

DEPARTMENT OF EDUCATION**34 CFR Part 668**

RIN 1840-AC17

Student Assistance General Provisions**AGENCY:** Department of Education.**ACTION:** Notice of proposed rulemaking.

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

DATES: Comments must be received on or before October 31, 1995.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Mr. Douglas Laine, Program Specialist, Direct Loan Policy Group, Policy Development Division, U.S. Department of Education, P.O. Box 23272, Washington, DC 20026-3272. Comments may also be sent through the internet to DIRECT_LOANS@ED.GOV.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the regulations that the comment addresses and that comments be in the same order as the regulations.

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. A copy of those comments may also be sent to the Department representative named in the preceding paragraph.

FOR FURTHER INFORMATION CONTACT: Mr. Douglas Laine, Program Specialist, Direct Loan Policy Group, Policy Development Division, U.S. Department of Education, 600 Independence Avenue, SW, room 3045, Regional

Office Building 3, Washington, DC 20202-5400, telephone: (202) 708-9406. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:**Background**

The Secretary is proposing to revise 34 CFR part 668 to enhance the Secretary's FFEL Program default reduction initiative and provide additional default prevention measures in the Direct Loan Program. The Secretary first published regulations to begin the FFEL Program default reduction initiative on June 5, 1989. This gave the Department the authority to take action to limit, suspend or terminate an institution's participation in the Title IV programs based on a high FFEL Program cohort default rate. The June 5, 1989 regulations provided that the Department may take L, S, and T action against an institution if it has an FFEL Program cohort default rate that exceeds 40 percent.

On July 19, 1991, the Secretary further expanded the default reduction initiative to reflect new legislation that made an institution ineligible to participate in the FFEL Program if that institution had a high FFEL Program cohort default rate for three consecutive years, unless the institution could demonstrate to the Secretary that exceptional mitigating circumstances would make the loss of eligibility inequitable. Currently, under that legislation, an institution is subject to the loss of eligibility if it has an FFEL Program cohort default rate that equals or exceeds 25 percent for three consecutive fiscal years. Under the exceptional mitigating circumstances criteria in the Department's regulations, an institution may appeal this loss of eligibility if it can demonstrate to the satisfaction of the Secretary that it has a completion and placement rate of at least 66.6 percent, and either less than 15 percent of its students borrow under the FFEL Program or at least 66.6 percent of its students come from economically disadvantaged backgrounds.

The Direct Loan Program was authorized by the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66) with the first loans made in July 1994. When the Direct Loan Program was authorized, the statute mandating the calculation of FFEL Program cohort default rates was not revised to include Direct Loan Program loans. Moreover,

the statute authorizing the Direct Loan Program does not specifically require the Secretary to calculate a similar rate for institutions that participate in the Direct Loan Program or contain a specific provision under which an institution would lose its eligibility to participate in the Direct Loan Program based on a default rate. The Secretary has determined, however, that it is appropriate to establish a measurement similar to the FFEL cohort default rate in the Direct Loan Program. Therefore, the Secretary is proposing in regulations to define a measurement similar to the FFEL Program cohort default rate under the Direct Loan Program, a "cohort rate" for Direct Loans, and to establish similar institutional eligibility requirements based on the repayment of Direct Loans by the institution's former students. The Secretary is proposing this change because FFEL Program cohort default rates have been a useful measure of institutional performance and have provided the Secretary an effective means to reduce defaults by removing high default institutions from participation in the FFEL Program. The potential loss of eligibility to participate in the FFEL Program based on high FFEL Program cohort default rates provides a powerful incentive for institutions to keep their FFEL Program cohort default rates low. This has resulted in increased protection for students and taxpayers, and has improved the integrity of the FFEL Program.

As in the FFEL Program, the Secretary proposes that exceptional mitigating circumstances be taken into consideration in determining whether an institution may continue to participate in the Direct Loan Program on the basis of its cohort rate. Further, the Secretary is proposing to modify the regulations for the FFEL Program to simplify the cohort default rate appeal process and to establish fair and reasonable measures for exceptional mitigating circumstances, while reducing the substantial burden on institutions and the Department that exists under the current regulations. Exceptional mitigating circumstances under the Direct Loan and FFEL Programs would be the same.

Finally, to make the L, S, and T process more effective, the Secretary is proposing to streamline the current L, S, and T procedures and to limit the grounds on which the institution may appeal when the L, S, or T action is warranted by high default rates. The current L, S, and T procedures are exceedingly lengthy and have not effectively protected students and Federal taxpayers from institutions

whose high FFEL Program cohort default rates are evidence of abuse of the Title IV programs. Additionally, the Secretary is proposing to prescribe timeframes that would reduce the amount of time an L, S, and T action would take to complete. Finally, the Secretary is proposing to remove the "Appendix D defense" which contains measures for an institution to follow to help the institution to reduce its cohort default rate. The Secretary believes that the measures included in the Appendix D defense, while effective for helping an institution reduce its default rate, do not support the continuation of a high FFEL Program cohort default rate institution's participation in the Title IV programs. The Secretary is proposing that the only means by which an institution may successfully appeal an L, S, and T action against its participation in the Title IV programs is to demonstrate to the hearing officer that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or if applicable, weighted average cohort rate, is inaccurate, and that a correct recalculation of the rate

would result in the institution having a rate that is beneath the thresholds that make the institution subject to L, S, and T action.

Proposed Regulatory Changes

Due to the complex nature of these proposed regulations, a chart is provided in each major section of the preamble that provides an overview of the proposed changes.

Section 668.17 Default Reduction and Prevention Measures

L, S, and T Authority. The proposed regulations would provide the Secretary with the authority to take L, S, and T action against an institution if it has an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate that is greater than 40 percent for a fiscal year. The Secretary is proposing this 40 percent threshold to make his authority to take L, S, and T action against an institution participating in the Direct Loan Program comparable with such authority under the FFEL Program.

The proposed regulations would also provide the Secretary with the authority to take L, S, and T action against an institution's participation in the FFEL Program if it has any combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years. Having a combination of these rates for three consecutive fiscal years is analogous to having FFEL Program cohort default rates that exceed the thresholds for three consecutive years. The Secretary is proposing this measure to prevent an institution that would not be eligible to participate in the Direct Loan Program based on consecutively high Direct Loan Program cohort rates or weighted average cohort rates from participating in the FFEL Program. The Secretary believes that this action is consistent with the statutory requirement that institutions with consecutively high default rates lose their eligibility to participate in the FFEL Program.

ACTION TAKEN AGAINST SCHOOLS BY TYPE OF RATE

Type of rate	Direct loan program schools	FFEL program schools
40+ percent FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate for one year.	L, S, and T for Title IV	L, S, and T for Title IV.
25 percent or greater Direct Loan Program cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L, S, and T for FFEL Program.
25 percent or greater weighted average cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L, S, and T for FFEL Program.

Direct Loan Program cohort rate and weighted average cohort rate. The Secretary proposes to calculate a Direct Loan Program cohort rate or weighted average cohort rate to use as a measure to determine if an institution should remain eligible to participate in the Direct Loan Program. The Secretary is proposing to use different formulas to calculate these rates for different sectors of institutions.

For a public institution, private nonprofit institution, or degree-granting proprietary institution, the Secretary proposes to calculate a Direct Loan Program cohort rate or weighted average cohort rate based on the number of an institution's current and former students who enter repayment on a Direct Loan in a fiscal year and who, by the end of the following fiscal year, are in default on those loans. This is the same formula the Secretary is required by section 435(a) of the HEA to use to calculate cohort default rates under the FFEL Program.

For non-degree-granting proprietary institutions, the Secretary is proposing to calculate Direct Loan Program cohort rates or weighted average cohort rates based on the percentage of students who enter repayment in a fiscal year and who, by the end of the following fiscal year, are either in default or are in repayment under the income contingent repayment (ICR) plan, and have scheduled monthly payments that are less than \$15 per month, and that payment is less than the interest that is accruing on the loan (i.e., in negative amortization).

If there are both FFEL Program and Direct Loan Program loans entering repayment in the institution's cohort, the Secretary will calculate a weighted average cohort rate for the institution. As in the FFEL Program, the Secretary will base the Direct Loan Program cohort rate or weighted average cohort rate on borrowers, not loans. For example, if a student enters repayment on both FFEL Program and Direct Loan Program loans so as to be in the same

cohort, the student will be counted only once in the calculation used to calculate the rate. However, an institution will continue to have an FFEL Program cohort default rate as long as it has former students entering repayment on FFEL Program loans. Such an institution will continue to be subject to loss of eligibility to participate in the FFEL Program or be subject to L, S, and T action based on its FFEL Program cohort default rate.

A "weighted average" cohort rate is calculated by taking the percentage of students who entered repayment on FFEL Program and Direct Loan Program loans in a fiscal year received for attendance at the institution (or on the portion of a loan made under the Federal Direct Consolidation Loan or Federal Consolidation Loan Programs that is used to repay those loans), who are in default before the end of the fiscal year immediately following the year in which they entered repayment, and, for non-degree-granting institutions, are in repayment under the income contingent

repayment plan at the end of that following fiscal year and have scheduled payments that are less than

\$15 per month and that payment results in negative amortization.

BORROWERS INCLUDED IN TYPES OF RATES

Type of institution	Type of rate	Defaulted borrowers	ICR component
Public, private-nonprofit, and degree-granting proprietary institutions.	FFEL Program Cohort Default Rate	Yes	No.
	Direct Loan Program Cohort Rate	Yes	No.
Non-Degree-Granting Proprietary Institutions.	Weighted Average Cohort Rate	Yes	No.
	FFEL Program Cohort Default Rate	Yes	No.
	Direct Loan Program Cohort Rate	Yes	Yes.
	Weighted Average Cohort Rate	Yes	Yes.

If an institution has less than 30 former students entering repayment in a fiscal year on Direct Loan and FFEL Program loans received at that institution, the Secretary will calculate the institution's Direct Loan Program cohort rate or weighted average cohort rate for that fiscal year based on the institution's former students who enter repayment on their Direct Loans or FFEL Program loans over the three most recent fiscal years.

A loan will be considered in default for purposes of a Direct Loan Program cohort rate or weighted average cohort rate for all institutions if a borrower or endorser has failed to make an installment payment when due provided that this failure has persisted for 270 days. The Secretary has chosen 270 days because this closely approximates the date a default claim is paid under the FFEL Program. The date a default claim is paid by a guaranty agency is used as the date the loan defaults for FFEL Program cohort default rates. A loan will not be considered in default if, after going into default, the borrower has made 12 consecutive on-time monthly payments under 34 CFR 685.211(e) on the loan before the end of the fiscal year following the fiscal year the loan entered repayment.

The Secretary has chosen to include a minimum payment component in defining the Direct Loan Program cohort rate and weighted average cohort rate for non-degree-granting proprietary institutions for several reasons. The Secretary believes that this is an appropriate performance-based measure to assess a borrower's ability to repay a student loan and the institution's quality of training. The Secretary is concerned that without such a measure an institution could have a low Direct Loan Program cohort rate or weighted average cohort rate when its former students are only making minimal

payments on their loans. The Secretary believes that this measure is needed to prevent an institution from effectively avoiding the effects of its failure to provide appropriate training by encouraging its students to repay their loans under the ICR plan. Under the ICR plan, a borrower with a low income may have scheduled monthly payments that are very low or zero. The \$15 payment rate was chosen because it is the approximate amount a borrower would have to pay if his or her income is at the poverty level as determined by the Department of Health and Human Services. The Secretary believes that if a sufficient proportion of borrower incomes is so low that the scheduled monthly payments for those borrowers under the ICR program are less than \$15 per month and those payment amounts result in negative amortization, this is generally evidence that the institution has not provided those borrowers with the education or training needed to obtain gainful employment that can provide the borrowers with sufficient incomes to repay the student loans incurred to attend the institution. The Secretary believes that such loans would likely go into default if the ICR plan were not available. The negative amortization factor was included with the \$15 dollar payment in order to exclude from the default calculation borrowers with incomes much higher than the poverty level who have small debts. The Secretary is proposing to use the minimum payment rate for non-degree-granting proprietary institutions because these institutions are in business to provide students with education or training needed to secure employment. A borrower's repayment schedule under the ICR plan will directly reflect the value of the education or training provided by the institution in the marketplace. Further, the former student borrowers of non-

degree-granting proprietary institutions are at the highest risk of default among all the sectors of institutions and the Secretary believes that for this reason, the use of the ICR plan by former students of these institutions be closely monitored.

The Secretary invites public comment regarding the use of the minimum payment under the ICR plan that may be used for the Direct Loan Program cohort rate for certain sectors of institutions. In addition, the Secretary is interested in knowing if the public believes the Secretary should implement measures to prevent an institution from evading the proposed rules under which a Direct Loan Program cohort rate and weighted average cohort rate are calculated for non-degree-granting proprietary institutions if such an institution switched to a non-profit status. The Secretary is also interested in receiving public comment regarding other possible measures that may be used to determine if an institution should be able to continue to participate in the Direct Loan Program or FFEL Program. The Secretary is especially interested in public comment on the following possible alternative measures to determine if an institution should continue to participate in the Direct Loan Program: (1) A percentage of Direct Loan borrowers paying under the ICR plan whose scheduled payments are less than the amount of interest that accrues monthly on their loans, i.e., in negative amortization, and (2) a percentage of the institution's former students who are making payments under the ICR plan whose income is less than a certain amount, such as \$15,000 (because income is a major factor in calculating monthly payments under the ICR plan).

The Secretary is also interested in public comment regarding a measure for borrowers for whom payment has been deferred for an extended period of time under the economic hardship or

unemployment deferment or forbearance. The Secretary is considering using such a measurement to trigger L, S, and T action against an institution participating in the FFEL and Direct Loan programs if a high percentage of its former students have forborne repayment on their loans or have deferred repayment on their loans for an extended period of time because of unemployment or economic hardship. Similar to the Secretary's concern that institutions may attempt to evade the consequences of a high Direct Loan Program cohort rate or weighted average cohort rate by encouraging students to use the ICR plan, the Secretary is concerned that institutions are evading the consequences of a high FFEL Program cohort default rate by encouraging and assisting a high percentage of their former students to obtain deferments or forbearance solely for the purpose of keeping their loans out of default until the period the

Department uses to calculate FFEL Program cohort default rate has elapsed. Because a deferment or forbearance generally lasts for one year, an institution generally needs to assist a former student to obtain only one deferment or forbearance to ensure that the former student does not default during the period the Department uses to calculate the FFEL Program cohort default rate. Finally, the Secretary specifically requests comment regarding how a borrower who has a scheduled ICR payment of less than \$15 and who would qualify for the economic hardship deferment should be treated in the Direct Loan Program cohort rate or weighted average cohort rate calculation.

Loss of eligibility to continue to participate in the Direct Loan Program. An institution with any combination of an FFEL Program cohort default rate, a Direct Loan Program cohort rate, or a weighted average cohort rate calculated

by the Secretary that is equal to or greater than 25 percent for three consecutive fiscal years would cease to be eligible to participate in the Direct Loan Program beginning 30 days from the date it receives notification of the loss of eligibility unless it can demonstrate to the satisfaction of the Secretary that exceptional mitigating circumstances would make the loss of eligibility inequitable. The Secretary will place such an institution on reimbursement until the 30th day following the institution's receipt of the notification of the loss of eligibility or, if the institution appeals, until the appeal is decided. Once the institution's appeal is decided, the Secretary will take the institution off reimbursement only if the appeal is successful. If the appeal is denied, the institution will not be eligible to participate in the Direct Loan Program for the remainder of the current fiscal year plus the following two fiscal years.

ELIGIBILITY STATUS OF INSTITUTIONS WITH HIGH RATES

Type of rate	Direct loan program	FFEL program
25 percent or greater FFEL Program cohort default rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	Loss of eligibility for the FFEL Program.
25 percent or greater Direct Loan Program cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L,S, and T for FFEL Program only.
25 percent or greater weighted average cohort rate for three consecutive years.	Loss of eligibility for Direct Loan Program.	L,S, and T for FFEL Program only.

The Secretary has chosen to eliminate institutions from the Direct Loan Program based on high cohort rates for several reasons. First, the Secretary believes it is imperative that institutions that would have high FFEL Program cohort default rates not be able to evade the consequences of that rate by participating in the Direct Loan Program, which currently has no default rate definition. Second, the Secretary is firmly committed to protecting students and Federal taxpayers from unscrupulous institutions that participate heavily in the loan programs but do not provide quality educational services to their students. The sanctions the Secretary is authorized to impose under the HEA and regulations on institutions that participate in the FFEL Program have proven to be a successful way to protect students, the Federal taxpayer, and the integrity of the loan programs. Therefore, the Secretary is proposing these regulations to provide him with the authority to take similar actions against institutions that have a high percentage of students that do not repay their Direct Loan Program loans.

The Secretary does not have the authority to amend or add to the

definition of the FFEL Program cohort default rate because that definition is specifically mandated in statute. The Secretary is, therefore, prohibited from adding to the FFEL Program cohort default rate a component that measures a minimum payment amount. The Secretary also does not have the authority to immediately terminate an institution's eligibility to participate in the FFEL Program if it has a Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive years. This means that an institution could have an FFEL Program cohort default rate of 25 percent or more for two years and a Direct Loan Program cohort rate of 25 percent for one year and remain eligible for the FFEL Program after it has lost its eligibility to participate in the Direct Loan Program. In this case, the Secretary will take L, S, and T action against the institution's participation in the FFEL Program.

Under these proposed rules, if an institution's former students enter repayment under both the FFEL Program and the Direct Loan Program in a fiscal year, the Secretary would calculate a weighted average cohort rate

to determine if an institution would lose its eligibility to participate in the Direct Loan Program. The Secretary will continue to use only FFEL Program loans to calculate an FFEL Program cohort default rate for that institution which will trigger a statutory loss of eligibility to participate in the FFEL Program. True equity between the Direct Loan and FFEL programs on this issue would require a statutory change that gives the Secretary authority to establish, in regulations, institutional eligibility requirements for the FFEL Program similar to the statutory authority for the Direct Loan Program, thus allowing him to move quickly to terminate any institution's participation in the FFEL Program when that institution's FFEL Program cohort default rate, Direct Loan cohort rate, or weighted average cohort rate warrants an action. The loss of eligibility provision in section 435 (a) of the HEA does not authorize the Secretary to make an institution ineligible to participate in the FFEL Program if it has Direct Loan Program cohort rates or weighted average cohort rates that exceed 25 percent for three consecutive years. However, under these regulations, the

Secretary will consider excessive Direct Loan Program cohort rates or weighted average cohort rates as a basis to take L, S, and T action against an institution's participation in the FFEL Program.

In addition to establishing this strict eligibility requirement under the Direct Loan Program, the Secretary will provide Direct Loan institutions with certain tools to help manage and reduce their Direct Loan Program cohort default rates. While the Secretary believes that the repayment plans available under the Direct Loan Program, coupled with the frequent borrower contact maintained by the Department's loan servicing efforts, will result in fewer defaults than in the FFEL Program, the Secretary is committed to developing, and making available to institutions, tools that will enable them to work effectively with borrowers to prevent defaults. These tools will include reports on delinquent borrowers, access to borrower information on the toll-free servicing telephone number, and free loan counseling materials for use during both entrance and exit interviews with borrowers. The Secretary invites public comment on the types and frequency of assistance that institutions need to help prevent Direct Loan defaults.

Exceptional Mitigating Circumstances. The Secretary proposes to modify the exceptional mitigating circumstances and the appeal process under which an institution may appeal the statutory loss of its eligibility to participate in the FFEL Program and the proposed loss of its eligibility to participate in the Direct Loan Program. Exceptional mitigating circumstances would be the same for both the Direct Loan and FFEL Programs. The Secretary believes that the current standards for exceptional mitigating circumstances are burdensome on an institution and administratively difficult for the Department to administer. For these reasons, the Secretary is proposing to change the exceptional mitigating circumstances and require that any appeal based on an exceptional mitigating circumstance be verified by an independent auditor prior to its submission to the Secretary. Under the proposed rules, any of the following criteria may be used as exceptional mitigating circumstances:

Exceptional Mitigating Circumstances

1. Participation Rate Index equal to or less than 0.0375 (Rate times percentage of students participating in the FFEL or Direct Loan programs)

2. 70 percent or greater completion rate and 70 percent or more students come from economically disadvantaged

backgrounds, for public or private-nonprofit institutions.

3. 50 percent or greater placement rate and 70 percent or more students come from economically disadvantaged backgrounds, for proprietary institutions.

• Participation rate index: The participation rate index is a new criterion based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate and the percent of an institution's students who were enrolled on at least a half-time basis that borrow under the FFEL or Direct Loan programs. This rate would be calculated by multiplying the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, its weighted average cohort rate by the percent of the institution's students who were enrolled on at least a half-time basis that borrowed under that loan program during a 12-month period that ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's rate. If this product is equal to or less than 0.0375, the institution would meet an exceptional mitigating circumstance. The Secretary has chosen 0.0375 as the participation rate index standard because, under the current mitigating circumstances, a borrower participation rate of 15 percent or less is acceptable as part of one of the exceptional mitigating circumstances. A cohort default rate of 25 percent for three consecutive years was the minimum rate that would trigger loss of eligibility. The Secretary has formulated the 0.0375 participation rate index criterion based on these percentages; $0.25 \times 0.15 = 0.0375$. Therefore the Secretary is proposing to use 0.0375 as the index.

For example, under this formula, an institution with an FFEL Program cohort default rate of 28 percent and a student borrower participation rate of 13 percent would be able to continue to participate in the FFEL program because $0.28 \times 0.13 = 0.0364$, which is less than 0.0375. The participation rate index criterion may be used by any institution that has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate of less than 40 percent for the most recent fiscal year. In order to appeal under this criterion, an institution would only need to submit to the Secretary a statement certifying the number of its students who were enrolled on at least a half-time basis during a 12-month period that has ended during the six months immediately preceding the fiscal year

used to determine the cohort of borrowers for the institution's borrower participation rate, and the number of those students that borrowed under the FFEL Program or Direct Loan Program, along with identifying information for those borrowers so they may be verified by the Secretary. In particular, the institution would need to provide the Secretary with the name, address, and social security number of each of those students. This will help the Department to verify this information through the National Student Loan Data System.

• Economically disadvantaged background rate and completion or placement rate: This exceptional mitigating circumstance criterion is derived from the current criteria which use completion rates, placement rates and the percent of the institution's students from economically disadvantaged backgrounds. Under this proposed rule, an institution would meet this exceptional mitigating circumstance if it can demonstrate that 70 percent or more of its student population, over a 12-month period that ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, came from an economically disadvantaged background, and either:

(1) For a public or private nonprofit institution, 70 percent of its students who were enrolled on at least a half-time basis, and were originally scheduled to complete their programs during a 12-month period that has ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers in the institution's rate, have completed their programs; or

(2) For a proprietary institution, 50 percent of its students originally scheduled to complete the programs during a 12-month period that has ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers used to calculate the institution's rate are currently employed, or were employed for at least 13 weeks, in an occupation related to the training they received, or are enrolled in a higher level educational program at another institution, or were enrolled such an institution for at least 13 weeks, for which the appealing institution's educational program provided substantial preparation.

For purposes of the completion rate and placement rate, a student is originally scheduled, at the time of

enrollment, to complete the educational program on the date when the student will have been enrolled in the program for the amount of time normally required to complete the program. The "amount of time normally required to complete the program" is the period of time specified in the institution's enrollment contract, catalog, or other materials, for completion of the program by a full-time student, or the period of time between the date of enrollment and the anticipated graduation date appearing on the student's loan application, if any, whichever is less.

For purposes of the completion rate, a student is considered to have completed the program if the student received a degree, certificate, or other recognized educational credential from the institution, transferred to a higher level educational program at another institution, or remained enrolled and was making satisfactory academic progress toward completion of the educational program.

The Secretary has chosen a 50 percent placement rate based on the completion rate and placement rate standards that are used to determine if certain programs are eligible for purposes of the FFEL Program. See section 481(e) of the HEA. This section mandates that such a program have a verified completion rate of at least 70 percent and a verified placement rate of 70 percent. The 50 percent threshold is derived from these two percentages. If an institution has a 70 percent completion rate and 70 percent of those students obtain employment in a relevant occupation, the institution will have a 49 percent placement rate under the proposed placement rate. The Secretary has chosen 50 percent because he believes an institution should exceed this threshold to be considered under an exceptional mitigating circumstance.

For purposes of the placement rate, a former student is considered placed if the student is employed or had been employed for at least 13 weeks following his or her last day of attendance at the institution, or enrolled in a higher level educational program at another institution for which the appealing institution's educational program provided substantial preparation.

The Secretary is proposing to remove the 15 percent or less student loan borrower rate as well as the 66.6 percent completion rate and 66.6 placement rate as an exceptional mitigating circumstance. In place of the loan borrower rate, the Secretary is proposing to add the participation rate index criterion because he believes that, when an institution has such a small percent

of its students borrow under the Direct Loan or FFEL Programs, borrower behavior may not reflect the quality of education at the institution. An appeal under this criterion is limited to institutions that have a Direct Loan Program cohort rate, an FFEL Program cohort default rate, or, if applicable, a weighted average cohort rate, that is less than 40 percent for a fiscal year. When more than 40 percent of all students at an institution are not repaying their loans, even if this percentage is based on a small proportion of the student body, the Secretary considers the institution to represent a significant financial risk for the taxpayers. Further, the Secretary believes that future student borrowers at the institution should be protected from the risks associated with borrowing Federal loans to pay for attending the institution.

Under the current exceptional mitigating circumstances, an institution can appeal if it has a completion rate of 66.6 percent or more, a placement rate of 66.6 percent or more, and if 66.6 percent or more of its students came from an economically disadvantaged background. The proposed regulations would make an appeal less burdensome to institutions because it would examine the completion, placement, and economically disadvantaged rates of the institution's former students over a shorter period of time. These modifications will also make the students who are included in the completion, placement and economically disadvantaged rates more representative of the borrowers included in the cohort used to determine the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate. Although the formula used for calculating the completion rate and student population from economically disadvantaged backgrounds is essentially the same, the institution would only need to review students who attended the institution (or for the completion rate, those students who were scheduled to complete their programs), during the 12-month period that preceded the fiscal year used to determine the cohort for the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate. The current regulations require an institution to review students over a 24-month period.

The Secretary is also proposing to modify the placement rate criterion for appeals to make it available only to proprietary institutions of higher education. The proposed placement rate will be measured by using the percent

of the institution's former students who were scheduled to complete their programs, during a 12-month period that ended during the six months immediately preceding the fiscal year used to determine the cohort of borrowers for the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, who either received a job in an occupation related to the training they received for at least 13 weeks or transferred to a higher level educational program. The current regulations base the placement rate on only those students who complete their educational programs in a recent 24-month period chosen by the institution. The Secretary has decided to use the students who were scheduled to graduate during the 12-month period preceding the fiscal year in which the cohort is determined for the institution's rate because it will be more representative of the former students in that cohort. The Secretary also believes that the calculation of a completion rate in this fashion is more equitable for proprietary institutions because students receiving training to obtain employment in a particular field may gain such employment before they complete their programs.

The Secretary is also proposing to revise the appeal procedures to make them easier for the institutions as well as the Department to manage while maintaining program integrity to ensure speedy resolution of appeals. Under the current appeal process, to remain eligible to participate in the FFEL Program during an appeal process, an institution is required to notify the Secretary within seven days following its receipt of its notification of the loss of eligibility that it intends to appeal the loss. The institution must then submit all the required information to support its appeal within 30 calendar days following the notification of loss of eligibility. The Secretary is proposing to remove from the regulations the requirement that the institution notify the Secretary in writing within the seven days that it intends to appeal in order to remain eligible during the appeal.

The Secretary is also proposing to remove the requirement that an institution notify the Secretary that it has requested verification of its FFEL Program cohort default rate data from the relevant guaranty agencies. Under the proposed regulations, an institution would remain eligible to participate in the FFEL Program or Direct Loan Program during the appeal if it submits a complete and accurate appeal, under the guidelines for exceptional mitigating

circumstances or inaccurate data, within 30 days from the date it is notified by the Secretary that it is no longer eligible to participate in the FFEL Program or Direct Loan Program.

Under the current regulations, if an institution requests verification of the data used to determine its cohort default rate from a guaranty agency, the institution remains eligible to participate in the FFEL Program until the guaranty agency verifies the data. Under the proposed rules, an institution would not remain eligible to participate beyond the 30-day period if the Secretary has not received the verified data by the 30th day following the notification of loss of eligibility. The Secretary believes that the new procedures for issuance and review of draft FFEL Program cohort default rates, that allow an institution to review the draft rates for error prior to the issuance of the official rates, will significantly improve the accuracy of the official FFEL Program cohort default rate. The Secretary will provide Direct Loan Program institutions with Direct Loan Program cohort rates, or if applicable, weighted average cohort rates, a similar opportunity to review the data used to determine those rates to ensure that they are accurate before the rates are made official. An institution should be able to resolve any additional discrepancies it believes exist in the FFEL Program cohort default rate, Direct Loan cohort rate, or weighted average cohort rate within 30 days.

Exceptional Mitigating Circumstances Appeal Process

- Institution receives notice that its participation in the FFEL or Direct Loan program will end in 30 days unless the institution appeals.
- The institution must submit a complete written appeal within 30 days after receiving the notice of loss of eligibility. An appeal will not be accepted after the 30th day.
- The Secretary issues a final decision on the institution's appeal within 45 days after receiving the appeal.
- No oral hearing is provided.

Subpart G—Fine, Limitation, Suspension, and Termination Proceedings

The proposed rules would provide the Secretary with the authority to take L, S, and T action against an institution that has a Direct Loan Program cohort rate or weighted average cohort rate that is greater than 40 percent for a fiscal year. The Secretary believes that such an authority is needed to protect students and taxpayers from abuse of

the Direct Loan Program. The Secretary has chosen a 40 percent Direct Loan Program cohort rate to parallel the 40 percent default rate threshold that triggers L, S, and T action against an institution that participates in the FFEL Program under 34 CFR 668.17(a)(1). Further, under the proposed rules, the Secretary could initiate an L, S, or T action against an institution's participation in the FFEL Program if it has a combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate that equals or exceeds 25 percent for three consecutive years. For example, an L, S, and T action could be taken against the institution if it has an FFEL Program cohort default rate that equals or exceeds 25 percent for one fiscal year, and a weighted average cohort rate for each of the two following fiscal years that equals or exceeds 25 percent. Such an institution is not subject to statutory loss of eligibility to participate in the FFEL Program. The Secretary is proposing this provision to prevent an institution that has lost its eligibility to participate in the Direct Loan Program, or attempts to evade a potential loss of eligibility to participate in the Direct Loan Program, from participating in the FFEL Program. The Secretary believes that such an institution presents an unreasonable risk to students and the Federal taxpayer. Under the proposed rules, the Secretary will cease any L, S, and T action against an institution's participation in the FFEL Program if that institution successfully appeals its loss of eligibility to participate in the Direct Loan Program under exceptional mitigating circumstances.

The Secretary is also proposing to revise the procedures and appeals for an L, S, and T action he may initiate when an institution has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, a weighted average cohort rate above 40 percent for a fiscal year or a combination of an FFEL Program cohort default rate, Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years. Under these revised procedures, an institution would have 30 days to notify the designated department official that it intends to appeal the L, S, or T; otherwise the action would become effective on the 31st day. If the institution intends to appeal, it may request a hearing or it may send written material to the designated department official within 30 days after it receives notice of the Secretary's intent to initiate L, S, or T

action. If a hearing is requested, the hearing officer must schedule a hearing within 15 days of the date the institution notifies the designated department official that it requests the hearing.

The designated department official or the hearing officer may only consider the accuracy of the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, the weighted average cohort rate to determine if the L, S, or T action should be upheld or dismissed. In light of the extensive process for determining default rates, the institution will have the burden of proving that the calculation of the rate was wrong. The Secretary believes it is appropriate to presume that the rates are accurate unless the institution can present clear and convincing evidence that the rate identified in the notice of intent is not final (i.e., the default rate appeal is pending) or does not accurately reflect the final rate determined by the Department. The designated department official or the hearing officer shall issue a final determination to uphold or dismiss the L, S, or T action within 30 days after the date the written material is received by the designated department official or the date the hearing is concluded, whichever is later.

In addition to streamlining the L, S, and T process, the Secretary is proposing to eliminate Appendix D as a defense from L, S, and T action. Appendix D was created to protect institutions from the consequences of L, S, and T action while they took action to reduce their FFEL Program cohort default rates. The Secretary believes that institutions have had ample time to exercise the measures provided in this section to reduce their FFEL Program cohort default rates and keep them low. The Secretary does not believe that the implementation of default reduction measures by an institution justifies the continued participation of a high default institution in the Title IV programs. However, the Secretary encourages institutions to continue to implement these measures to keep their default rates low.

Streamlined L, S, and T Procedures

- Institution receives notice stating that the L, S, or T action will be effective in 30 days unless the institution requests a hearing.
- Institution must request the hearing prior to the effective date.
- The hearing will be scheduled within 15–20 days after the request is received.

- The institution may appeal the proposed action only on the basis of the accuracy of the rate.

- The L, S, and T action is effective 30 days after the hearing if the hearing officer decides the action is warranted.

Executive Order 12866

1. Assessment of Costs and Benefits

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

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the Title IV, HEA programs effectively and efficiently. Burdens specifically associated with information collection requirements, if any, are explained elsewhere in this preamble under the heading of Paperwork Reduction Act of 1995.

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

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

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the Title IV, HEA programs.

2. Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with their clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but

shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 668.17 *Default Reduction and Prevention Measures*) (4) Is the description of the proposed regulations in the "Supplementary Information" section of this preamble helpful in the understanding of the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern whether these proposed regulations are easy to understand should also be sent to Stanley Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, SW., (Room 5100 FB-10), Washington, D.C. 20202.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Certain reporting, recordkeeping, and compliance requirements are imposed on institutions by the regulations. These requirements, however, would not have a significant impact because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

Section 668.17 contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Exceptional Mitigating Circumstances Appeals

The Student Assistance General Provisions regulations codify the procedures and the exceptional mitigating circumstances criteria under which an institution may appeal a loss of eligibility to participate in the FFEL Program or Direct Loan Program. The information to be collected may include one of the following: (1) For the participation rate index, the number of an institution's students enrolled on at least a half-time basis who enrolled in the appealing institution during a 12-month period and the number of those students who borrowed under the FFEL and Direct Loan programs during that 12-month period and the name, address and social security number of those students; (2) for the completion rate, the number of an institution's students who were scheduled to complete their programs in a 12-month period and the

name, address and social security number and, if applicable, the name of the institution and program to which the student transferred, for each of those students who actually completed; (3) for the placement rate, the number of students who were scheduled to complete their programs during a 12-month period and the name, address, social security number, job title, dates during which the student was employed, and the employer's name and address for all those students who obtained employment in an occupation related to the education or training received. The Department needs and uses the information to determine whether the institution may continue to participate in the FFEL or Direct Loan programs.

All information is to be collected and reported only once and only if the institution has a FFEL Program cohort default rate, Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years. Annual public reporting and recordkeeping burden contained in the collection of information proposed in these regulations is estimated to be 80 hours per response for 200 respondents (total annual reporting and recordkeeping burden equals 16,000 hours) including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing collection of information, and submitting materials.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on this proposed collection of information in—

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical use;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations. All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 3045, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except federal holidays.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 668

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

Dated: September 14, 1995.

Richard W. Riley,

Secretary of Education.

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

The Secretary proposes to amend part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

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

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

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

§ 668.17 Default reduction and prevention measures.

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

(2) The Secretary may initiate a proceeding under subpart G of this part to limit, suspend, or terminate the participation of an institution in the Title IV, HEA programs, if—

(i) For an institution whose former students enter repayment only on FFEL Program loans in a fiscal year, the FFEL Program cohort default rate for that institution exceeds 40 percent for that fiscal year;

(ii) For an institution whose former students enter repayment only on Direct Loan Program loans in a fiscal year, the Direct Loan Program cohort rate for that institution exceeds 40 percent for that fiscal year; or

(iii) For an institution that has both FFEL Program and Direct Loan Program loans entering repayment in the same fiscal year, the weighted average cohort rate for that institution exceeds 40 percent for that fiscal year.

(3) Unless an institution is subject to loss of eligibility to participate in the FFEL Program under paragraph (b)(1) of this section, the Secretary initiates a proceeding under subpart G of this part to limit, suspend, or terminate an institution's participation in the FFEL Program if the institution, for three consecutive fiscal years, has a combination of—

(i) An FFEL Program cohort default rate that is equal to or greater than 25 percent if only FFEL loans enter repayment in that cohort;

(ii) A Direct Loan Program cohort rate that is equal to or greater than 25 percent if only Direct Loan Program loans enter repayment in that cohort; or

(iii) A weighted average cohort rate that is equal to or greater than 25 percent if both FFEL Program and Direct Loan Program loans enter repayment in that cohort.

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

(5) The Secretary will cease any limitation, suspension, or termination action against an institution under paragraph (a)(3) of this section if the institution satisfactorily demonstrates to the Secretary that, pursuant to a timely submitted appeal under paragraph (b)(6) of this section, the institution meets one of the exceptional mitigating circumstances under paragraph (c)(1)(ii) of this section.

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

(2) Except as provided in paragraph (b)(6) of this section, an institution's participation in the Direct Loan Program ends 30 days after the date the institution receives notification from the Secretary that for each of the three most recent fiscal years the institution has any combination of—

(i) An FFEL Program cohort default rate that is equal to or greater than 25 percent if only FFEL Program loans enter repayment in that cohort;

(ii) A Direct Loan Program cohort rate that is equal to or greater than 25 percent if only Direct Loan Program loans enter repayment in that cohort; or

(iii) A weighted average cohort rate that is equal to or greater than 25 percent if both FFEL Program and Direct Loan Program loans enter repayment in that cohort.

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

(i) For the remainder of the fiscal year in which the Secretary determines that

the institution's participation has ended under paragraph (b)(1) or (2) of this section; and

(ii) For the two subsequent fiscal years.

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

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

(6) An institution may, notwithstanding § 668.26, continue to participate in the FFEL Program or Direct Loan Program, if the Secretary receives an appeal that is complete, accurate, and timely in accordance with paragraph (c) of this section.

(c) *Appeal procedures.* (1) An institution may appeal the loss of participation in the FFEL Program or Direct Loan Program under paragraph (b)(1) or (2) of this section by submitting an appeal in writing to the Secretary that must be received by the 30th calendar day following the date the institution receives notification of the end of participation. The institution may appeal on the grounds that—

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

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

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

(A) The institution has a participation rate index of 0.0375 or less. The participation rate index is determined by multiplying the institution's FFEL Program cohort default rate, Direct Loan Program cohort rate or, if applicable, weighted average cohort rate, by the percentage of the institution's students who were enrolled on at least a half-time basis who received a loan made under either the FFEL Program or Direct Loan Program, for a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined.

(B) For a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined, 70 percent or more of the institution's students who are enrolled on at least a half-time basis are individuals from disadvantaged economic backgrounds, as established by documentary evidence submitted by the institution. Such evidence must relate to either qualification by those students for an expected family contribution (EFC) of zero for any award year that generally coincides with the 12-month period, or attribution to those students of an adjusted gross income of the student and his or her parents or spouse, if applicable, reported for any award year that generally coincides with the 12-month period, of less than the poverty level, as determined under criteria established by the Department of Health and Human Services.

(1) For a public or private nonprofit institution, 70 percent or more of the institution's students who were initially enrolled on a full-time basis, and were scheduled to complete their programs during a 12-month period that has ended during the six months immediately preceding the fiscal year for which the cohort of borrowers used to calculate the institution's rate is determined, completed the educational programs in which they were enrolled. This rate is calculated by comparing the number of students who were classified as full-time at their initial enrollment in the institution and were originally scheduled, at the time of enrollment, to complete their programs within the relevant 12 month period, with the number of these students who received a degree, certificate, or other recognized educational credential from the institution; transferred from the institution to a higher level educational

program at another institution for which the prior program provided substantial preparation; or, at the end of the 12-month period, remained enrolled and were making satisfactory academic progress toward completion of their educational programs; or

(2) For a proprietary institution, the institution had a placement rate of 50 percent or more with respect to its former students who were enrolled in a program to receive a degree, certificate, or other recognized educational credential from the institution, and who remained in the program beyond the point the students would have received a 100 percent tuition refund from the institution. This rate is based on those students who were scheduled to complete their educational programs during the 12-month period ending prior to the fiscal year for which the cohort for the institution's rate is determined. This rate is calculated by determining the percentage of all those students who, based on evidence submitted by the institution, are, on the date the institution submits the appeal, employed, or had been employed for at least 13 weeks following their last day of attendance at the institution, in the occupation for which the institution provided training, or are enrolled, or had been enrolled for at least 13 weeks following receipt of the credential from the institution, in a higher level educational program at another institution for which the prior educational program provided substantial preparation.

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

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

(4) The Secretary's decision is based on the consideration of written material

submitted by the institution. No oral hearing is provided.

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

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

(7) An institution that appeals on the grounds that it meets the exceptional mitigating circumstances criteria contained in paragraph (c)(1)(ii) of this section must include in its appeal the following information:

(i) A written statement from an independent auditor that the information contained in the appeal is complete, accurate and determined in accordance with the requirements of this section;

(ii) For purposes of the participation index under paragraph (c)(1)(ii)(A) of this section—

(A) A statement indicating the number of students who were enrolled on at least a half-time basis at the institution in the relevant 12-month period; and

(B) The name, address, and social security number of each of the institution's current and former students who received Federal Stafford, Federal SLS, or Direct Loan Program loans during that 12-month period.

(iii) For purposes of the institution's percentage of students coming from disadvantaged economic backgrounds under paragraph (c)(1)(ii)(B) of this section:

(A) The number of students who were enrolled on at least a half-time basis at the institution in the relevant 12-month period; and

(B)(1) If EFC is used to determine if a student comes from an economically disadvantaged background, the name, address, and social security number, of each student with an EFC of zero, for an award year that, in whole or part, coincides with the relevant 12-month period, who was enrolled on at least a half-time basis at the institution in the relevant 12-month period; or

(2) If poverty level income as determined by the Department of Health and Human Services is used to measure an economically disadvantaged background, the name, address, and social security number of each student

with an adjusted gross income, or attribution to that student of an adjusted gross income of that student and his or her parents or spouse, if applicable, reported for the most recent calendar year that is less than the poverty level, and documentation of that income.

(iv) For purposes of the completion rate under paragraph (c)(1)(ii)(B)(1) of this section—

(A) The number of students who were initially enrolled on a full-time basis at the institution and were scheduled to complete their programs in the relevant 12-month period;

(B) For each of those former students who received a degree, certificate, or other recognized educational credential from the institution, the student's name, address, and social security number;

(C) For each of those former students who transferred to a higher level educational program at another institution, the name, address, social security number of the student, and the name and address of the institution to which the student transferred and the name of the higher level program; and

(D) For each of those students who remained enrolled and was making satisfactory academic progress toward completion of the educational program, the student's name, address, and social security number.

(v) For purposes of the placement rate under paragraph (c)(1)(ii)(B)(2) of this section—

(A) The number of students who were scheduled to receive a degree, certificate, or other recognized educational credential at the institution during the relevant 12 month period who remained enrolled beyond the point in the program in which he or she would receive a 100 percent tuition refund from the institution;

(B) For each of those former students who is employed or had been employed for at least 13 weeks following his or her last day of attendance at the institution, the student's name, address, and social security number, the employer's name and address, the student's job title, and the dates the student was so employed; and

(C) For each of those former students who enrolled in a higher level educational program at another institution for which the appealing institution's educational program provided substantial preparation, the former student's name, address, and social security number, the subsequent institution's name and address, the name of the educational program, and the dates the former student was so enrolled.

(d) *Definitions.* The following definitions apply to this section and § 668.90:

(1)(i) For purposes of the FFEL Program, except as provided in paragraph (e)(1)(ii) of this section, the term FFEL Program cohort default rate means—

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

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

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

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

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

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

(D) For the purposes of this definition, an SLS loan made in accordance with section 428A of the HEA (or a loan made under the Federal Consolidation Loan Program, a portion of which is used to repay a Federal SLS loan) shall not be considered to enter repayment

until after the borrower has ceased to be enrolled in an educational program leading to a degree, certificate, or other recognized educational credential at the participating institution on at least a half-time basis (as determined by the institution) and ceased to be in a period of forbearance or deferment based on such enrollment. Each eligible lender of a loan made under section 428A (or a loan made under the Federal Consolidation Loan Program, a portion of which is used to repay a Federal SLS loan) of the HEA shall provide the guaranty agency with the information necessary to determine when the loan entered repayment for purposes of this definition, and the guaranty agency shall provide that information to the Secretary.

(iii)(A) An FFEL Program cohort default rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(B) An FFEL Program cohort default rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

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

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

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

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

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

(e)(1) *Direct Loan Program cohort rate.* For purposes of the Direct Loan Program, the Secretary calculates Direct Loan Program cohort rates using the following formulas:

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

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

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

(ii) For proprietary non-degree granting institutions—

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

15 dollars per month and that payment results in negative amortization; or

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

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

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

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

(5) A Direct Loan Program cohort rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(6) A Direct Loan Program cohort rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

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

(8) For an institution that changes its status from that of a free-standing institution to that of a location of another institution, the Secretary determines the Direct Loan Program cohort rate based on the combined

number of students who enter repayment during the applicable fiscal year from both the former free-standing institution and the other institution. This Direct Loan Program cohort rate applies to the new, consolidated institution and all of its current locations.

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

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

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

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

(f)(1) *Weighted average cohort rate.* For purposes of an institution that has former students entering repayment in a fiscal year on both Direct Loan Program and FFEL Program, the Secretary calculates a weighted average cohort rate using the following formulas;

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

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

(B) For any fiscal year in which fewer than 30 of the institution's current and former students enter repayment on an FFEL Program or Direct Loan Program loan (or on the portion of a loan made under the Federal Consolidation Loan Program or Federal Direct Consolidation Loan Program that is used to repay such

loans) received for attendance at the institution, the percentage of those current and former students who entered repayment on such loans in the three most recent fiscal years, who are in default before the end of the fiscal year immediately following the year in which they entered repayment.

(ii) For proprietary non-degree granting institutions—

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

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

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

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

(4) Any Direct Loan Program loan on which the borrower has made 12

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

(5) A weighted average cohort rate of an institution applies to all locations of the institution as the institution exists on the first day of the fiscal year for which the rate is calculated.

(6) A weighted average cohort rate of an institution applies to all locations of the institution from the date the institution is notified of that rate until the institution is notified by the Secretary that the rate no longer applies.

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

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

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

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

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

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

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

§ 668.85 Suspension proceedings.

(b)(1) * * *
 (ii)(A) Specifies the proposed effective date of the suspension, which is at least 20 days after the date of mailing of the notice of intent; or

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

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

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

§ 668.86 Limitation or termination proceedings.

* * * * *

(b)(1) * * *
 (ii)(A) Specifies the proposed effective date of the limitation or termination, which is at least 20 days after the date of mailing of the notice of intent; or

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

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

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

§ 668.90 Initial and final decisions.

* * * * *

(a)(1) * * *
 (iii) * * *

(D) For hearings regarding the limitation, suspension, or termination of

an institution based on an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate, the 30th day after the conclusion of the hearing.

* * * * *

(3) * * *

(iv) In a limitation, suspension, or termination proceeding commenced on the grounds described in § 668.17(a)(1), if the hearing official finds that an institution's FFEL Program cohort default rate, Direct Loan Program cohort rate, or, if applicable, weighted average cohort rate meets the conditions specified in § 668.17(a)(1) for initiation of limitation, suspension, or termination proceedings, the hearing official also finds that the sanction sought by the designated department official is warranted, except that the hearing official finds that no sanction is warranted if the institution presents clear and convincing evidence demonstrating that its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate is not final or does not accurately reflect the final rate determined by the Department and that the correct rate would result in the institution having an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate that is beneath the thresholds that make the institution subject to limitation, suspension, or termination action.

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

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