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Dated: April 10, 2013.

**Arne Duncan,**

Secretary of Education.

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## DEPARTMENT OF EDUCATION

### 34 CFR Chapter VI

[Docket ID ED-2013-OPE-0008]

#### Negotiated Rulemaking Committee; Public Hearings

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Intent to establish negotiated rulemaking committee.

**SUMMARY:** In May 2012, we announced our intention to establish a negotiated rulemaking committee to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA) (title IV Federal Student Aid programs). We now announce additional topics for consideration for action by that committee. We also announce three public hearings at which interested parties may comment on the new topics suggested by the Department and may suggest additional topics for consideration for action by the negotiated rulemaking committee. For anyone unable to attend a public hearing, the Department will accept written comments.

**DATES:** The dates, times, and locations of the public hearings are listed under the **SUPPLEMENTARY INFORMATION** section of this notice. We must receive written comments suggesting issues that should be considered for action by the negotiated rulemaking committee on or before May 30, 2013.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by email. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the

Docket ID (listed at the beginning of this notice) at the top of your comments.

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket is available on the site under “How to Use Regulations.gov” in the Help section.

- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006.

**Privacy Note:** The Department’s policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** For information about the public hearings, go to <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/index.html> or contact: Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006. Telephone: (202) 502-7526. Email: [wendy.macias@ed.gov](mailto:wendy.macias@ed.gov).

For information about negotiated rulemaking in general, see The Negotiated Rulemaking Process for Title IV Regulations, Frequently Asked Questions at <http://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html> or contact: Wendy Macias, U.S. Department of Education, 1990 K Street NW., Room 8017, Washington, DC 20006. Telephone: (202) 502-7526. Email: [wendy.macias@ed.gov](mailto:wendy.macias@ed.gov).

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**SUPPLEMENTARY INFORMATION:** On May 1, 2012, we published a notice in the **Federal Register** (77 FR 25658) announcing our intent to establish a negotiated rulemaking committee under section 492 of the HEA to develop proposed regulations designed to

prevent fraud and otherwise ensure proper use of title IV Federal Student Aid program funds, especially within the context of current technologies. In particular, we announced our intent to propose regulations to address the use of debit cards and other banking mechanisms for disbursing title IV Federal Student Aid program funds, and to improve and streamline the campus-based Federal Student Aid programs. The notice also announced two public hearings at which interested parties could comment on the topics suggested by the Department and suggest additional topics for consideration for action by the negotiated rulemaking committee. The hearings were held on May 23, 2012, in Phoenix, Arizona, and on May 31, 2012, in Washington, DC. We invited parties to comment and submit topics for consideration in writing as well. Transcripts from the hearings can be found at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/index.html>. Written comments may be viewed through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Instructions for finding comments are available on the site under “How to Use Regulations.gov” in the Help section. Individuals can enter docket ID ED-2012-OPE-0008 in the search box to locate the appropriate docket.

At this time, we are announcing additional topics for consideration for action by the negotiated rulemaking committee. These topics include regulations that have been the subject of litigation over the past two years. We are also announcing three additional public hearings at which interested parties may comment on the new topics suggested by the Department and may suggest additional topics for consideration for action by the negotiating committee. For anyone unable to attend a public hearing, the Department will accept written comments.

We intend to select participants for the negotiated rulemaking committee from nominees of the organizations and groups that represent the interests significantly affected by the proposed regulations. To the extent possible, we will select individual negotiators who reflect the diversity among program participants, in accordance with section 492(b)(1) of the HEA.

#### Regulatory Issues

Over the next several years, the Department intends to conduct rulemakings related to the title IV Federal Student Aid programs. In the near term, as indicated by the topics suggested in the May 1, 2012, **Federal**

**Register** notice and in this notice, we plan to address program integrity issues that place title IV Federal Student Aid program funds at risk. We expect to announce the formation of additional negotiated rulemaking committees to address more directly access to, and the affordability of, higher education and possible steps to improve the quality of higher education in the United States and to better encourage students to complete their education. This long-term agenda will take several years to complete.

The additional topics for consideration for action by the next negotiated rulemaking committee are: cash management of funds provided under the title IV Federal Student Financial Aid programs; State authorization for programs offered through distance education or correspondence education; State authorization for foreign locations of institutions located in a State; clock-to-credit hour conversion; gainful employment; changes made by the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), Public Law 113–4, to the campus safety and security reporting requirements in the HEA; and the definition of “adverse credit” for borrowers in the Federal Direct PLUS Loan Program.

#### **Cash Management**

In response to the May 1, 2012, **Federal Register** notice, we heard testimony and received comments on disbursing title IV Federal Student Aid program funds by electronic funds transfer (EFT) and on whether students should have a greater role in deciding to accept debit cards or other banking services that are provided through an institutionally-controlled process or contracted provider. We are interested in further modifying and updating the Department’s cash management regulations in subpart K of 34 CFR part 668. In particular, we are interested in reducing the time by which an institution must refund to a student any title IV Federal Student Aid program funds that are more than the amount the institution charges for tuition and fees and other educationally related costs, amending the regulations relating to requirements for student authorizations, specifying when and how an institution must disburse title IV Federal Student Aid program funds, and addressing how title IV Federal Student Aid program funds are provided to domestic and foreign schools and to students. In addition, we are considering developing regulations governing how an institution may use or invest title IV

Federal Student Aid program funds held in its federal or operating accounts or, if the institution transfers the funds to a third-party servicer to make disbursements to students, how those funds are managed by the provider.

#### **State Authorization for Programs Offered Through Distance Education or Correspondence Education**

On October 29, 2010, we published final regulations (75 FR 66831) to clarify what is required for an institution of higher education, a proprietary institution of higher education, and a postsecondary vocational institution to be considered legally authorized by a State to offer an educational program in that State. The regulations in 34 CFR 600.9(c) specifically provided that, if an institution is offering postsecondary education through distance or correspondence education to students in a State in which the institution is not physically located or in which it is otherwise subject to State jurisdiction as determined by the State, the institution would be required to meet any State requirements for it to legally offer postsecondary distance or correspondence education in that State. Furthermore, under 34 CFR 600.9(c), an institution was required to document the State’s approval upon the Secretary’s request.

On July 12, 2011, in response to a legal challenge by the Career College Association, the U.S. District Court for the District of Columbia vacated the regulation under 34 CFR 600.9(c) on procedural grounds. *Career College Ass’n v. Duncan*, 796 F. Supp. 2d 108 (D.D.C. 2011). On August 14, 2012, on appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed the decision of the district court and ruled that the regulation under 34 CFR 600.9(c) is not a logical outgrowth of the Department’s proposed rules. It remanded the case to the district court with instructions to remand the regulation to the Department for reconsideration consistent with the D.C. Circuit’s opinion. *Ass’n of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012). In order to address the procedural concerns identified by the D.C. Circuit, the Department is now considering regulatory changes related to State authorization for programs offered through distance education or correspondence education.

#### **State Authorization for Foreign Locations of Institutions Located in a State**

State authorization requirements for institutions located in a State (as the term “State” is defined in 34 CFR 600.2)

are established in 34 CFR 600.9. The regulations do not specifically address the State authorization requirements for foreign locations (i.e., locations that are not located in a State) of institutions located in a State. The Department is considering amending the State authorization regulations to establish authorization requirements for such foreign locations.

#### **Clock to Credit Hour Conversion**

We have heard concerns from schools and other parties about whether schools should track the underlying clock hours in a program after the program is converted to credit hours, as well as how the Department should consider State approval or licensing requirements in determining that a program is measured in clock hours for the purpose of awarding title IV Federal Student Aid program funds. The clock to credit hour conversion regulations are in 34 CFR 668.8(k) and (l). We are requesting public input on whether these issues should be addressed by the negotiated rulemaking committee.

#### **Gainful Employment**

On June 30, 2012, in response to a legal challenge by the Association of Private Sector Colleges and Universities, the U.S. District Court for the District of Columbia invalidated the repayment rate threshold in the gainful employment regulations, and set aside the requirement for institutions to report gainful employment program information to the Department. *Ass’n of Private Colleges and Universities v. Duncan* (D.D.C. 2012). That litigation is still ongoing; however, the Department is interested in public input in this area. The Department is interested in potential approaches to defining what it means for a program to prepare students for gainful employment in a recognized occupation. This includes thoughts on the best measures (such as debt-to-earnings ratios or repayment rates) and their thresholds for defining or evaluating gainful employment programs, how best to construct an accountability system that accurately distinguishes between successful and unsuccessful programs, and how to address the establishment of new programs, as well as related ideas. In considering these questions, the Department recommends taking into account the information included in the program-level data we gathered and released as Information Rates on June 26, 2012, available at <http://studentaid.ed.gov/about/data-center/school/ge>.

### Campus Safety and Security Reporting

The VAWA Reauthorization, enacted March 7, 2013, amended section 485(f) of the HEA, known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act). These amendments address the high rates of dating violence and sexual assault on college campuses by requiring institutions to provide information to students about domestic violence, dating violence, sexual assault, and stalking, and to inform students and staff about the number of these crimes that occur on and near campus. Institutions are also required to create and disseminate policies describing the protections, resources, and services available to victims to help them safely continue their education. We intend to develop proposed regulations to implement these changes.

### Definition of “Adverse Credit” for the Direct PLUS Loan Program

The PLUS Loan Program provides loans up to the amount of the cost of attendance to graduate students and parents. In light of the unique nature of the PLUS Loan Program, Congress limited eligibility to graduate or professional students or parents who do not have an adverse credit history, as determined pursuant to regulations promulgated by the Secretary. Under regulations published by the Department in 1994, a PLUS loan applicant is considered to have an “adverse credit history” if the applicant (1) is 90 or more days delinquent on the repayment of any debt or (2) has been the subject of a default determination, bankruptcy discharge, foreclosure, repossession, tax lien, wage garnishment, or write-off of a title IV debt during the five years preceding the date of the credit report (34 CFR 685.200(c)(1)(vii)(B)). Since 1994, much has changed in consumer credit markets and credit reporting, and PLUS loans are no longer delivered through both the Federal Family Education Loan Program as well as the William D. Ford Direct Loan (Direct Loan) Program. Now, new PLUS Loans are only made through the Direct Loan Program. For these reasons, the Department is seeking public comment on whether and how it may be appropriate to modify the current regulatory definition of “adverse credit.”

After a review of the public comments presented at the public hearings and in the written submissions, we will publish a notice in the **Federal Register** announcing the specific subject areas for which we intend to establish a negotiated rulemaking committee and

requesting nominations for individual negotiators for the committee who represent the interests significantly affected by the proposed regulations. This notice will also be posted on the Department’s Web site at: <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/index.html>.

### Public Hearings

We will hold three public hearings for interested parties to discuss the topics included in this notice and to suggest additional topics for the rulemaking agenda.

The public hearings will be held on:

- May 21, 2013, at the U.S. Department of Education, 1990 K Street, NW., Eighth Floor Conference Center, Washington, DC 20006.
- May 23, 2013, at the University of Minnesota, Twin Cities, Hubert H. Humphrey School of Public Affairs, Cowles Auditorium, 301 19th Avenue S, Minneapolis, MN 55455.
- May 30, 2013, at the University of California, San Francisco, UC Hall, Toland Hall Auditorium (Room U142), 533 Parnassus Avenue, San Francisco, CA 94143.

The public hearings will be held from 9:00 a.m. to 4:00 p.m., local time. Further information on the public hearing sites, including directions, is available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/index.html>.

Individuals desiring to present comments at the public hearings must register by sending an email to [negreghearing@ed.gov](mailto:negreghearing@ed.gov). The email should include the name of the presenter along with a general timeframe during which the individual would like to speak (for example, a presenter could indicate morning or afternoon, or before 11:00 a.m. or after 3:00 p.m.). We will attempt to accommodate each speaker’s preference but, if we are unable to do so, we will make the determination on a first-come, first-served basis (based on the time and date the email was received). It is likely that each participant will be limited to five minutes. The Department will notify registrants of the location and time slot reserved for them. An individual may make only one presentation at the public hearings. If we receive more registrations than we are able to accommodate, the Department reserves the right to reject the registration of an entity or individual that is affiliated with an entity or individual that is already scheduled to present comments and to select among registrants to ensure that a broad range of entities and individuals is allowed to present. We will accept

walk-in registrations for any remaining time slots on a first-come, first-served basis beginning at 8:30 a.m. on the day of the public hearing at the Department’s on-site registration table.

Speakers may also submit written comments. In addition, for anyone who does not present at a public hearing, the Department will accept written comments through May 30, 2013. (See the **ADDRESSES** sections of this notice for submission information.)

### Schedule for Negotiations

We anticipate that any committee established after the public hearings will begin negotiations in September 2013, with the committee meeting for up to three sessions of approximately four days each at roughly monthly intervals. The committee will meet in the Washington, DC area. The dates and locations of these meetings will be published in a subsequent document in the **Federal Register**, and will be posted on the Department’s Web site at: <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/index.html>.

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**Program Authority:** 20 U.S.C. 1098a.

Dated: April 11, 2013.

**Martha Kanter,**

*Under Secretary for Education.*

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