter said the changes will provide students with access to more high-quality programs. Another commenter said the changes will align the needs of graduates with those of employers and allow institutions to offer timely, relevant educational program offerings they may be unable to provide on their own, allowing them to better attract and retain students. One commenter supported the proposal, citing an improved ability for employers to engage with institutions to reduce skills gaps and personalize learning.

Discussion: The Department appreciates the support for the proposed changes.

Changes: None.

Comments: Many commenters supported the consensus language, including the requirement in both current regulation and the proposed regulation that an ineligible institution or organization may provide up to 25 percent of a program (or up to 50 percent with accrediting agency approval). Several of these commenters urged the Department not to go beyond the 25 percent and 50 percent limits because doing so could pose risks to students and taxpayers, and particularly disadvantaged groups of students, especially if an outside entity could provide more than half of a program. They stated in various ways that going above 50 percent would risk, or outright permit, institutions to lend their accreditation or title IV eligibility status to others. One of these commenters worried that the motivation for abuse could be more acute given potentially declining revenues during and after the COVID-19 pandemic if the Department went beyond 25 and 50 percent limits. These commenters cited discussion at negotiated rulemaking, including negotiators' rejection of proposals that would have allowed institutions to go beyond these limits. One of these commenters suggested that the current limit of 50 percent would allow for sufficient flexibility for institutions while ensuring they pass accountability measures.

Discussion: The Department appreciates the support for consensus language from these commenters and acknowledges concerns about written arrangements, especially if the 25 and 50 percent limits were lifted. This topic received extensive discussion during negotiated rulemaking, both from negotiators and subcommittee members. The Department agrees that using written arrangements for all or nearly all of a program could raise questions about which entity confers the credential. Anything beyond 75 percent may trigger restrictions from accrediting agencies who require the institution conferring the credential to deliver at least 25 percent of the program. While the consensus agreement would not allow institutions to go beyond 50 percent, the Department maintains that written arrangements beyond 50 percent theoretically could be used responsibly.

The Department disagrees with the implication from many commenters that written arrangements are somehow inherently dangerous for students or that the risk for abuse is greater for disadvantaged groups of students or

considering the COVID-19 pandemic. Instead, the Department sees written arrangements as a tool that can provide more opportunity for students (especially for the groups or in the circumstances cited by commenters), because even the most well-resourced institutions may not be able to provide every conceivable course or instructional resource. In fact, many well-resourced institutions struggle to keep up with the latest practices of their students' future employers and written arrangements can help. Such tools can, of course, be misused and the Department encourages accrediting agencies to support written arrangements where they offer benefits to students, but be wary of them if they merely serve as a lifeline to institutions that could not otherwise meet the accrediting agency's requirements for fiscal and administrative capacity (or other standards) under § 602.16. However, we agree with commenters who noted that the proposed language, which streamlines approvals but maintains the 25 and 50 percent limits, was the product of an extensively discussed consensus agreement and, as a result, the Department declines to make changes.

Changes: None.

Comments: One commenter was generally supportive of the provisions in this section, but opposed the 50 percent cap and suggested at least moving it to 75 percent, believing the Department is not sufficiently promoting innovative workforce partnerships, especially given the COVID-19 pandemic's impact on the economy.

Discussion: As noted elsewhere in this section, the Department would have preferred greater flexibility for institutions to use written arrangements and believes such allowance could have been used responsibly. However, we agree with commenters who noted that the proposed language, which streamlines approvals but maintains the 25 and 50 percent limits, was the product of an extensively discussed consensus agreement and so the Department declines to make changes.

Changes: None.

Comments: One commenter supported the provisions of § 668.5(f) that clarify the ability of institutions utilizing written arrangements to modify their curriculum to meet workforce needs, but opposed the provisions that clarify the ability of institutions to make governance or decision-making changes as an alternative to faculty control or approval. This commenter argued that advisory boards should not have greater authority than faculty and that faculty expertise should be used to inform

program design. Another commenter also opposed the latter provision citing their institution's shared governance model. One commenter suggested that faculty support must be a prerequisite to any academic or administrative change and believed that the Department is taking away the opportunity for faculty and staff to be involved in administrative changes.

Discussion: The Department agrees that faculty perform an important role in any institution, but strongly disagrees that faculty should have veto authority over virtually every academic or administrative decision. Institutions use written arrangements to benefit from outside expertise, to better align a program with workforce needs, or for other purposes. The Department thanks the commenter for supporting this goal but notes that alignment with workforce needs can be achieved in different ways, including ways that are recommended by expert advisory boards that may have more direct experience in the workforce and better understand contemporary needs. To achieve this goal, many institutions understandably wish to act quickly in such cases for the benefit of their students. Institutions may be hamstrung if they must ask permission from different parties. Institutions may use traditional governance models. However, the Department sought to clarify that institutions may determine the level of faculty input that should be provided on decisions relating to written arrangements. The Department disagrees with the commenter's suggestion that the proposed rule affirmatively takes away the opportunity for faculty and staff involvement in administrative changes due to the diversity of existing governance arrangements.

Changes: None.

Comments: Several commenters related their concern about written arrangements to concerns about the extent to which institutions utilize online program managers (OPM) or other similar third parties that assist institutions with various functions not related to the actual provision of academic instruction. One commenter stated that the exclusion of issues related to OPMs from this rulemaking has prevented proper oversight of distance education programs, but generally supported the addition of language to clarify how to calculate the percentage of a program that is part of a written arrangement. This commenter believed that agreements with OPMs covering issues such as course development, instructor training, and student recruitment should be treated as written arrangements because they are

distinct from other types of agreements such as food service where the institution may not have expertise. The commenter opposed tuition-sharing arrangements as being a source of risk. One commenter expressed appreciation for the Department's mention in the NPRM that written arrangements do not apply to such third-party services. One commenter suggested the proposed rule could incorrectly be read to imply that a written arrangement would be required if an outside entity provides design or administration but not instruction. One commenter implored the Department not to "gut the meaning of college." Other commenters raised concerns with OPMs or other arrangements such as the acquisition of a proprietary institution by a public institution that do not relate to the proposed rule.

Discussion: Although mentioned briefly in the NPRM, the Department wishes to expand upon its long-standing position that written arrangements do not generally apply to contracts with OPMs. Use of the word "design" or "administration" in § 668.5(g) may refer to one or more of the following—establishing the requirements for successful completion of the course; delivering instruction in the course; or assessing student learning. One example of this would be if an ineligible entity provides instructors and delivers instruction via a ground-based or online program separate from what the eligible institution would normally provide. This would not include, as the commenter worries some might infer, a course's "platform or method of delivery, technical support, or student services." In fact, institutions frequently utilize employer advisory boards or other outside expertise to develop courses or use a variety of methods to recruit students without written arrangements. In addition, just as in elementary and secondary schools, outside providers are frequently used to provide training and professional development to instructors in postsecondary education. Requiring a written arrangement for these core functions could grind the basic functions of an institution to a halt. Instead, the Department believes § 668.5(h) is a non-exhaustive list of activities that do not require written arrangements, but many others from contracting for food service, or with OPMs, or facilitating ground-based instruction through upkeep to facilities—should be assumed to not require a written arrangement either, in accordance with longstanding practice. We further question one commenter's

premise that written arrangements should only be for functions where the institution would not have expertise, such as food service. The diversity of institutional expertise is one reason the Department does not use such criteria to distinguish between agreements requiring written arrangements from those that do not. Instead, the regulations state that they are required if an ineligible entity provides "part of the educational program," which means actual delivery of instruction using outside instructors and facilities. The Department assures one commenter that it is not changing and could not "gut" the meaning of college.

Changes: None.

Comments: Two commenters noted that a limited number of institutions were permitted to go above the 50 percent limit to partner with ineligible providers as part of the Department's Educational Quality through Innovative Partnerships (EQUIP) experiment. These commenters said that participants have struggled to meet Department benchmarks necessary to launch their programs and, as a result, data has been quite limited and so should not be used to justify changes to written arrangements. One commenter further suggested that some participants in the program engaged in practices that were harmful to students, noting one was cited by its State for deceptive advertising, and another precipitously closed. As a result, they asserted that not enough information is known about whether these types of programs can be successful.

Discussion: EQUIP was launched under the Department's Experimental Sites Initiative.¹³ We acknowledge the limitations of the experiment.¹⁴ The Department believes there were multiple design flaws in that experiment, many unrelated to flexibility for written arrangements. As the commenters acknowledge, most potential participants were unable to start-up their programs and begin utilizing the waivers. This was at least in part due to the experiment's requirements, written under the prior administration, were so burdensome and complex that many institutions expressing interest did not ultimately apply, and those that applied, have slowly dropped out at various stages in the years-long process of attempting to obtain approval for and launch these programs. Much of this complexity

¹³ 80 FR 62047.

¹⁴ [ed.gov/news/press-releases/expanding-pathways-success-after-high-school-us-department-education-approves-first-innovative-equip-experiment](https://www.ed.gov/news/press-releases/expanding-pathways-success-after-high-school-us-department-education-approves-first-innovative-equip-experiment).

relates to burdensome reporting requirements, the requirement for a third-party quality assurance entity to oversee program outcomes (in addition to the accrediting agency), and other issues (some quite similar to suggestions made at the negotiating table and by commenters). While these mechanisms were designed to protect students, promote transparency, allow for a rigorous evaluation, and other laudable goals, the Department believes that they were ultimately too burdensome and costly to justify the potential benefits of participation, which may have ultimately denied students the opportunity to benefit from innovative programs that were potentially quite valuable. In short, the Department believes that the most significant lesson from EQUIP is that burden must be weighed against safeguards in order to support innovation while protecting students. This was one of the reasons that the Department undertook this rulemaking and made the changes to § 668.5 and other sections.

Changes: None.

Comments: Several commenters urged the Department to rescind changes made to § 602.22 in the accreditation rulemaking that allow senior staff of an accrediting agency to review several types of substantive change requests, including those relating to written arrangements, rather than requiring the agency's decision-making body to make the decision. One commenter also suggested removing a change that would require expedited approval by accrediting agencies of written arrangements, adding other reporting and data collection requirements, and closely reviewing written arrangements approved by accrediting agencies during recognition reviews. Another commenter suggested seeking data on the use of written arrangements from institutions and accrediting agencies.

Discussion: The changes to § 602.22 were made in a separate rulemaking effort and the Department declines to rescind the change it made months ago. However, the Department reminds these commenters, some of whom are strongly urging the Department to stick with the consensus agreement's limits of 25 and 50 percent in § 668.5(c), that the Department and others agreed that maintaining these limits would not impede innovation, as long as approvals by accrediting agencies could be streamlined and take less time. We continue to believe that the consensus language strikes the right balance between enabling innovation and protecting students and taxpayers. The Department will uphold the consensus language regarding the 25 and 50

percent limits in § 668.5(c), as well as regarding the efforts to streamline approvals in § 602.22 either. The Department believes that these changes reduce burden on accrediting agencies and streamline institutions' ability to respond to workforce needs, as outlined in greater detail in the Department's NPRM and final rule on accreditation.¹⁵ As discussed during negotiated rulemaking, the Department declines to add further burdensome reporting requirements; however, according to § 668.43(a)(12), institutions are required to disclose written arrangements to students, which is an added requirement included in the Accreditation and State Authorization final rule to improve transparency.

Changes: None.

Comments: Several commenters responded to the question posed by the Department in the NPRM, which asked whether the requirement for non-accredited entities to demonstrate prior experience and effectiveness prior to engaging in a written arrangement would be too difficult to meet. These commenters suggested that it would be too difficult for most third-party providers to meet a requirement to "demonstrate experience" before being given the opportunity to do so. One commenter added that institutions are sufficiently motivated to ensure academic rigor when using written arrangements and thoroughly vet them before signing a contract. This commenter noted that the content provided by the ineligible provider must still meet standards for accreditation and said that new entrants often have the most advanced and desirable content. The commenter questioned what type of information would be sufficient to demonstrate experience if the provision remained. Another commenter added that the "experience" requirement would intrude into matters overseen by accrediting agencies. And one commenter believed the requirement was ambiguous while restraining innovation.

Discussion: The Department agrees with the commenters who uncovered serious flaws in a requirement to demonstrate prior experience and effectiveness. The Department does not change consensus language without a good reason, especially in a provision so vigorously debated during negotiations. However, after negotiations, the Department noted similarity between the experience requirement in § 668.5(c)(1)(i) and provisions removed in the accreditation regulations, especially those in § 602.12, which

previously required accrediting agencies to demonstrate prior experience in a given area before the Department would allow an expansion of scope to conduct accreditation activities in those areas. We removed such provisions because they could have had an anticompetitive effect and created a sometimes-impossible standard requiring an entity to demonstrate experience doing something they are legally barred from doing. The Department was unable to find, and commenters did not suggest, a workable alternative that would have maintained the language while avoiding similar problems. The Department does not believe a viable alternative exists that would provide meaningful protection without having an anticompetitive effect, being overly burdensome, or being unenforceable. In addition, the Department believes the requirement that the provider be effective in meeting stated learning objectives is vague, likely unenforceable, may be deemed arbitrary and capricious, and may violate 20 U.S.C. 3403(b), which prohibits the Secretary from exercising authority over curriculum, administration, and personnel of educational institutions. The Department believes that commenters made a compelling case that the proposed provision could interfere into areas overseen by accrediting agencies.

Changes: The Department concurs with the commenters. We have deleted § 668.5(c)(1)(i) and renumbered the section accordingly.

Comments: One commenter supported the proposed removal of language that previously required the certificate or degree-granting institution to provide more than 50 percent of the educational program in a written arrangement between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation.

One commenter opposed this change and stated that there may be differences in quality or the student experience between institutions sharing ownership, which could lead to students being misled about the nature of their education. The commenter suggested students may be required to take more courses online through one affiliated institution when they expected to be taking ground-based courses from the other. The commenter suggested the Department has provided insufficient evidence to support the change.

Discussion: The Department thanks the commenter for supporting removal of this restrictive provision. The Department maintains that there is value in maintaining flexibility to

achieve synergies between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation.

The COVID-19 pandemic highlights a worst-case scenario, where institutions had to quickly move students online and expand any remote learning infrastructure they had at their disposal. However, a local or national economic shift that quickly necessitates more training in one area and less in another may be a more common example. The Department notes that many accrediting agencies require at least 25 percent of the program to be delivered by the institution conferring the credential and defers to accrediting agencies in this area. The Department does not believe this provision, which applies to a very small subset of institutions and students, exposes those students to meaningful additional risk and notes that any misrepresentation or fraud of the kind the commenter fears may be addressed through existing enforcement means. As noted elsewhere, we not only maintained the requirement to disclose these arrangements to students in § 668.43(a)(12), but we actually strengthened those requirements in the accreditation final rule, which was developed through a consensus agreement as part of the same negotiated rulemaking as this regulation.¹⁶

Students may enroll in a program they choose. However, options are finite and may be unexpectedly limited, regardless of the use of a written arrangement. Unavailability of faculty or facilities, insufficient demand to offer a certain course during any given term, or other factors could limit students' options. In most cases, despite the commenter's assertions, the Department believes this provision is likely to increase (rather than decrease) available options to students. The risk of fraud is always present any time Federal funds are involved. The Department prefers strong enforcement of a limited number of important and straightforward safeguards rather than diverting resources to maintaining numerous low-risk restrictions that could deny benefits to students.

Changes: None.

Clock to Credit Hour Conversion (§ 668.8)

Comments: One commenter expressed support for the proposed changes to § 668.8(k), noting that the changes eliminate confusion about the inclusion of homework time in the clock-hour determination.

¹⁵ 84 FR 27404 and 84 FR 58834, respectively.

¹⁶ 84 FR 58834.

Another commenter asserted that compliance with these regulatory changes would, in addition to having negative financial effects, be potentially burdensome, and conflict with accreditor expectations. The commenter further offered that credit hours are more suitable than clock hours for evaluating satisfactory academic progress and the current regulation (§ 668.8(k) and (l)) is more reflective of the levels of learning at their institution. Finally, the commenter expressed concern over the effect the proposed changes might have on the institution's ability to provide the same levels of contact for online and in-person courses.

One commenter noted that the Department neglected in the NPRM to address the proposed change to § 668.8(k)(2)(ii), removing the requirement that an institution demonstrate students enroll in and graduate from degree programs and replacing it with a requirement that the institution demonstrate that at least one student was enrolled in the program during the current or most recently completed award year. The commenter asserted that the proposed rule would allow institutions to effectively invent a nonexistent program to use as a backdoor way to avoid the conversion formula, thus compromising program integrity.

Discussion: The actual scope of what was proposed in the NPRM is essentially a revision to the conversion formula. The applicability of clock-to-credit-hour conversion is not expanded as a result of these changes. Under current regulations, any program that is at least two academic years in length and provides an associate or bachelor's degree (presumably the overwhelming majority of those programs offered at four-year public and private, degree-granting institutions) is not subject to clock-to-credit-hour conversion. This would not change under what was proposed in the NPRM. It should further be noted that there are no Department rules requiring the use of clock hours as opposed to credit hours in measuring students' progress.

We inadvertently omitted from the NPRM any discussion of proposed § 668.8(k)(2)(ii), which removes the requirement that an institution demonstrate students enroll in and graduate from degree programs and replaces it with a requirement that the institution demonstrate that at least one student was enrolled in the program during the current or most recently completed award year, and thank the commenter who brought this omission to our attention. This change was made

at the request of negotiators who expressed the concern that programs with small numbers of students may not produce graduates in a given year, or even over a couple of years, raising the prospect of those programs being found in violation of § 668.8(k)(2)(ii). The change was included in amendatory text on which consensus was reached.

While appreciative of those negotiators' concerns, we are persuaded that removal of the requirement for institutions to demonstrate that students enroll in and graduate from the program would make it possible for an unscrupulous institution to stand-up nonexistent programs that do not actually graduate anyone, effectively circumventing the clock-to credit-hour conversion requirement.

With respect to degree programs with limited numbers of students, we note that current § 668.8(k)(2)(ii) makes no mention of the frequency with which students must be shown to graduate from the degree program that courses from the program that would otherwise be subject to clock-to-credit hour conversion are acceptable toward; and a year where no student graduates from the degree program is not, in and of itself, an indicator of noncompliance.

Accordingly, we are revising § 668.8(k)(2)(ii) to clarify that an institution must be able to demonstrate that at least one student graduated from the program during the current award year or the two preceding award years. We continue to believe that the exception in § 668.8(k)(2) is appropriately limited to programs that consistently produce graduates. Even where an institution is not attempting to deliberately circumvent clock-to-credit-hour requirements, a circumstance where no student graduates from the degree-granting program over multiple years legitimately calls into question whether that program is truly meeting the requirements for the exception found in § 668.8(k)(2). Therefore, because the exemption requirement only applies when an institution offers a program that leads to a degree, and the shortest degree programs are generally no less than two years in length, the Department believes that a two-year look-back period would be sufficient to identify programs that could fulfill this requirement for an exemption from the clock-to-credit conversion requirements. If no student graduates from a program during the entire expected timeframe for completion of that program, it calls into question whether the transferability of credits into such a program is in fact useful to a student enrolled in a non-degree programs, which is the essence of the exemption in the first place.

Changes: We have revised § 668.8(k)(2)(ii) to clarify that in meeting the clock-to-credit hour exemption, an institution must demonstrate that at least one student graduated from the program during the current award year or the two preceding award years.

Certification Procedures (§ 668.13)

Comments: Several commenters stated their support for language providing that if the Secretary does not make a decision to grant or deny certification within 12 months of an institution's expiration date of its current period of participation, the Department will grant the institution an automatic recertification, which may be provisional. The commenters supported this change for the increased certainty and transparency it provides to institutions that would otherwise receive month-to-month extensions of their eligibility. The commenters also believed that such changes properly balance this increased certainty for institutions with Department oversight on behalf of students and taxpayers. One commenter added that the change will allow institutions to move forward with new programs in a timely and responsive manner.

Discussion: The Department thanks the commenters for their support and agrees that the changes provide for increased certainty and transparency while balancing the need to protect students and taxpayers.

Changes: None.

Comment: One commenter opposed automatic certification renewal when the Secretary does not decide to grant or deny within 12 months of an institution's expiration date. The commenter claimed that this change contradicts the HEA and circumvents the Secretary's obligations under the Act. The commenter asserted that this change would undo the Secretary's obligation under 20 U.S.C. 1099c(a) to evaluate the institution's legal authority to operate within a State, accreditation status, administrative capability, and financial responsibility. The commenter also claimed that the Department provided no evidence of the uncertainty experienced by institutions because of the current practice. The commenter suggested that there could be good reason for the Department to delay its review, including if it is investigating the institution. The commenter believed that, due to the lack of evidence or reasoning, the proposed change is both arbitrary and capricious and that the Department would violate the APA by making the proposed change. The commenter further stated that the Department failed to consider

reasonable alternatives and that it has a legal obligation to do so. The commenter suggested that the Department instead seek additional funding for staff to review recertification applications to ensure a prompt review and decision. The commenter also proposed providing a shorter extension of, perhaps, three or six months while the Department continues its review.

Discussion: The Department appreciates the commenter's interest in this topic. Certification decisions can have major implications for institutions and students. We agree that more must be done at the administrative level to provide more timely responses and better communication. However, we believe those steps alone are insufficient. Further, we believe it is in the best interest of students and taxpayers for the Department to timely identify deficiencies and take appropriate action.

The Department appreciates the suggestion that the Department grant three- or six-month extensions instead of a month-to-month extension. However, institutions must make important budgetary and academic decisions annually. The Department believes those proposals would have the same drawbacks and present the same uncertainty to institutions as the status quo. An extension longer than one year would not give the Department sufficient oversight to revisit a decision in the short term if needed.

The Department disagrees that it has failed to provide a proper justification for this change and did not deviate from the consensus language on this topic. As discussed during negotiated rulemaking and as other commenters have noted, delaying decisions causes significant uncertainty. The Department believes that 12 months beyond the expiration date of the institution's current certification is more than sufficient time, especially since the institution is required to submit the application for recertification no less than 90 days prior to the expiration of its current certification. The Department's review usually begins more than a month before the expiration date, adding additional time to the process. If an investigation is underway, the Department has other options at its disposal. The Department can provisionally certify the institution for as little as one year or can deny the recertification if justified. If the Department must issue sanctions, it may do so at any time. This change does not reduce the Department's enforcement power. Instead, it encourages the Department to process applications promptly, which provides timely

feedback for institutions, helps the Department to properly oversee institutions, and can allow speedier remedies if deficiencies are identified. As such, and contrary to the assertion made by this commenter, the certification renewal process outlined in § 668.13 is neither arbitrary and capricious nor would it constitute an impermissible abdication of the Secretary's responsibility to determine an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility when determining the institution's eligibility to participate in title IV, HEA programs.

Changes: None.

Limitation on Number of Clock Hours Based on Minimum State Requirements (§ 668.14(b)(26))

Comments: Many commenters supported the proposed requirement that eligible short-term programs demonstrate reasonable program length. These commenters acknowledged the trade-off between setting proper safeguards to ensure program length is not inflated and ensuring students are able to meet States' occupational licensure requirements. The commenters believed that the Department struck a proper balance, which will promote worker mobility across State lines and reduce barriers to employment, especially in regional economies that cross State boundaries.

Several other commenters underscored that the negotiating committee compromised on the provisions related to program length and suggested that the provisions would protect students from fraud. One of these commenters noted the proposed rule provided balance and an acute positive impact on student veterans and military-connected students.

Several commenters said they preferred the proposed rule's provision over other options discussed during negotiated rulemaking, especially the Department's initial proposal allowing program length of 100 percent of the longest minimum requirement in any State. These commenters urged the Department to maintain the consensus agreement contained in the proposed rule.

One commenter praised the changes to this provision and the positive impact they will have on veterans and their spouses, who frequently move across State lines.

One commenter suggested that the proposed provision did not go far enough to prevent institutions from lengthening their programs in ways that do not benefit students, including if

labor markets do not significantly overlap two States' borders. They cited past statements, including from the Department's OIG, of institutions that the commenters say falsified their program length. Instead, this commenter suggested that we allow institutions to lengthen their program based on an adjacent State's requirement only if the institution is within a metropolitan statistical area (MSA) that includes another State. The commenter also suggested an alternative, that the institution instead attest to, and demonstrate if asked, that it has enrolled a student who lived in that State within the preceding three years or that recent graduates are gainfully employed in that State.

One commenter supported the proposed rule in this area and cited a need for greater occupational licensure reciprocity across State lines.

Discussion: We appreciate the support from commenters on this issue and acknowledge that setting the right balance on this issue is difficult for reasons outlined in the NPRM, most notably that individuals often move from one State to another or live, work, and learn in different States at the same time.

The Department appreciates the concern from the commenter who suggested the proposed rule would not go far enough to prevent institutions from artificially increasing program length. We have serious concerns any time an institution, accrediting agency, or State takes steps to artificially limit access to a profession. The Department will continue to speak out against such policies and take steps where possible to prevent credential inflation and related barriers to opportunity. However, as outlined in the NPRM and supported by many commenters, the Department believes this language strikes a reasonable balance between supporting students who must qualify for State licensure and preventing abuse. If abuse rises to the level of falsification of documents, as the commenter suggests, we will use existing enforcement methods.

The Department thanks the commenter for the suggestion about tying requirements to out-of-State MSAs or past success at finding students employment in a neighboring State. However, we believe this would hamper mobility across State lines and impose burdens on institutions and the Department. The tie to MSAs would only benefit areas that are more heavily populated or where MSAs cross State lines (they frequently do not) so the

proposal does not seem to be a viable alternative.¹⁷

We also do not agree that institutions should be required to demonstrate that their graduates have been successful at finding employment in another State when the institution's programs, under our current regulations, may be unable to meet the requirements of preparing individuals to be licensed in that State.

The Department appreciates the support of the commenter who noted that reciprocity for occupational licensure is a helpful, but incomplete, step States can take to lower barriers for individuals. Time-based requirements that may not be tied to employer needs can be harmful and deny opportunity to individuals looking to build a better life.

Changes: None.

Comments: A few commenters supported the proposed provision and asked that the Department define "adjacent State" to include States whose border is within 100 miles of the State in which the institution is located to allow for greater flexibility for regional economies.

Discussion: Although the Department appreciates the suggestion to define an "adjacent State" as one whose border is within 100 miles of the State in which the institution is located, such a change would not align with the consensus agreement or the definition of the word "adjacent" in this context, which means "having a common endpoint or border."¹⁸ The Department wishes to maximize opportunity and minimize barriers and appreciates hearing from institutions with students that may benefit from this provision. However, many States have "statutory language allowing reciprocity or endorsement agreements for licenses" including for cosmetology and, as already mentioned, States have opportunities to lower the barriers they have erected in these areas.¹⁹ As many commenters have noted, the consensus agreement in this area involved genuine compromise and balancing of competing priorities. While a small number of students may be willing to travel up to 100 miles and cross two State borders to work or learn, the Department does not believe this benefit is outweighed by the risk of institutions using a significantly longer requirement two States away in order to lengthen their programs for all students.

Changes: None.

Comments: A few commenters requested that the Department use its

authority to allow voluntary early implementation of this provision.

Discussion: The Department will allow voluntary early implementation on the entire rule, including this provision.

Changes: None.

Return of Title IV Funds (R2T4) (§ 668.22)

Comments: Numerous commenters expressed support for the proposed changes in the treatment of title IV funds when a student withdraws. One of those commenters stated that the changes regarding which students are considered withdrawn for R2T4 calculation are a welcome attempt to resolve technical problems in the current rules existing for students enrolled in self-paced instruction and in modules, whose treatment with respect to R2T4 sometimes does not reflect their actual level of coursework completion. Another commenter expressed appreciation for the Department's attention in considering the inequities that currently exist for students withdrawing from a program delivered in modules. Pointing out the unfairness of penalizing a student by requiring an R2T4 calculation and the potential return of funds solely because that student completed her program on a more aggressive timeline than originally anticipated, other commenters thanked the Department for removing the requirement to conduct an R2T4 calculation in cases where a student has completed graduation requirements.

Discussion: We appreciate the support of these commenters.

Changes: None.

Comments: Several commenters requested clarification on the proposed rule, which does not consider a student withdrawn from a program offered in modules if the student completes:

- One module that includes 50 percent or more of the number of days in the payment period,
- A combination of modules that when combined contain 50 percent or more of the number of days in the payment period, or
- Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under § 668.2 for the payment period.

The commenters identified various ways in which application of the proposed rule as written might result in inequitable treatment of students who withdraw from programs taught in modules. One commenter offered the example of a 102-day term consisting of two modules, the first module 50 days in length and ending on a Friday and

the second comprising the remaining 52 days and beginning the following Monday. Students who complete only the first module could be treated as withdrawn, because their first module included a scheduled break or did not include a weekend.

Another commenter provided the example of a program offered in standard semesters, each comprised of two, 8-week modules. Both modules of the fall semester, each 54 days in length, are separated by a weekend and there are no breaks of five or more days in the semester. The spring semester contains a spring break of nine days occurring between the first and second modules (each 54 days in length) of the semester. A student enrolls in five credits in the first module of the fall semester and six credits in the second module of that term, successfully completing the first module but opting not to return for the second module. With the break included, the fall semester is 110 days in length, 54 days, or 49 percent of which the student completed, meaning he or she would be considered withdrawn. Another student enrolls in the same pattern during the spring semester, again completing the first module of 54 days but not returning for the second module, also 54 days in length. However, with the spring break excluded from the number of the number of days in the semester, this student has completed 54 of 108 days or 50 percent of the spring semester and is not considered withdrawn. Both students completed the same five credits and 54 days in the payment period, but in the case of the first student the institution is required to perform the R2T4 calculation due to the break between the modules being less than five days (*i.e.*, a weekend).

Finally, one commenter explained that in a standard term program where the total days in the payment period is an odd number and the first of two modules offered over the semester is one day shorter than the second, a student enrolling in both modules but completing only the first module would complete only 49 percent of the payment period. The commenter offered that this could result in students, who for all intents and purposes completed a module lasting half of the term, being considered withdrawn for lack of one day.

To address these issues, commenters variously suggested counting only days of instruction (excluding both breaks and weekends) instead of calendar days, excluding scheduled breaks of less than 5 days between modules from the number of calendar days to address the issue of weekends between modules,

¹⁷ www2.census.gov/geo/maps/metroarea/us_wall/Sep2018/CBSA_WallMap_Sep2018.pdf.

¹⁸ merriam-webster.com/dictionary/adjacent.

¹⁹ ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx.

and changing the minimum completion percentage from “50 percent or more” to “49 percent or more.”

Discussion: We agree with the commenters that additional clarifications to the proposed changes in § 668.22 are necessary to avoid the potential unintended consequences identified above. As expressed in the preamble of the NPRM, the Department’s intent in proposing modifications to the treatment of modules in the R2T4 was that a student would be considered to have completed the period if he or she completed coursework constituting at least half of the days in the period, not including the days in scheduled breaks. It is not our intent in these final rules that students who have otherwise met that standard be considered withdrawn due to minor differences in the number of days that constitute 50 percent of a term, resulting from weekends falling between modules, the absence of breaks of five days or more, or terms with uneven numbers of days etc. Accordingly, we are revising proposed § 668.22(a)(2)(ii)(A)(2)(i) and (ii) to reflect that a student who withdraws from a program offered in modules who completes one module that includes 49 percent or more of the number of days in a payment period or a combination of modules that when combined contain 49 percent or more of the number of days in the payment period, will not be considered withdrawn. This change will ensure that a day or two difference in the number of days in each module does not become the determining factor in whether a student is considered withdrawn. We are further revising § 668.22(a)(2)(ii)(A)(2)(i) and (ii) to exclude scheduled breaks of five or more consecutive days and all days between modules from the number of days in the payment period used to calculate whether the module(s) completed by the student comprise 49 percent of the payment period.

Changes: We have revised § 668.22(a)(2)(ii)(A)(2)(i) and (ii) to reflect that a student who completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete is not considered to have withdrawn from a program offered in modules if the student successfully completes one module that includes 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules or combination of modules that when combined contain 49 percent or more of the number of days in the payment

period, excluding scheduled breaks of five or more consecutive days and all days between modules.

Comments: One commenter referenced the Department’s proposal in the preamble of the NPRM to amend § 668.22(l)(6) to clarify that a program is “offered in modules” if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. The preamble also stated that non-term programs would no longer be considered programs “offered in modules” in any circumstances. Specifically, the commenter requested the Department clarify whether a student who completes at least a half-time coursework in a subscription period before ceasing enrollment will be considered to have withdrawn from the payment period for purposes of R2T4.

Another commenter expressed overall support for the proposed changes to § 668.22(l)(6), clarifying that a program is “offered in modules” if the program uses a standard-term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. However, the commenter noted that the change, while discussed in the preamble, is not included in the amendatory text of the NPRM. The same commenter offered that, given these changes, use of the term “module” in § 668.10(a)(3), relevant to direct assessment programs, is confusing and an alternative term should be found to replace it.

Discussion: We appreciate the commenter bringing the omission of proposed § 668.22(l)(6) from the preamble to our attention.

A student in a subscription-based or nonterm program is not considered to have completed a payment period if the student completed at least half-time coursework in that payment period because the Department does not consider a nonterm program or a subscription-based program to be “offered in modules.” The nature of such programs—which are not required to set limits on the timeframes for students to complete coursework—are not suited to the use of modules, which presume a clear start and end date for the coursework that a student is attempting during a payment period. Such a timeframe is crucial to the incorporation of modules into the Department’s framework for the R2T4 calculations because the number of days

in the modules that a student is scheduled to complete in a payment period or period of enrollment comprise the denominator of the calculation that determines the amount of title IV, HEA program funds that the student earns for the period.

During meetings of the Distance Learning and Innovation subcommittee, the Department specifically expressed its intent to make changes to § 668.22 that would exclude non-term and subscription-based programs from the types of programs that are considered “offered in modules” and eliminate regulations specific to subscription-based and nonterm programs that previously incorporated the concept of modules. As noted above, these changes are discussed in the preamble to the NPRM but are not reflected in the amendatory text. The Department therefore believes that it is necessary to make a change to § 668.22(l)(6) in order to fully implement its proposed approach, which was approved by both the Distance Learning and Innovation subcommittee and the full negotiated rulemaking committee.

Finally, regarding the reference to modules in § 668.10, we believe the term is used correctly in that section and does not prejudice the amendatory text in § 668.22(l)(6). Proposed § 668.10(a)(3) requires an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. If it were the case that all direct assessment programs were subscription-based, this might be a source of confusion. However, many direct assessment programs are offered in terms using modules. We believe the clear statement in § 668.22(l)(6) that a program offered in modules is not considered to be a subscription-based program is sufficient to avoid any confusion between these two sections.

Changes: We have revised § 668.22(l)(6) to clarify that a program is “offered in modules” if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. The amendatory text in the final rule includes § 668.22(l)(6) which was inadvertently omitted in the NPRM.

Comments: One commenter requested that the Department clarify whether a completed module is one the student successfully completed, or simply one the student attended all the way through, *i.e.*, the module end date is in the past, the student began attendance and did not withdraw or stop attending;

the module grade(s) could be earned failing grades or incompletes.

Discussion: As discussed in the NPRM, the Department proposed to revise its approach to the treatment of students who complete some, but not all, of the coursework they were scheduled to attend during a payment period to ensure more equitable treatment of such students while maintaining the integrity of the title IV, HEA programs. In achieving that balance, the Department believes it is reasonable to require that a student successfully complete the module(s) comprising 49 percent of the payment period or half-time enrollment. This standard will have the added benefit of reducing confusion for institutions that are not required to take attendance, since passing grades will necessarily be the determining factor in whether a student is treated as a completer rather than a withdrawal. Successful completion of a module requires the student receive at least one passing grade for that module. Successful completion of coursework equal to or greater than the coursework necessary for half-time enrollment requires that the student receive a passing grade in a sufficient number of credits to comprise half-time enrollment status (as defined by the institution under applicable regulations) for the payment period.

A student who completes a module but receives all incomplete grades, or a combination of course incompletes and failing grades is not considered to have successfully completed that module unless at least one course incomplete converts to a passing grade before the deadline by which the institution must otherwise perform an R2T4 calculation for that student. Likewise, a student receiving all course incompletes or a combination of course incompletes and failing grades is not considered to have successfully completed the number of credits necessary to establish half-time enrollment unless a number of course incompletes sufficient to comprise half-time enrollment convert to passing grades before the deadline by which the institution must otherwise perform an R2T4 calculation for that student.

Changes: We have revised the provisions of § 668.22(a)(2)(ii)(A)(2) to reflect that a student who is enrolled in a program offered in modules is not considered to have withdrawn if the student successfully completes one module that includes 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days, and all days between modules or combination of modules that when combined contain 49 percent or more of

the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules.

Comments: One commenter noted that proposed § 668.22(a)(2)(i)(C) provides that for a student in a standard or nonstandard-term program, excluding a subscription-based program, the student is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on approved leave of absence, as defined in paragraph (d). However, § 668.22(a)(2)(i)(D), which provides that for a student in a non-term program or a subscription-based program, the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance, lacks a similar qualifier clarifying that a student who is unable to resume attendance within the prescribed period is not considered withdrawn if on an approved leave of absence.

Discussion: We appreciate the commenter bringing this unintentional discrepancy to our attention and clarify that no student on an approved leave of absence is ever considered to be withdrawn.

Changes: We have revised § 668.22(a)(2)(i)(D) to clarify that a student who is unable to resume attendance in a non-term or subscription-based program within a payment period or period of enrollment within 60 calendar days after ceasing enrollment is, nevertheless, not considered withdrawn if on an approved leave of absence.

Comments: One commenter asked the Department to consider whether, in view of the November 5, 2019 electronic announcement (EA) extending the maximum length of a semester to 21 weeks, proposed changes to § 668.22(a)(3)(ii) requiring students enrolled in programs offered in standard terms to confirm that they will enroll in another module within 45 days of ceasing enrollment to avoid being treated as withdrawn is still justified. The commenter observed that prior to the Department's revised policy for standard term length issued on November 5, 2019, it was uncommon for a module in a standard term program to begin more than 45 days following the end of a prior module. However, the new guidance that allows a standard term to be as long as 21 weeks, increases the likelihood that more than 45 days would elapse.

Discussion: While the commenter is correct in asserting that a standard term of 21 weeks, as permitted by the November 5, 2019 EA, increases the potential for a student to be scheduled to return to a course that begins more than 45 days after the end of the module the student ceased attending, we are not persuaded that this obviates the reasons for which the Department proposed the changes to § 668.22(a)(3)(ii). As explained in the preamble of the NPRM, the Department maintains the same concerns about long periods of non-attendance for standard term programs as it does for nonstandard-term and non-term programs and believes that students should be treated consistently in these situations. The increased likelihood for these extended periods of non-attendance to occur with longer standard terms, we believe, argues in favor of this requirement.

Changes: None.

Comments: Under proposed § 668.22(l)(9), a student in a program offered in modules is scheduled to complete the days in a module if the student's coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds for the payment period or period of enrollment. One commenter requested that the Department clarify whether the most recent determination of enrollment status would be used for this purpose or whether the Department is referring to a specific initial or "census" date, or whether this can be a matter of institutional policy. The commenter asked, if the latter, will institutions have the latitude to implement a policy with multiple points of determination during the term much like existing policies with multiple Pell recalculation dates?

Discussion: In the preamble to the NPRM, the Department proposed to use the student's schedule at a fixed point to determine the number of days the student is scheduled to attend during the period for R2T4 purposes. Using this approach, subsequent fluctuations in the student's enrollment would have no effect on the number of days in the denominator of the R2T4 calculation if the student withdraws, resulting in a greater degree of certainty for students, a diminished likelihood of improper payments, and reduced administrative burden for institutions performing such calculations. In order to allow institutions flexibility in adopting a policy that is practical for their program(s), we are not prescribing a specific date that institutions must use as the fixed point for determining the number of days the student is scheduled to attend. A Pell recalculation date or

census date is an allowable option, as would be some other date determined by the institution. An institutional policy that includes multiple dates, such as is permitted for Pell recalculation dates, is acceptable.

Changes: None.

Comments: One commenter noted that the proposed amendatory text in § 668.22(a)(2)(ii)(A)(3), addressing written confirmation for a payment period or period of enrollment in which courses in the program are offered in modules, specifically allows “electronic confirmation,” whereas § 668.22(a)(2)(ii)(A)(4) and (5) pertaining to subscription-based programs and non-term programs respectively, make no reference to the use of electronic confirmation.

Discussion: We thank the commenter for bringing this inconsistency to our attention. It is the Department’s longstanding policy that, in the absence of regulations specifically requiring that a notification or authorization be sent via U.S. mail, a school may provide notices or receive authorizations electronically. It is further permissible to use an electronic process to provide required notices and make disclosures by directing students to a secure website that contains the required notifications and disclosures. Because of this, we believe specific mention, in any regulation, of the option to distribute required notifications and disclosures, or collect required authorizations and confirmations through electronic means, is redundant and may cause confusion.

Changes: We have revised § 668.22(a)(2)(ii)(A)(3) to remove the reference to “electronic confirmation.”

Satisfactory Academic Progress (§ 668.34)

Comments: Several commenters expressed general support for the proposed changes to satisfactory academic progress (SAP). However, some of those commenters asked that the Department consider amending the proposed rule to account for enrollment status in determining whether a student is meeting maximum timeframe requirements as measured in calendar time. One commenter objected to allowing institutions to measure maximum timeframe in calendar time because it could negatively affect students for whom life challenges preclude ongoing full-time attendance. The commenter suggested an alternative of allowing a maximum timeframe of 200 percent of program length. The commenter also suggested grandfathering students under existing standards as another alternative.

Discussion: We appreciate the support for our proposals to eliminate redundancy and provide greater flexibility in the application of SAP requirements. In response to those commenters who suggested that the definition of “maximum timeframe,” as measured in calendar time, accommodate differences in enrollment status, we note that the limitation on maximum timeframe of 150 percent of the published length of the program (for an undergraduate program) is an intentionally static measure designed to ensure completion of that program within a reasonable time. For example, a four-year, 120 credit Bachelor of Arts program may have a maximum timeframe of 180 attempted credits or six years. Measuring maximum timeframe for the program in credit hours, with pace determined by dividing the cumulative number of successfully completed credit hours by the cumulative number of attempted hours, does account for variances in enrollment status. However, this is because credit hours are measured only as attempted, not because students who attend part-time are permitted additional hours beyond 180. Calendar time elapses at a constant rate regardless of how many credit hours a student attempts or completes. As a result, maximum time frame expressed in calendar time is, necessarily, less flexible with respect to variances in enrollment status. Factoring part-time enrollment into the measurement of students’ pace would potentially result in a maximum timeframe, as expressed in calendar time, of greater than 150 percent of published program length.

We do not agree that allowing institutions to measure maximum timeframe in calendar time will negatively affect students whose personal situations preclude full-time attendance in a program. First, this flexibility was not proposed with the expectation that large numbers of institutions would adopt calendar time in lieu of credit hours. Most institutions will continue to express maximum timeframe for their programs in credit hours which, as described above, does account for differing enrollment statuses throughout a student’s matriculation. Those institutions opting to measure in calendar time will likely do so having determined that it makes better sense for the type of programs they offer, e.g., competency-based programs or programs requiring a prescribed set of courses in each term for all students. Last, we remind commenters that a student who fails to meet SAP, including for reasons related to

maximum timeframe, may file a SAP appeal (if the institution’s SAP policy permits such appeals).

Changes: None.

Foreign Schools (§§ 600.52 and 600.54)

Comments: Two commenters supported retaining the current exception for independent research done by an individual student in the United States. The provision permits not more than one academic year of research conducted during the dissertation phase of a doctoral program (and where the research can only be performed at a facility in the United States). The provision also permits an eligible foreign institution to enter into a written arrangement with an eligible institution within the United States to provide no more than 25 percent of the courses required for a student’s eligible program. However, both commenters requested that the proposed regulation be broadened such that a doctoral student, having already completed 25 percent of his or her eligible program by taking coursework in the United States, would be permitted an additional full academic year to conduct independent research there. One of those commenters opined that the research phase of a doctoral program can take years and should not be subject to an artificial time limit that could preclude students from pursuing a program that provides insights into their chosen field. The commenter concluded that since the research phase of a doctoral program is separate and distinct from the classroom phase, it is both logical and equitable that students be permitted to undertake research in the United States without regard to whether or not they have taken a portion of their classroom study in that country.

Responding to the Department’s request for comments on whether written arrangements for students studying in the U.S. should include organizations that are not eligible institutions, one commenter replied in the affirmative. The commenter explained that a student’s home institution is responsible for designing and supervising its students and that any written arrangement involving another entity, whether an eligible institution or not, is ultimately subject to the approval and review of the home, eligible institution. The eligible institution must itself be approved to offer postsecondary education by a recognized authority in its home country that provides oversight that is the equivalent of that provided in the United States. The commenter further stressed that, as proposed, the rules regarding written arrangements would

circumscribe the ability of eligible foreign institutions to offer diverse programs that include partnerships with other universities that specialize in certain topics, and entities which provide unique experiences within a student's program of study, as well as access to career-enhancing internships.

One commenter supported the proposed revisions to § 600.54(c) that would permit written arrangements between an eligible foreign institution and an ineligible entity, provided the ineligible entity is an institution that satisfies the definition in paragraphs (1)(iii) and (iv) of "foreign institution" and the ineligible foreign institution provides 25 percent or less of the educational program. The same commenter requested that, given the potential for ongoing ramifications related to the COVID-19 pandemic, the Department increase the percentage of study permitted at recognized ineligible foreign institutions to as much as 50 percent. This, it was suggested, would provide students the flexibility to navigate the changing situation without having to appeal for special dispensation in future circumstances that are impossible to predict.

Two commenters asked that the Department reconsider the prohibition on foreign institutions offering any portion of an eligible program through distance education found in current § 600.51(d). One of those commenters suggested that there is sufficient ambiguity in the applicable statute on which to base permitting some use of distance education, especially in view of the temporary flexibilities extended under the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act.²⁰ Another commenter expressed the opinion that temporary flexibility, under the CARES Act, for foreign institutions to use distance education is tacit acknowledgement by Congress of the difficulties American students face as a result of the ban on distance education. In view of this, the commenter asked that the Department modify its regulations to permit American students to take up to 25 percent of their program of study via distance education.

Finally, one commenter rejected the proposal to allow students enrolled in foreign institutions to complete up to 25 percent of a program in the United States based on concerns that, in conjunction with other Department rule changes, there would be no way to determine the fiscal and academic quality of such foreign institutions, and the potential for the change to result in

opening the door to millions of students receiving degrees without completing the requirements deemed necessary by academic and industry leaders. The commenter further expressed opposition to foreign institutions gaining access to, and leveraging control over title IV financial aid, explaining that this would be a direct and overtly questionable act, constituting an ethical breach, and not in the best interest of the Department, American higher education institutions, or our nation's students.

Discussion: We appreciate the commenters' concerns over the need for universities to make flexible and diverse research opportunities available for doctoral candidates whose specialized research often takes place over several years, and requires travel to specific locations, including in the United States. However, the Department is not convinced that providing those opportunities necessitates or warrants allowing students who have already completed 25 percent of their programs in the United States to spend an additional year conducting research in the United States. This "stacking" would create the potential for a student enrolled in a four-year doctoral program at an eligible foreign institution to complete half of that program in the United States. As explained in the preamble of the NPRM, the Department's intention in proposing these rules is to enhance the range of educational opportunities available to U.S. students enrolled in eligible foreign institutions, aligning them with those enjoyed by students attending domestic institutions, while adhering to the basic principle that U.S. students borrowing from the Direct Loan program for enrollment in a program at an eligible foreign institution should reside in the country where that institution is located. We believe this balance to be equally necessary at the graduate and undergraduate level.

The Department is declining to permit stacking of the allowance for a student to complete up to 25 percent of their program at an eligible institution in the United States under proposed § 600.52. However, an exception is permitted for independent research done by an individual student in the United States for not more than one academic year for research conducted during the dissertation phase of a doctoral program (where the research can only be performed at a facility in the United States) under current § 600.51. Nevertheless, we wish to clarify that the proposed changes to § 600.52 do not preclude an institution from allowing doctoral students to study and/or conduct research in the United States

using the flexibilities provided in each section. The examples below illustrate the practical application of both provisions.

Example 1

A student in the dissertation phase of her three-year doctoral program requests permission from the institution to conduct research in the United States. The student has not completed any portion of her program in the United States. Having concurred that her research can only be performed at a facility located there, the institution approves one year of research time in the United States.

Example 2

A student enrolled in a three-year doctoral program requests to study at an institution in the United States under a written arrangement. The home institution approves her request to take 12 credits at the Ph.D. level over two 16-week semesters, 24 percent of the length of the program as determined under proposed § 668.5(g) (*i.e.*, dividing the number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the eligible U.S. institution by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program). Subsequently, while in the dissertation phase of her program, the student requests to conduct research in the United States. Because the one-year limit on the amount of time a doctoral student may remain in the United States in order to conduct research is measured in calendar time, it is necessary for the institution to consider any time the student has already spent studying or conducting research there. With 32 weeks of previous study factored in, the student is approved for an additional period of research in the United States of up to 20 weeks.

We thank the commenter who responded to our request for comments on whether written arrangements for students studying in the U.S. should include organizations that are not eligible institutions. With respect to internships, we agree with the commenter that limiting these to eligible institutions would circumscribe opportunities for U.S. students attending eligible foreign institutions in a way that is contrary to the intent of proposed regulations. The preponderance of internship opportunities is not at eligible postsecondary institutions but rather with corporations, other businesses, and non-profit organizations other than

²⁰ S. 3548, 116th Congress (2020).

postsecondary institutions. Given the extent to which relevant internship experience can enhance a student's educational experience and affect a graduate's employment prospects, we are convinced that U.S. students attending eligible foreign institutions should not be placed at a disadvantage relative to their counterparts attending domestic institutions, and should have the same opportunities to pursue internships in any country including the United States.

While appreciative of the commenter's position that increased latitude be accorded coursework as well, we are not similarly persuaded of the need to allow U.S. students attending eligible foreign institutions to take coursework in the United States, as part of their eligible program, at any entity other than an eligible institution. Unlike the situation in foreign countries, where another eligible institution may not exist or be within a reasonable travel distance for ground-based instruction, there is no lack of eligible institutions in the United States with which to execute a written arrangement. We believe the partnerships with other universities in specialized topics and unique student experiences referred to by the commenter can readily be secured through written arrangements with one or more of the 6,000 plus eligible institutions in the United States. In addition, we are concerned that an institution in a foreign country may not have sufficient opportunity to enforce elements of a written arrangement with a non-eligible entity located in the U.S., making such arrangements inherently risky.

As a result, we are amending proposed § 600.52 (Foreign institution) to remove internships and externships from the list of program-related activities that may only be performed in the United States at an eligible institution, and specifying that internships and externships may be provided by an ineligible organization as described in proposed § 668.5(h)(2). Proposed § 668.5(h)(2) clarifies that the limitations on written arrangements are not applicable to the internship or externship portion of a program if the internship or externship is governed by the standards of an outside oversight entity, such as an accrediting agency or government entity, that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.

We thank the commenter for writing in support of the proposed revisions to

§ 600.54(c) that would permit written arrangements between an eligible foreign institution and an ineligible entity (other than in the United States), provided the ineligible entity is an institution that satisfies the definition in paragraphs (1)(iii) and (iv) of "foreign institution" and the ineligible foreign institution provides 25 percent or less of the educational program. However, we disagree with the commenter that the percentage of a program that is provided by the ineligible entity should be increased to 50 percent. Domestic institutions entering into a written arrangement with an ineligible entity to offer more than 25 percent, but less than 50 percent of an eligible program, must obtain accreditor approval. No similar protocol exists for foreign institutions. Requiring that a non-eligible entity satisfy the regulatory definition of "foreign institution" does reasonably assure some degree of program integrity. However, the Department is not persuaded that this is an adequate substitute for accreditor approval where the percentage of the eligible program offered by an ineligible entity would be greater than 25 percent. Moreover, it would create a standard for eligible foreign institutions lower than that applied to domestic institutions.

In response to the commenters who asked that the Department reconsider the prohibition on foreign institutions offering any portion of an eligible program through distance education reflected in current § 600.51(d), we note that this prohibition (sec. 481(b)(3) of the HEA) is statutory and provides no flexibility. Although the CARES Act does authorize the use of distance education by eligible foreign institutions, and we believe that students benefit from having access to distance learning opportunities, including while enrolled at a foreign institution, that authority is temporary and tied to the national emergency declared on March 13, 2020.

We disagree with the commenter who objected to allowing students enrolled in foreign institutions to complete up to 25 percent of a program in the United States, and asserted that the Department would be unable—(1) To determine the fiscal and academic quality of such foreign institutions; or (2) to prevent millions of students from receiving degrees without completing the requirements deemed necessary by academic and industry leaders. We further disagree that these changes facilitate foreign institutions gaining access to or leveraging control over title IV financial aid. First, eligible foreign institutions already participate in the Direct Loan program. The changes

proposed in the NPRM do not, in any way, increase the scope of foreign institutions' participation in the title IV programs, nor do they loosen the existing financial responsibility standards that eligible foreign institutions must adhere to. Regarding academic quality and the potential for students to receive degrees that their work does not merit, we note that the proposed regulations make no changes to the current rules governing institutional eligibility. Lastly, we are uncertain of what the commenter means with reference to foreign institutions gaining access to or leveraging control over the title IV programs. As previously discussed, eligible foreign institutions already participate in the Direct Loan program, and the title IV, HEA programs are not structured in such a way that it is possible for any institution, foreign or domestic, to leverage control over them.

Changes: The definition of Foreign institution in proposed § 600.52 (Foreign institution, paragraph (1)(ii)(C)) is changed to remove internships and externships from the list of program-related activities that may only be performed in the United States at an eligible institution. Paragraph (1)(ii)(C)(2) is added to allow participation in an internship or externship provided by an ineligible organization as described in § 668.5(h)(2).

Request for Review (§ 668.113)

Comments: One commenter expressed strong support for the proposed changes to § 668.113, establishing that if a final audit determination or final program review determination includes liabilities resulting from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary would rely on the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the work associated with the institution's credit hours is consistent with commonly accepted practices in higher education.

Another commenter, offering qualified support for the proposed changes, suggested that the Department clarify which fields would be suitable for distance education as the criteria for applying the standards in § 668.113. To make these determinations, the commenter offered that the Department should analyze whether the use of distance education is appropriate for and sustains the quality of instruction in those online programs where a final program review or audit determination has assessed liabilities.

Discussion: We thank the commenter who expressed strong support for these proposed changes. In response to the commenter who suggested the Department clarify which fields are suitable for distance education and make determinations regarding the appropriateness of that mode of instruction for individual programs, we note that the applicable statute and regulations place no constraints on the fields of study in which an institution may offer instruction using distance education, nor do they grant the Department authority to make such determinations. Assessing the quality of an educational program offered by an eligible postsecondary institution or establishing if that program may be offered using distance education is entirely within the purview of the institution's accrediting agency and, in some cases, the State agency with oversight responsibilities. Were an institution to offer a program through distance education that its accrediting agency or State agency had determined may not be taught using that modality, the Department would hold the institution potentially liable for all of the title IV funds disbursed to students enrolled in that program. The proposed changes to § 668.113 do not, in any way, compromise the Department's oversight authority in this area and, if anything, clarify that institutions are accountable to accreditor and State agency requirements in offering programs through distance education.

Changes: None.

Past Performance (§ 668.174)

Comments: Several commenters agreed that the proposal that an institution is not financially responsible if a person who exercises substantial ownership or control over an institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan approved by that institution's accrediting agency and/or state regulatory body. The commenters believed the proposal change will help to protect students attending institutions that close and ensure that individuals affiliated with an institution that closed without a viable teach out plan, will not participate again in the title IV programs.

Discussion: The Secretary thanks the commenters for their support.

Changes: None.

Factors of Financial Responsibility (§§ 668.15 and 668.171–668.175)

Comments: One commenter questioned the need for, and implications of, the proposal to apply

the financial standards in § 668.15 to institutions that undergo a change of ownership and control. The commenter noted that historically, the Department has used only two of the financial measures in this section—the acid test ratio and positive tangible net worth or positive unrestricted net asset standards—to evaluate institutions that changed ownership and control. The commenter argued that applying, or potentially applying, all of § 668.15 to changes in ownership would constitute a significant change in Department practice that would more appropriately call for a substantive rulemaking to clarify the relationship between the two sections of the regulations that address financial responsibility—§§ 668.15 and 668.171 through 668.175. In addition, the commenter stated that the proposed change to the title and applicability of this section was presented during negotiated rulemaking as a technical update rather than a substantive change.

Given the significant concern of many institutions and others for the Department to initiate a rulemaking on financial responsibility standards and the composite score, the commenter urged the Department to withdraw this proposed change and defer making revisions to changes of ownership standards to a broader rulemaking discussion.

Discussion: In as much as the Department intended to clarify that § 668.15 applies only to institutions that undergo a change of ownership and control, we agree with the commenter that a broader discussion is warranted, particularly since the Department intends to conduct future negotiated rulemaking for the financial responsibility standards, including those applicable to changes of ownership.

Changes: We have withdrawn the proposed changes to § 668.15.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) determines 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.

OMB has determined that this rule is an economically significant action and would have an annual effect on the economy of more than \$100 million. This regulation will enable institutions to harness the power of innovation to expand postsecondary options, leverage advances in technology to improve student learning, and allow students to progress by demonstrating competencies rather than seat time. According to the Department's FY 2020 Budget Summary, Federal Direct Loans and Pell Grants accounted for almost \$124 billion in new aid available in 2018. Given this scale of Federal student aid amounts disbursed yearly, the addition of even small percentage changes could result in transfers between the Federal Government and students of more than \$100 million on an annualized basis.

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).

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866, and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The rule is considered an E.O. 13771 deregulatory action. We believe the effect of this regulation will be to remove barriers for development of distance and direct assessment programs and their participation in title IV, HEA funding, reduce the Department's role in approving programs, and promote innovation in higher education. We believe this regulatory action will be, in sum, deregulatory.

As required by Executive Order 13563, the Department has assessed the potential costs and benefits, both

quantitative and qualitative, of this regulatory action, and we are issuing these regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that the regulations are consistent with the principles in Executive Order 13563.

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

In accordance with the Executive orders, the Department has assessed, both quantitatively and qualitatively, the potential costs and benefits of this regulatory action.

In this regulatory impact analysis, we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, and regulatory alternatives we considered.

Elsewhere in this section, under Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

Need for Regulatory Action

The emphasis in the regulations is on clarifying the distinctions between distance education and correspondence courses, affirming the permissibility of team teaching models, improving worker mobility by accommodating differences in licensure requirements across State lines, simplifying conversions between clock and credit hours to enable students to meet licensure requirements while also earning credits more likely to transfer to other institutions, establishing regulations regarding subscription-based programs so that institutions can confidently implement programs that measure competencies rather than seat time, and reducing barriers that limit the number of direct assessment programs available to students.

These changes benefit institutions by enabling them to employ innovative methods and models without undue risk of inadvertently violating title IV requirements. These options benefit students by expanding the number of postsecondary education opportunities available to them, including those who may have been poorly served by more traditional “seat-time” instructional models. By providing a larger variety of postsecondary options and strategies such as blended learning, adaptive learning, and competency-based education, students may be much more

likely to persist in and complete their programs and institutions will be much more equipped to drive student success.^{21 22} The regulations define or clarify terms such as “correspondence course,” “distance education,” and “regular and substantive interaction,” and would streamline the current regulations to reduce the complexity of performing clock-to-credit hour conversions, disbursing aid to students enrolled in subscription-based programs, and ensuring that programs align with program length restrictions, while improving worker mobility across State lines. In some instances, the definitions clarify terms used in, but not defined by, the HEA. In other cases, the regulations codify program administration requirements that had previously been communicated only through sub-regulatory guidance, to give institutions the certainty they need to expand the postsecondary education options that they make available to students.

For instance, while CBE programs using direct assessment have been permitted by statute since 2006, most institutions continue to evaluate progress in CBE programs based on measures of time (or time equivalency) rather than a student’s demonstration of competency. This is largely due to uncertainties regarding how to disburse and calculate return-to-title IV for students enrolled in programs that measure competencies rather than time.

As a result, the potential benefits of CBE programs, such as accelerated learning and completion as well as providing better assurances to employers that graduates are prepared for workplace demands, were mitigated because programs still were required to adhere to time-based title IV disbursement methodologies.²³ These regulations provide needed certainty to institutions about how to disburse aid to students enrolled in CBE programs. The regulations also eliminate a significant legal obstacle to the adoption of direct assessment CBE programs by permitting title IV-eligible programs to be offered partly through direct assessment and partly using credit or clock hours. Eliminating this restriction makes it easier for institutions to experiment with direct assessment without having to immediately establish and implement

a program offered entirely through direct assessment.

The regulations acknowledge that subscription-based programs are permissible and provide instructions to institutions about how to disburse aid and evaluate satisfactory academic progress for students enrolled in these programs. These regulations also reduce the steps involved in gaining approval for direct assessment programs, which reduces the burden associated with administering these programs and reduces the risk that an institution could invest resources in designing a high-quality program that the Department denies or unnecessarily delays. Institutions that better understand the rules for administering Federal student aid in circumstances that depart from traditional delivery models are more likely to invest in developing one of those models, and administering it properly, thus avoiding improper payments and improving the student experience.

The regulations also acknowledge that, given the cost of developing sophisticated technology-driven instructional tools or building specialized facilities on college campuses, a rational approach may be to rely on a third-party provider with a much broader reach than an individual institution or on industry partners who have other incentives to maintain state-of-the-art facilities and equipment. Until institutions fully understand what is permissible in the development and implementation of innovative delivery models, institutional leaders will remain largely risk averse, and solutions that would otherwise help large numbers of students will not be made available to them.

Finally, the regulations change the return of title IV funds and satisfactory academic progress provisions to reduce administrative burden and increase flexibility for many postsecondary institutions offering innovative programs. Reducing the amount of burden and expense associated with the administration of the title IV, HEA programs for unique or non-traditional programs will also encourage institutions to offer programs that do not fit into the traditional mold and improve the available offerings for students.

The Department believes this regulatory action will have an annual effect on the economy of more than \$100 million. If students have more postsecondary options to select from and if more students persist to completion, the number of students who enroll for the full duration of a program may increase. For example, although

²¹ www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html.

²² www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.

²³ www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html.

extremely limited in availability now, if there were fewer barriers to starting a direct assessment program, there could be an increase in the number available, and perhaps adult learners would find this to be a more satisfying way to learn, or the only way they can juggle the demands of work, school, and family.

While a limited number of experienced institutions with established direct assessment programs may increase their program offerings, it is difficult to predict whether larger numbers of students will be attracted to higher education, in general, or if the current number of students would be distributed differently across the landscape of available programs. Direct assessment programs may be considerably more attractive to busy adult learners who would get credit for what they know from prior work or life experience.²⁴

The demand for distance education programs has visibly increased in recent years. In 2003–04, 15.6 percent of undergraduate students took at least one distance education class and only 4.9 percent of students were exclusively in distance education while by 2015–16, 43 percent of undergraduate students took at least one distance education class and approximately 11 percent were in exclusively distance

programs.²⁵ In many cases, more students are taking at least one online class while enrolled in a traditional ground-based program.

Correspondingly, there has also been significant growth in the number of students who are enrolled in exclusively online programs.²⁶ We have also seen significant redistribution of online enrollments as some large non-profit and public institutions have increased their market share, while at the same time some proprietary schools that once dominated distance education delivery are suffering sizeable enrollment losses and even closures. Overall, growth in the number of students enrolled exclusively online has been moderate, increasing 22 percent between 2013 and 2018. The number of students taking at least one online class has increased 28 percent between 2013 and 2018.^{27 28 29}

While current providers of CBE and direct assessment learning do so through distance learning modalities, it is possible that, as regulatory requirements become clearer, those institutions that primarily provide ground-based education will also develop and implement CBE and direct assessment programs. On the other hand, programs that lead to licensure may be slower to introduce CBE or direct assessment models since

licensing boards may resist change—although in the wake of COVID–19 we are seeing greater receptivity among licensing boards to distance learning.³⁰

As can be seen in Table 1 below, which is based on data collected by the National Center for Education Statistics (NCES), while the percentage of students who are enrolled exclusively in online programs has increased slightly between 2013 and 2018, the largest growth has been in the percentage of students who take at least one, but not all, of their classes online. The number of students engaged in online learning grew between 2013 and 2018 from approximately 5.5 million to 6.9 million. This suggests that learning modalities will change as innovation creates a broader range of options. However, despite the increase in enrollments in online options, the total number of postsecondary enrollments has been in decline for the last several years. Therefore, it is clear that an increase in the percentage of students who enroll in online classes will, alone, not likely result in overall increases in postsecondary enrollments. College enrollments are most dependent upon economic cycles, so changes in delivery models may be less important than macroeconomic conditions in determining total enrollments.

TABLE 1

All institutions	Total students (#)	No-distance education courses (%)	At least one distance course, not all (%)	All-distance education courses (%)
2018	20,008,434	65.3	18.4	16.3
2017	19,765,598	66.3	18.0	15.7
2015	19,977,270	70.2	15.4	14.4
2013	20,375,789	72.9	14.1	13.1
4-year (total):				
2018	13,901,011	64.3	18.0	17.6
2017	13,823,640	65.8	17.3	16.9
2015	13,486,342	69.7	14.4	15.9
2013	13,407,050	73.0	12.2	14.8
2-year (total):				
2018	6,107,423	67.6	19.2	13.2
2017	5,941,958	67.5	19.5	13.0
2015	6,490,928	71.2	17.6	11.2
2013	6,968,739	72.7	17.6	9.8
Public:				
2018	14,639,681	66.1	21.5	12.3
2017	14,560,155	67.8	20.8	11.4
2015	14,568,103	72.0	18.0	10.0
2013	14,745,558	74.6	16.7	8.7
Private Non-Profit:				
2018	4,147,604	69.7	10.1	20.2

²⁴ onlinelibrary.wiley.com/doi/full/10.1002/cbe2.1008.

²⁵ U.S. Department of Education, National Center for Education Statistics, Digest of Education Statistics 2018, Table 311.22. Number and percentage of undergraduate students enrolled in distance education or online classes and degree programs, by selected characteristics: Selected years, 2003–04 through 2015–16. Available at

nces.ed.gov/programs/digest/d18/tables/dt18_311.22.asp.

²⁶ www.insidehighered.com/digital-learning/article/2019/12/11/more-students-study-online-rate-growth-slowed-2018.

²⁷ nces.ed.gov/programs/digest/d18/tables/dt18_311.15.asp.

²⁸ nces.ed.gov/programs/digest/d14/tables/dt14_311.15.asp.

²⁹ U.S. Department of Education, National Center for Education Statistics, IPEDS, Spring 2019, Fall Enrollment component (provisional data), Number and percentage distribution of students enrolled at title IV institutions, by control of institution, student level, level of institution, distance education status of student, and distance education status of institution: United States, fall 2018.

³⁰ ij.org/wp-content/themes/ijorg/images/Iw2/License_to_Work_2nd_Edition.pdf.

TABLE 1—Continued

All institutions	Total students (#)	No-distance education courses (%)	At least one distance course, not all (%)	All-distance education courses (%)
2017	4,106,477	71.3	9.5	19.2
2015	4,063,372	75.0	8.5	16.5
2013	3,974,004	80.0	6.9	13.1
Private For-Profit:				
2018	1,221,149	41.0	8.6	50.4
2017	1,098,966	29.0	11.1	59.9
2015	1,345,795	35.9	8.6	55.5
2013	1,656,227	40.7	7.6	51.7

Growth in the number and percentage of online learners was especially strong among private not-for-profit institutions, where students who took all courses through distance education increased over 54 percent, from 13.1 to 20.2 percentage points. At 2-year institutions, the percentage of students taking all courses online increased from 9.8 to 13.2 percentage points, almost a 35-percent jump from 2013 to 2018. However, total enrollments at 2-year institutions during that same time period decreased by over 850,000 students.

While the percentage of students enrolled exclusively in distance learning is highest among proprietary institutions (60 percent), relatively few students are enrolled at these institutions (only approximately 1 million of the nearly 20 million enrolled in postsecondary education in 2017 were enrolled at proprietary institutions). There have been sizable decreases in total enrollments at proprietary institutions between 2013 and 2017, and in 2017 only 659,379 students were enrolled exclusively

online at proprietary institutions as compared to 821,296 students who were enrolled exclusively online at private non-profit institutions and 1.6 million who were enrolled exclusively in online programs at public institutions. These data suggest that increases in enrollments among exclusively online courses do not necessarily result in increased number of total postsecondary enrollments.

The information about the number and distribution of distance education programs and students has clearly been temporarily altered in 2020 because of COVID-19 and the disruption of ground-based campus operations during times of mandatory or recommended quarantine. While some students may have withdrawn because of COVID-19 related circumstances, the Department believes that most students continued their program, albeit at least temporarily in a distance format. The extent to which this transformation continues in the remainder of 2020 and beyond will depend on the further developments with respect to COVID-19, the experience students have in their

distance education courses and the value they place on campus activities, and the decisions institutions make about resuming on-campus programs. Additionally, as noted by the commenter, adverse economic conditions have been associated with increases in postsecondary enrollment, particularly for programs with an emphasis on career training and development. Postsecondary enrollment increased substantially from 2007–08 to 2010–11 as students responded to the recession during that time.³¹ Table 2 reflects this increase and the significant growth in proprietary enrollment during this period. The shape of the economic recovery from COVID-19 and the experience and outcomes of those who pursued postsecondary credentials during the last recession may affect how big an increase is seen in future postsecondary enrollment. The Department believes it is reasonable to expect some additional increase in new distance education students, the possibility of which is incorporated into the cost estimate in the *Net Budget Impact* section of this RIA.

TABLE 2³²—TRENDS IN FALL ENROLLMENT 2007–2013 BY CONTROL OF INSTITUTION

Year	Public		Private		Proprietary		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
2007	13,603,772	.....	3,595,466	.....	1,478,231	.....	18,677,469	.....
2008	14,090,863	3.6	3,684,190	2.5	1,778,731	20.3	19,553,784	4.7
2009	14,936,402	6.0	3,793,751	3.0	2,123,270	19.4	20,853,423	6.6
2010	15,279,455	2.3	3,881,630	2.3	2,430,657	14.5	21,591,742	3.5
2011	15,251,185	-0.2	3,954,173	1.9	2,368,440	-2.6	21,573,798	-0.1
2012	15,000,302	-1.6	3,973,422	0.5	2,174,457	-8.2	21,148,181	-2.0
2013	14,856,309	-1.0	3,990,858	0.4	2,000,883	-8.0	20,848,050	-1.4

The CBE marketplace overall has also seen significant attention from within

the postsecondary education community and general public, but the

direct assessment component of CBE has not, potentially because of the

³¹ Foote, A. & Grosz, M. (2019). *The Effect of Local Labor Market Downturns on Postsecondary Enrollment and Program Choice*. MIT Press Journals.

Schmidt, Erik, "Postsecondary Enrollment Before, During, and Since the Great Recession," P20–580, *Current Population Reports*, U.S. Census Bureau, Washington, DC, 2018. (<https://www.census.gov/>

<content/dam/Census/library/publications/2018/demo/P20-580.pdf>).

Barr, Andrew, and Sarah Turner. 2012. "Out of a Job and into School: Labor Market Policies and College Enrollment during the Great Recession." Working Paper, University of Virginia.

³² U.S. Department of Education, National Center for Education Statistics, *Digest of Education*

Statistics 2018, Table 303.20: Total fall enrollment in all postsecondary institutions participating in title IV programs and annual percentage change in enrollment, by degree-granting status and control of institution: 1995 through 2017. Available at https://nces.ed.gov/programs/digest/d18/tables/dt18_303.20.asp. Last Accessed May 26, 2020.

length of time it takes for the Department to review applications for direct assessment programs, and because several audits by the Department's OIG in the past decade have been sharply critical of the oversight of direct assessment by the Department and accrediting agencies.^{33 34 35} The Department also believes that another recent report by the Department's Inspector General, which found one institution's team teaching model did not comply with title IV, HEA requirements, may have deterred other institutions that were considering the development of CBE programs. Even the threat of an audit finding recommending the return of hundreds of millions of dollars in title IV funds could dissuade institutions from pursuing such innovations. This may still be the case even if audit recommendations are not accepted by the Department.³⁶

The Department's data does not break out information about competency-based education students to the same extent as it does for distance education students, but a number of surveys and articles provide some background on existing programs. According to the 2018 National Survey of Postsecondary Competency-Based Education (NSPCBE), co-authored by American Institutes of Research (AIR) and Eduventures, a majority of respondents believe that CBE will experience strong growth although they also perceive that a number of barriers to implementation remain.³⁷ The survey was sent to over 3,000 institutions including primarily 2- and 4-year institutions listed in the Integrated Postsecondary Education Data System (IPEDS). About 69 percent of respondents were 4-year institutions and 31 percent were 2-year institutions. A total of 501 institutions replied to the survey, representing a survey response rate of 16 percent. It is possible that the survey may suffer from selection bias if the institutions that completed the survey were more likely to be those institutions considering adding CBE programs, which would mean that the survey results could not be accurately projected to the full postsecondary system.

Four-hundred-thirty of the 501 respondents reported being interested in, or in the process of, implementing CBE programs, while 71 indicated no interest. Some 57 institutions stated that they were currently offering at least one CBE program, with these institutions, in aggregate, offering a total of 512 CBE programs. The largest portion of programs (427 of 512) was at the undergraduate level with 85 at the graduate level. The highest concentration of CBE programs was in the fields of nursing and computer science. Given the requirement for nursing students to participate in clinical rotations, it is likely that CBE programs in nursing were designed to target students who are already registered nurses (with an associate degree) and now wish to complete a bachelor's degree.

Over 50 percent of institutions reported CBE undergraduate enrollments of no more than 50 students per program while only a small number of institutions (approximately 4 percent) enrolled more than 1,000 undergraduate students in CBE programs at their institution. Thus, assuming these findings are characteristic of the overall CBE landscape, it appears that most institutions are still in the early stages of implementing CBE programs with only a handful of institutions operating large-scale programs.

Similar results were described in the 2019 survey that had 602 respondents with 54 percent from public institutions, 42 percent from private, nonprofit institutions and 4 percent were from proprietary institutions.³⁸ Of the 588 programs offered by 64 institutions, 84 percent were undergraduate and 16 percent were graduate programs. The majority of existing programs remain small, with 53 percent with enrollment under 50 students.³⁹ As in the 2018 survey, popular fields for competency-based programs include nursing, computer and information sciences, and business administration.⁴⁰ Seventy-seven percent of responding institutions with competency-based programs reported that they are eligible for Federal financial aid. Of those, 75 percent report they maintain that eligibility by using a course structure to map to credit hours.⁴¹

One of the three top barriers to implementing CBE programs, as cited by over 50 percent of the responding institutions, was "Federal student aid regulations." The other two key barriers to entry included the need to change business processes and the high costs associated with start-up. While the survey results point to a guarded optimism on the growth of CBE programs, this optimism is tempered by a perception that the regulatory climate needs to be flexible and conducive to expansion of CBE programs; however, the report suggests that it is crucial to preserve consumer protections.

The Department agrees with this theme, as we noted in the executive summary of the NPRM that "the purpose of these distance education and innovation regulations is to reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers."

Therefore, these final regulations send a signal to the higher education community that the Department is committed to reducing regulatory burden to make way for responsible innovations, such as CBE programs and direct assessment programs. Further, the regulations would enable institutions to develop new title IV disbursement models, such as subscription-based programs, to align the delivery of aid with programs that allow students to complete as many classes as possible during a given period of time, but to also pace themselves appropriately based on other demands and learning needs.

While technology has transformed the way almost every industry in America does business, it may have not fundamentally transformed the way we educate students, monitor their progress, or diagnose when and what kind of additional support services a student needs. Many institutions are educating postsecondary students today in a very similar manner to methods and practices used a hundred years ago. Nonetheless, there have been some early innovators who have made advances despite the Department's lagging in this area. In that regard, this rule represents the Department's effort to catch up with innovations that are already taking place at forward-looking institutions. We seek to promote continuing innovation, both in distance learning and ground-based education. The regulations update our definitions of "distance education" and "correspondence courses" to acknowledge that as a result of CBE and

³³ www2.ed.gov/about/offices/list/oig/auditreports/fy2014/a05n0004.pdf.

³⁴ www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05o0010.pdf.

³⁵ www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a05p0013.pdf.

³⁶ www2.ed.gov/documents/press-releases/20190111-wgu-audit.pdf.

³⁷ www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf.

³⁸ American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf.

³⁹ *Id.*, p. 25.

⁴⁰ *Id.*, p. 26.

⁴¹ *Id.*, p. 31.

direct assessment, many students enrolled in distance education progress at their own pace, which is a characteristic that in the past was determinant of a correspondence course. With the introduction of adaptive learning and other technologies, a student enrolled in distance education is likely to be learning at his or her own pace, although that learner continues to have regular and substantive interactions with the instructor(s). The regulations acknowledge that adaptive learning can play an important role in a student's educational experience and can facilitate regular and substantive interaction between students and instructors by providing students with continuous feedback regarding their learning. The Department appreciates the considerable effort of negotiators to recommend and agree to regulatory changes that promote and enable flexibility, while at the same time ensuring the preservation of student protections and the responsible distribution of title IV, HEA assistance.

It is the combination of changes addressed in these final regulations that cumulatively would have sufficient impact on the economy to warrant classifying this regulation as economically significant. Specifically, while there could be increases in the number of students seeking title IV, HEA assistance, or the number of students who persist to completion, these increased Federal expenditures could result in the preparation of a more capable workforce and a better-educated citizenry. As more adults are required to obtain additional postsecondary courses or credentials throughout their professional lifetime, the availability of more efficient learning opportunities, such as CBE and direct assessment learning, will enable more adults to evolve in their careers.

Summary of Comments and Changes From NPRM

As described throughout this preamble, the Department considered a number of comments and made some technical corrections and changes in these final regulations. One comment

focused on the RIA analysis and emphasized that the Department should have accounted for the effects of COVID-19 and the resulting increase in distance education. The commenter noted that previous recessions had resulted in significant increases in postsecondary enrollment and that the specifics of the COVID-19 situation would likely result in students choosing distance education options over traditional, campus-based programs. The commenter also pointed out that distance education and competency-based programs are often attractive to veterans, students of color, low-income students, students who are parents, or working students who are disproportionately affected by the COVID-19 health effects and economic disruption. The commenter encouraged the Department to rescind the rule, open a new round of negotiated rulemaking in light of COVID-19, or, at least to redo the cost estimates and regulatory analysis for these final regulations to take COVID-19 impacts into account.

The Department appreciates the comment and recognizes that the NPRM was published on April 2, 2020, when we were still understanding the impact that COVID-19 could have on enrollments in distance learning. The rapid transformation of the postsecondary educational landscape as a result of COVID-19 supports the Department's point that the creation of innovative postsecondary programs, including distance education and competency-based programs, will be driven by student demands and other events that generate demand. The changes in these final regulations allow those student-driven program development decisions to be implemented more efficiently while maintaining appropriate safeguards for students.

Another consideration is that the cost estimate for the NPRM and these final regulations is intended to capture the impacts of the regulatory changes. The rapid transformation to distance education occurred independent of these final regulations, although the

Department did waive several provisions in line with the proposed changes in these final regulations to facilitate the response to COVID-19. For example, the Department waived preapproval requirements that would have otherwise delayed institutions in their efforts to move to distance learning, and it permitted accreditors to develop policies and procedures to enable rapid transition to distance learning without going through the regular policy-making process that would have taken months to accomplish. In addition, the Department permitted students enrolled at foreign institutions to complete up to 25 percent of their program at an eligible U.S. institution or an ineligible foreign institution so that students whose primary institution suspended operations could continue their education elsewhere without jeopardizing their continued participation in title IV programs. The consequences of COVID-19 and subsequent economic disruption are part of the conditions and environment within which these regulations will have an impact, and while it may be impossible to definitively distinguish between the effects of COVID-19 on the transition to distance learning, we attempt in this RIA to do so. In light of the recent, COVID-19 related transformation in postsecondary education, the Department has updated some of the information about such programs and has considered how the experience over the past months may increase or accelerate institutions' plans to develop additional distance or competency-based programs. This is addressed in the *Net Budget Impact* section of this RIA.

Costs, Benefits, and Transfers

The Department anticipates that the regulations would affect students, IHEs, accrediting agencies, and the Federal Government. State government may also be impacted in some instances. Table 3 refers to key changes described in the identified preamble sections and summarizes potential impacts.

TABLE 3—SUMMARY OF KEY CHANGES

Change	Affected parties	Impacts
Reg Section 600.2—Definitions		
Create definition for “academic engagement” ...	Students/Institutions/ Federal Government.	Clarifies and expands the types of activities that verify student enrollment for the purpose of performing return to title IV funds calculations while standardizing the Department's definition of “academic engagement” for use elsewhere in the regulations. Prevents improper payment of title IV funds to students who are not legitimately engaged in postsecondary learning.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Defines “clock hour” for distance education	Students/Institutions/ Federal Govern- ment/Accrediting Agencies.	Codifies current policy allowing institutions to record clock hours earned through distance education but requires such hours to be taught through synchronous or, as permitted by these final regulations, asynchronous instruction by the instructor. Clock hours may be earned through distance education only when permitted by licensing boards or other regulatory entities that require enrollment to be measured in clock hours. Regulatory clarity may encourage greater use of distance education to provide the didactic portion of occupationally focused programs, thus expanding access to students who are working, raising families, or live far from campus. As described in the preamble and further discussed after this table, potential concerns with allowing asynchronous instruction include a lack of direct interaction and the use of the hours for the completion of homework.
Modifies definitions of “correspondence course” and “distance education” to clarify that it is permissible to employ a team approach to instruction and clarifies that the requirements for regular interaction are met if the institution provides opportunities for interaction, even if each student does not take advantage of each opportunity. Removes self-pacing from definition of “correspondence course” as it is not a necessary characteristic for such courses.	Students/Institutions/ Federal Govern- ment/Accrediting Agencies.	Benefits students by encouraging the development of programs taught by instructional teams consisting of experts in the various elements of high-quality instruction, as opposed to a more traditional model that relies on a single faculty member to meet all of the student’s learning needs. Benefits students and institutions by potentially reducing some of the costs of instruction. Reduces the need for institutions to require students to engage in less substantive work solely for the purpose of documenting that regular and substantive interaction took place in order to document that a course is offered using distance education and is not a correspondence course.
Refines definition of “credit hour” to reflect current sub-regulatory guidance in DCL GEN–11–06 that references a variety of delivery methods.	Students/Institutions/ Federal Government.	Maintains time-based standard to ensure consistency among institutions regarding the awarding of academic credit, while also creating the necessary flexibility to consider that many new educational delivery models are not based on seat time. Codifies flexibility provided in sub-regulatory guidance under the Department’s Dear Colleague Letter GEN–11–06.
Amends definition of “distance education” by removing references to specific kinds of electronic media used in providing instruction, relegating the determination of instructor qualifications to accrediting agencies, including the use of interactive technologies to meet the requirements for “substantive interaction,” and establishing standards for “regular interaction” that include predictable opportunities for interaction and monitoring of student engagement.	Students/Institutions/ Federal Govern- ment/Accrediting Agency.	Updates regulations to remove references to outdated forms of electronic media and to ensure that new forms of electronic media will be covered by the regulations in the future. Acknowledges that the use of interactive learning technologies can facilitate regular and substantive interaction between students and instructors. Benefits institutions by more clearly explaining regulatory compliance requirements for educational innovations, thus reducing risk and potential financial penalties for those institutions pursuing educational innovation. Benefits students by expanding learning opportunities and flexibilities, including personalized learning, without unnecessary bureaucratic hurdles for the purpose of meeting title IV requirements for regular participation. Benefits the Federal Government by ensuring that students are receiving high-quality education when using Federal student aid to pay for that education. Benefits students by ensuring that online learning includes meaningful interactions with qualified instructors who can monitor and improve student learning.
Clarifies definitions of “incarcerated student” and “juvenile justice facilities”.	Students/Institutions/ Federal Government.	Reflects current practice and sub-regulatory guidance and clarifies that individuals in certain correctional facilities may be eligible for Pell grants, but limits the use of Pell grants to appropriate instructional expenses.
Amends definition of “nonprofit institution” to delete reference to 501(c)(3) tax status.	Institutions	Redundant language removed; no impact anticipated.
Reg Section 600.7—Conditions of Institutional Eligibility		
Establishes that a student is not considered to be “enrolled in correspondence courses” until at least 50 percent of the student’s classes are correspondence courses.	Students/Institutions ...	Impact minimal based on the small number of correspondence courses operating in the country. Potential benefit to institutions and students is that enrollment in a single or small number of correspondence courses does not cause a student to be counted against the institution for eligibility purposes. Provides greater flexibilities for students who are managing multiple life demands or for whom travel to the campus is difficult or for whom technology access is limited, by allowing them to participate in a small number of correspondence courses without putting title IV participation for the institution at risk.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Reg Section 600.10—Date, Extent, Duration, and Consequences of Eligibility		
Limits Secretary's approval of direct assessment programs at the same academic levels to the first such program at an institution.	Students/Institutions/ Federal Government.	Acknowledges that the Department's role in approving direct assessment programs is limited to ensuring the integrity of the title IV, HEA programs, and assumes that if an institution can disburse aid properly to students in one program at a given academic level, it is likely to be able to do so for additional programs. Ensures that an institution that creates a first new direct assessment program at a new academic level is reviewed by the Department to ensure appropriate administration of title IV funds. Encourages institutions that have demonstrated the ability to design and operate a direct assessment program to expand that model of instruction and enables institutions to respond more quickly to student and workforce needs. Reduces a potential barrier or reduces time required to establish a direct assessment program. A consequence of eliminating the requirement that the Secretary approve each new direct assessment program at the same academic level is that it may lead to the rapid expansion a direct assessment programs without the guardrail of the Department's review.
Reg Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification		
Requires the Secretary to provide timely review of new program applications and enables institutions to start advertising programs early enough to enroll a full cohort of students.	Students/Institutions/ Federal Government.	Benefits institutions and students by allowing faster development of new programs, especially those responsive to workforce development needs. Reflects role of accreditors in assessing program quality and Department's intent to rely on accreditor's assessment except in rare circumstances related to the Department's statutory and regulatory requirements or specific requirements of the institution's PPA. Protects an institution from Department's failure to act on an application for new program approval and reduces the likelihood that delays on the Department's part will require an institution to navigate the State and accreditor approval process a second time.
Reg Section 600.21—Updating Application Information		
Adds reporting requirements for (1) the addition of second and subsequent direct assessment programs at the same academic level.	Institutions/Federal Government.	With the elimination of the requirement for the Department to approve subsequent programs, this allows the Department to monitor the growth and development of direct assessment programs. Also allows cross-checking with accreditors to be sure program or arrangement has approval.
Reg Section 600.52 and 600.54 (related to Foreign Institutions)		
Amended to permit written arrangements with an eligible institution in the United States to provide no more than 25 percent of a student's program.	Students/Institutions/ Federal Government.	Benefits students by allowing them to take Federal student loans to enroll at certain foreign institutions but retain the ability to take a limited number of courses in the U.S., such as during summer breaks. Also enables title IV-participating students enrolled at foreign institutions to pursue qualifying internships or externships in the United States at entities other than eligible institutions. Benefits students by allowing them to find internships or externships in a variety of settings in which they may wish to pursue a career.
Amended to permit written arrangements between a foreign institution and an ineligible entity for no more than 25 percent of a student's program; provided that the ineligible entity satisfies definition of "foreign institution".	Students/Foreign Institutions/ Federal Government.	Allows students at eligible foreign institutions to take courses at other approved foreign institutions in that country, thus benefiting from the same opportunities as their international peers enrolled at foreign schools. Broadens educational opportunities available to U.S. students at foreign institutions while maintaining reasonably equivalent quality. However, while the regulations require the ineligible institution to meet the requirements of the foreign country in which it is located, these arrangements would not be overseen by a recognized accrediting agency or the Department, outside of the regulatory requirements, which may make it difficult to ensure academic quality of the coursework offered by the ineligible foreign institution.
Reg Section 668.2—Definitions		
Eliminates definition of Academic Competitiveness Grant (ACG).	None	ACG program is no longer authorized by HEA. Removing definition has no impact on students or institutions.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Amends “full-time student” to define requirements for subscription-based programs and to prevent an institution offering such a program from including repeated courses for which a student has already received a passing grade in a student’s enrollment status.	Students/Institutions/ Federal Government.	Provides clarity for institutions regarding subscription-based models and how they can be structured to permit students to receive title IV, HEA assistance.
Defines “subscription-based program” for title IV disbursement purposes as standard or non-standard term program for which an institution charges a student for a term with the expectation that the student completes a specified number of credit hours within the term. Clarifies that no specific timeframe applies for the terms and that students must complete a cumulative number of credit hours (or the equivalent) during or following the term before receiving another disbursement of title IV funds.	Students/Institutions/ Federal Government.	Revision from NPRM expands use of subscription-based model to all types of programs, not just direct assessment programs. Benefits all parties by clarifying how title IV aid disbursements work for subscription-based programs. Provides flexibility for students to take advantage of self-pacing inherent in this program model while limiting potential for abuse by requiring completion before subsequent disbursements of aid. Some protection for students with possibility of one single subscription period for catch-up work before loss of title IV eligibility. Clarity provided by definition may increase the establishment of direct assessment programs or other programs that could benefit from this approach, to the benefit of the institutions that offer them, and as options for students, including the non-traditional students that have taken advantage of existing CBE programs. Provides an opportunity for students who fall behind in a subscription-based program to catch up and get back on track. A potential risk of expanding subscription-based model beyond direct assessment programs include the possibility that students in subscription-based programs will quickly accrue debt early in their programs while falling behind in their coursework.
Requires institutions to establish a single enrollment status that applies to a student throughout his or her enrollment in a subscription-based program, with the student able to change their enrollment status once in an academic year.	Students/Institutions/ Federal Government.	Provides consistency for students regarding expectations for completion of coursework in a subscription-based program. Offers clarity to institutions regarding requirements for structuring such programs to ensure access to Federal aid. Improves program integrity by limiting options for students to avoid completion requirements through changes in enrollment status.
Explains method for determining number of credit hours (or the equivalent) that must be completed before subsequent disbursements of title IV aid.	Students/Institutions/ Federal Government.	Benefits institutions by clarifying how to match disbursements to pace of each student’s progress. Benefits the Federal Government by establishing a clear completion standard for students to meet before they receive subsequent disbursements of Federal aid. Benefits students by allowing for an additional term to “catch-up” on coursework before losing title IV eligibility.
Modifies definition of “third party servicer” to use “originating loans” instead of “certifying loan applications”.	None	Reflects current practices and terminology. No impact anticipated on any party.

Reg Section 668.3—Academic Year

Revises definition of “week of instructional time” as it pertains to an institution’s “academic year.” One part of the definition would cover traditional postsecondary programs and remain unchanged and the other would cover programs using asynchronous coursework through distance education or correspondence courses. For these courses, defines it as a week in which the institution “makes available the instructional material, other resources, and instructor support necessary for academic engagement and completion of course objectives”.	Students/Institutions/ Federal Government.	Benefits institutions by clarifying requirements for building instructional calendars in programs offered asynchronously through distance education and may spur additional innovation given better understanding of compliance thresholds. Benefits students and the Federal Government by ensuring that institutions make appropriate instructional materials and support available during instructional periods in exchange for Federal student aid. As noted by commenters, the interactions in asynchronous courses may not be predictable.
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Reg Section 668.5—Written Arrangements to Provide Educational Programs

Clarifies that institutions using written arrangements may align or modify their curriculum to meet requirements of industry advisory boards or other industry-recognized credentialing bodies rather than going through a mandatory, and typically lengthy, shared governance decision-making process.	Institutions/Faculty/Students/Accrediting Agencies.	Enables institutions to keep pace with changing needs of employers and protects non-accredited providers from having their educational programs or technologies manipulated by others. This is important since providers through written arrangements must prove the efficacy of their programs, so outsiders should not be allowed to modify or change the program in a way that could influence those results. Ensures that students are better prepared for entry to the workforce in certain occupations. Could create tension with faculty and reduce their influence over certain aspects of the curriculum but could require proper oversight by partnering institutions and accreditors to reduce risk of harm to students.
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TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Clarifies calculation of percentage of program that could be provided by an ineligible institution.	Students/Institutions/ Accreditors/Ineligible Entities involved in Written Arrangements.	Ensures that degree-granting institutions retain academic control of a program and maintain the responsibility for delivering at least half of an academic program. Setting out a clear methodology makes clear when and how written arrangements may be used but ensures that colleges and universities are not simply outsourcing instructional responsibilities to non-accredited providers. Benefits institutions by improving speed with which accrediting agencies review and approve such arrangements. While the accrediting agency can deny the request for a written arrangement, increasing the speed for review and expanding the options for staff that can review these arrangements could make for a less robust or rigorous review. Benefits students and institutions by allowing institutions to engage other providers, such as unions and apprenticeship providers, who may have specialized facilities and uniquely trained employees who can serve as teachers and mentors. Benefits institutions by allowing them to offer educational opportunities or technologies that are developed by outside providers who may be better situated to invest in new technologies due to their opportunities to deliver them to a larger population of students than are typically at a single institution.
Clarifies that written arrangements are not necessary for certain other interactions with outside entities. Specifically, the limitations in § 668.5 do not apply to the transfer of credits, use of prior learning assessment or other non-traditional methods of providing academic credit, or the internship or externship portion of a program.	Institutions/Students ...	Offers clarity for institutions to ensure that use of written arrangements does not result in fewer credits being accepted through transfer or awarded through prior learning assessment. Benefits students by reducing costs and time to completion for those who bring pre-existing knowledge and skills to the classroom.
Removes 50 percent limitation on written arrangements between two or more eligible institutions under joint ownership.	Institutions	Allows greater opportunities for institutions to share administrative or instructional resources when under shared ownership.
Ineligible entities would not, as was proposed in the NPRM, have to demonstrate experience in delivery and assessment of the program or portion the ineligible entity delivers and that the programs have been successful in meeting stated learning objectives.	Institutions	Allows institutions to use third parties to deliver portions of programs, to integrate advanced technologies, enable student access to specialized facilities and experts, expand the number of learning options available to students and potentially increase the number of students an institution can responsibly serve. While written arrangements may reduce the cost of delivering certain kinds of instruction, constructing specialized facilities, or developing new technologies, the written arrangement will have associated costs that could reduce revenue. Students could have access to newer technologies or higher quality instruction than could be provided by the institution. In the final regulations, ineligible entities will not be required to demonstrate prior experience and success in meeting learning objectives for portions of programs they deliver. However, there are potential risks inherent in contracting with an ineligible entity that lacks demonstrable experience. The outside provider could be of lower quality, have less of a vested interest in the student's success, or lack the necessary resources to provide the educational services agreed upon in the written arrangement.

Reg Section 668.8—Eligible Programs

Eliminates consideration of “out-of-class” hours for purposes of performing clock-to-credit conversions for non-degree programs that are subject to those requirements.	Institutions	Aligns the Department’s requirements with those of most licensing boards and simplifies the conversion process. Enables students to meet licensure requirements in programs that are title IV eligible and helps institutions by allowing them to comply with the reasonable length requirements while also allowing credit hour to clock hour conversions. May result in additional title IV funds expenditures for programs currently lacking any out-of-class components.
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Reg Section 668.10—Direct Assessment Programs

Revises definition of “direct assessment” and eliminates separate definitions of key terms for direct assessment programs, referring instead to requirements elsewhere in regulations.	Institutions	Simplifies and clarifies requirements related to direct assessment programs.
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TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Eliminates certain prohibitions on types of coursework that can be offered through direct assessment, including remedial coursework, and enables “hybrid” programs to provide students options to take some direct assessment courses and some traditional or distance learning courses.	Students/Institutions/ Federal Government.	Allows institutions to provide students with more options so that learners can select the learning modality that best meets their needs. Allows students to take some traditional courses even if some of their other courses are direct assessment courses. Recognizes that co-remediation is a promising practice, and direct assessment classes may increase the number of students who can participate in co-remediation programs while taking other classes.
Codifies current policy by adding prohibition on paying title IV, HEA funds for credit earned solely through prior learning assessment.	Students/Institutions/ Federal Government.	Benefits students and taxpayers by discouraging institutions from charging excessive fees for conducting prior learning assessment and ensures that taxpayer dollars are not being used to pay institutions for instruction that they are not providing.
Reg Section 668.13—Certification Procedures		
Automatic renewal of an institution’s certification if the Secretary does not make a decision on an application for recertification submitted no later than 90 calendar days before its PPA expires within 12 months.	Institutions	Benefits institutions by setting a time limit for the uncertainty of month-to-month eligibility. With the option of provisional recertification, the Department retains sufficient control over recertification process but cannot use certification delays to prevent institutions from starting new programs or making other necessary changes.
Reg Section 668.14—Program Participation Agreement		
Clarifies requirements related to making data available to prospective students about the most recent employment statistics, graduation statistics, or other information to substantiate the truthfulness of its advertising that uses job placement rates to attract students.	Institutions	Benefits institutions by reducing the amount of information that must be disclosed to students to enable institutions to include graduation rates or employment statistics in their marketing materials. Benefits students by improving the accuracy and truthfulness of published outcomes data, and by making an appropriate amount of information available to students without overwhelming them with extraneous data. Maintains the requirement for institutions to make available any information needed to substantiate the truthfulness of the institution’s advertisements about job placement or graduation rates.
Eliminates requirements to provide the source of such statistics, associated timeframes, and methodology.	.....	Considered redundant to requirement to provide data and other information to substantiate truth in the institution’s advertising.
Aligns program length to occupational requirements. Limits program length to 150 percent of minimum program length for the State in which the institution is located or 100 percent of the minimum program hours for licensure in an adjoining State.	Students/institutions ...	Allows institutions to create programs that meet professional licensure requirements in multiple States, thus expanding the potential pool of students served and the number of job opportunities available to graduates. Students benefit by increased occupational mobility and, in some cases, being able to go to school in a lower cost State but work upon graduation in a different State where wages are higher. Conversely, if an institution increases program length, a student may have to pay more to meet requirements of a State in which the student does not plan to work.
Requires updates to teach-out plans after specified negative events.	Students/Institutions/ Accrediting Agencies.	Allows accrediting agencies to gather more information from institutions that will be helpful to triad partners in assisting students find transfer and teach-out opportunities, and retain access to their academic records, when a school closure occurs. Requires institutions to update teach-out plans in instances where risk of closure increases.
Reg Section 668.22—Treatment of Title IV Funds When a Student Withdraws		
Adds several exceptions to determination a student has withdrawn, including early completion of requirements for graduation, completion of module(s) containing 49 percent or more of the days in the payment period, or completion of coursework equal to or greater than the institution’s requirements for a half-time student.	Students/Institutions ...	Benefits institutions by not requiring them to return title IV funds simply because a student is a faster learner. Benefits students by allowing them to complete courses at a quicker pace and still retain full title IV eligibility. Could improve completion rates and reduce time to completion if students are not required to participate in busy work if they finish the legitimate work required by the course more quickly than other students.
Applies 45-day time limit on delaying withdrawal for students who cease attendance to standard term programs. Eliminates references to modules for nonterm programs and revises timeframes for allowing students to provide written confirmation of intent to return without beginning an approved leave of absence.	Students/Institutions ...	Improves consistency of regulations as they apply to programs with different types of academic calendars and addresses concerns about long periods of non-attendance by students. Ensures that institutions perform return of title IV calculations when students cease attendance for long periods of time without beginning an approved leave of absence.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Clarifies requirements for determining the number of days in the payment period or period of enrollment for a student who is enrolled in a program offered using modules. Requires an institution to include all the days in modules that included coursework used to determine the student's eligibility for title IV, HEA assistance.	Institutions/Federal Government.	Simplifies and clarifies requirements for establishing the denominator of the return of title IV funds calculation when a student is enrolled in a program that uses modules. May result in a greater amount of title IV funds being returned for a limited number of students who enroll in numerous modules during a payment period or period of enrollment but fail to attend those modules.
Eliminates references to programs under which financial aid is no longer disbursed. Adds Iraq and Afghanistan Service Grants to types of aid subject to the return of title IV funds calculation and clarifies order for application of returned funds.	.....	No impact anticipated for technical changes incorporating current policy.
Reg Section 668.28—Non-Title IV Revenue (90/10)		
Removes references to net present value when including institutional loans in the 90/10 calculation.	.....	No impact anticipated for technical changes.
Reg Section 668.34—Satisfactory Academic Progress		
Eliminates pace requirements for satisfactory academic progress for subscription-based programs.	Students/Institutions/ Federal Government.	Reduces burden on institutions for making pace-based title IV calculations for students in subscription-based programs. Improves flexibility for students by allowing them to determine the pace of their learning without certain limits.
Allows maximum timeframe for undergraduate programs measured in credit hours to be expressed in calendar time in addition to current credit hour measurement. Limited to 150 percent of published length of program.	Students/Institutions/ Federal Government.	Increases flexibility for institutions and students and provides new options for monitoring student progress when traditional semester-based time constraints conflict with a student's work or life responsibilities. However, sets outer limit for use of aid to ensure that students are progressing through their program and using Federal student aid funds efficiently.
Reg Section 668.111—Scope and Purpose and 668.113—Request for Review		
Indicates that, for final audit or program review determinations related to classification of a program as distance education or the assignment of credit hours, the Secretary will rely on institution's accrediting agency or State agency requirements.	Institutions/Federal Government.	Conforms with changes to definitions of "distance education" and "credit hour" and provides regulatory clarity that accreditors are the triad member given the responsibility of monitoring program quality and establishing standards for academic quality, faculty credentials, and effective distance learning.
Reg Section 668.164—Disbursing Funds		
Establishes disbursement requirements specific to subscription-based programs. Sets the later of 10 days before the first day of classes in the payment period or the date the student completed the cumulative number of credit hours associated with student's enrollment status in all prior terms attended.	Students/Institutions/ Federal Government.	Conforming change with disbursement pattern for subscription-based programs in § 668.2 to enforce requirement that no disbursements be made until the student has completed the appropriate credit hours.
Reg Section 668.171—General		
Allows the Secretary to determine an institution is not financially responsible if the institution does not submit its financial and compliance audits by the date permitted and manner required under § 668.23.	Institutions/Federal Government.	Codifies current practice; no impact expected.
Reg Section 668.174—Past Performance		
Adds the term "entity" or "entities" to various provisions as ownership may be vested in an entity or an individual.	Institutions/Federal Government.	Allows the Department to consider more ownership structures when evaluating past performance.

TABLE 3—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Clarifies that institution is not financially responsible if a person who exercises substantial ownership or control over the institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution.	Institutions/Federal Government.	Allows the Department to consider whether a person or entity affiliated with an institution has overseen the precipitous closure of another institution with the goal of preventing an institution from being substantially owned or controlled by persons or entities that would cause the institution to be financially irresponsible and close without providing to students a plan to finish their education in place or at another institution.
Reg Section 668.175—Alternative Standards and Requirements		
Eliminates reference to fax transmission	None	Change to recognize technological advancements. No impact.

A key change that would result from this regulation is greater certainty among institutions about how to implement innovative programs without running afoul of title IV disbursement requirements. Institutions are not inherently opposed to regulations, but instead crave information that will enable them to be sure they are complying with regulations that are otherwise difficult to interpret. The new definitions ensure a shared understanding of the various kinds of programs an institution can provide and the rules for disbursing title IV aid to students enrolled in those programs. Greater clarity in our regulations will reduce the likelihood that student and taxpayer dollars will be wasted or that institutions will face undeserved negative program review findings and financial liabilities that could have devastating consequences to the institution and its students.

Significant changes in the final regulation from the proposed regulations include: (1) The expansion of the subscription-based disbursement model to all programs, not just direct assessment; (2) modification of the clock hour definition to include clock hours in which instruction occurs asynchronously; (3) clarification that internships and externships of students at foreign institutions can be completed at entities in the United States that are not eligible institutions; (4) elimination of the prior experience requirement for ineligible entities involved in a written agreement; and (5) withdrawal of the proposed provisions regarding change of ownership in § 668.15.

Students

Students will benefit from the expanded program options available when institutions understand the ground rules for offering new kinds of programs and when they do not fear surprises at a program review. Despite being permitted by the HEA for decades, there are relatively few competency-

based programs available to students, and even fewer direct assessment programs. Yet these types of programs may be very appealing to adult learners who bring considerable knowledge and skills to their programs. Expansion of subscription-based programs provides students with the scheduling flexibility they may need if managing responsibilities from school, work, and family. A clearer framework for administering title IV aid to students enrolled in competency-based programs on a subscription basis may increase institutions' willingness to develop new programs. To the extent that institutions determine that this funding model fits other types of programs, the expansion of this disbursement model beyond direct assessment programs in these final regulations increases the flexibility and options for students. Students will have to evaluate if programs using this model meet their schedule and educational objectives.

The regulations eliminate the financial penalties that students and institutions would otherwise face when a student progresses quickly through a course and completes it early. Students, especially non-traditional students, could benefit from the flexible pacing and different model for assessing progress offered by this type of program. The emphasis on flexibility, workforce development, and innovative educational approaches could be beneficial to students and the national economy.

According to U.S. Census data,⁴² for the civilian non-institutionalized population, there were approximately 44 million adults between the ages of 25 and 49 with high school or some college as their highest educational level in 2018. Even a small percentage of that

group represents a sizeable potential market for expansion of competency-based or other distance education programs. Additionally, students outside that age range and those with a degree may want to pursue competency-based graduate certificates or degrees to enhance their careers. While a variety of factors may explain individual education attainment, to the extent that traditional programs were not suitable for some students' academic and employment goals, competency-based programs may provide an appealing option. However, evaluating the quality of new programs may be challenging, and it could be difficult to determine how much a student should learn to be awarded a certain amount of credit, as opposed to more traditional delivery models that award aid and mark progress by the number of hours during which a student is scheduled to be in class (many institutions do not take attendance, and therefore do not monitor how much time an individual student actually is in class). As with all programs, students would need to carefully consider if specific competency-based or distance education programs are appropriate for their objectives and learning. Distance learning, subscription-based programs, and other self-paced options require a higher degree of academic discipline on the part of students, which may pose challenges to students who are already burdened by work and family responsibilities.⁴³ For those who are so motivated, they could complete their program more quickly. For those who struggle to stay engaged, innovative learning models emphasizing coach or mentor support may improve retention and completion in online programs

⁴² U.S. Census Bureau, Table 1. Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2018. Available at www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html. Last accessed November 29, 2019.

⁴³ California Community College Chancellor's Office, 2017 Distance Education Report, 2017, <http://californiacommunitycolleges.cccco.edu/Portals/0/Reports/2017-DE-Report-Final-ADA.pdf>.

where students with poor self-directed learning skills might otherwise fail.⁴⁴ 45

Another potential benefit for students in competency-based programs could be reduced costs to obtain a postsecondary credential. Western Governors University (WGU), for example, is known for its success in adopting this instructional approach, although it still disburses aid using a time-based model. In its 2018 annual report, WGU states that the average time to a bachelor's degree completion among its students is 2.5 years, which could generate substantial savings to students and taxpayers. An analysis done by Robert Kelchen⁴⁶ based on 14 cost structures at 13 institutions for credits earned through portfolio or prior learning assessment found that significant savings could be generated, but they vary substantially among colleges. Potential savings for 3 credits varied from \$127 to \$1,270.⁴⁷ The fee structure, amount of credits allowed to be obtained through these methods, the availability of Federal aid, and the ability of students to pass those assessments with limited attempts all contribute to determining whether a competency-based approach would generate savings for a given student. The other pricing model, one that is supported by the regulations, is subscription based pricing in which the potential savings relate to the number of credits a student completes during a subscription period and student's eligibility for financial aid in their specific program. Kelchen calculates the number of credits needed in a subscription period for students who receive a full Pell Grant and non-aided students to break even with traditional pricing models at 5 institutions that offer a subscription pricing option. These range from 6 credits for a non-aided student to 27 credits for a student in a bachelor's degree program who receives a full Pell Grant.⁴⁸ The subscription periods and prices vary by

institution and pricing policies may have been updated since the time of this analysis, but that idea that subscription pricing may result in cost savings for students depending upon the speed of their progress is still valid.⁴⁹

While more difficult to quantify, the Department also expects students would find benefits in programs they can complete more quickly in terms of reduced opportunity costs, which include wages lost when the student is in school rather than in the job for which the student is preparing. Also, since student retention declines as time to degree completion expands, programs that enable students to finish more quickly are likely to increase credential completion.

Of course, it could be the unique attributes of WGU, or the students attracted to the institution, that contribute to these results, and it is not yet known if the results would be replicated by other institutions that adopt the WGU model. A number of factors, including a given student's anticipated pace of learning, likelihood of completion, desired employment outcomes, personal motivation, and the range of options available to them will influence the return the student enjoys on their educational investment.

Students will also benefit from the changes to the definition of a week of instruction. Under the regulations, institutions would be less likely to assign less substantive work to students (such as posting a blog or responding to a chat) simply to meet title IV requirements. Where these activities are substantive, they will likely continue to take place, but in many instances, these activities have been integrated into courses simply to provide evidence of "regular and substantive" interaction. Students who may otherwise be successful in distance learning can become frustrated if they are not allowed to move at their own pace because of requirements to post blogs, participate in chats, or answer questions that do not actually enhance learning.

The inclusion of asynchronous coursework that provides for direct interaction between students and instructors in the definition of clock-hours could expand the options for students in such programs. Asynchronous coursework has the advantage of being able to facilitate an individualized learning experience for each student in a way that cannot be accomplished through scheduled

meetings or lectures. Students can access lectures and other class activities as their schedules permit, spending as much time as is necessary to master a particular task or concept. New technologies permit lectures to be combined with videos and other resources enabling students to pause at any point to reinforce mastery of subject matter. Moreover, the availability of asynchronous learning allows for mixed model learning reflective of non-title IV eligible programming with theory learned asynchronously and specific practical tasks through synchronous instruction.

Adjustments made for COVID-19 conditions have demonstrated to institutions, accrediting agencies, and licensing agencies that at least some parts of certain clock-hour programs can be delivered effectively through asynchronous coursework. While this will need to be monitored on an ongoing basis, this development will benefit students involved in these programs.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this final rule and none of the burden is assigned to students in that analysis.

Institutions

Institutions should benefit from the regulatory clarifications, especially those institutions that seek to expand competency-based and direct assessment learning options but are uncertain as to the Department's requirements for disbursing aid to students enrolled in those programs. A significant barrier to entry for institutions seeking to provide direct assessment programs is a lack of clarity regarding what the Department expects of these programs in order to approve them, and the slowness with which the Department has made decisions on applications submitted by institutions. Only six institutions, as of 2020, have been approved by the Department to offer direct assessment programs. This indicates that there could be a lack of interest in offering direct assessment programs, or institutions are hesitant to invest in their development because approval requirements are too burdensome or uncertainties too great about what the Department and accreditors require. The regulations will reduce burden and provide clarity to encourage more institutions to experiment with direct assessment programs. Under the rule, the Department is required to approve the first direct assessment program offered by an institution at a given credential level, but after that, only the accreditor would be required to review the

⁴⁴ www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.

⁴⁵ Xu, D. and Xu, Y. March 2019. *The Promises and Limits of Online Higher Education: Understanding How Distance Education Affects Access, Cost, and Quality*. American Enterprise Institute.

⁴⁶ Robert Kelchen, *The Landscape of Competency-Based Education—Enrollments, Demographics, and Affordability*, January 2015. Center for Higher Education Reform, American Enterprise Institute AEI Series on Competency-Based Higher Education. Available at www.aei.org/wp-content/uploads/2015/04/Competency-based-education-landscape-Kelchen-2015.pdf.

⁴⁷ Id., p. 11, Table 4 Cost Structures of Portfolio and Prior Learning Assessment Programs.

⁴⁸ Id., p. 14, Table 5 Costs of Subscription-Based CBE Programs Compared to Other Online Providers.

⁴⁹ Western Governors University, *WGU 2018 Annual Report*, p. 17. Available at www.wgu.edu/content/dam/western-governors/documents/annual-report/annual-report-2018.pdf.

program to ensure academic quality. Some institutions may aggressively seek approval for more direct assessment programs, while others may take a wait-and-see attitude until other institutions have forged new ground.

In the short term, it is likely that institutions already approved to offer at least one direct assessment program will expand offerings since their experience well positions them to do so. According to the Department's data, there are only six institutions that have established direct assessment programs. Although these institutions may expand the number of direct assessment programs available, the Department anticipates that these programs would mostly attract students away from more traditional distance learning programs, but may not add significantly to the total number of students enrolled in postsecondary education. Students looking for a flexible postsecondary program can find many advantages through distance education already but may gravitate to direct assessment programs because of added advantages, including in pacing and format. The Department's assumptions about potential student growth related to the regulations are described in the Net Budget Impact section of this analysis.

However, over time, additional institutions may develop new direct assessment programs, especially if early adopters create demand among students for this new form of education. The Department projects that if new institutions engage in direct assessment, and those already approved to offer direct assessment programs launch new programs, there could be shifting of students from other programs to self-paced direct assessment programs. It is also possible that students not interested in current pedagogical models will find direct assessment programs to be attractive and will decide to enroll in a postsecondary program. This could increase the number of students who would qualify for Pell Grants or take Federal Direct Loans. While increased interest in direct assessment could result in higher title IV participation, it is possible that students enrolled in direct assessment programs would finish their programs more quickly, therefore reducing the amount of financial aid a student uses to complete his or her program.

Changes to the limitations on the ability of clock hour programs to offer didactic instruction through distance learning may enable more individuals to enroll in these programs. The inclusion of asynchronous coursework with sufficient monitoring of participation and direct interaction between

instructors and students in the definition of clock hour in these final regulations could expand institutions' program offerings. In turn, this could increase the number of individuals qualified for State licensure or certification, and thus gainful employment, in licensed occupations. There are very few clock-hour programs that use distance learning to provide portions of the program since there are few State or professional licensing boards that permit distance learning for clock-hour programs. However, for clock-hour programs permitted to incorporate distance learning, it is possible that more students will be served or that more students will persist to completion.

The regulations more clearly define what constitutes a reasonable length for clock-hour programs and allow institutions to meet the licensure requirements of surrounding States, thus enabling greater student and workforce mobility. There are only a few States that have licensure requirements that are significantly longer than other States, but if programs in surrounding States increase their clock hours to meet those requirements, there could be small increases in cost and utilization of title IV, HEA assistance. On the other hand, if programs can be structured to ensure that students can work if they cross State lines, there could be cost savings since, under the status quo, a student who moves from one State to another may be required to start their program over in order to meet the clock-hour requirements since shorter-term "completer programs" are not typically approved by those States. Therefore, this regulation could reduce the cost of education for students who move from one State to the next and could increase worker mobility in fields that employ large numbers of workers, such as cosmetology and massage therapy.^{50 51}

Institutions will also benefit from simplifications to the formula for clock-to-credit hour conversions. The regulations would eliminate the need for institutions to consider the number of homework hours associated with each credit hour in programs that are subject to the conversion. This change reduce administrative burden while allowing institutions to offer programs in credit hours that are more likely to transfer to other schools than clock hours, but still meet the clock-hour

requirements of licensing boards by calculating clock-hour equivalencies.

Institutions will also benefit from the options allowed in these final regulations with respect to asynchronous coursework in clock-hour programs and the expansion of subscription-based disbursement beyond direct assessment programs. Institutions considering asynchronous coursework would have to invest in systems to monitor active engagement, but several such technologies are available. Expanding subscription-based disbursement could lead to economies of scale that make it worthwhile for institutions to develop such subscription-based pricing plans. These changes from the NPRM give institutions additional options in designing their programs. This could also result in additional competition from expanded course offerings at other institutions.

As discussed further in the *Paperwork Reduction Act of 1995* section of this preamble, the regulations are expected to result in a net reduction in burden for institutions. In estimating costs and savings associated with these changes in burden, we assume that these activities are conducted by postsecondary administrators, which earn an average wage of \$53.47.⁵² Throughout, to estimate the total costs and savings associated with these changes, we multiply wage rates by two to account for overhead and benefits. The elimination of the Net Present Value calculation related to the 90/10 rule is estimated to save –2,808 hours, which would generate cost savings of approximately \$300,000 annually. The regulations also impose burden related to reporting subsequent direct assessment programs estimated to impose 18 hours of burden annually for a cost of \$1,926 using the same hourly rate of \$53.47 multiplied by two for overhead and benefits for a rate of \$106.94. Together, the estimated net reduction in burden for institutions is –2,790 hours and \$ –298,363.

Accrediting Agencies

The regulations recognize the primary role that accrediting agencies play in evaluating the quality of new programs and approving institutions to offer them. Although the Department's review of direct assessment programs focuses on an institution's technical ability to calculate and disburse title IV aid to students enrolled in these programs, accreditors have always had—and will continue to have—the responsibility of ensuring that these programs are

⁵⁰ www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm.

⁵¹ www.bls.gov/ooh/healthcare/massage-therapists.htm.

⁵² www.bls.gov/oes/current/oes119033.htm.

rigorous and of high quality. In conjunction with the recently published Accreditation and State Authorization Regulations, one or more existing or new accrediting agencies may step forward to become a leader in the field for assessing and approving direct assessment programs, which could lead to more rapid expansion of direct assessment programs. Accrediting agencies will continue to play an important role in approving written arrangements covering between 25 and 50 percent of a program; however, changes already published in the accreditation regulations to allow these approvals to take place at the staff level, and requirements for accrediting agencies to approve or deny them within 90 days, could encourage more institutions to consider entering into written arrangements.

Accrediting agencies play an important role in evaluating the quality of academic programs, including distance education programs, and will continue to play that role. These regulations do not create new responsibilities in this regard; however, until accrediting agencies have more experience in reviewing and approving competency-based and direct assessment programs, the approval process could be somewhat more burdensome. Some agencies may also need to develop new standards to facilitate the evaluation of these programs, but many already have such standards in place. If growth in competency-based programs is more significant than anticipated, there could be an increase in accrediting agency workload, but it is possible that demand for approval of traditional programs would decline as interest shifts to competency-based or direct assessment programs.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this final rule and does not estimate any additional burden to accrediting agencies from the regulations.

Federal Government

In the regulations, the Federal Government is reducing some of the complexity of administering Federal student aid and calculating return-to-title IV obligations. These regulations also reaffirm that it is accreditors—and not the Department—who are authorized by the HEA to establish and evaluate compliance with education quality standards, including when innovative delivery models challenge the status quo. The regulations require the Secretary to provide a timely review of new program applications and limit

the Secretary's approval of direct assessment programs at the same academic level to the first such program at an institution, both provisions designed to support the expansion of innovative educational programs.

Net Budget Impact

We estimate that these regulations will have a net Federal budget impact for Federal student loan cohorts between 2020–2029, of \$[–54] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of \$1,163 million over 10 years, for a total net impact of \$1,109 million. 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. The Net Budget Impact is compared to a modified version of the 2020 President's Budget baseline (PB2021) that adjusts for the publication of the final Borrower Defense, Gainful Employment, and Accreditation and State Authorization rules.

The Department emphasizes that its estimates of transformations in higher education delivery that could occur as a result of these regulations are uncertain. Similarly, the Department is constrained in its budget estimates by the limited data available to it. We estimate how institutions and students would respond to the regulatory changes, and we present alternative scenarios to capture the potential range of impacts on Federal student aid transfers. Similarly, we do not attempt to estimate effects based on evidence cited in this preamble that students enrolled in similar programs have persisted longer, completed at higher rates, and finished in a shorter period of time with less debt. While increased enrollment and persistence could result in increased transfers to students in the form of Federal student aid grants and loans, it could also produce graduates better prepared to succeed in the workplace and encourage robust economic growth. The Administration's emphasis on workforce development may encourage more institutions to implement competency-based educational programs, which could improve employment outcomes and loan repayment performance.

There is anecdotal evidence that competency-based education programs may have strong loan repayment performance. Looking again to WGU, an institution that has been an early adopter of competency-based learning,

we note that its three-year cohort default rates of 4.6 percent for 2014, 4.1 percent for 2015, and 4.2 percent for 2016⁵³ are below the national average of 10.1 percent overall in 2016 (6.6 percent for private, 9.6 percent for public, and 15.2 percent for proprietary institutions).⁵⁴ Comparatively, Capella University, another leader in competency-based education, had a cohort default rate of 6.5 percent in 2015 and 6.8 percent in 2016.⁵⁵ Factors that could lead to lower defaults among institutions employing innovative learning models—and in particular when those models are used to provide graduate education—may be that they would attract older students who are employed and are seeking specific credentials for advancement or a career change. These individuals may be more likely to have resources (including those provided by current employers) to reduce the need to borrow and to repay any loans they need to take. On the other hand, the non-traditional students that may be the primary market for competency-based learning or direct assessment may have employment and family obligations that could make them less likely to complete their programs, potentially increasing their default risk.

An additional complicating factor in developing these estimates are the related regulatory changes on which the committee reached consensus in this negotiated rulemaking that we addressed in separate notices of rulemaking. The budget impacts estimated here are in addition to the potential increases attributed to the accreditation changes promulgated in the final rule published November 1, 2019 that are reflected in the PB 2021 baseline.⁵⁶

The main budget impacts estimated from these final regulations come from changes in loan volumes and Pell Grants disbursed to students if these new delivery models were to attract an increased number of students who receive title IV, HEA funds. The Department believes that much of the growth in this area will come from future students that shift from more traditional ground-based or distance

⁵³ U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.

⁵⁴ U.S. Department of Education, Comparison of FY 2016 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates available at www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf. Accessed February 21, 2020.

⁵⁵ U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.

⁵⁶ 84 FR 58834.

learning programs to those offered using competency-based learning or direct assessment methods. In developing the primary estimate, the Department does not estimate the types of programs and institutions students who choose competency-based education may come from or the potential cost differential between those programs, as further discussed after Table 5. Instead, we assume that the growth associated with programs that are developed or expanded in part because the regulations make it easier to administer title IV aid to such programs comes from students who would not otherwise have borrowed to attend a different type of program and apply an average level of borrowing to each estimated enrollee. The Department believes that many of the students who enroll in CBE will do so as a substitute for a different type of program for which they likely would receive some form of title IV aid, but there will be some small increase in enrollment from students who either not have pursued postsecondary education or who would not have received title IV aid for their program. Additionally, the alternate budget scenarios consider the possibility that the implementation of new pedagogical and delivery models could result in more or fewer new students being interested in pursuing a postsecondary credential. Expansion of

subscription-based programs, provisions in these regulations that would encourage innovation, the growth of workforce development programs, and the new methods of delivery may particularly appeal to non-traditional students. Tables 4.A to 4.E illustrate the changes in title IV grant and loan volume developed for use in estimating the net budget impact of these regulations for the primary scenario, with discussion about underlying assumptions following the tables.

In order to have a common basis for the Pell Grant and loan assumptions and to facilitate comment, we started the estimate with an assumption about the number of additional programs that would be established because of the combined effect of the regulations. As noted in response to the comment about the RIA in the NPRM, the expansion of distance education in response to COVID-19 disruptions is not a response to these regulations, and the extent to which the transformation will persist is unknown. Instead, the response to COVID-19 has provided evidence that additional flexibilities are necessary and appropriate to enable institutions to adapt to the changing needs of students and society.

We did not increase the estimated number of students to reflect the current shift of campus-based students to

distance learning, nor did we attribute to the regulation the possibility that some students may prefer that distance programs or alternative types of programs like CBE after their experience during the COVID-19 shutdown. Additionally, any COVID-19 related economic downturn will be reflected in future baseline updates, with the potential increase in enrollment and related financial aid as a reaction to economic conditions and not driven by the changes in these final regulations. However, we did recognize that institutions' experience in shifting programs to distance platforms may encourage them to accelerate the development of distance of CBE programs. Students may also decide that distance learning is a good approach for them and consider it for furthering their education or for future programs. This is reflected in an increase in programs in Table 4.A to 968 compared to 864 in the NPRM, leading to an estimated 60,379 additional Pell Grant recipients. On the other hand, because the rapid shift to distance may provide students with sub-optimal experiences, there could also be a negative backlash in which students will resist engaging in distance learning if their experience during the COVID-19 necessitated transition was less than satisfactory.

TABLE 4.A—ASSUMPTIONS ABOUT CUMULATIVE NUMBER OF ADDITIONAL PROGRAMS BY SIZE OF PROGRAM

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	24	72	95	150	225	275	325	375	420	450
75	12	20	40	60	90	110	135	150	175	200
150	10	18	26	40	68	75	90	113	120	128
350	8	15	25	30	38	50	60	70	80	90
750	3	8	14	20	30	38	48	56	65	70
1500	1	4	7	10	14	18	20	25	28	30

As seen in Table 4.A, we expect the current trends of distance education programs capturing an increasing share of students to continue, and perhaps to accelerate as institutions and accreditors become more experienced in establishing or evaluating these programs. We also expect more institutions to engage in competency-based learning and direct assessment, which may or may not be delivered online. The initial distribution of programs by enrollment size uses information from the 2018 AIR survey and the 2019 survey;⁵⁷ however, we

acknowledge that the results of that survey may be biased in that we expect the small proportion of institutions interested in starting CBE or direct assessment programs were more likely to respond. Nonetheless, these are the best data available to us, and we projected the results of that survey onto the postsecondary system as a whole. We assumed, based on the 2018 and 2019 survey data, that the majority of programs will be small, but assumed that over time larger programs would evolve.

In addition, as institutions become more comfortable with using written agreements to access facilities and experts that private sector organizations and unions make available, there could be growth in career and technical education programs that are currently

limited due to the high cost of constructing facilities, procuring equipment and hiring faculty qualified to teach in those programs.⁵⁸ As more hospitals and health care facilities require nurses to have bachelor's degrees, we expect to see continued growth of RN to BSN programs, which can be delivered using CBE or direct assessment because students in these programs are typically required to be working in the field, thus negating the need for the institution to provide clinical placements.

⁵⁷ American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf.

⁵⁸ Shulock, N., Lewis, J., & Tan, C. (2013). Workforce Investments: State Strategies to Preserve Higher-Cost Career Education Programs in Community and Technical Colleges. California State University: Sacramento. Institute for Higher Education Leadership & Policy.

Other factors that support the increase in programs are recent regulatory developments with respect to accreditation and no requirement for approval of new delivery methods as a substantive change. The provisions requiring the Secretary to provide a timely review of new program applications and to limit the Secretary's review to the first competency-based education program at a given academic

level could also accelerate the process of establishing programs.

We then had to develop an assumption for how many of the additional programs would be undergraduate or graduate programs for the purposes of determining how many would potentially serve Pell recipients and subsidized loan borrowers. Of the 512 programs described in the 2018 survey, approximately 17 percent were identified as graduate programs and of

the 588 programs described in the 2019 survey, 16 percent were graduate programs. However, competency-based programs could be a good fit for working adults wanting a self-paced program to earn a graduate credential, so we assumed that that the distribution of undergraduate versus graduate programs would change over time, especially among smaller programs, as shown in Table 4.B.

TABLE 4.B—UNDERGRADUATE SHARE OF CUMULATIVE ADDITIONAL PROGRAMS

Size of program	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
25	83	78	70	65	60	55	50	50	45	45
75	83	78	70	65	60	60	60	60	60	60
150	83	78	70	65	60	60	60	60	60	60
350	83	80	75	75	75	70	70	70	70	70
750	83	80	80	80	75	75	75	75	75	75
1,500	83	83	80	80	78	78	75	75	75	75

This resulted in an assumed number of additional undergraduate and

graduate students who may receive Pell Grants or take loans.

TABLE 4.C—NUMBER OF ADDITIONAL UNDERGRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	498	1,404	1,663	2,438	3,375	3,781	4,063	4,688	4,725	5,063
75	747	1,170	2,100	2,925	4,050	4,950	6,075	6,750	7,875	9,000
150	1,245	2,106	2,730	3,900	6,075	6,750	8,100	10,125	10,800	11,520
350	2,324	4,200	6,563	7,875	9,975	12,250	14,700	17,150	19,600	22,050
750	1,743	4,800	8,400	12,000	16,875	21,375	27,000	31,500	36,563	39,375
1,500	1,245	4,980	8,400	12,000	16,380	21,060	22,500	28,125	31,500	33,750
Total	7,802	18,660	29,855	41,138	56,730	70,166	82,438	98,338	111,063	120,758

TABLE 4.D—NUMBER OF ADDITIONAL GRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	100	400	710	1,310	2,250	3,090	4,060	4,690	5,780	6,190
75	150	330	900	1,580	2,700	3,300	4,050	4,500	5,250	6,000
150	260	590	1,170	2,100	4,050	4,500	5,400	6,750	7,200	7,680
350	480	1,050	2,190	2,630	3,330	5,250	6,300	7,350	8,400	9,450
750	360	1,200	2,100	3,000	5,630	7,130	9,000	10,500	12,190	13,130
1,500	260	1,020	2,100	3,000	4,620	5,940	7,500	9,380	10,500	11,250
Total	1,610	4,590	9,170	13,620	22,580	29,210	36,310	43,170	49,320	53,700

The next assumption involved the percent of those additional students who would receive Pell Grants and would take out different types of loans. For existing programs, the percent of undergraduates with Pell Grants is approximately 39 percent overall,⁵⁹ but this varies significantly by institution and program type. One motivating factor

for competency-based programs is to expand opportunities for non-traditional students, who typically qualify for Pell grants at higher rates; in the 2018–19 award year 54% of dependent applicants had a Pell eligible expected family contribution (EFC), while 85% of independent applicants met that threshold. However, independent applicants are often ineligible for Pell at relatively moderate incomes—in AY 2018–19 88 percent of the eligible independent applicants with dependents had family incomes under \$50,000 and 96 percent of the eligible

independent applicants without dependents had family incomes under \$25,000. If programs attract more students from lower income brackets, Pell Grant costs will increase. On the other hand, CBE and distance learning programs, including direct assessment programs, may be more attractive to working adults, who may be less likely to qualify for Pell grants given their earnings. Evidence is mixed from existing programs, both because the data does not always distinguish students in CBE programs from those in traditional programs at the institution and the

⁵⁹ U.S. Department of Education, The FY 2021 Justification of Appropriations Estimates to Congress Vol. II: Student Financial Assistance, p. p-11. Available at www2.ed.gov/about/overview/budget/budget21/justifications/p-sfa.pdf.

percentage of students receiving Pell Grants does vary among institutions with at least some CBE programs. In 2017–18 IPEDS student financial assistance data, the percent of undergraduates receiving a Pell Grant at some institutions known for at least

some CBE programs was 30 percent for Western Governor’s University, 33 percent for Sinclair Community College, 35 percent for Northern Arizona University, 43 percent for Capella University, 45 percent for the University of Wisconsin Flex program, and 47

percent for Southern New Hampshire University. Nonetheless, we assumed that the percentage of students who may be eligible for Pell Grants increases to 50 percent, resulting in the estimated number of additional Pell recipients shown in Table 4.E.

TABLE 4.E—ESTIMATED ADDITIONAL PELL RECIPIENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	249	702	831	1,219	1,688	1,891	2,031	2,344	2,363	2,531
75	374	585	1,050	1,463	2,025	2,475	3,038	3,375	3,938	4,500
150	623	1,053	1,365	1,950	3,038	3,375	4,050	5,063	5,400	5,760
350	1,162	2,100	3,281	3,938	4,988	6,125	7,350	8,575	9,800	11,025
750	872	2,400	4,200	6,000	8,438	10,688	13,500	15,750	18,281	19,688
1,500	623	2,490	4,200	6,000	8,190	10,530	11,250	14,063	15,750	16,875
Total	3,901	9,330	14,928	20,569	28,365	35,083	41,219	49,169	55,531	60,379

We also assumed a distribution of Pell recipients based on expected growth in programs by type and control of institutions, as shown in Table 4.F. However, the share of programs reflected in Table 4.F does not necessarily reflect the share of students at each type of institution.

TABLE 4.F—ASSUMED DISTRIBUTION OF NEW PROGRAMS BY INSTITUTIONAL CATEGORY

	Share of programs (%)
4-year public	22
2-year public	30
4-year private	15
2-year private	8
Proprietary	25

We recognize that competency-based and direct assessment programs, in particular, are a relatively new and developing part of the postsecondary market and it is not clear what institutions will pursue opportunities in this area or how the size and scope of programs offered will develop. Estimated program costs for Pell Grants range from \$30.1 billion in AY 2021–22 to \$36.1 billion in AY 2030–31, with a 10-year total estimate of \$329.0 billion. On average, the FY 2021 President’s Budget projects a baseline increase in Pell Grant recipients from 2021 to 2030 of approximately 150,000 annually. The increase in Pell Grant recipients estimated due to these regulations ranges from about 6 percent in 2022 to approximately 41 percent by 2030 of the projected annual increase that would

otherwise occur. The additional 60,379 recipients estimated for 2030 would account for under 1 percent of all estimated 8.25 million Pell recipients in 2030–31 and result in an increase in program costs of approximately \$1,397 million, a 0.4 percent increase in estimated 10-year Pell Grant program costs of \$329.0 billion.

For the loan programs, we used the estimated split between graduate and undergraduate programs to develop additional volume estimates by loan type and student loan model risk-group. Table 4.G presents the assumed borrowing rate by loan type of the additional students.

TABLE 4.G—ESTIMATED BORROWING RATES BY LOAN TYPE

	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
Subsidized	45	45	45	45	45	45	45	45	45	45
Unsubsidized	55	55	55	55	55	55	55	55	55	55
Parent PLUS	10	10	10	10	10	10	10	10	10	10
Grad Unsubsidized ...	35	35	35	35	35	35	35	35	35	35
Grad PLUS	25	25	25	25	25	25	25	25	25	25

We then used estimated average loans by loan type as projected for the PB2021 estimates to estimate a total increase in

volume by loan type, as shown in Tables 4.H and 4.I.

TABLE 4.H—ESTIMATED AVERAGE AMOUNTS PER BORROWER BY LOAN TYPE

Average loan	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Subsidized	4,240	4,240	4,240	4,250	4,250	4,260	4,260	4,270	4,280	4,290
Unsubsidized	4,630	4,660	4,700	4,720	4,760	4,780	4,820	4,830	4,860	4,880
PLUS	18,550	18,880	19,290	19,620	19,920	20,440	20,780	21,070	21,460	21,860
Grad Unsubsidized ...	20,660	20,910	21,120	21,230	21,330	21,590	21,810	22,080	22,290	22,500
Grad PLUS	25,990	26,760	27,510	28,130	28,640	29,330	30,100	30,870	31,760	32,660

TABLE 4.I—ESTIMATED ADDITIONAL LOAN VOLUME BY LOAN TYPE

Additional loan volume	2021	2022	2023	2024	2025
Subsidized	14,886,216	35,603,280	56,963,340	78,675,469	108,496,125
Unsubsidized	19,867,793	47,825,580	77,175,175	106,792,950	148,519,140
Parent PLUS	14,472,710	35,230,080	57,590,295	80,711,775	113,006,160
Grad Unsubsidized	11,641,910	33,591,915	67,784,640	101,203,410	168,570,990
Grad PLUS	10,460,975	30,707,100	63,066,675	95,782,650	161,672,800
Additional loan volume	2026	2027	2028	2029	2030
Subsidized	134,508,701	158,032,688	188,955,506	213,906,375	233,122,354
Unsubsidized	184,467,071	218,541,813	261,233,569	296,870,063	324,113,130
Parent PLUS	143,419,815	171,305,125	207,197,113	238,340,125	263,975,895
Grad Unsubsidized	220,725,365	277,172,385	333,617,760	384,769,980	422,887,500
Grad PLUS	214,182,325	273,232,750	333,164,475	391,600,800	438,460,500

Clearly, the large average borrowing amounts of graduate students contribute significantly to the loan volume estimates, so a different mix of programs or a different borrowing level would affect the estimated impact of the regulations, so we adjust this factor in

the alternate scenarios to identify a range of possible impacts.

As subsidy rates differ by risk group and loan type, the Department assumed a distribution of the undergraduate loans as shown in Table 4.J. This distribution is based on the PB2021 distribution of loan volume by risk

group, but reduces the share in the 4-year Junior/Senior risk group by 10–15 percentage points and the 4-year Freshman/Sophomore risk group by approximately 5 percentage points and increases the share in the 2-year risk groups. All graduate loans are in the graduate risk group.

TABLE 4.J—ASSUMED DISTRIBUTION OF ADDITIONAL LOAN VOLUMES BY RISK GROUP

	Subsidized (%)	Unsubsidized (%)	Parent PLUS (%)
2-year Proprietary	18	15	10
2-year Not-for-Profit	20	15	10
4-year Freshman/Sophomore	32	35	42
4-year Junior/Senior	30	35	38

The resulting additional loan volumes are generated by simple multiplication of the estimated additional undergraduate students by the percent borrowing and average amount per borrower by loan type, and then by the distribution by risk group. The same process occurred for graduate students.

As seen from the approximately \$100 billion total annual loan volume, even small changes would result in a significant amount of additional loan transfers. We update loan volume estimates regularly; for PB2021 the total non-consolidated loan volume estimates between FY2021 and FY2030 range from \$94 billion to \$107 billion. The assumed changes in loan volume would result in a small savings that represents the net impact of offsetting subsidy changes by loan type and risk group due to positive subsidy rates for Subsidized and Unsubsidized Stafford loans and negative subsidy rates for PLUS Loans.

Given the higher loan amounts associated with PLUS loans and loans to graduate students, the negative subsidy rates that range from –20.57 in 2021 to –16.60 in 2028 generate significant savings (\$–427 mn in outlays) to offset the increased costs in other loan types. In Alternate 2, the higher non-consolidated loan volume eventually results in higher consolidated loan volume, that, combined with the other positive subsidy categories results in a net cost in that scenario.

We do not assume any changes in subsidy rates from the potential creation of new programs or the other changes reflected in the regulations. We are uncertain to what extent and in what direction the performance of programs that expand or develop under the regulations will shift relative to current programs. As indicated previously, several institutions known for competency-based programs have

default performance that is as good as or better than national averages, but it is not clear that most programs that will be created in the future will achieve that result. Depending on how programs are configured, the market demand for them, and their quality, key subsidy components such as defaults, prepayments, and repayment plan choice may vary and affect the cost estimates.

Table 5 summarizes the Pell and loan effects for the Main, Alt1, and Alt2 scenarios over a 10-year period. Each column reflects a scenario showing estimated changes to Pell Grants and Direct Loans under those conditions. Therefore, the overall amounts reflect the sum of outlay changes occurring under each scenario for Pell Grants and Direct Loans when combined.

TABLE 5—ESTIMATED NET IMPACT OF PELL GRANT AND LOAN CHANGES— 2021–2030 OUTLAYS
[\$mns]

	Main	Alt 1	Alt 2
Pell Grants	1,163	465	1,804
Loans	- 54	- 26	107
Overall	1,109	439	1,911

The cost estimates presented above do not attempt to account for several factors that could ultimately result in a different net budget impact than the primary estimate presented in Table 5, including potential cost differences among programs and relative repayment performance. As discussed previously, one potential benefit of competency based programs is reduced costs for students relative to other programs. If a large share of students would have attended a different program or completed faster, their Pell Grant or borrowing may be lower than assumed in the PB2021 baseline. However, without more significant evidence, we are not estimating any savings from that possibility. Other provisions that we do not include in the budget estimate

because of limited information on the potential significance include the treatment of out-of-class hours and the reasonable length provisions related to clock hour programs.

As discussed previously, the uncertainty around several factors affected by the changes led the Department to develop some alternative scenarios for the potential impacts. The extent to which institutions invest in making direct assessment programs work and try to enroll additional students as opposed to converting some portion of existing enrollments to this type of program is unclear. In the AIR survey about competency-based education, approximately 40 percent of the 501 institutional respondents indicated CBE is in their institutions'

strategic plans in a "minor way" and 16 percent in a "major way".⁶⁰ It is also unclear if the size and type of existing CBE programs is representative of future CBE programs, especially direct assessment programs.

In order to capture the effect of changing some of the key assumptions associated with the primary budget estimate, the Department developed the Alternate Scenarios presented in Table 6. Alternate 1 is a low impact scenario that reduces the number of additional programs and students and lowers the average amount borrowed and the percentage of students eligible for Pell Grants. Alternate 2, the high impact scenario, increases programs and student growth, the percentage of Pell recipients, and amounts borrowed.

TABLE 6—ALTERNATE SCENARIOS

	Alternate 1—low impact	Alternate 2—high impact
Program Growth	Eliminate half the programs per cell for 3 smallest categories and one-third of programs in 3 largest size categories.	+ 20 programs per cell for 3 smallest categories; +5 programs per cell for 3 largest size categories through 2025 and +10 per cell for 2026 to 2029.
Undergraduate Program Share	+15 percent	- 15 percent.
Percent of Pell Recipients	30 percent	75 percent.
Distribution of Pell Recipients by Institutional Category.	4-yr Public 10%	4-yr Public 30%.
	4-yr Private 5%	4-yr Private 24%.
	2-yr Public 38%	2-yr Public 20%.
	2-yr Private 10%	2-yr Private 5%.
	Proprietary 37%	Proprietary 21%.
Borrowing Rates	Subsidized - 10%	Subsidized +5%.
	Unsubsidized - 15%	Unsubsidized +10%.
	Plus - 5%	Plus +5%.
	Grad Unsub - 15%	Grad Unsub +10%.
	Grad Plus - 15%	Grad Plus +10%.
Average Loan Amount	Decrease 20 percent	Increase 10 percent.
Distribution by Risk Group (Subsidized and Unsubsidized).	2-yr Prop - 10%	2-yr Prop +15%.
	2-yr NFP - 5%	2-yr NFP +10%.
	4-yr FRSO +10%	4-yr FRSO - 15%.
	4-yr JRSR +5%	4-yr JRSR - 10%.
	GRAD No change	GRAD No change.
Distribution by Risk Group (PLUS)	2-yr Prop - 6%	2-yr Prop +12%.
	2-yr NFP - 3%	2-yr NFP +8%.
	4-yr FRSO +6%	4-yr FRSO - 12%.
	4-yr JRSR +3%	4-yr JRSR - 8%.
	GRAD No change	GRAD No change.

⁶⁰ www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf.

Accounting Statement

As required by OMB Circular A-4 (available at www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf), in the following table we

have prepared an accounting statement showing the classification of the expenditures associated with the provisions of 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 and Pell Grant recipients.

TABLE 7—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES [in millions]

Category	Benefits	
Clarification of terms and processes related to establishing programs and administering title IV aid to encourage development of new programs	Not Quantified	
Net Reduction in Paperwork Burden on Institutions, primarily due to elimination of Net Present Value calculation related to the 90/10 rule	7%	3%
	\$ - 0.30	\$ - 0.30
	Not Quantified	
Category	Costs	
Category	Transfers	
Increased transfers of Pell Grants	7%	3%
	\$101.2	\$109.6
Increased transfers of loans to students in additional programs established, in part, due to the regulations	\$ - 6.9	\$ - 6.1

Alternatives Considered

Several proposals were considered on various sections of the regulations as the

negotiated rulemaking committee moved toward consensus. Some key

alternatives that were considered are summarized in Table 76.

TABLE 8—KEY ALTERNATIVES CONSIDERED

Topic	Alternative proposal	Reasons rejected
Definition of Credit Hour	Eliminate time-based requirements	Retain definition for some consistency across higher education.
Subscription-based programs.	Disbursement based on attempted programs, not completed ones. Include a competency in student's enrollment status more than once if it overlapped more than one subscription period.	Concern for potential abuse leading to paying title IV aid for same course twice.
Written Arrangement	No limitation on percentage of program that could be provided by written arrangement with ineligible entity.	Goal was to facilitate partnerships with organizations using trade experts in workplace environment. Committee found sufficient flexibility with existing limit and changes would call into question whether the eligible institution was really offering the program.
Program Length	Allow limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State.	Concern that changes would encourage institutions to add hours beyond what is necessary for student to become employed.

Regulatory Flexibility Act Analysis

These final regulations are expected to have a significant impact on institutions, many of which are considered to be small entities. The analysis presented below evaluates the impact of the final regulations on these small entities.

Description of the Reasons That Action by the Agency Is Being Considered

The Department is regulating to reflect the development in postsecondary education delivery models, including those facilitated by

technology and those that are based on the demonstration of competencies rather than seat time, to help institutions understand regulatory requirements for such programs and to facilitate further innovations in such areas. The regulations provide or clarify definitions of terms such as correspondence course, distance education, subscription-based program, and clock hour, where the HEA provides no definition.

The regulations send a signal to the higher education community that the Department is committed to supporting

educational innovations such as subscription-based and direct assessment programs as well as new technology-driven delivery mechanisms, such as adaptive learning. The regulations also seek to clarify definitions used to differentiate between distance education and correspondence courses, while at the same time preserving student protections and title IV financial aid distribution.

Succinct Statement of the Objectives of, and Legal Basis for, the Regulations

These final regulations amend the Institutional Eligibility regulations issued under the HEA, related to distance education and innovation in 34 CFR part 600. In addition, these regulations amend the Student Assistance General Provisions regulations issued under the HEA in 34 CFR parts 602 and 668. The changes to part 600 are authorized by 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c. The change to part 602, removing the definition of “Distance education” (now defined in part 600), is authorized by 20 U.S.C. 1099b while the changes to part 668 are authorized by 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474.

Through the final regulations, we attempt to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students, and also provide sufficient

flexibility to ensure that future innovations we cannot yet anticipate have an opportunity to move forward.

The regulations are also designed to protect students and taxpayers from unreasonable risks. Inadequate consumer information could result in students enrolling in programs that will not help them meet their goals. In addition, institutions adopting innovative methods of educating students may expend taxpayer funds in ways that were not contemplated by Congress or the Department, resulting in greater risk to the taxpayers of waste, fraud, and abuse and to the institution of undeserved negative program review findings. These regulations attempt to limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors. This delegation of authority through the higher education regulatory triad entrusts oversight of most consumer protections to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department.

Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Regulations Will Apply

Of the entities that the final regulations will affect, we consider many institutions to be small. The Department recently proposed a size classification based on enrollment using IPEDS data that established the percentage of institutions in various sectors considered to be small entities, as shown in Table 8. We described this size classification in the NPRM published in the **Federal Register** on July 31, 2018 for the borrower defense rule (83 FR 37242, 37302). The Department discussed the proposed standard with the Chief Counsel for Advocacy of the Small Business Administration, and while no change has been finalized, the Department continues to believe this approach most accurately reflects a common basis for determining size categories that is linked to the provision of educational services.

TABLE 9⁶¹—SMALL ENTITIES UNDER ENROLLMENT BASED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	342	1,240	28
2-year	Private	219	259	85
2-year	Proprietary	2,147	2,463	87
4-year	Public	64	759	8
4-year	Private	799	1,672	48
4-year	Proprietary	425	558	76
Total		3,996	6,951	57

The regulations would provide needed clarity around title IV eligibility for distance education, correspondence courses, subscription-based programs, and direct assessment programs. They would also provide greater clarity regarding how the Department determines whether a program is of reasonable length. The effect on small entities would vary by the extent they currently participate in such programs or that they choose to do so going forward. Introducing competency-based programs in areas with strong demand could be an opportunity for some small entities to maintain or expand their business. On the other hand, small entities could be vulnerable to competition from other institutions, large or small, that are capturing an increasing share of the postsecondary market with distance or competency-based programs. Developing and implementing new programs and delivery models, and especially those

that require sophisticated technology, may be impractical for small institutions that cannot distribute the cost among a population of enough size to result in favorable return-on-investment. We expect that the development of the first direct assessment program at an institution would be a multi-stage and multi-year process involving choosing the subject areas appropriate for this model, developing competencies, modifying course materials and teaching approaches, reaching out to potential future employers to build acceptance of the credential, and getting approval from accreditors and the Department, and recruiting students. The Department does not have a detailed understanding of the costs and timeframe involved with establishing these programs, especially for small entities and we welcome such information. Small institutions may be more inclined to rely on consortia arrangements with other, larger institutions, to make

distance learning and competency-based education available to their students. The regulations would remove many barriers to innovation that currently restrain institutions, including small ones, and may accelerate innovations, but these innovations were likely to take place in postsecondary education anyway given the call for new, more efficient delivery models for the growing population of non-traditional students and the likelihood that adults will be engaged in postsecondary education throughout their lifetime.

⁶¹ U.S. Department of Education analysis of IPEDs 2015–16 enrollment data.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this final rule. Overall, the Department estimates \$300,288 in reduced paperwork burden associated with the elimination of the net present value calculation related to the 90/10 rule. This affects proprietary institutions, of which approximately 85 percent are considered small according to Table 8 (2,572/3,021), so most of that burden reduction (\$300,288*85 percent = \$255,245) will be enjoyed by small entities. The Department is unable to estimate the effect of this change on the profits of institutions, including those considered to be small entities. No mechanism exists to track profits at institutions. The only way to obtain data on profits would be through a manual review of financial statements submitted by each institution. Even with that information, the effect of this change on profits could not be estimated with any degree of accuracy. First, it would be necessary to determine which schools used NPV, which was optional per our regulations. Second, it would have to be known, for the period that an institution used NPV, what revenue from institutional loans would have been had that revenue included only loan payments received by the institution during the fiscal year. Also, despite the estimated cost savings due to paperwork burden reduction, the full time equivalent of those employees who calculated NPV most likely remains a salary expense. Finally, any savings identified that would benefit profits would have to be offset by the corresponding reduction in revenue resulting from no longer being able to apply NPV. Regarding overall economic impact, it would be negligible given that total savings of \$255,245 is spread over 85% of the nearly 3,000 participating for-profit institutions. There are also some small increases in burden related to reporting about direct assessment programs that is expected to increase burden on small entities by approximately 10 hours, a small increase for those small institutions that choose to participate in direct assessment programs or written arrangements.

Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Regulations

The regulations are unlikely to conflict with or duplicate existing Federal regulations.

Alternatives Considered

As described above, the Department participated in negotiated rulemaking when developing the regulations and considered several options for some of the provisions. These included: (1) Eliminating time-based requirements for credit hours; (2) no limitation on the percentage of a program that could be offered through written arrangement with an ineligible entity; (3) allowing limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State, (4) disbursing funds in subscription-based programs based on attempted competencies, not completed ones; and (5) including a competency that overlaps subscription periods in a student's enrollment status more than once. In proposing to remove limits on the portion of a program that may be offered through a written arrangement with an ineligible entity, the Department sought to make a wider range of occupationally-related educational resources available to students than could be reasonably provided by the institutions they attend. It was the Department's belief that this change would particularly benefit smaller institutions whose resources are typically more limited than those of larger entities.

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.

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.

Section 600.21—Updating Application Information

Requirements: The regulations in § 600.21 require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously has such approval. The regulations also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization will provide more than 25 percent of a program. We also intend to request that institutions report additional information related to the use of asynchronous distance education in clock hour programs and would incorporate this change in the Department's system for reporting information related to the eligibility of academic programs. We would meet all applicable Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) requirements before collecting this information.

Burden Calculation: We believe that the reporting of written arrangements will impose burden on institutions. We estimate that 36 institutions will need to report such activities. We anticipate that an institution will require an average of .5 hours (30 minutes) to report such activities for a total estimated burden of 18 hours under OMB Control Number 1845–NEW1.

We estimate that there are 12 proprietary institutions that will be required to report this information for 6 burden hours (12 institutions × .5 hours = 6 hours). We estimate that there are 11 private institutions that will be required to report this information for 5 burden hours (11 institutions × .5 hours = 5 hours). We estimate that there are 13 public institutions that will be required to report this information for 7 burden hours (13 institutions × .5 hours = 7 hours).

600.21—UPDATING APPLICATION INFORMATION—1845—NEW1

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost \$106.94
Proprietary	12	12	.5	6	\$642
Private	11	11	.5	5	538
Public	13	13	.5	7	749
Total	36	36	.....	18	1,926

Section 668.5—Written Arrangements To Provide Education Programs

Requirements: The proposed regulations in § 668.5 which required an eligible institution to demonstrate how an ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement has been removed from the final rule.

Burden Calculation: The proposed burden of 120 hours in the information collection 1845—NEW2 is being withdrawn.

Section 668.28—Non-Title IV Revenue (90/10)

Requirements: The regulations in § 668.28 remove the Net Present Value calculation currently in the regulations.

Burden Calculation: This regulatory language change will remove burden

from the institution. Based on the explanation provided in the preamble, the regulations in § 668.28(b) no longer applies to the calculation of the treatment of revenue. Therefore, the current burden applied under OMB Control Number 1845—0096 will be eliminated. Upon the effective date of these regulation, the currently assessed 2,808 burden hours will be discontinued.

SECTION 668.28—NON-TITLE IV REVENUE (90/10)—1845—0096

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost savings \$106.94/hour
Proprietary	- 936	- 936	2	- 1,872	\$ - 200,192
Proprietary	- 936	- 936	1	- 936	- 100,096
Total	- 1,872	- 1,872	.....	- 2,808	- 300,288

The estimated cost to institutions is \$53.47 per hour based on the 2018 mean hourly information from the Bureau of Labor Statistics Occupational Employment Statistics for

Postsecondary Education Administrators⁶² × 2 to account for benefits and expenses for a total per hour cost of \$106.94. As 85 percent of for-profit institutions are considered to

be small entities, most of the reduction and corresponding cost savings will accrue to those institutions.

Regulatory section	Information collection	OMB control No. & estimated burden (change in burden)	Estimated costs \$106.94/hour
§ 600.21 Updating application information.	The regulations in § 600.21 require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously been awarded such approval. The regulations also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.	1845—NEW1—18 hours	\$1,926
§ 668.5—Written arrangements to provide education programs.	The regulations in § 668.5 requiring the eligible institution to demonstrate how the ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement has been removed from the final rule and this estimated burden is withdrawn.	1845—NEW2—0 hours	0
§ 668.28 Non-title IV revenue (90/10).	The regulations in § 668.28 removes the Net Present Value calculation currently in the regulations.	- 2,808	(300,288)

⁶² www.bls.gov/oes/current/oes119033.htm.

Collection of Information
 The total burden hours and change in the burden hours associated with each

OMB control number affected by the regulations follows:

OMB control No.	Total burden hours	Change in burden hours
1845-NEW1	+ 18	+ 18
1845-NEW2	0	0
1845-0096	-2,808	-2,808
Total	-2,790	-2,790

Intergovernmental Review

These regulations are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

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. In the NPRM we noted that parts 600 and 668 may have federalism implications and encouraged State and local elected officials to review and provide comments on these final regulations. In the *Public Comment* section of this preamble, we discuss any comments we received on this subject.

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List of Subjects

34 CFR Part 600

Colleges and universities, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 602

Colleges and universities, 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, Student aid, Vocational education.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends parts 600, 602, and 668 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. Adding, in alphabetical order, a definition for "Academic engagement".
 ■ b. Revising the definitions of "Clock hour", "Correspondence course", "Credit hour", "Distance education", and "Incarcerated student".

- c. Adding, in alphabetical order, a definition for "Juvenile justice facility".
- d. Revising the definition "Nonprofit institution".
- e. Removing the authority citation at the end of the section.

The additions and revisions read as follows:

§ 600.2 Definitions.

* * * * *

Academic engagement: Active participation by a student in an instructional activity related to the student's course of study that—

- (1) Is defined by the institution in accordance with any applicable requirements of its State or accrediting agency;
- (2) Includes, but is not limited to—
 - (i) Attending a synchronous class, lecture, recitation, or field or laboratory activity, physically or online, where there is an opportunity for interaction between the instructor and students;
 - (ii) Submitting an academic assignment;
 - (iii) Taking an assessment or an exam;
 - (iv) Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction;
 - (v) Participating in a study group, group project, or an online discussion that is assigned by the institution; or
 - (vi) Interacting with an instructor about academic matters; and
- (3) Does not include, for example—
 - (i) Living in institutional housing;
 - (ii) Participating in the institution's meal plan;
 - (iii) Logging into an online class or tutorial without any further participation; or
 - (iv) Participating in academic counseling or advisement.

* * * * *

Clock hour: (1) A period of time consisting of—

- (i) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;
- (ii) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period;
- (iii) Sixty minutes of preparation in a correspondence course; or

(iv) In distance education, 50 to 60 minutes in a 60-minute period of attendance in—

(A) A synchronous or asynchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students; or

(B) An asynchronous learning activity involving academic engagement in which the student interacts with technology that can monitor and document the amount of time that the student participates in the activity.

(2) A clock hour in a distance education program does not meet the requirements of this definition if it does not meet all accrediting agency and State requirements or if it exceeds an agency's or State's restrictions on the number of clock hours in a program that may be offered through distance education.

(3) An institution must be capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour under this definition.

Correspondence course: (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructors. Interaction between instructors and students in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

Credit hour: Except as provided in 34 CFR 668.8(k) and (l), a credit hour is an amount of student work defined by an institution, as approved by the institution's accrediting agency or State approval agency, that is consistent with commonly accepted practice in postsecondary education and that—

(1) Reasonably approximates not less than—

(i) One hour of classroom or direct faculty instruction and a minimum of two hours of out-of-class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different period of time; or

(ii) At least an equivalent amount of work as required in paragraph (1)(i) of this definition for other academic activities as established by the institution, including laboratory work, internships, practica, studio work, and

other academic work leading to the award of credit hours; and

(2) Permits an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels.

* * * * *

Distance education: (1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include—

(i) The internet;

(ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(iii) Audio conference; or

(iv) Other media used in a course in conjunction with any of the technologies listed in paragraphs (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—

(i) Providing direct instruction;

(ii) Assessing or providing feedback on a student's coursework;

(iii) Providing information or responding to questions about the content of a course or competency;

(iv) Facilitating a group discussion regarding the content of a course or competency; or

(v) Other instructional activities approved by the institution's or program's accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency—

(i) Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and

(ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

* * * * *

Incarcerated student: A student 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. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends. For purposes of Pell Grant eligibility under 34 CFR 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal Government or a State, but is considered incarcerated for the purposes of determining costs of attendance under section 472 of the HEA in determining eligibility for and the amount of the Pell Grant.

Juvenile justice facility: A public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws—

(1) Are accused of committing a delinquent act;

(2) Have been adjudicated delinquent; or

(3) Are determined to be in need of supervision.

* * * * *

Nonprofit institution: An institution that—

(1)(i) Is owned and operated by one of more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); or

(2) For a foreign institution—

(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 600.7 is amended by:
 - a. Redesignating paragraph (b)(2) as (b)(3).
 - b. Adding a new paragraph (b)(2).
 - c. Removing the authority citation at the end of the section.

The addition reads as follows:

§ 600.7 Conditions of institutional eligibility.

* * * * *

(b) * * *

(2) *Calculating the number of correspondence students.* For purposes of paragraph (a)(1)(ii) of this section, a student is considered "enrolled in correspondence courses" if the student's enrollment in correspondence courses constituted more than 50 percent of the courses in which the student enrolled during an award year.

* * * * *

- 4. Section 600.10 is amended by revising paragraph (c)(1)(iii) and removing the authority citation at the end of the section to read as follows:

§ 600.10 Date, extent, duration, and consequence of eligibility.

* * * * *

(c) * * *

(1) * * *

(iii) For a 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, obtain the Secretary's approval.

* * * * *

- 5. Section 600.20 is revised to read as follows:

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

(a) *Initial eligibility application.* (1) An institution that wishes to establish its eligibility to participate in any HEA program must submit an application to the Secretary for a determination that it qualifies as an eligible institution under this part. The Secretary must ensure

prompt action is taken by the Department on any materially complete application required under this section.

(2) If the institution also wishes to be certified to participate in the title IV, HEA programs, it must indicate that intent on the application, and submit all the documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in 34 CFR part 668, subparts B and L.

(3) A freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, must include in its application to participate—

(i)(A) A list of all medical school educational sites and where they are located, including all sites at which its students receive clinical training, except those clinical training sites that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks; and

(B) The type of clinical training (core, required clinical rotation, not required clinical rotation) offered at each site listed on the application in accordance with paragraph (a)(3)(i)(A) of this section; and

(ii) Whether the school offers—

(A) Only post-baccalaureate/ equivalent medical programs, as defined in § 600.52;

(B) Other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or

(C) Both; and

(iii) Copies of the formal affiliation agreements with hospitals or clinics providing all or a portion of a clinical training program required under § 600.55(e)(1).

(b) *Reapplication.* (1) A currently designated eligible institution that is not participating in the title IV, HEA programs must apply to the Secretary for a determination that the institution continues to meet the requirements in this part if the Secretary requests the institution to reapply. If the institution chooses to be certified to participate in the title IV, HEA programs, it must submit an application to the Secretary and must submit all the supporting documentation indicated on the application to enable the Secretary to determine that it satisfies the relevant certification requirements contained in subparts B and L of 34 CFR part 668.

(2)(i) A currently designated eligible institution that participates in the title IV, HEA programs must apply to the Secretary for a determination that the institution continues to meet the

requirements in this part and in 34 CFR part 668 if the institution chooses to—

(A) Continue to participate in the title IV, HEA programs beyond the scheduled expiration of the institution's current eligibility and certification designation;

(B) Reestablish eligibility and certification as a private nonprofit, private for-profit, or public institution following a change in ownership that results in a change in control as described in § 600.31; or

(C) Reestablish eligibility and certification after the institution changes its status as a proprietary, nonprofit, or public institution.

(ii) The Secretary must ensure prompt action is taken by the Department on any materially complete application required under paragraph (a)(2)(i) of this section.

(3) A freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, must include in its reapplication to participate—

(i)(A) A list of all of the foreign graduate medical school's educational sites and where they are located, including all sites at which its students receive clinical training, except those clinical training sites that are not used regularly, but instead are chosen by individual students who take no more than two electives at the location for no more than a total of eight weeks; and

(B) The type of clinical training (core, required clinical rotation, not required clinical rotation) offered at each site listed on the application in accordance with paragraph (b)(3)(i)(A) of this section; and

(ii) Whether the school offers—

(A) Only post-baccalaureate/ equivalent medical programs, as defined in § 600.52;

(B) Other types of programs that lead to employment as a doctor of osteopathic medicine or doctor of medicine; or

(C) Both; and

(iii) Copies of the formal affiliation agreements with hospitals or clinics providing all or a portion of a clinical training program required under § 600.55(e)(1).

(c) *Application to expand eligibility.* A currently designated eligible institution that wishes to expand the scope of its eligibility and certification and disburse title IV, HEA Program funds to students enrolled in that expanded scope must apply to the Secretary and wait for approval to—

(1) Add an educational program or a location at which the institution offers or will offer 50 percent or more of an educational program if one of the

following conditions applies, otherwise it must report to the Secretary under § 600.21:

(i) The institution participates in the title IV, HEA programs under a provisional certification, as provided in 34 CFR 668.13.

(ii) The institution receives title IV, HEA program funds under the reimbursement or cash monitoring payment method, as provided in 34 CFR part 668, subpart K.

(iii) The institution acquires the assets of another institution that provided educational programs at that location during the preceding year and participated in the title IV, HEA programs during that year.

(iv) The institution would be subject to a loss of eligibility under 34 CFR 668.188 if it adds that location.

(v) The Secretary notifies, or has notified, the institution that it must apply for approval of an additional educational program or a location under § 600.10(c).

(2) Increase its level of program offering (*e.g.*, adding graduate degree programs when it previously offered only baccalaureate degree programs);

(3) Add an educational program if the institution is required to apply to the Secretary for approval under § 600.10(c);

(4) Add a branch campus at a location that is not currently included in the institution's eligibility and certification designation;

(5) For a freestanding foreign graduate medical school, or a foreign institution that includes a foreign graduate medical school, add a location that offers all or a portion of the foreign graduate medical school's core clinical training or required clinical rotations, except for those locations that are included in the accreditation of a medical program accredited by the Liaison Committee on Medical Education (LCME) or the American Osteopathic Association (AOA); or

(6) Convert an eligible location to a branch campus.

(d) *Notice and application*—(1) *Notice and application procedures.* (i) To satisfy the requirements of paragraphs (a), (b), and (c) of this section, an institution must notify the Secretary of its intent to offer an additional educational program, or provide an application to expand its eligibility, in a format prescribed by the Secretary and provide all the information and documentation requested by the Secretary to make a determination of its eligibility and certification.

(ii)(A) An institution that notifies the Secretary of its intent to offer an educational program under paragraph (c)(3) of this section must ensure that

the Secretary receives the notice described in paragraph (d)(2) of this section at least 90 days before the first day of class of the educational program.

(B) If an institution does not provide timely notice in accordance with paragraph (d)(1)(ii)(A) of this section, the institution must obtain approval of the additional educational program from the Secretary for title IV, HEA program purposes.

(C) If an additional educational program is required to be approved by the Secretary for title IV, HEA program purposes under paragraph (d)(1)(ii)(B) of this section, the Secretary may grant approval, or request further information prior to making a determination of whether to approve or deny the additional educational program.

(D) When reviewing an application under paragraph (d)(1)(ii)(C) of this section, the Secretary will take into consideration the following:

(1) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs.

(2) Whether the additional educational program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.

(3) Whether the number of additional educational programs being added is inconsistent with the institution's historic program offerings, growth, and operations.

(4) Whether the process and determination by the institution to offer an additional educational program that leads to gainful employment in a recognized occupation is sufficient.

(E)(1) If the Secretary denies an application from an institution to offer an additional educational program, the denial will be based on the factors described in paragraphs (d)(1)(ii)(D)(2) and (3) of this section, and the Secretary will explain in the denial how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation.

(2) If the Secretary denies the institution's application to add an additional educational program, the Secretary will permit the institution to respond to the reasons for the denial and request reconsideration of the denial.

(2) *Notice format.* An institution that notifies the Secretary of its intent to offer an additional educational program under paragraph (c)(3) of this section must at a minimum—

(i) Describe in the notice how the institution determined the need for the program and how the program was designed to meet local market needs, or for an online program, regional or national market needs. This description must contain any wage analysis the institution may have performed, including any consideration of Bureau of Labor Statistics data related to the program;

(ii) Describe in the notice how the program was reviewed or approved by, or developed in conjunction with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program;

(iii) Submit documentation that the program has been approved by its accrediting agency or is otherwise included in the institution's accreditation by its accrediting agency, or comparable documentation if the institution is a public postsecondary vocational institution approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation; and

(iv) Provide the date of the first day of class of the new program.

(e) *Secretary's response to applications.* (1) If the Secretary receives an application under paragraph (a) or (b)(1) of this section, the Secretary notifies the institution—

(i) Whether the applicant institution qualifies in whole or in part as an eligible institution under the appropriate provisions in §§ 600.4 through 600.7; and

(ii) Of the locations and educational programs that qualify as the eligible institution if only a portion of the applicant qualifies as an eligible institution.

(2) If the Secretary receives an application under paragraph (a) or (b) of this section and that institution applies to participate in the title IV, HEA programs, the Secretary notifies the institution—

(i) Whether the institution is certified to participate in those programs;

(ii) Of the title IV, HEA programs in which it is eligible to participate;

(iii) Of the title IV, HEA programs in which it is eligible to apply for funds;

(iv) Of the effective date of its eligibility to participate in those programs; and

(v) Of the conditions under which it may participate in those programs.

(3) If the Secretary receives an application under paragraph (b)(2) of this section, the Secretary notifies the institution whether it continues to be certified, or whether it reestablished its

eligibility and certification to participate in the title IV, HEA programs and the scope of such approval.

(4) If the Secretary receives an application under paragraph (c)(1) of this section for an additional location, the Secretary notifies the institution whether the location is eligible or ineligible to participate in the title IV, HEA programs, and the date of eligibility if the location is determined eligible.

(5) If the Secretary receives an application under paragraph (c)(2) of this section for an increase in the level of program offering, or for an additional educational program under paragraph (c)(3) of this section, the Secretary notifies the institution whether the program qualifies as an eligible program, and if the program qualifies, the date of eligibility.

(6) If the Secretary receives an application under paragraph (c)(4) or (5) of this section to have a branch campus certified to participate in the title IV, HEA programs as a branch campus, the Secretary notifies the institution whether that branch campus is certified to participate and the date that the branch campus is eligible to begin participation.

■ 6. Amend § 600.21 by revising paragraph (a)(11) and adding paragraphs (a)(12) and (13) and removing the authority citation at the end of the section to read as follows:

§ 600.21 Updating application information.

(a) * * * (11) For any program that is required to provide training that prepares a student for gainful employment in a recognized occupation—

- (i) Establishing the eligibility or reestablishing the eligibility of the program;
(ii) Discontinuing the program's eligibility;
(iii) Ceasing to provide the program for at least 12 consecutive months;
(iv) Losing program eligibility under § 600.40; or
(v) Changing the program's name, CIP code or credential level.

(12) Its addition of a second or subsequent direct assessment program.

(13) Its establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program pursuant to 34 CFR 668.5(c).

* * * * *

■ 7. Section 600.52 is amended by revising the definition of "Foreign institution" and removing the authority citation at the end of the section to read as follows:

§ 600.52 Definitions.

* * * * *

Foreign institution: (1) For the purposes of students who receive title IV aid, an institution that—

- (i) Is not located in the United States;
(ii) Except as provided with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2)—

(A) Has no U.S. location;
(B) Has no written arrangements, within the meaning of 34 CFR 668.5, with institutions or organizations located in the United States for those institutions or organizations to provide a portion of an eligible program, as defined under 34 CFR 668.8, except for written arrangements for no more than 25 percent of the courses required by the program to be provided by eligible institutions located in the United States; and

(C) Does not permit students to complete an eligible program by enrolling in courses offered in the United States, except that it may permit students to complete up to 25 percent of the program by—

- (1) Enrolling in the coursework, research, work, or special studies offered by an eligible institution in the United States; or

(2) Participating in an internship or externship provided by an ineligible organization as described in 34 CFR 668.5(h)(2);

(iii) Is legally authorized by the education ministry, council, or equivalent agency of the country in which the institution is located to provide an educational program beyond the secondary education level; and

- (iv) Awards degrees, certificates, or other recognized educational credentials in accordance with § 600.54(e) that are officially recognized by the country in which the institution is located.

(2) Notwithstanding paragraph (1)(ii)(C) of this definition, independent research done by an individual student in the United States for not more than one academic year is permitted, if it is conducted during the dissertation phase of a doctoral program under the guidance of faculty, and the research is performed only in a facility in the United States.

(3) If the educational enterprise enrolls students both within the United States and outside the United States, and the number of students who would be eligible to receive title IV, HEA program funds attending locations outside the United States is at least twice the number of students enrolled within the United States, the locations outside the United States must apply to participate as one or more foreign

institutions and must meet all requirements of paragraph (1) of this definition, and the other requirements of this part. For the purposes of this paragraph (3), an educational enterprise consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership.

* * * * *

■ 8. Section 600.54 is amended by revising paragraph (c) and removing the authority citation at the end of the section to read as follows:

§ 600.54 Criteria for determining whether a foreign institution is eligible to apply to participate in the Direct Loan Program.

* * * * *

(c)(1) Notwithstanding 34 CFR 668.5, written arrangements between an eligible foreign institution and an ineligible entity are limited to those under which—

- (i) The ineligible entity is an institution that meets the requirements in paragraphs (1)(iii) and (iv) of the definition of "foreign institution" in § 600.52; and

(ii) The ineligible foreign institution provides 25 percent or less of the educational program.

(2) For the purpose of this paragraph (c), written arrangements do not include affiliation agreements for the provision of clinical training for foreign medical, veterinary, and nursing schools.

* * * * *

PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

■ 9. The authority citation for part 602 continues to read as follows:

Authority: 20 U.S.C. 1099b, unless otherwise noted.

■ 10. Section 602.3 is amended by:

■ a. Adding periods at the ends of paragraphs (a)(1) through (14).

■ b. Redesignating paragraphs (a)(6) through (14) as paragraphs (a)(7) through (15).

■ c. Adding a new paragraph (a)(6).

■ d. In paragraph (b), removing the definition of "Distance education."

■ e. Removing the authority citation at the end of the section.

The addition reads as follows:

§ 602.3 What definitions apply to this part?

(a) * * *

(6) Distance education.

* * * * *

**PART 668—STUDENT ASSISTANCE
GENERAL PROVISIONS**

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

Authority: 20 U.S.C. 1001–1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221–3, and 1231a, unless otherwise noted.

Section 668.14 also issued under 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a–3, 1099c, and 1141.

Section 668.41 also issued under 20 U.S.C. 1092, 1094, 1099c.

Section 668.91 also issued under 20 U.S.C. 1082, 1094.

Section 668.171 also issued under 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109.

Section 668.172 also issued under 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109.

Section 668.175 also issued under 20 U.S.C. 1094 and 1099c.

■ 12. Section 668.1 is amended by revising paragraph (b) introductory text and removing the authority citation at the end of the section to read as follows:

§ 668.1 Scope.

* * * * *

(b) As used in this part, an “institution,” unless otherwise specified, includes—

* * * * *

■ 13. Section 668.2 is amended by:

■ a. Designating the undesignated words and phrases in paragraph (a) as paragraphs (a)(1) through (26).

■ b. Adding periods at the ends of newly designated paragraphs (a)(1) through (26).

■ c. Removing newly designated paragraph (a)(26).

■ d. Further redesignating newly designated paragraphs (a)(7) through (23), (24), and (25) as paragraphs (a)(8) through (24), (26), and (27), respectively.

■ e. Adding new paragraphs (a)(7) and (25) and paragraphs (a)(28) through (31).

■ f. In paragraph (b):

■ i. Removing the definition of “Academic Competitiveness Grant (ACG) Program” and the authority citation following the definition;

■ ii. Revising the definition of “Full-time student” and removing the authority citation following the definition;

■ iii. Adding in alphabetical order the definition of “Subscription-based program”; and

■ iv. In the definition of “Third-party servicer”, revising paragraph (1)(i)(D) and removing the authority citation at the end of the definition.

The additions and revisions read as follows:

§ 668.2 General definitions.

(a) * * *

(7) Direct assessment program.

* * * * *

(25) Religious mission.

* * * * *

(28) Teach-out.

(29) Teach-out agreement.

(30) Teach-out plan.

(31) Title IV, HEA program.

(b) * * *

Full-time student: An enrolled student who is carrying a full-time academic workload, as determined by the institution, under a standard applicable to all students enrolled in a particular educational program. The student’s workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. For a term-based program that is not subscription-based, the student’s workload may include repeating any coursework previously taken in the program; however, the workload may not include more than one repetition of a previously passed course. For an undergraduate student, an institution’s minimum standard must equal or exceed one of the following minimum requirements, based on the type of program:

(1) For a program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), 12 semester hours or 12 quarter hours per academic term.

(2) For a program that measures progress in credit hours and does not use terms, 24 semester hours or 36 quarter hours over the weeks of instructional time in the academic year, or the prorated equivalent if the program is less than one academic year.

(3) For a program that measures progress in credit hours and uses nonstandard-terms (terms other than semesters, trimesters, or quarters) the number of credits determined by—

(i) Dividing the number of weeks of instructional time in the term by the number of weeks of instructional time in the program’s academic year; and

(ii) Multiplying the fraction determined under paragraph (3)(i) of this definition by the number of credit hours in the program’s academic year.

(4) For a program that measures progress in clock hours, 24 clock hours per week.

(5) A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.

(6) The work portion of a cooperative education program in which the amount

of work performed is equivalent to the academic workload of a full-time student.

(7) For correspondence coursework—

(i) A full-time course load must be commensurate with the requirements listed in paragraphs (1) through (6) of this definition; and

(ii) At least one-half of the coursework must be made up of non-correspondence coursework that meets one-half of the institution’s requirement for full-time students.

(8) For a subscription-based program, completion of a full-time course load commensurate with the requirements in paragraphs (1), (3), and (5) through (7) of this definition.

* * * * *

Subscription-based program: A standard or nonstandard-term program in which the institution charges a student for each term on a subscription basis with the expectation that the student completes a specified number of credit hours (or the equivalent) during that term. Coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term. Students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. An institution establishes an enrollment status (for example, full-time or half-time) that will apply to a student throughout the student’s enrollment in the program, except that a student may change his or her enrollment status no more often than once per academic year. The number of credit hours (or the equivalent) a student must complete before receiving subsequent disbursements is calculated by—

(1) Determining for each term the number of credit hours (or the equivalent) associated with the institution’s minimum standard for the student’s enrollment status (for example, full-time, three-quarter time, or half-time) for that period commensurate with paragraph (8) in the definition of “full-time student,” adjusted for less than full-time students in light of the definitions of “half-time student” and “three-quarter time student,” and adjusted to at least one credit (or the equivalent) for a student who is enrolled less than half-time; and

(2) Adding together the number of credit hours (or the equivalent) determined under paragraph (1) for each term in which the student was enrolled in and attended that program, excluding

the current and most recently attended terms.

* * * * *
Third-party servicer: (1) * * *
 (j) * * *
 (D) Originating loans;
 * * * * *

■ 14. Section 668.3 is amended by revising paragraphs (b)(2) and (3) and removing the authority citation at the end of the section to read as follows:

§ 668.3 Academic year.

* * * * *
 (b) * * *
 (2) A week of instructional time is any week in which—
 (i) At least one day of regularly scheduled instruction or examinations occurs, or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs; or
 (ii)(A) In a program offered using asynchronous coursework through distance education or correspondence courses, the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives; and
 (B) In a program using asynchronous coursework through distance education, the institution expects enrolled students to perform educational activities demonstrating academic engagement during the week; and
 (3) Instructional time does not include any scheduled breaks and activities not included in the definition of “academic engagement” in 34 CFR 600.2, or periods of orientation or counseling.
 * * * * *

■ 15. Section 668.5 is amended by:
 ■ a. Revising paragraphs (a), (c), and (d)(1).
 ■ b. Adding paragraphs (f), (g), and (h).
 ■ c. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 668.5 Written arrangements to provide educational programs.

(a) *Written arrangements between eligible institutions.* (1) Except as provided in paragraph (a)(2) of this section, if an eligible institution enters into a written arrangement with another eligible institution, or with a consortium of eligible institutions, under which the other eligible institution or consortium provides part of the educational program to students enrolled in the first institution, the Secretary considers that educational program to be an eligible program if the educational program offered by the institution that grants the

degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.
 (2) If the written arrangement is between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation, the Secretary considers the educational program to be an eligible program if the educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.
 * * * * *

(c) *Written arrangements between an eligible institution and an ineligible institution or organization.* Except as provided in paragraph (d) of this section, if an eligible institution enters into a written arrangement with an institution or organization that is not an eligible institution under which the ineligible institution or organization provides part of the educational program of students enrolled in the eligible institution, the Secretary considers that educational program to be an eligible program if—

- (1) The ineligible institution or organization has not—
 - (i) Had its eligibility to participate in the title IV, HEA programs terminated by the Secretary;
 - (ii) Voluntarily withdrawn from participation in the title IV, HEA programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution’s State licensing agency, accrediting agency, or guarantor, or by the Secretary;
 - (iii) Had its certification to participate in the title IV, HEA programs revoked by the Secretary;
 - (iv) Had its application for recertification to participate in the title IV, HEA programs denied by the Secretary; or
 - (v) Had its application for certification to participate in the title IV, HEA programs denied by the Secretary;
- (2) The educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8; and
- (3)(i) The ineligible institution or organization provides 25 percent or less of the educational program, including in accordance with 34 CFR 602.22(b)(4); or
- (ii)(A) The ineligible institution or organization provides more than 25 percent but less than 50 percent of the educational program, in accordance with 34 CFR 602.22(a)(1)(ii)(f);
- (B) The eligible institution and the ineligible institution or organization are

not owned or controlled by the same individual, partnership, or corporation; and

(C) The eligible institution’s accrediting agency or, if the institution is a public postsecondary vocational educational institution, the State agency listed in the **Federal Register** in accordance with 34 CFR part 603 has specifically determined that the institution’s arrangement meets the agency’s standards for executing a written arrangement with an ineligible institution or organization.

(d) *Administration of title IV, HEA programs.* (1) If an institution enters into a written arrangement as described in paragraph (a), (b), or (c) of this section, or provides coursework as provided in paragraph (h)(2) of this section, except as provided in paragraph (d)(2) of this section, the institution at which the student is enrolled as a regular student must determine the student’s eligibility for the title IV, HEA program funds, and must calculate and disburse those funds to that student.
 * * * * *

(f) *Workforce responsiveness.* Nothing in this or any other section in this part prohibits an institution utilizing written arrangements from aligning or modifying its curriculum or academic requirements in order to meet the recommendations or requirements of industry advisory boards that include employers who hire program graduates, widely recognized industry standards and organizations, or industry-recognized credentialing bodies, including making governance or decision-making changes as an alternative to allowing or requiring faculty control or approval or integrating industry-recognized credentials into existing degree programs.

(g) *Calculation of percentage of program.* When determining the percentage of the program that is provided by an ineligible institution or organization under paragraph (c) of this section, the institution divides the number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the ineligible organization or organizations by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program. A course is provided by an ineligible institution or organization if the organization with which the institution has a written arrangement has authority over the design, administration, or instruction in the course, including, but not limited to—

(1) Establishing the requirements for successful completion of the course;

(2) Delivering instruction in the course; or

(3) Assessing student learning.

(h) *Non-applicability to other interactions with outside entities.* Written arrangements are not necessary for, and the limitations in this section do not apply to—

(1) Acceptance by the institution of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit; or

(2) The internship or externship portion of a program if the internship or externship is governed by accrediting agency standards, or, in the case of an eligible foreign institution, the standards of an outside oversight entity, such as an accrediting agency or government entity, that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.

■ 16. Section 668.8 is amended by revising paragraphs (e)(1)(iii), (k)(2), and (l) and removing the authority citation at the end of the section to read as follows:

§ 668.8 Eligible program.

* * * * *

(e) * * * (1) * * *

(iii) The institution can demonstrate reasonable program length, in accordance with § 668.14(b)(26); and

* * * * *

(k) * * *

(2) Each course within the program is acceptable for full credit toward completion of an eligible program offered by the institution that provides an associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that—

(i) The eligible program requires at least two academic years of study; and

(ii) The institution can demonstrate that least one student graduated from the program during the current award year or the two preceding award years.

(l) *Formula.* For purposes of determining whether a program described in paragraph (h) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for the purposes of the title IV, HEA programs—

(1) A semester or trimester hour must include at least 30 clock hours of instruction; and

(2) A quarter hour must include at least 20 clock hours of instruction.

* * * * *

17. Section 668.10 is revised to read as follows:

§ 668.10 Direct assessment programs.

(a)(1) A direct assessment program is a program that, in lieu of credit or clock hours as the measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others. The assessment must be consistent with the accreditation of the institution or program utilizing the results of the assessment.

(2) Direct assessment of student learning means a measure of a student's knowledge, skills, and abilities designed to provide evidence of the student's proficiency in the relevant subject area.

(3) An institution must establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. This methodology must be consistent with the requirements of the institution's accrediting agency or State approval agency.

(4) All regulatory requirements in this chapter that refer to credit or clock hours as a measurement apply to direct assessment programs according to whether they use credit or clock hour equivalencies, respectively.

(5) A direct assessment program that is not consistent with the requirements of the institution's accrediting agency or State approval agency is not an eligible program as provided under § 668.8. In order for any direct assessment program to qualify as an eligible program, the accrediting agency must have—

(i) Evaluated the program based on the agency's accreditation standards and criteria, and included it in the institution's grant of accreditation or preaccreditation; and

(ii) Reviewed and approved the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

(b)(1) An institution that wishes to offer a direct assessment program must apply to the Secretary to have its direct assessment program or programs determined to be eligible programs for title IV, HEA program purposes.

Following the Secretary's initial approval of a direct assessment program, additional direct assessment programs at an equivalent or lower academic level may be determined to be eligible without further approvals from the Secretary except as required by 34 CFR 600.10(c)(1)(iii), 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.

(2) The institution's direct assessment application must provide information satisfactory to the Secretary that includes—

(i) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;

(ii) A description of how the direct assessment program is structured, including information about how and when the institution determines on an individual basis what each student enrolled in the program needs to learn and how the institution excludes from consideration of a student's eligibility for title IV, HEA program funds any credits or competencies earned on the basis of prior learning;

(iii) A description of how learning is assessed and how the institution assists students in gaining the knowledge needed to pass the assessments;

(iv) The number of semester, trimester, or quarter credit hours, or clock hours, that are equivalent to the amount of student learning being directly assessed for the certificate or degree;

(v) The methodology the institution uses to determine the number of credit or clock hours to which the program or programs are equivalent; and

(vi) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of direct assessment program(s) and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency indicating agreement with the institutions methodology for determining the direct assessment program's equivalence in terms of credit or clock hours.

(vii) Notwithstanding paragraphs (a) and (b) of this section, no program offered by a foreign institution that involves direct assessment will be considered to be an eligible program under § 668.8.

(c) A direct assessment program may use learning resources (e.g., courses or portions of courses) that are provided by entities other than the institution providing the direct assessment program without regard to the limitations on contracting for part of an educational program in § 668.5(c)(3).

(d) Title IV, HEA program funds may be used to support instruction provided, or overseen, by the institution, except for the portion of the program that the student is awarded based on prior learning.

(e) Unless an institution has received initial approval from the Secretary to offer direct assessment programs, and the institution's offering of direct assessment coursework is consistent with the institution's accreditation and State authorization, if applicable, title IV, HEA program funds may not be used for—

(1) The course of study described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), if offered using direct assessment; or

(2) Remedial coursework described in § 668.20, if offered using direct assessment.

(f) Student progress in a direct assessment program may be measured using a combination of—

(1) Credit hours and credit hour equivalencies; or

(2) Clock hours and clock hour equivalencies.

■ 18. Section 668.13 is amended by:

■ a. Redesignating paragraph (a)(1) as paragraph (a)(1)(i).

■ b. Adding paragraph (a)(1)(ii).

■ c. Adding paragraph (b)(3).

■ d. Removing the word “or” at the end of paragraph (c)(1)(i)(D).

■ e. Removing the period and adding in its place “; or” at the end of paragraph (c)(1)(i)(E).

■ f. Adding paragraph (c)(1)(i)(F).

■ g. Removing the word “facsimile” and adding in its place the word “electronic” in paragraphs (d)(3)(i) and (d)(3)(ii)(C).

■ h. Revising paragraph (d)(3)(iii).

■ i. Removing paragraph (d)(3)(iv).

■ j. Revising paragraph (d)(5).

■ k. Removing the authority citation at the end of the section.

The additions and revisions read as follows:

§ 668.13 Certification procedures.

(a) * * * (1)(i) * * *

(ii) On application from the institution, the Secretary certifies a location of an institution that meets the requirements of § 668.13(a)(1)(i) as a branch if it satisfies the definition of “branch” in 34 CFR 600.2.

* * * * *

(b) * * *

(3) In the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration of its current period of participation, the institution will automatically be granted renewal of certification, which may be provisional.

(c) * * * (1)(i) * * *

(F) The institution is a participating institution that has been provisionally recertified under the automatic recertification requirement in paragraph (b)(3) of this section.

* * * * *

(d) * * *

(3) * * *

(iii) Documents filed by electronic transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation.

* * * * *

(5) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service or another service that provides delivery confirmation for that document.

* * * * *

■ 19. Section 668.14 is amended by revising paragraphs (b)(10), (26), and (31) introductory text to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which the course of instruction is designed to prepare such prospective students, as provided in § 668.43(a)(5)(v);

* * * * *

(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed the greater of—

(A) One hundred and fifty percent of the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by any Federal agency; or

(B) The minimum number of clock hours required for training in the

recognized occupation for which the program prepares the student as established in a State adjacent to the State in which the institution is located; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student;

* * * * *

(31) The institution will submit a teach-out plan to its accrediting agency in compliance with 34 CFR 602.24(c) and the standards of the institution's accrediting agency. The institution will update its teach-out plan upon the occurrence of any of the following events:

* * * * *

■ 20. Section 668.22 is amended by:

■ a. Removing the word “or” at the end of paragraph (a)(2)(i)(B).

■ b. Revising paragraph (a)(2)(i)(C).

■ c. Adding paragraph (a)(2)(i)(D).

■ d. Revising paragraph (a)(2)(ii).

■ e. Removing the word “nonterm” and adding in its place the word “non-term” in paragraph (a)(2)(iii)(B).

■ f. Revising paragraph (a)(3).

■ g. Removing the citation “§ 668.164(g)” at the end of paragraph (a)(5) and adding in its place the citation “§ 668.164(i)”.

■ h. Revising paragraphs (a)(6)(ii)(A), (d)(1)(vii), and (i).

■ i. Removing the citation “§ 668.164(g)” in paragraph (l)(1) and adding in its place the citation “§ 668.164(j)”.

■ j. Removing the citation “§ 668.164(g)(2)” in paragraph (l)(4) and adding in its place the citation “§ 668.164(j)(2)”.

■ k. Revising paragraphs (l)(6) and (7).

■ l. Adding paragraph (l)(9).

■ m. Removing the authority citation at the end of the section.

The additions and revisions read as follows:

§ 668.22 Treatment of title IV funds when a student withdraws.

(a) * * *

(2)(i) * * *

(C) For a student in a standard or nonstandard-term program, excluding a subscription-based program, the student is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on approved leave of absence, as defined in paragraph (d) of this section; or

(D) For a student in a non-term program or a subscription-based program, the student is unable to

resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance, unless the student is on an approved leave of absence, as defined in paragraph (d) of this section.

(ii)(A) Notwithstanding paragraph (a)(2)(i) of this section—

(1) A student who completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete is not considered to have withdrawn;

(2) In a program offered in modules, a student is not considered to have withdrawn if the student successfully completes—

(i) One module that includes 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules;

(ii) A combination of modules that when combined contain 49 percent or more of the number of days in the payment period, excluding scheduled breaks of five or more consecutive days and all days between modules; or

(iii) Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under § 668.2 for the payment period;

(3) For a payment period or period of enrollment in which courses in the program are offered in modules—

(i) A student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will attend a module that begins later in the same payment period or period of enrollment; and

(ii) For standard and nonstandard-term programs, excluding subscription-based programs, that module begins no later than 45 calendar days after the end of the module the student ceased attending;

(4) For a subscription-based program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date occurs within the same payment period or period of enrollment and is no later than 60 calendar days after the student ceased attendance; and

(5) For a non-term program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume

attendance, and that date is no later than 60 calendar days after the student ceased attendance.

(B) If an institution has obtained the written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) of this section—

(1) A student may change the date of return that begins later in the same payment period or period of enrollment, provided that the student does so in writing prior to the return date that he or she had previously confirmed;

(2) For standard and nonstandard-term programs, excluding subscription-based programs the later module that he or she will attend begins no later than 45 calendar days after the end of the module the student ceased attending; and

(3) For non-term and subscription-based programs, the student's program permits the student to resume attendance no later than 60 calendar days after the student ceased attendance.

(C) If an institution obtains written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) of this section and, if applicable, paragraph (a)(2)(ii)(B) of this section, but the student does not return as scheduled—

(1) The student is considered to have withdrawn from the payment period or period of enrollment; and

(2) The student's withdrawal date and the total number of calendar days in the payment period or period of enrollment would be the withdrawal date and total number of calendar days that would have applied if the student had not provided written confirmation of a future date of attendance in accordance with paragraph (a)(2)(ii)(A) of this section.

(3) For purposes of this section, "title IV grant or loan assistance" includes only assistance from the Direct Loan, Federal Pell Grant, Iraq and Afghanistan Service Grant, TEACH Grant, and FSEOG programs, not including the non-Federal share of FSEOG awards if an institution meets its FSEOG matching share by the individual recipient method or the aggregate method.

(6) * * *

(ii)(A) If outstanding charges exist on the student's account, the institution may credit the student's account up to the amount of outstanding charges in accordance with § 668.164(c) with all or a portion of any—

(1) Grant funds that make up the post-withdrawal disbursement; and

(2) Loan funds that make up the post-withdrawal disbursement only after obtaining confirmation from the student, or parent in the case of a parent PLUS loan, that they still wish to have the loan funds disbursed in accordance with paragraph (a)(6)(iii) of this section.

(d) * * * (1) * * *

(vii) Except for a clock hour or non-term credit hour program, or a subscription-based program, upon the student's return from the leave of absence, the student is permitted to complete the coursework he or she began prior to the leave of absence; and

(i) *Order of return of title IV funds—*

(1) *Loans.* Unearned funds returned by the institution or the student, as appropriate, in accordance with paragraph (g) or (h) of this section respectively, must be credited to outstanding balances on title IV loans made to the student or on behalf of the student for the payment period or period of enrollment for which a return of funds is required. Those funds must be credited to outstanding balances for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Unsubsidized Federal Direct Stafford loans.

(ii) Subsidized Federal Direct Stafford loans.

(iii) Federal Direct PLUS received on behalf of the student.

(2) *Remaining funds.* If unearned funds remain to be returned after repayment of all outstanding loan amounts, the remaining excess must be credited to any amount awarded for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Federal Pell Grants.

(ii) Iraq and Afghanistan Service Grants.

(iii) FSEOG Program aid.

(iv) TEACH Grants.

(j) * * *

(6) A program is "offered in modules" if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment.

(7)(i) "Academic attendance" and "attendance at an academically-related activity" must include academic engagement as defined under 34 CFR 600.2.

(ii) A determination of "academic attendance" or "attendance at an academically-related activity" must be

made by the institution; a student's certification of attendance that is not supported by institutional documentation is not acceptable.

* * * * *

(9) A student in a program offered in modules is scheduled to complete the days in a module if the student's coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds for the payment period or period of enrollment.

* * * * *

§ 668.28 [Amended]

■ 21. Section 668.28 is amended by removing and reserving paragraph (b) and removing the authority citation at the end of the section.

■ 22. Section 668.34 is amended by:

- a. Revising paragraph (a)(5).
■ b. Revising paragraph (1) in the definition for "Maximum timeframe" in paragraph (b).
■ c. Removing the authority citation at the end of the section.

The revisions read as follows:

§ 668.34 Satisfactory academic progress.

(a) * * *

(5) The policy specifies—

(i) For all programs, the maximum timeframe as defined in paragraph (b) of this section; and

(ii) For a credit hour program using standard or nonstandard terms that is not a subscription-based program, the pace, measured at each evaluation, at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, calculated by either dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted or by determining the number of hours that the student should have completed by the evaluation point in order to complete the program within the maximum timeframe. In making this calculation, the institution is not required to include remedial courses;

* * * * *

(b) * * *

Maximum timeframe. * * *

(1) For an undergraduate program measured in credit hours, a period that is no longer than 150 percent of the published length of the educational program, as measured in credit hours, or expressed in calendar time;

* * * * *

§ 668.111 [Amended]

23. Section 668.111 is amended by adding the phrase "issuance by the

Department of and" after the phrase "establishes rules governing the" in the first sentence of paragraph (a) and removing the authority citation at the end of the section.

■ 24. Section 668.113 is amended by:

- a. Removing the word "shall" and adding in its place the word "must" in both instances it is used in paragraph (c) introductory text.
■ b. Redesignating paragraphs (d)(1) and (2) as paragraphs (d)(2) and (3).
■ c. Adding a new paragraph (d)(1).
■ d. Removing the authority citation at the end of the section.

The addition reads as follows:

§ 668.113 Request for review.

* * * * *

(d)(1) If the final audit determination or final program review determination in paragraph (a) of this section results from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary relies upon the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the amount of work associated with the institution's credit hours is consistent with commonly accepted practice in postsecondary education, in applying the definitions of "distance education" and "credit hour" in 34 CFR 600.2.

* * * * *

■ 25. Section 668.164 is amended by:

- a. Adding the phrase "that is not a subscription-based program" after the phrase "equal in length" in paragraphs (i)(1)(i) and (ii).
■ b. Removing the word "or" at the end of paragraph (i)(1)(i).
■ c. Removing the period and adding in its place "; or" in paragraph (i)(1)(ii)(B).
■ d. Adding paragraph (i)(1)(iii).

The addition reads as follows:

§ 668.164 Disbursing funds.

* * * * *

(i)(1) * * *

(iii) If the student is enrolled in a subscription-based program, the later of—

(A) Ten days before the first day of classes of a payment period; or

(B) The date the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms that the student attended under the definition of a subscription-based program in § 668.2.

* * * * *

■ 26. Section 668.171 is amended by:

- a. Removing the word "or" at the end of paragraph (i)(1).

■ b. Removing the period and adding in its place "; or" in paragraph (i)(2).

■ c. Adding paragraph (i)(3).

The addition reads as follows:

§ 668.171 General.

* * * * *

(i) * * *

(3) Deny the institution's application for certification or recertification to participate in the title IV, HEA programs.

■ 27. Section 668.174 is amended by:

- a. Revising paragraph (b)(1)(i) introductory text.
■ b. Adding the phrase "ownership or" after the word "substantial" and removing the word "or" at the end of paragraph (b)(1)(i)(A).
■ c. Redesignating paragraph (b)(1)(i)(B) as paragraph (b)(1)(i)(C).
■ d. Adding a new paragraph (b)(1)(i)(B).
■ e. Adding "entity," after the phrase "That person," in paragraph (b)(1)(ii).
■ f. Adding the phrase "or entity" after the word "person" in paragraphs (b)(2)(i) and (ii).
■ g. Adding "entity," after the phrase "owes the liability by that" in paragraph (b)(2)(ii)(A).
■ h. Adding "entity," after the phrase "owes the liability that the" in paragraph (b)(2)(ii)(B).
■ i. Adding the phrase "or entity" after the phrase "The person" in paragraphs (b)(2)(iv)(A) and (B).
■ j. Adding the phrase "or entity" after both uses of the word "person" in paragraph (c)(3) introductory text.
■ k. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 668.174 Past performance.

* * * * *

(b) Past performance of persons or entities affiliated with an institution. (1)(i) Except as provided in paragraph (b)(2) of this section, an institution is not financially responsible if a person or entity who exercises substantial ownership or control over the institution, as described under 34 CFR 600.31, or any member or members of that person's family alone or together—

* * * * *

(B) Exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution; or

* * * * *