DEPARTMENT OF EDUCATION

34 CFR Parts 600, 668, and 690

[Docket ID ED–2022–OPE–0062]

RIN 1840–AD54, 1840–AD55, 1840–AD66

Institutional Eligibility, Student Assistance General Provisions, and Federal Pell Grant Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

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

DATES: We must receive your comments on or before August 26, 2022.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *regulations.gov.* Information on using *Regulations.gov*, including instructions for finding a rule on the site and submitting comments, is available on the site under ''FAQ.'' If you require an accommodation or cannot otherwise submit your comments via *regulations.gov*, please contact one of the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted by fax or by email or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

The Department strongly encourages you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), the Department strongly encourages you to convert the PDF to ''print-to-PDF'' format, or to use some other commonly used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions to assist in the rulemaking process.

Privacy Note: The Department's policy is to generally make comments received from members of the public available for public viewing at *www.regulations.gov.* Therefore, commenters should include in their comments only information about themselves that they wish to make publicly available. Commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. If, for example, your comment describes an experience of someone other than yourself, please do not identify that individual or include information that would allow readers to identify that individual. The Department will not make comments that contain personally identifiable information (PII) about someone other than the commenter publicly available on *www.regulations.gov* for privacy reasons. This may include comments where the commenter refers to a third-party individual without using their name if the Department determines that the comment provides enough detail that could allow one or more readers to link the information to the third party. If your comment refers to a third-party individual, to help ensure that your comment is posted, please consider submitting your comment anonymously to reduce the chance that information in your comment about a third party could be linked to the third party. The Department will also not make comments that contain threats of harm to another person or to oneself available on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For PEPs: Aaron Washington. Telephone (202) 453–7241. Email: *Aaron.Washington@ed.gov.* For 90/10: Ashley Clark. Telephone: (202) 453–7977. Email: *Ashley.Clark@ed.gov.* For Change in Ownership: Brian Schelling. Telephone: (202) 453–5966. Email: *Brian.Schelling@ed.gov.* You may also email your questions to *Sophia.Mcardle@ed.gov,* but as described above, comments must be submitted via *www.regulations.gov.* The mailing address for all of the contacts above is U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Avenue SW, 2nd Floor, Washington, DC 20202.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action:

The Department convened two negotiated rulemaking committees between October 4, 2021 and March 18, 2022 [1] to consider proposed regulations for the Federal Student Aid programs authorized under title IV of the HEA (title IV, HEA programs): the Affordability and Student Loans Committee and the Institutional and Programmatic Eligibility Committee (see the section under *Negotiated Rulemaking* for more information on the negotiated rulemaking process). Both Committees operated by consensus, defined as no dissent by any member when votes are taken. Consensus votes were taken issue by issue. Consensus was reached on the topic of Pell Grants for Prison Education Programs by the Affordability and Student Loans Committee. Consensus was also reached on the topic of Title IV revenue and non-Federal education assistance funds (90/10 Rule) by the Institutional and Programmatic Eligibility Committee.

On July 13, 2022, the Department published in the **Federal Register** (87 FR 41878) a notice of proposed rulemaking (NPRM) related to Interest Capitalization, Public Service Loan Forgiveness (PSLF), Borrower Defense to Repayment, Total and Permanent Disability, Pre-dispute Arbitration and Class Action Waivers, Closed School Discharge, and False Certification Discharge (''NPRM 1''), topics which were considered by the Affordability and Student Loans Committee. This NPRM addresses Prison Education Programs (PEPs), which were also considered by the Affordability and Student Loans Committee, and the 90/10 rule and institutional changes in ownership, which were considered by the Institutional and Programmatic Eligibility Committee. Regulations related to income-driven repayment will be included in a separate NPRM.

[1] *Negotiated Rulemaking for Higher Education 2020–21.*

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

Prison Education Programs

The proposed PEP regulations would provide the Department and stakeholders, including students, correctional agencies and institutions, postsecondary institutions, accrediting agencies, and related organizations, with a detailed and clear framework for how to implement section 484(t) of the HEA. The Department is proposing to amend the regulations in §§ 600.2, 600.10, 600.21, 668.8, 668.32, 668.43, 668 subpart P, and 690.62. A new legal provision takes effect July 1, 2023, that addresses prison education programs (PEP). Section 484(t) of the HEA will provide PEP requirements that include: (1) a prohibition on proprietary institutions offering PEPs; (2) the definitions of a ''confined or incarcerated individual'' and a ''prison education program''; (3) the program approval process by the Bureau of Prisons, State Department of Corrections, or other entity that is responsible for overseeing the correctional facility (these entities are referred to throughout this NPRM as the oversight entity); (4) a credit transfer requirement for prison education programs; (5) a prohibition against program offerings by institutions that are subject to adverse actions by the Department, their accrediting agency, or the relevant State; (6) requirements that prison education programs offer educational programming that satisfies professional licensure or certification, as applicable; (7) student enrollment restrictions for programs in which there would be prohibitions on ultimate licensure or employment; (8) the requirement that confined or incarcerated individuals be enrolled in an eligible prison education program in order to access a Pell Grant; and (9) various Department reporting requirements for postsecondary institutions offering prison education programs.

The proposed regulations would clarify and implement these statutory requirements by setting clear standards for postsecondary institutions offering PEPs and outlining the steps that must be taken to develop and implement such programs in order to gain access to Pell Grant funds and maintain that access over time. The proposed regulations would also ensure that institutions report needed data to the Department, which would assist in assessing program outcomes. The proposed rule would establish important guardrails for confined or incarcerated students and taxpayers to protect students from enrolling in programs that would not permit them to benefit by finding employment in the field after graduating and being released and to prevent taxpayer funds from financing such programs. It would also outline title IV program requirements for PEPs related to States and accrediting agencies.

Section 484(t)(1)(B)(iii) of the HEA requires an oversight entity, defined in the proposed regulations as a state department of corrections or other entity responsible for overseeing correctional facilities or the Federal Bureau of Prisons, to determine that a prison education program that it approves is ''operating in the best interest'' of the confined or incarcerated students under its supervision. Congress outlined indicators of ''best interest''—both inputs and outcomes—which are explained in the SUMMARY OF PROPOSED CHANGES section below. Because oversight entities may not have previously assessed some of the ''best interest'' indicators outlined in statute, such as student earnings and job placement post-release, the proposed regulations would provide needed clarity on how to implement this requirement. To ensure that program assessment is thorough and well-informed, these regulations would require oversight entities to seek input from relevant stakeholders in making the ''best interest'' determination.

90/10 Rule

The proposed 90/10 regulations would amend § 668.28 to change how proprietary institutions calculate and report to the Department the percentage of their revenue that comes from Federal sources, in accordance with section 487(a) of the HEA. Section 487(a) establishes the requirement that proprietary institutions derive not less than 10 percent of their revenue from non-Federal sources. Section 487(d) of the HEA: (1) defines how proprietary institutions calculate the percentage of their revenue that is derived from non-Federal sources; (2) sets out sanctions for proprietary institutions that fail to meet the requirement in section 487(a); (3) requires the Secretary to publicly disclose on the College Navigator website proprietary institutions that fail to meet the requirement; and (4) requires that the Secretary submit a report to Congress that contains the Federal and non-Federal revenue amounts and percentages for each proprietary institution.

The ARP amended these sections to require proprietary institutions to include other sources of Federal revenue, in addition to title IV revenue from the Department, in the calculation that proprietary institutions make to determine if they are in compliance with the 90/10 rule. These proposed regulatory amendments would align the regulations with this statutory change and provide periodic updates to proprietary institutions regarding which Federal funds should be included in their calculations.

Additionally, the proposed regulations would amend how proprietary institutions calculate 90/10 to address the permissibility of practices that some proprietary institutions have employed to alter their revenue calculation or inflate their non-Federal revenue percentage. The NPRM would create a new requirement for when proprietary institutions must request and disburse title IV student aid funds from the Department to ensure that proprietary institutions are not delaying disbursements to the next fiscal year. The proposed regulations would also more closely align allowable non-Federal revenue with statutory intent by clarifying (1) allowable non-Federal revenue generated from programs and activities that can count for the purposes of 90/10; (2) how schools must apply Federal funds to student accounts and determine the funds' inclusion in the Federal revenue percentage of 90/10; (3) which revenue generated from institutional aid can count as non-Federal revenue for purposes of 90/10; and (4) funds that must be excluded from the calculation determining 90/10 compliance.

The proposed regulations would also modify the steps that proprietary institutions must take if they fail to derive at least 10 percent of their revenue from allowable non-Federal sources by requiring them to notify students of the failure and the students' potential loss of title IV aid at that proprietary institution. The proposed regulations would also provide the steps that proprietary institutions that determined they met the 90/10 requirement for the preceding fiscal year must take to notify the Secretary immediately, if they obtain information after the reporting deadline indicating they failed 90/10. Lastly, under the proposed regulations, a proprietary institution would be liable for repaying all title IV funds disbursed for the fiscal year after it became ineligible to participate in the title IV program due to failing 90/10.

Changes in Ownership

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

Institutions would be required to provide a minimum 90-day notice to the Department when they are to undergo a change in control, and the Department may apply necessary terms to a proposed new temporary provisional Program Participation Agreement (TPPPA) after the change and until a decision on the pending application for approval of the change is issued. The proposed regulations would also increase transparency for changes in ownership that do not constitute a change of control by increasing the reporting requirements to the Department on such transactions at lower levels.

Summary of the Major Provisions of This Regulatory Action

The proposed regulations would make the following changes.

• Make updates to appropriate cross-references. Prison Education Programs (PEP) (§§ 600.2, 600.7, 600.10, 600.21, 668.8, 668.32, 668.43, 668.234–242, 690.62)

• Extend access to Pell Grants for confined or incarcerated individuals in qualifying postsecondary education programs by defining an eligible PEP based on the statutory requirements.

• Clarify that only public or private nonprofit institutions as defined in § 600.4, or vocational institutions as defined in § 600.6, may offer eligible PEPs and require that those PEPs offered at a correctional institution be reported to the Department as an ''additional location.''

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

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

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

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

• Define the requirements for approval from the Secretary and the IHE's accrediting agency for the first PEP at the institution's first two additional locations at prison facilities.

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

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

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

• Revise the revenue calculation methodology in the 90/10 rule by changing references to ''title IV revenue'' to ''Federal revenue'' where appropriate to align with the statutory amendment that revises the 90/10 revenue requirement to include all Federal revenue.

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

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

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

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

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

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

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

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

• Clarify the definitions of ''additional location,'' ''branch campus,'' ''main campus,'' ''distance education'' locations, and ''nonprofit institution'' and, for the last term, describe characteristics of institutions that do not generally meet the definition of a ''nonprofit institution.''

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

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

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

• Refine the definitions of the terms ''ownership or ownership interest,'' ''parent,'' and ''other entities,'' as applied to changes in ownership, and add ''trust'' to the definition of ''person.''

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

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

Proposed PEP regulations would benefit incarcerated individuals, taxpayers, and communities by creating higher employment and earnings, and lower recidivism rates, for those who enroll in higher education programs in prison, as described in the Regulatory Impact Analysis of this proposed regulation. Institutions that offer programs in correctional facilities and do not currently receive Pell Grants sometimes bear some or all of the costs of that programming. Institutions that do not currently receive Pell funds for these programs would benefit from these revisions. Pell Grant transfers are estimated to increase by $1.1 billion from these programs. There would be increased costs for the Department due to various requirements in the proposed regulations including, but not limited to: data collection and dissemination, approval of prison education programs, and required reporting to Congress and the public. There would be increased costs to the oversight entity due to the required ''best interest determination'' defined in proposed 34 CFR 668.241. There would be no direct costs to students, completing the FAFSA® is free (though there is some burden associated with completing the form) and Pell Grant program does not need to be repaid.

Under the proposed 90/10 revisions, veteran borrowers and students would benefit as proprietary institutions' incentive to aggressively recruit GI Bill and Department of Defense (DOD) Tuition Assistance recipients would be greatly reduced because Federal assistance for those students was treated differently than title IV funds in the 90/10 revenue calculation. The Department is aware that some proprietary institutions have sought to enroll additional VA or DOD recipients because their dollars provide a larger cushion to pursue more title IV, HEA funds, sometimes to the detriment of those veterans and service members. The proposed regulatory changes would remove that incentive by counting all Federal education assistance funds on the 90 side of the 90/10 calculation. These changes would produce some savings to the taxpayer in the form of reduced expenditures of title IV, HEA aid to institutions that are not able to adapt and would lose eligibility. As indicated in the RIA, we estimate transfers would be reduced by −$292 million from the changes to the 90/10 provisions. The proposed revisions would further decrease proprietary institutions' incentive to rely on potentially costly student financing options to meet 90/10 requirements. Costs to institutions would include the need to ensure compliance with the proposed regulations. Institutions unable to generate sufficient non-Federal revenues through their eligible program may have to create programs that are not title IV eligible to generate revenue to meet 90/10 requirements.

The proposed revisions to CIO would benefit institutions and the Department by clarifying requirements as well as providing timely feedback for those undergoing CIO transactions. Students and borrowers would benefit from the 90-day CIO notice requirement that ensures students receive important information timely that would impact their education and that they can make future educational decisions based on that knowledge. Costs to institutions would include compliance and the paperwork burden associated with the increased reporting and disclosure requirements.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to clearly identify the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities. The Department also welcomes comments on any alternative approaches to the subjects addressed in the proposed regulations.

During and after the comment period, you may inspect public comments about these proposed regulations by accessing *Regulations.gov*.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT**.

Background

Prison Education Program (PEP) (§§ 600.2, 600.7, 600.10, 600.21, 668.43, 668.234–242, 690.62)

The Pell Grant program was established in 1972. Pell Grants are awarded to undergraduate students who document financial need and who have not earned a bachelor's, graduate, or professional degree. A Pell Grant does not have to be repaid, except under certain circumstances.

Pell Grant eligibility for confined or incarcerated students has changed over time. Before 1994, individuals in correctional facilities were able to receive Pell Grants. Thereafter, the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322) made individuals confined or incarcerated in a Federal or State correctional facility ineligible to receive Pell Grants. Individuals in any other type of correctional facility, for example local jails, reformatories, work farms, and juvenile justice facilities, remained eligible to receive Pell Grants.

A growing body of research has demonstrated the value of quality higher education programs for confined or incarcerated individuals. Incarcerated people who participate in postsecondary education programs are 48 percent less likely to return to prison than those who do not.[2] As incarcerated people achieve higher levels of education, the likelihood of recidivism decreases.[3] This research also indicates that prison education programs increase the literacy and numeracy skills of incarcerated students and improve their employment outcomes.[4]

In 2015, the Department used its authority under the HEA to allow a limited number of postsecondary institutions to seek a waiver of the statutory restriction on Pell Grant eligibility for confined or incarcerated students. Conducted under the Department's Experimental Sites Initiative authority, this experimental waiver is known as the Second Chance Pell experiment.[5] Between 2015 and 2022, the Department expanded the experiment twice to include additional participating postsecondary institutions. From 2016 to 2021, over 28,000 students enrolled in postsecondary education through Second Chance Pell, with more than 9,000 students earning a certificate or diploma, associate degree, or bachelor's degree.[6]

The First Step Act of 2018 (Pub. L. 115–391) sought to improve criminal justice outcomes, as well as to reduce the size of the Federal prison population while also creating mechanisms to maintain public safety. It required the Federal government to develop frameworks around recidivism reduction, including a provision about educational programs, to offer incentives for success of confined or incarcerated individuals, and Federal correctional reforms, among other things.

The Consolidated Appropriations Act, 2021 added section 484(t) to the HEA to formally establish Pell Grant eligibility for confined or incarcerated individuals, as long as they are enrolled in a PEP as defined under the HEA. We propose regulations to implement the statutory requirements allowing access to Federal Pell Grants for individuals who are confined or incarcerated when enrolled in programs that meet necessary standards.

Title IV Revenue and Non-Federal Education Assistance Funds (90/10 Rule) (§ 668.28)

The HEA has required that proprietary institutions derive a minimum percentage of their revenue from non-title IV sources since the Higher Education Amendments of 1992.[7] Originally, proprietary institutions were required to derive at least 15 percent of their revenue in a fiscal year from non-title IV sources (originally referred to as the 85/15 rule to reflect that institutions could receive up to 85 percent of funds from title IV, HEA sources and were required to receive at least 15 percent of funds from non-title IV, HEA sources). The Higher Education Amendments in 1998 reduced this requirement to at least 10 percent of a proprietary institution's revenue in a fiscal year that must come from non-title IV sources (now referred to as the 90/10 rule).[8]

Proprietary institutions are required to report, as a footnote in their audited financial statements, the percentage of their revenue derived from title IV, HEA program funds for the fiscal year, the dollar amount of the numerator and denominator of the ratio, and the individual revenue amounts from the sources of allowable title IV and non-title IV funds. They must also notify the Secretary within 45 days after the end of their fiscal year if they fail to meet the 90/10 requirement for that fiscal year. When the 85/15 statutory provision became effective in 1995, proprietary institutions became ineligible to participate in the title IV program after failing to meet the revenue requirement for one year. The Higher Education and Opportunity Act of 2008 (HEOA) amended this so that proprietary institutions would only lose eligibility to participate in the title IV programs if they failed for two consecutive fiscal years.[9]

Over the last decade, lawmakers and other stakeholders have raised concerns that counting Federal funds provided by the Department of Defense (DOD) and the Department of Veterans Affairs (VA) as non-title IV revenue resulted in some proprietary institutions aggressively marketing their programs to service members and veterans, as well as military-connected family members.[10] By enrolling those students, policymakers noted the institutions would be able to offset title IV aid with other Federal education aid without running afoul of the 90/10 rule. In other cases, proprietary institutions offered institutional loans, opened or closed locations to reach different student populations less dependent upon title IV funds, or engaged in other activities that allowed them to meet the 90/10 rule. In some reported cases, proprietary institutions using these strategies allegedly also engaged in aggressive, abusive, or deceptive marketing practices.[11]

In 2021, the ARP modified the 90/10 calculation by requiring proprietary institutions to derive at least 10 percent of their revenue from non-Federal sources (as opposed to non-title IV funds). The Department's proposed regulations implement those changes and more closely align the 90/10 calculation with the statutory intent of the provision.

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

In recent years the Department has seen an increase in the number of institutions applying for changes in ownership, many of which result in a change in the entity or persons controlling the institution and therefore

[2] Bozick, R., Steele, J., Davis, L., and Turner, S., ''Does Providing Inmates with Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States,'' *Journal of Experimental Criminology* 14, no. 3 (2018), 389–428. *https://www.rand.org/pubs/external_publications/EP67650.html#:~:text=Conclusion,program%20is%20to%20reduce%20recidivism.*

[3] Ibid.

[4] Davis, L., Bozick, R., Steele, J., Saunders, J., Miles, J., ''Evaluating the Effectiveness of Correctional Education,'' Rand Corp. (2013), *https://www.rand.org/pubs/research_reports/RR266.html* (pages41-47); Ositelu, M., ''Equipping Individuals for Life Behind Bars,'' *New America* (last updated Nov. 2019), *https://www.newamerica.org/education-policy/reports/equipping-individuals-life-beyond-bars/* (pages 49–53); Oakford, P., Brumfield, C., Goldvale, C., Tatum, L., diZerega, M., and Patrick, F., ''Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison,'' Vera Institute of Justice (Jan. 2019) (''Investing in Futures''), *https://www.vera.org/downloads/publications/investing-in-futures.pdf.*

[5] Second Chance Pell Experiment, *https://experimentalsites.ed.gov/exp/approved.html.*

[6] Chesnut, K., Taber, N., and Quintana, J. ''Second Chance Pell: Five Years of Expanding Higher Education Programs in Prisons, 2016–2021.'' Vera Institute of Justice, May 2022.

[7] Public Law 102–325.

[8] Public Law 105–244.

[9] Public Law 110–315.

[10] See, for example, *https://www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html*; *https://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf.*

[11] See, for example, *https://www.chronicle.com/article/for-profit-college-marketer-settles-allegations-of-preying-on-veterans/*; *https://www.insidehighered.com/quicktakes/2015/10/09/defense-department-puts-u-phoenix-probation*; *https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-itt-tech-lender-illegal-student*; and *https://files.eric.ed.gov/fulltext/ED614219.pdf.*

the policies or management of the institution. In a few cases, those newly in control of an institution also sought a conversion in status from proprietary to nonprofit or public.

As reported in 2020 by the Government Accountability Office (GAO), between January 2011 and August 2020, of 59 changes of ownership (involving 20 separate transactions) involving a conversion from a for-profit entity to a nonprofit entity, one entire chain that comprised 13 separate institutions was granted temporary continued access to title IV, HEA aid, but ceased operations prior to the Department reaching a decision on whether to approve the requested conversion to nonprofit status.[12] Three-fourths were sold to a nonprofit entity that had not previously operated an institution of higher education, increasing the risk that students may not get the educational experience for which they are paying. One-third had what GAO termed ''insider involvement'' in the purchasing nonprofit organization (*i.e.,* someone from the former for-profit ownership was also involved with the nonprofit purchaser), suggesting greater risk of impermissible benefits to those insiders. Altogether, the 59 institutions that underwent a change in ownership resulting in a conversion received more than $2 billion in Award Year 2018–19 in taxpayer-financed Federal student aid.

Based on the GAO report and other information, the Department has determined it is necessary to reevaluate the relevant policies to accommodate the increased complexity of changes in ownership arrangements and to mitigate the greater risk to students and taxpayers when institutions fail to meet Federal requirements. These proposed regulations would clarify the existing definition of a ''nonprofit institution'' to ensure particularly that institutions converting from proprietary status meet the standards to qualify as a nonprofit, including to avoid providing net earnings of the institution to a private entity or person; establish clearer up-front requirements for applications for changes in ownership; and provide for greater clarity in the procedures the Department follows in reviewing changes in ownership for continued eligibility for title IV aid.

[12] GAO Report, GAO–21–89, ''Higher Education: IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions'', Dec. 31, 2020. Accessed at *https://www.gao.gov/products/gao-21-89.*

Public Participation

The Department has significantly engaged the public in developing this NPRM, including through review of oral and written comments submitted by the public during four public hearings. During each negotiated rulemaking session, we provided opportunities for public comment at the end of each day. Additionally, during each negotiated rulemaking session, non-Federal negotiators obtained feedback from their stakeholders that they shared with the negotiating committee.

On May 26, 2021, the Department published a notice in the **Federal Register** (86 FR 28299) announcing our intent to establish multiple negotiated rulemaking committees to prepare proposed regulations on the affordability of postsecondary education, institutional accountability, and Federal student loans.

The Department developed a list of proposed regulatory provisions for an Affordability and Student Loans Committee (Committee 1) and an Institutional and Programmatic Eligibility Committee (Committee 2) based on advice and recommendations submitted by individuals and organizations in testimony at three virtual public hearings held by the Department on June 21 and June 23–24, 2021. An additional virtual public hearing on the 90/10 rule was held on October 26–27, 2021.

Additionally, the Department accepted written comments on possible regulatory provisions that were submitted directly to the Department by interested parties and organizations. You may view the written comments submitted in response to the May 26, 2021, **Federal Register** notice on the Federal eRulemaking Portal at *www.regulations.gov,* within docket ID ED–2021–OPE–0077. Instructions for finding comments are also available on the site under ''FAQ.''

Transcripts of the public hearings can be accessed at *https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html?src=rn.*

Negotiated Rulemaking

Section 492 of the HEA, 20 U.S.C. 1098a, requires the Secretary to obtain public involvement in the development of proposed regulations affecting programs authorized by title IV of the HEA. After obtaining extensive input and recommendations from the public, including individuals and representatives of groups involved in the title IV, HEA programs, the Secretary, in most cases, must engage in the negotiated rulemaking process before publishing proposed regulations in the **Federal Register**. If negotiators reach consensus on the proposed regulations, the Department agrees to publish without substantive alteration a defined group of regulations on which the negotiators reached consensus—unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreement reached during negotiations. Further information on the negotiated rulemaking process can be found at: *https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.*

The Department held two separate negotiated rulemakings related to this NPRM. The negotiated rulemaking session for Committee 1 consisted of three rounds of negotiations that lasted five days each, as well as two subcommittee meetings specific to the PEP proposed regulations that lasted three days each. The negotiated rulemaking session for Committee 2 consisted of three rounds of negotiations, the first of which was held over four extended days, while the latter two were five days each.

With respect to Committee 1, on August 10, 2021, the Department published a notice in the **Federal Register** (86 FR 43609) announcing its intention to establish the committee to prepare proposed regulations for the title IV, HEA programs. The notice set forth a schedule for Committee 1 meetings and requested nominations for individual negotiators to serve on the negotiating committee. In the notice, we announced the topics that Committee 1 would address. We also announced the creation of the PEP Subcommittee (Subcommittee) and requested nominations for individual negotiators and others with relevant expertise to serve on the Subcommittee.

Committee 1 included the following members, representing their respective constituencies:

- *Accrediting Agencies:* Heather Perfetti, Middle States Commission on Higher Education, and Michale McComis (alternate), Accrediting Commission of Career Schools and Colleges.
- *Dependent Students:* Dixie Samaniego, California State University, and Greg Norwood (alternate), Young Invincibles.
- *Departments of Corrections:* Anne L. Precythe, Missouri Department of Corrections.
- *Federal Family Education Loan Lenders and/or Guaranty Agencies:* Jaye O'Connell, Vermont Student Assistance Corporation, and Will Shaffner

(alternate), Higher Education Loan Authority of the State of Missouri.

• *Financial Aid Administrators at Postsecondary Institutions:* Daniel Barkowitz, Valencia College, and Alyssa A. Dobson (alternate), Slippery Rock University.

• *Four-Year Public Institutions:* Marjorie Dorimé-Williams, University of Missouri, and Rachelle Feldman (alternate), University of North Carolina at Chapel Hill.

• *Independent Students:* Michaela Martin, University of La Verne, and Stanley Andrisse (alternate), Howard University.

• *Individuals with Disabilities or Groups Representing Them:* Bethany Lilly, The Arc of the United States, and John Whitelaw (alternate), Community Legal Aid Society.

• *Legal Assistance Organizations that Represent Students and/or Borrowers:* Persis Yu, National Consumer Law Center, and Joshua Rovenger (alternate), Legal Aid Society of Cleveland.

• *Minority-serving Institutions:* Noelia Gonzalez, California State University.

• *Private Nonprofit Institutions:* Misty Sabouneh, Southern New Hampshire University, and Terrence S. McTier, Jr. (alternate), Washington University.

• *Proprietary Institutions:* Jessica Barry, The Modern College of Design in Kettering, Ohio, and Carol Colvin (alternate), South College.

• *State Attorneys General:* Joseph Sanders, Illinois Board of Higher Education, and Eric Apar (alternate), New Jersey Department of Consumer Affairs.

• *State Higher Education Executive Officers, State Authorizing Agencies, and/or State Regulators:* David Tandberg, State Higher Education Executive Officers Association, and Suzanne Martindale (alternate), California Department of Financial Protection and Innovation.

• *Student Loan Borrowers:* Jeri O'Bryan-Losee, United University Professions, and Jennifer Cardenas (alternate), Young Invincibles.

• *Two-year Public Institutions:* Robert Ayala, Southwest Texas Junior College, and Christina Tangalakis (alternate), Glendale Community College.

• *U.S. Military Service Members and Veterans or Groups Representing Them:* Justin Hauschild, Student Veterans of America, and Emily DeVito (alternate), The Veterans of Foreign Wars.

• *Federal Negotiator:* Jennifer M. Hong, U.S. Department of Education.

The Department also invited nominations for two advisors. These advisors were not voting members of Committee 1 and did not impact the consensus vote; however, they were consulted and served as a resource. The advisors were:

• Rajeev Darolia, University of Kentucky, for issues related to economic and/or higher education policy analysis and data.

• Heather Jarvis, Fosterus, for issues related to qualifying employers on the topic of Public Service Loan Forgiveness.

The Subcommittee included the following members, representing their respective constituencies:

• *Consumer Advocacy Organizations:* Belinda Wheeler, Vera Institute of Justice.

• *Financial Aid Administrators:* Kim Cary, Ozarks Technical Community College.

• *Formerly Incarcerated Students:* Stanley Andrisse, Howard University College of Medicine.

• *Groups That Represent Incarcerated Students:* Terrell Blount, Formerly Incarcerated College Graduates Network.

• *Postsecondary Institutions that are PEP Providers:* Terrence S. McTier, Jr., Washington University.

• *State Correctional Education Directors:* Marisa Britton-Bostwick, Montana Department of Corrections.

• *State Higher Education Executive Officers:* Angie Paccione, Colorado Department of Higher Education.

• *State Departments of Corrections:* Anne L. Precythe, Director of the Missouri Department of Corrections.

• *Department of Education Representative:* Aaron Washington, U.S. Department of Education.

Committee 1 met to develop proposed regulations in October, November, and December 2021. During the second session, a Committee 1 member petitioned to add another constituency, State Departments of Corrections, to Committee 1 and the Subcommittee. Committee 1 voted to add that constituency to the groups represented at the Committee and Subcommittee.

The Department tasked the Subcommittee with making recommendations to the full Committee on issues related to PEPs. The Subcommittee met in October and November 2021.

At its first meeting, Committee 1 reached agreement on its protocols and proposed agenda. The protocols provided, among other things, that Committee 1 would operate by consensus. The protocols defined consensus as no dissent by any member of Committee 1 and noted that consensus votes would be taken issue by issue.

Committee 1 reviewed and discussed the Department's drafts of regulatory language and alternative language and suggestions proposed by negotiators and Subcommittee members. Two members of the Subcommittee briefed the committee on the Subcommittee's work and provided extensive written materials for Committee 1's consideration. At the final meeting on December 10, 2021, Committee 1 reached consensus on the Department's proposed regulations regarding PEPs. Committee 1 also reached consensus on three other issues that are not included in this publication: total and permanent disability discharge; elimination of interest capitalization for non-statutory capitalization events; and false certification discharge. For more information on the negotiated rulemaking sessions, including the work of the Subcommittee, please visit: *https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.*

With respect to Committee 2, on December 8, 2021, the Department published a notice in the **Federal Register** (86 FR 69607) announcing its intention to establish a second Committee, the Institutional and Programmatic Eligibility Committee, to prepare proposed regulations for the title IV, HEA programs. The notice set forth a schedule for Committee 2 meetings and requested nominations for individual negotiators to serve on the negotiating Committee. In the notice, the Department announced the topics that Committee 2 would address.

Committee 2 included the following members, representing their respective constituencies:

• *Accrediting Agencies:* Jamienne S. Studley, WASC Senior College and University Commission (WSCUC), and Laura Rasar King (alternate), Council on Education for Public Health.

• *Civil Rights Organizations:* Amanda Martinez, UnidosUS.

• *Consumer Advocacy Organizations:* Carolyn Fast, The Century Foundation, and Jaylon Herbin (alternate), Center for Responsible Lending.

• *Financial Aid Administrators at Postsecondary Institutions:* Samantha Veeder, University of Rochester, and David Peterson (alternate), University of Cincinnati.

• *Four-Year Public Institutions of Higher Education:* Marvin Smith, University of California, Los Angeles, and Deborah Stanley (alternate), Bowie State University.

• *Legal Assistance Organizations that Represent Students and/or Borrowers:* Johnson Tyler, Brooklyn Legal Services, and Jessica Ranucci (alternate), New York Legal Assistance Group.

• *Minority-Serving Institutions:* Beverly Hogan, Tougaloo College (retired), and Ashley Schofield (alternate), Claflin University.

• *Private, Nonprofit Institutions of Higher Education:* Kelli Perry, Rensselaer Polytechnic Institute, and Emmanual A. Guillory (alternate), National Association of Independent Colleges and Universities (NAICU).

• *Proprietary Institutions of Higher Education:* Bradley Adams, South College, and Michael Lanouette (alternate), Aviation Institute of Maintenance/Centura College/Tidewater Tech.

• *State Attorneys General:* Adam Welle, Minnesota Attorney General's Office, and Yael Shavit (alternate), Office of the Massachusetts Attorney General.

• *State Higher Education Executive Officers, State Authorizing Agencies, and/or State Regulators of Institutions of Higher Education and/or Loan Servicers:* Debbie Cochrane, California Bureau of Private Postsecondary Education, and David Socolow (alternate), New Jersey's Higher Education Student Assistance Authority (HESAA).

• *Students and Student Loan Borrowers:* Ernest Ezeugo, Young Invincibles, and Carney King (alternate), California State Senate.

• *Two-Year Public Institutions of Higher Education:* Anne Kress, Northern Virginia Community College, and William S. Durden (alternate), Washington State Board for Community and Technical Colleges.

• *U.S. Military Service Members, Veterans, or Groups Representing them:* Travis Horr, Iraq and Afghanistan Veterans of America, and Barmak Nassirian (alternate), Veterans Education Success.

• *Federal Negotiator:* Gregory Martin, U.S. Department of Education.

The Department also invited nominations for two advisors. These advisors were not voting members of the Committee; however, they were consulted and served as a resource. The advisors were:

• David McClintock, McClintock & Associates, P.C. for issues with auditing institutions that participate in the title IV, HEA programs.

• Adam Looney, David Eccles School of Business at the University of Utah, for issues related to economics, as well as research, accountability, and/or analysis of higher education data.

At its first meeting, Committee 2 reached agreement on its protocols and proposed agenda. The protocols provided, among other things, that Committee 2 would operate by consensus. The protocols defined consensus as no dissent by any member of Committee 2 and noted that consensus votes would be taken issue by issue. During its first week of sessions, Committee 2 was petitioned to add, and reached consensus on adding, a member from another constituency group, Civil Rights Organizations.

Committee 2 reviewed and discussed the Department's drafts of regulatory language and the alternative language and suggestions proposed by Committee 2 members. At the final meeting on March 18, 2022, Committee 2 reached consensus on the Department's proposed regulations regarding the 90/10 rule, but did not reach consensus on the proposed regulations for changes in ownership. For more information on the negotiated rulemaking sessions please visit *https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.*

Summary of Proposed Changes

The proposed regulations would make the following changes to current regulations.

Pell Grants for Prison Education Programs (PEP) ((34 CFR 600.2, 600.7, 600.10, 600.21, 668.43, 668.234–242, 690.62) (Sections 102(a)(3), 401(b)(3), 484(t), 485(a)(1)(G), 498(k)of the HEA))

• Amend in § 600.2 the definition of "additional location" so that prison education programs offered at correctional facilities are properly reported to the Department.

• Amend in § 600.7 the requirements for an institution to obtain and maintain a waiver from the Secretary to allow students who are confined or incarcerated to exceed 25 percent of regular student enrollment. We also propose to consider the financial responsibility and administrative capability of postsecondary institutions in determining whether to grant a waiver.

• Amend § 600.10 to require that institutions seek approval from the Secretary prior to offering the first PEP at the first two additional locations at correctional facilities.

• Amend § 600.21 to require that institutions report the addition of any subsequent new PEP to the Secretary within 10 days of the program's establishment.

• Amend § 668.43 to require disclosure of typical State or Federal prohibitions on the licensure or employment of formerly confined or incarcerated individuals for a PEP that is designed to meet educational requirements for a specific professional license or certification.

• Create § 668.234, which would describe a scope and purpose for the new subpart P.

• Create § 668.235, which would define "advisory committee", "feedback process", "oversight entity", and "relevant stakeholders".

• Create § 668.236, which would define and set forth the requirements for an "eligible prison education program."

• Create § 668.237, which would prescribe program evaluation and review requirements for the institution's accrediting agency or State approval agency.

• Create § 668.238, which would require the Secretary's approval of an institution's first PEP at the first two additional locations for purposes of participation in title IV programs. Applications for approval of subsequent PEPs would be subject to fewer requirements.

• Create § 668.239, which would require a postsecondary institution that offers an eligible prison education program to submit required reports to the Secretary and establish an agreement with the oversight entity to report information to the Secretary about the transfer and release of confined or incarcerated individuals enrolled in eligible prison education programs.

• Create § 668.240, which would set forth the Secretary's authority to limit or terminate approval of an institution's eligible PEP.

• Create § 668.241, which would define the "best interest" program assessment that must be conducted by the oversight entity at least two years after the postsecondary institution has continuously provided a PEP and the documentation requirements for such assessment.

After the initial "best interest" determination, subsequent assessments would be conducted not less than 120 calendar days prior to the expiration of each institution's Program Participation Agreement (PPA).

• Create § 668.242, which would prescribe the process for the winddown of eligible programs operating at a facility that is not a Federal or State correctional facility if those programs are not approved as eligible prison education programs.

• Amend § 690.62 to codify a statutory requirement that the Pell Grant award not exceed cost of attendance.

Title IV Revenue and Non-Federal Education Assistance Funds (90/10 Rule) ((34 CFR 668.28) (Sections 487(a) and 487(d) of the HEA))

• Amend the heading of § 668.28 and references throughout the section to change ''non-title IV revenue'' to ''non-Federal funds.''

- Modify § 668.28(a)(1) to provide for periodic publication of information identifying the sources of Federal funds proprietary institutions must include in their 90/10 calculation and clarify how the Department will alert them when new Federal funds must be counted in the calculation in subsequent years.
- Amend § 668.28(a)(2) to create a disbursement rule that outlines how proprietary institutions calculate the percentage of their revenue that is Federal revenue and creates an end-of-fiscal-year deadline for proprietary institutions to request and disburse title IV funds to students.
- Amend § 668.28(a)(3) to reflect which non-Federal revenue generated from programs and activities proprietary institutions may count in the calculation.
- Amend § 668.28(a)(4) to describe how proprietary institutions apply Federal funds to student accounts and determine the funds' inclusion in their revenue calculation.
- Amend § 668.28(a)(5) to specify what revenue generated from institutional activities proprietary institutions may count as non-Federal revenue.
- Remove outdated provisions in § 668.28(a)(6) that no longer impact the non-Federal revenue calculation.
- Redesignate § 668.28(a)(7) as § 668.28(a)(6) and amend the types of funds that proprietary institutions may not include in their revenue calculation.
- Amend § 668.28(c) to establish disclosures for proprietary institutions that fail to derive at least 10 percent of their fiscal-year revenues from allowable non-Federal funds, clarify reporting requirements, and clarify liabilities for institutions that lose access to title IV, HEA funds due to failing 90/10 for two consecutive years.

Changes in Ownership (CIO) ((§§ 600.2, 600.4, 600.20, 600.21, 600.31) (Sections 101, 102, 103, 410, 498 of the HEA)).

- Add a definition of ''main campus'' in § 600.2 to clarify a commonly used term that is currently undefined.
- Amend the definitions of ''additional location'' and ''branch campus'' in § 600.2 to emphasize that they are physical locations within the ownership structure of the institution. These amendments would further clarify that an additional location participates in the title IV, HEA programs through the certification of the main campus, and a branch campus must be designated as such by the Department.
- To codify current practice, add under the definition of ''distance education'' in § 600.2 that, for institutions offering both on-campus instruction and distance education, the distance education programs are associated with the main campus where one or more approved educational programs are offered. For institutions offering only distance education, the location of the institution is where its administrative offices are located and approved by its accrediting agency.
- Clarify the definition of ''nonprofit institution'' in § 600.2 to reflect that no part of its net earnings may benefit a natural person or private entity. We would also specify that, in general, a nonprofit institution is not an obligor on a debt to a former owner or affiliated person or entity and does not enter into a revenue-sharing or other kind of agreement involving payment to a former owner or affiliated person or entity.
- Add under § 600.20(g) the requirement for institutions to notify the Department at least 90 days in advance of any proposed change in ownership, which includes any modification to such a change.
- Add a new § 600.20(g)(2) to provide that, even with the submission of the proposed CIO, the Department may determine that the institution's participation in the title IV, HEA programs should not continue after the change in ownership.
- Amend § 600.20(g)(3) to add the requirement, discussed in current paragraph (g)(2), that a complete application must include documentation that the institution's accreditation and State authorization remained in effect as of the day before the change in ownership and add provisions explaining when the Secretary may require an institution to provide financial protection, and in what amounts, as part of the change in ownership application.
- Add § 600.20(g)(4), which requires institutions to notify enrolled and prospective students at least 90 days prior to the proposed change in ownership.
- Establish in § 600.20(h) the terms of the extension of a TPPPA and clarify when the TPPPA expires.
- Clarify § 600.21 to specify when institutions are required to report to the Department changes in ownership and/or changes in control and clarify the terminology for owners who are natural persons versus entities.
- Specify in § 600.31(c) when ''other entities'' undergo a change in control, such as when a person or combination of persons acquires or loses 50 percent of voting interests in the entity or otherwise acquires or loses 50 percent control, or when an entity with members loses them or an entity without members acquires them. The paragraph would provide what qualifies to meet the 50 percent thresholds and under what other conditions a person or persons may be deemed to have actual control of the entity, including based on ownership by a combination of persons, each of whom has less than a 50 percent interest in the entity.
- Amend § 600.31(d) to add that a change of control may include the acquisition of an institution to become an additional location of another institution unless the acquired institution closed or ceased to provide educational instruction.
- Clarify the terminology in § 600.31(e) related to the death or resignation of an individual owner.

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect. The Department made small, technical, non-substantive updates to the PEP amendatory consensus language to conform with proper formatting, capitalization, and cross-reference standards.

Prison Education Programs

§ 600.2 Definitions

Additional Location

Statute: Section 410 of the General Education Provisions Act (20 U.S.C. 1221e–3) provides the Secretary with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by, the Department. Furthermore, under section 414 of the Department of Education Organization Act (20 U.S.C. 3474), the Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department. These authorities, together with the provisions in the HEA, thus include promulgating regulations that, in this case amend the definition of ''additional location''. Finally, section 498(k) of the HEA refers to additional locations.

Current Regulations: The current definition of an ''additional location'' in § 600.2 is a ''facility that is geographically apart from the main campus of the institution and at which the institution offers at least 50 percent of a program and may qualify as a branch campus.''

Proposed Regulations: The proposed regulation would treat a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility or other similar correctional institution as an ''additional location'' for purposes of § 600.2, even if a student receives instruction primarily through distance education or correspondence courses at that location.

Reasons: Section 484(t)(5) requires institutions offering one or more PEPs to file annual reports with the Department and requires the Department to annually report to Congress. Among other items, annual reports include the names and types of institutions, Pell Grant expenditures, demographics of enrolled students, and mode of instruction (such as distance education). In the course of administering the Second Chance Pell experiment (described in the Background section), the Department became aware that some postsecondary institutions were not reporting to the Department certain educational programming they were providing in Federal or State correctional facilities. This is because the current definition of an ''additional location'' is phrased in terms of a location that is ''geographically apart from the main campus of the institution'' and ''may qualify as a branch campus,'' which institutions were interpreting such as to exclude non-traditional locations where distance education programs are offered. To ensure adequate data collection and accurate reports, it is imperative that institutional reports to the Department include all correctional facilities where IHEs offer PEPs. The proposed amendment to the definition of ''additional location'' also would ensure proper reporting under the proposed addition to § 600.21(a)(14) regarding updates to an institution's PPA (see the discussion of § 600.21 for more information).

Including PEPs as additional locations would also provide related benefits to students and taxpayers, as it would ensure greater oversight of the PEP, including oversight of the academic quality of the program by the accrediting agency, and would provide potential financial aid benefits in the event the IHE ceases to provide educational offerings at the correctional facility. The additional oversight that would be conducted for additional locations would help to protect the integrity of taxpayer-financed title IV, HEA dollars, by ensuring that such locations are not eligible for Federal aid unless and until they have met other conditions. Under § 602.22, for example, which governs accrediting agencies, the establishment of additional locations is considered to be a ''substantive change,'' triggering an agency's obligation to assess whether such change adversely affects the institution's ability to meet accreditation standards. In most cases, an agency's review of a new location must include an assessment of the institution's fiscal and administrative capabilities, academic controls, faculty, facilities, resources, support systems, and financial stability. In addition, as discussed further below, proposed § 668.237 would require an accrediting agency to conduct a site visit no later than one year after the institution has initiated a PEP at its first two additional locations at correctional facilities. The Department believes that these additional steps would help to ensure education quality, oversight of the programming at the facility, and minimum standards for the services provided to students.

Additionally, under section 437(b)(3) of the HEA, a student whose institution closes may be eligible for restoration of their Pell Grant lifetime eligibility used (Pell LEU) for the period of a student's attendance at the institution, providing a benefit to affected students. Similar to the Department's interpretation of this statute for other program types, the Department has interpreted the statute to mean that, if a postsecondary institution closes, all students enrolled in an impacted PEP may be eligible for Pell LEU restoration. By requiring PEPs to be reported as additional locations, the Department could ensure that confined or incarcerated individuals enrolled in those programs are protected in the event the institution ceases to operate in the correctional facility by restoring their lifetime Pell Grant eligibility.

Confined or Incarcerated Individual

Statute: As amended by the Consolidated Appropriations Act, 2021, section 484(t)(1)(A) of the HEA defines a ''confined or incarcerated individual'' for purposes of title IV programs as ''an individual who is serving a criminal sentence in a Federal, State, or local penal institution, prison, jail, reformatory, work farm, or other similar correctional institution,'' and excludes ''an individual who is in a halfway house or home detention or is sentenced to serve only weekends.'' Individuals falling within the definition are eligible for Pell Grants if they attend an eligible PEP, which, among other requirements, must be operated in a State or Federal correctional facility.[13]

[13] See section 484(t)(1)(B) of the HEA.

Current Regulations: The current regulations in § 600.2 use the phrase ''incarcerated student,'' which is defined as ''a student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends. For purposes of Pell Grant eligibility under § 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal Government or a State, but is considered incarcerated for the purposes of determining costs of attendance under section 472 of the HEA in determining eligibility for and the amount of the Pell Grant.''

Proposed Regulations: We propose to update the defined term to ''confined or incarcerated individual'' and to define the phrase as ''an individual who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. An individual would not be considered incarcerated if that individual is subject to or serving an involuntary civil commitment, in a half-way house or home detention, or is sentenced to serve only weekends.''

Reasons: We propose to change the term from ''incarcerated student'' to ''confined or incarcerated individual'' to reflect the statute as amended more accurately. We also propose to specifically include ''juvenile justice facilities'' in the list of eligible locations where a criminal sentence is served, to ensure that programs offered there would be subject to the same high program standards as programs in other State and Federal correctional facilities. The statute refers to ''other similar correctional facilit[ies],'' which reasonably includes juvenile justice facilities in this context. Students meeting the definition of a confined or incarcerated individual would not be eligible for Direct Loan funds.

Currently, an individual who is incarcerated in any Federal or State correctional facility, or who is subject to an involuntary civil commitment upon completion of a period of incarceration for a forcible or nonforcible sexual offense (as determined in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting

Program), is not eligible to receive a Pell Grant. Recent amendments removed the Pell Grant prohibition for involuntarily civilly committed individuals from Section 401 of the HEA. Based on Congress' change to the relevant statutory language and consistent with a rulemaking subcommittee member's recommendation, we propose clarifying that individuals subject to or serving an involuntary civil commitment are not considered to be incarcerated. As discussed during the rulemaking subcommittee meetings, the statute's exclusion of those subjected to involuntary civil commitment from the definition of ''confined or incarcerated individual'' makes clear they are not prohibited from receiving a Pell Grant on that basis, nor do they need to be enrolled in a PEP in order to qualify.

§ 600.7 Conditions of institutional ineligibility.

Statute: Section 102(a)(3) of the HEA states that an institution will not meet the definition of an institution of higher education for title IV purposes if more than 25 percent of its regular enrolled students are incarcerated. The Secretary may waive this limitation for a nonprofit institution that provides a two- or four-year program of instruction (or both) for which the institution awards a bachelor's degree, associate degree, or postsecondary diploma.

Current Regulations: The current regulations at § 600.7(a)(iii) restate the statutory requirement that a postsecondary institution is ineligible to participate in the title IV, HEA programs if more than 25 percent of its enrolled regular students are incarcerated. Section 600.7(c) permits nonprofit (including public) postsecondary institutions to seek a waiver of the 25 percent enrollment limitation. The waiver is automatic upon request if the postsecondary institution consists solely of four-year or two-year education programs for which it awards a bachelor's degree, associate degree, or postsecondary diploma.

Under § 600.7(c)(3)(ii), nonprofit institutions whose offerings are not limited to four-year and two-year programs but that award the degrees identified above are subject to two different waiver determinations: (1) the waiver is automatic upon request for its two- and four-year programs, but (2) for any other program, the waiver is only available if the incarcerated regular students enrolled in such programs have a completion rate of 50 percent or greater. The formula for calculating the completion rate is set forth in § 600.7(e)(2). Under § 600.7(g), the institution must substantiate the completion rate calculation by having the certified public accountant who prepares its audited financial statements verify the calculation's accuracy.

Under § 600.7(f), the institution maintains the waiver indefinitely if it satisfies the waiver requirements each award year. If the institution fails to satisfy waiver requirements for an award year, it becomes ineligible to participate in title IV programs on June 30 of that award year.

Proposed Regulations: The proposed regulations would enhance the Secretary's ability to monitor PEP enrollment, while allowing eligible institutions with demonstrated program success to expand the number of incarcerated students they serve. Specifically:

- We propose to add a condition to § 600.7(c)(1) that the Secretary will not approve an enrollment cap waiver for a postsecondary institution's PEP until the oversight entity is able to make the ''best interest determination'' described in § 668.241, which would be at least two years after the postsecondary institution has continuously provided a PEP.
- In proposed § 600.7(c)(1)(i), the Secretary would not grant the waiver to a non-degree program at a nonprofit institution unless it meets the current requirement of maintaining a completion rate for its enrolled incarcerated students of at least 50 percent.
- We propose to add § 600.7(c)(1)(ii)(A) and (B) to require that all postsecondary institutions operating a PEP, regardless of program length, satisfy two conditions to obtain and maintain an enrollment cap waiver for incarcerated students. Under the proposed regulations, an institution would be required to: (1) comply with all requirements under proposed part 668 subpart P (Prison Education Programs), and (2) demonstrate they are administratively capable as defined in § 668.16 and financially responsible under part 668 subpart L. Administrative capability requires the institution to show it is capable of adequately administering the title IV programs, including for PEPs. Financial responsibility requires the institution to demonstrate that it provides the services described in its official publications and statements, meets all of its financial obligations, and provides the administrative resources necessary to comply with title IV, HEA program requirements.
- We propose to update paragraphs § 600.7(c)(1) and (2) by clarifying that the Secretary has the discretion to deny an enrollment cap waiver request if the application fails to meet the aforementioned standards, noting instead that the Secretary ''may'' waive the enrollment cap prohibition. This is a change from the current regulations that make the waivers automatic for four-year and two-year programs. The proposed provisions more closely reflect the statute, which states that the Secretary ''may'' approve the waiver.
- Based in part on the recommendation of a rulemaking subcommittee member, we propose to add paragraph (c)(4) to § 600.7, which would set program enrollment limitations on incarcerated students even after a waiver is approved. In paragraph (c)(4)(i)(A), once a postsecondary institution is granted a waiver, for the next five years, up to 50 percent of the institution's regular enrolled students could be incarcerated students. Paragraph (c)(4)(i)(B) would permit that percentage to increase to 75 percent for the five years thereafter. Paragraph (c)(4)(ii) would exempt from these limits a public institution that is chartered for the explicit purpose of educating confined or incarcerated students, as determined by the Secretary. All students in such a PEP must be located in the State in which the postsecondary institution is chartered to serve.
- Proposed § 600.7(c)(5) would allow the Secretary to limit or terminate a postsecondary institution's waiver if it no longer meets the requirements established under paragraph (c)(1).
- Finally, proposed § 600.7(c)(6) provides that revocation of an institution's enrollment cap waiver would render an institution ineligible to participate in title IV, HEA programs, commencing at the end of the award year in which the waiver was revoked so students will not immediately lose eligibility for title IV aid. Paragraph (c)(6)(i) would allow a postsecondary institution to retain its eligibility for title IV aid if it demonstrates that it meets all requirements prior to losing eligibility, including reducing its enrollment of confined or incarcerated students to no more than 25 percent of its regular enrolled students, as required of eligible institutions by the statute, and ceasing to enroll new incarcerated students upon the loss of the waiver.

Reasons: A rulemaking subcommittee member stated that unlimited expansion of incarcerated student enrollment, spurred on by increased access to Pell Grant funds, could potentially compromise the quality of prison education programming. The Department shares the concern that if institutions become too reliant on enrolling incarcerated students, institutions may not have sufficient incentive to ensure those students are served well; students who enroll in prison education programs have fewer options and thus more limited ability to walk away from programs. The Department proposes strengthening the waiver application process to ensure postsecondary institutions are serving their incarcerated students well and are capable of meeting other Department requirements for the operations and finances of the institution. This would help to prevent circumstances in which institutions not serving incarcerated students well are permitted to enroll such students in very large numbers, potentially harming such students with educational programming that does not meet the requirements of the waiver. We also propose to set the maximum enrollment of confined or incarcerated students depending on the amount of time the institution has offered a PEP, allowing institutions to move from 25 percent of enrollment by incarcerated students, to 50 percent, to 75 percent, over a number of years, to guard against growth of prison education programming that outpaces an institution's ability to support those programs. The Department also believes this additional built-in time would help assure the Department and an institution's accreditors that such programming is appropriate and acceptable and would protect students and taxpayers.

§ 600.10 Date, extent, duration, and consequence of eligibility.

Statute: Section 484(t) of the HEA authorizes Pell Grant eligibility for confined or incarcerated individuals who enroll in an eligible PEP.

Current Regulations: None.

Proposed Regulations: The Department proposes in § 600.10 to require an institution to obtain approval from the Secretary to offer the institution's eligible PEPs at its first two additional locations at correctional facilities. Such locations would include a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. While an institution's first additional location may have multiple PEPs, this approval process would only apply to the first program at each of the first two locations. The application requirements for the first two locations are prescribed in proposed § 668.238(b).

Reasons: The Department already requires institutions to seek approval from the Secretary before offering certain eligible programs in 600.10(c), including direct assessment programs and comprehensive transition and postsecondary programs, and if otherwise required for the institution's participation in the title IV programs. In these cases, where experience is more limited, the Department believes it is particularly important to ensure an institution satisfies regulatory requirements to offer those programs in advance and is persuaded that this prior approval better protects students and taxpayers. Approval of an institution's initial prison education programming would serve a similar purpose. According to research, quality prison education programming may reduce the likelihood of recidivism, lower unemployment, and increase social mobility for formerly confined or incarcerated individuals.[14] After the approval of the first PEP at each of the first two additional locations, and provided enrollment of incarcerated students does not exceed the presumptive cap of 25 percent, the Department believes (in part based on its experience in reviewing other new programs, such as direct assessment programs, being offered for the first several times) the postsecondary institution would have demonstrated the capacity and capability to effectively maintain or expand the number of eligible PEP(s) it offers. If the postsecondary institution sought to expand the incarcerated student enrollment cap of 25 percent, it would be required to use the procedures outlined in § 600.7.

§ 600.21 Updating application information.

Statute: Section 484(t)(5) of the HEA requires institutions with a PEP to submit annual reports to the Department and requires annual reports from the Department to Congress.

Current Regulations: Sections 600.21(a)(1)–(13) require an institution to update its PPA no later than 10 days after any of the specified events occurs, such as adding a second or subsequent direct assessment program.

Proposed Regulations: The Department proposes to add a new reporting requirement to § 600.21 that would require an institution to also update its PPA no later than 10 days after it establishes or adds an eligible PEP at an additional location as defined under § 600.2, at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution that was not previously included in the institution's eligibility determination under § 600.10.

Reasons: The Department proposes to increase by one the existing specified events requiring an updated report. Among the items required in the Department's annual reports to Congress by section 484(t)(5) of the HEA are the names and types of postsecondary institutions offering PEPs in which confined or incarcerated individuals are enrolled and receiving Pell Grants. For the Department to provide accurate reports to Congress, postsecondary institutions must notify the Department when they add eligible PEPs.

Further, requiring prompt notice of the addition of an eligible PEP would allow the Department to monitor trends in eligible PEPs in real time and more precisely target oversight as the programs progress. This approach mirrors our oversight of direct assessment programs (§ 668.10), for example, where institutions must notify us of each additional program.

§ 668.8 Eligible program.

Statute: Section 484(t)(1)(b) of the HEA establishes PEPs as eligible programs under title IV of the HEA.

Current Regulations: None related to prison education programs. Current regulations under § 668.8 establish various requirements for eligible programs, including requirements for program length, the number of credit hours in a program for title IV, HEA purposes, and use of distance education.

Proposed Regulations: We propose to update § 668.8(n) to include prison education programs as named ''eligible programs'' for title IV aid.

Reasons: This is a technical update to ensure the regulations would reflect statutory language authorizing PEPs as programs eligible for Federal student aid.

§ 668.11 Severability.

Statute: None.

Current Regulations: None.

Proposed Regulations: We would redesignate § 668.11 as § 668.12 and add a severability provision in proposed § 668.11, to be included in subpart A, which would make clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: Each of the proposed provisions discussed in this NPRM serves one or more important, related but distinct purposes. Each of the requirements provides value to students, prospective students, their families, to the public, taxpayers, and the Government, and to institutions separate from, and in addition to, the

[14] *https://www.americanprogress.org/article/education-opportunities-prison-key-reducing-crime/. https://www.justice.gov/opa/pr/justice-and-education-departments-announce-new-research-showing-prison-education-reduces. https://www.rand.org/pubs/research_reports/RR266.html.https://www.vera.org/blog/back-to-school-a-common-sense-strategy-to-lower-recidivism.*

value provided by the other requirements. To best serve these purposes, we would include this administrative provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder.

§ 668.32 Student eligibility—general.

Statute: Section 484(t)(3) of the HEA establishes Pell Grant eligibility for confined or incarcerated individuals who are enrolled in an eligible PEP.

Current Regulations: Under § 668.32, an individual incarcerated in a Federal or State penal institution is not eligible for a Pell Grant.

Proposed Regulations: We propose to update the regulations to reflect that a confined or incarcerated individual would be eligible for a Pell Grant if enrolled in an eligible PEP.

Reasons: This is a technical update to conform with recent amendments made to the statute.

§ 668.43 Institutional information.

Statute: Section 485(a)(1)(G) of the HEA requires a postsecondary institution to make certain information readily available to enrolled and prospective students, including information that accurately describes the institution's academic program.

Current Regulations: The current regulations at § 668.43(a)(5)(v) require an institution to disclose whether an academic program would fulfill educational requirements for licensure or certification if the program is designed to meet, or advertised as meeting, such requirements. For each State, institutions are required to disclose whether the program does or does not meet such requirements, or whether the institution has not made such a determination.

Proposed Regulations: We propose to add § 668.43(a)(5)(vi), which would apply if an eligible PEP were designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation (as described in proposed § 668.236(g) and (h)). In that case, the postsecondary institution would provide information regarding whether that occupation typically involves State or Federal prohibitions on the licensure or employment of formerly confined or incarcerated individuals. The institution would provide this information for any State for which the institution has made a determination about such State prohibitions, other than the State in which the correctional facility is located or the State where most students are likely to return in the case of a Federal correctional facility where the institution would already be required to meet such requirements under proposed § 668.236(g) and (h).

Reasons: The proposed disclosure would provide students with information that institutions and oversight entities already would have to collect and report to the Department under other existing and proposed provisions. Section 484(t)(1)(B)(vi) of the HEA already requires (and proposed § 668.236(g) would require) that an eligible PEP satisfy any applicable educational requirements for professional licensure or certification, including licensure or certification examinations needed to practice or find employment in the sectors or occupations for which the program prepares the individual. This requirement would apply in the State in which the correctional facility is located or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release. Similarly, section 484(t)(1)(B)(vii) already requires (and proposed § 668.236(h) would require) that an eligible PEP not offer education that is designed to lead to licensure or employment for a specific job or occupation in the State if such job or occupation typically involves prohibitions on the licensure or employment of formerly confined or incarcerated individuals in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release.

Disclosure of this information to confined or incarcerated students is critical. According to one analysis of collateral consequences of incarceration, ''The American Bar Association's inventory of penalties against those with a record has documented 27,254 state occupational licensing restrictions.'' [15] In Minnesota, for example, rules bar participation by incarcerated students in careers ranging from dental assistant to server in a restaurant, based on the type of offense.[16] This issue is further complicated by the diversity of offenses among the State or Federal prison population, which means some inmates serving time for the same offense may benefit from a particular PEP, but others may not, depending on applicable State educational requirements. By ensuring that institutions provide clear and timely information on licensure restrictions to students, they would be able to make more informed decisions about whether to enroll in a particular PEP. This is especially important because PEPs would use up some portion of students' lifetime Pell Grant eligibility; if confined or incarcerated individuals enroll in programs that do not meet their needs, they would have less remaining Pell Grant eligibility for another PEP or another postsecondary education program they may wish to enroll in upon release from a correctional facility.

The Department does not propose to require such disclosures for the State in which the correctional facility is located or the State where most students are likely to return, because the program approval process under proposed § 668.236(g) and (h) already ensures the program satisfies educational standards for licensure or employment in those locations. With respect to other States' educational requirements for licensure or employment, institutions would have to provide information to confined or incarcerated individuals only for States for which the institution has made a determination about State prohibitions on the licensure or certification of formerly confined or incarcerated individuals, in recognition that institutions may not be aware of the licensure requirements in every State, particularly where they are not otherwise enrolling students.

§ 668.234 Scope and purpose.

Statute: Section 484(t) of the HEA authorizes Pell Grant eligibility for confined or incarcerated individuals who enroll in a PEP.

Current Regulations: None.

Proposed Regulations: We propose a new subpart P to part 668 that sets forth the mechanics and requirements for PEPs. The scope and purpose in § 668.234 for proposed subpart P confirms that a confined or incarcerated individual is eligible to receive a Pell Grant if that individual enrolls in an eligible PEP. We also propose to clarify that eligible PEPs are subject to proposed subpart P and all other regulations that otherwise apply to title IV programs.

Reasons: Given the Department's enhanced statutory obligation to monitor PEPs in the context of administering Pell Grant funds, the Department proposes to create a new subpart P to part 668. The subpart

[15] Stephen Slivinski, ''Turning Shackles into Bootstraps—Why Occupational Licensing Reform is the Missing Piece of Criminal Justice Reform'', Center for the Study of Economic Liberty at Arizona State University. (2016), *https://csel.asu.edu/sites/default/files/2019-09/csel-policy-report-2016-01-turning-shackles-into-bootstraps.pdf.*

[16] *https://careerwise.minnstate.edu/exoffenders/find-job/jobs-criminal-record.html.*

would provide detail and clarity around the establishment and maintenance of PEPs, as well as applicable operational details and reporting in a single new subpart, which would aid institutions and oversight entities in implementing such programs and confined and incarcerated students in obtaining available benefits.

§ 668.235 Definitions.

Statute: There are no statutory definitions of ''advisory committee,'' ''feedback process,'' ''oversight entity,'' or ''relevant stakeholders.''

Current Regulations: None.

Proposed Regulations: In § 668.235, the Department proposes to define several terms that have specific application in the PEP context. The proposed ''advisory committee'' would be a group established by the oversight entity that provides nonbinding feedback regarding the approval and operation of a PEP within the oversight entity's jurisdiction. We propose to define ''feedback process'' as the process developed by the oversight entity to gather nonbinding input from relevant stakeholders regarding the approval and operation of PEPs. Although the solicitation of input from relevant stakeholders would be required, use of an advisory committee as part of that process would be optional. We propose to define ''oversight entity'' as the Federal Bureau of Prisons or the appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities. Finally, we propose to define ''relevant stakeholders'' as individuals and organizations that provide input to the oversight entity as part of a feedback process regarding approval and operation of PEPs. These stakeholders would include, at minimum, representatives of incarcerated students, organizations representing confined or incarcerated individuals, State higher education executive offices, and accrediting agencies, and may include additional stakeholders as determined by the oversight entity.

Reasons: By statute, an oversight entity is required to determine whether its PEP is operating in the best interest of the students that it oversees (see § 668.241). Without this determination, a postsecondary institution would not be eligible to award a Pell Grant to a confined or incarcerated individual at a correctional facility.

We propose the term ''oversight entity'' to capture in concept the longer phrase in section 484(t) of the HEA (''the appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities, or . . . the Bureau of Prisons'').

During Subcommittee meetings, members urged the Department to mandate a feedback process from relevant stakeholders with expertise in prison education and from confined or incarcerated or formerly confined or incarcerated individuals, to assist the oversight entity in making the best interest determination. One Subcommittee member recommended requiring the oversight entity to engage with a formal advisory committee. While section 484(t)(1)(A)(ii) and (iii) of the HEA vests sole authority over the best interest determination in the oversight entity, the Department and Subcommittee members agreed that input from relevant stakeholders through a feedback process would be a valuable addition to the best interest determination, and the full Committee ultimately reached consensus on this issue. Such feedback would be nonbinding and need not come from a formal advisory committee. The Department was concerned that a formal advisory committee process could introduce delays in the approval of PEPs, particularly because the Federal Bureau of Prisons is subject to certain Federal requirements regarding advisory processes when informal feedback could provide similar value to the oversight entity. For these reasons, the Department recommended that an advisory committee be an optional component of the feedback process.

§ 668.236 Eligible prison education program.

Statute: Section 484(t) of the HEA authorizes Pell Grants for confined or incarcerated individuals enrolled in an eligible PEP.

Current Regulations: None.

Proposed Regulations: We propose new § 668.236, which would establish eligibility, operational, and monitoring requirements for PEPs. Paragraph (a) would limit the ability to offer PEPs to public or private nonprofit institutions of higher education or postsecondary vocational institutions, consistent with the statute. Paragraph (b) would require that the PEP be offered by a postsecondary institution that has been approved to operate in a correctional facility by the oversight entity. Section 484(t)(1)(B)(iii) of the HEA requires the oversight entity to determine that each PEP is operating in the best interest of students (see § 668.241); in paragraph (c), the Department proposes that the oversight entity make this determination after a two-year period of initial approval. Paragraph (d) would require that credits earned while enrolled in an eligible PEP transfer to at least one public, private nonprofit, or vocational institution in the State in which the facility is located or, for Federal facilities, the State in which most of the individuals confined or incarcerated in such facility will reside upon release as determined by the postsecondary institution with input from the oversight entity. Paragraph (e) is from section 484(t)(1)(B)(v) of the HEA and would prohibit an institution from offering a PEP if it has been subject to certain adverse actions by its accrediting agency or association in the last five years; those adverse actions are defined to include any suspension, emergency action, or termination of programs by the Department, any final adverse action by the institution's accrediting agency or association (as defined in § 602.3), or any action by the State to revoke a license or other authority to operate. Paragraph (f) would impose limits on an institution's ability to offer a PEP if it is subject to a current adverse action. Paragraph (g) would require an eligible PEP to satisfy any applicable educational requirements for professional licensure or certification, including licensure or certification examinations needed to practice or find employment in the sectors or occupations for which the program prepares the individual, in the State in which the correctional facility is located or, for a Federal facility, in the State in which most of the individuals will reside upon release. Paragraph (h) would prohibit the eligible PEP from offering education that is designed to lead to licensure or employment for a specific job or occupation in the State, or allowing students to enroll in such programs, if such job or occupation typically involves prohibitions on the licensure or employment of formerly confined or incarcerated individuals in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release. For both paragraphs (g) and (h), the institution would be required to make this determination not less than annually, based on information provided by the oversight entity. The prohibition would not extend to local laws; screening requirements for good moral character or similar provisions; State or Federal laws that have been repealed, even if the repeal has not yet taken effect or if the repeal occurs between assessments of the institution of higher education by the oversight entity; or other restrictions as determined by the Secretary.

Reasons: As noted above, many of the PEP requirements are drawn directly from statute. The Department proposes clarifying and operational regulations to support the effective implementation of the statute. For example, while the statute requires the oversight entity to make a ''best interest'' determination, the statute is silent as to when that determination must be made. The Department proposes to give the oversight entity two years to make that determination to allow the oversight entity time to collect the necessary data and make an informed decision. With respect to the statutory requirement, captured in proposed paragraph (d), that a PEP in a Federal facility offer transferability of credit to at least one institution of higher education in the State in which most of the students will reside upon release, clarity is needed as to who determines the appropriate State. A Subcommittee member recommended, and the full Committee 1 agreed, that the postsecondary institution should determine which State this should be, based on information provided by the oversight entity. This is because the postsecondary institution would have the most expertise on its student population. The same is true for the requirements in proposed paragraphs (g) and (h), which require institutions offering programs in Federal facilities to determine whether such programs satisfy educational, licensure and employment requirements in the State in which most of the students will reside upon release. Postsecondary institutions, with input from the oversight entity, would be in the best position to know about, and adapt their programming to, the educational, licensure, and employment requirements of various States. The Department proposes to require institutional decisions under paragraphs (g) and (h) be made not less than annually, to ensure educational programming remains current with frequently changing licensure requirements.

The statute dictates, and the proposed regulations would codify in paragraph (e), that the postsecondary institution offering the eligible PEP has not been subject to various adverse actions by the Department, the accrediting agency, or the State within the last five years. With respect to accrediting agency action, we propose to draw on a familiar definition of ''adverse action'' in § 602.3, which includes the denial, withdrawal, suspension, revocation, or termination of accreditation or pre-accreditation, or any comparable accrediting action an agency may take against an institution or program. Additionally, paragraph (f) would make clear that an institution may not begin offering a new PEP if the institution's accrediting agency initiates such adverse action and must submit a teach-out plan to the accrediting agency after an adverse action is initiated for any PEPs it already operates. Until a significant action like the ones contained in § 602.3 is resolved, it would not be in any stakeholder's best interest for that institution to start a new PEP until the adverse action has been rescinded or otherwise resolved. If the action is not rescinded, for example, the school could ultimately face a loss of accreditation, in which case the PEP would lose eligibility for title IV aid, students may not be able to complete their programs, and taxpayers may be forced to bear the costs of restoring Pell Grant eligibility for the students. The required submission of a teach-out plan in these cases would provide additional protections for students to ensure equitable treatment of confined or incarcerated individuals if the program closes.

Paragraph (h), which outlines prohibitions on enrollment, is based on the statutory requirement in section 484(t)(1)(B)(vii) of the HEA. As noted above, the postsecondary institution would make the determination as to which State most students would reside in upon release. Proposed paragraphs (h)(1) and (2) would add necessary guardrails for confined or incarcerated students. A postsecondary institution should not enroll a student in an eligible PEP if, based on their conviction, the institution knows prior to enrollment that the confined or incarcerated individual would not be able to obtain licensure or employment in the field for which the education is intended to prepare them and in the State the individual is likely to live in upon release. In the interest of ensuring that access to postsecondary education is not overly restricted for confined or incarcerated individuals, however, the Department in proposed paragraph (h)(3) clarifies that not all restrictive provisions would bar enrollment and lists the types of restrictions that would be exempt from the enrollment prohibition (local laws, for example).

§ 668.237 Accreditation requirements.

Statute: Section 484(t) of the HEA authorizes Pell Grants for confined or incarcerated individuals enrolled in an eligible PEP.

Current Regulations: None.

Proposed Regulations: We propose in § 668.237 that an eligible PEP must meet the requirements of the institution's accrediting agency or State approval agency. We further propose that, in order for any PEP to qualify as an eligible program, the accrediting agency would need to undertake the following four measures: (1) evaluate at least the first two additional locations and PEPs being offered there to ensure the institution's ability to offer and implement the program based on the agency's accreditation standards, and include it in the institution's grant of accreditation or pre-accreditation; (2) evaluate the institution's first additional PEP offered using a new mode of delivery to ensure the institution's ability to offer and implement the program based on the agency's standards, and include it in the institution's grant of accreditation or pre-accreditation; (3) perform a site visit as soon as practicable but no later than one year after initiating the PEPs at the first two additional locations; and (4) review and approve the methodology for how the institution, in collaboration with the oversight entity, made the determination that the PEP meets the same standards as substantially similar non-PEP programs at the institution.

Reasons: The requirement that the first PEP at the first two additional locations be evaluated by the institution's accrediting agency or State approval agency mirrors the Department's approval requirement in proposed § 600.10. After the first two programs at the first two additional locations, an institution's subsequent PEPs are generally not required to be evaluated by the accrediting agency or State approval agency unless the accrediting agency or State approval agency itself has a requirement that all PEPs are evaluated, or the institution changes the method of delivery. A Subcommittee member recommended that the Department require that a change in the method of delivery be evaluated by the accrediting agency or State approval agency. The Department agreed with this suggestion, at least with respect to the first such program offered through a different mode of delivery (such as the first distance education program). This would allow the Department and accrediting agency to maintain oversight of PEP program quality in the face of a potentially significant change in the operations of the program, regardless of whether the institution already underwent approval at its first two additional locations.

An accrediting agency would be required to perform a site visit at the first two additional locations offering PEPs, or upon a change in the modality of the program, due to the unique nature of an eligible PEP. It is important to ensure that programming can be delivered to a confined or incarcerated individual, which may require different capabilities on the part of an institution of higher education, and that the programming would provide a quality education. A site visit would further ensure that the accrediting agency has adequate opportunity to evaluate the realities of the program on the ground and ensure that its initial assessment was appropriate. Under § 602.3(b), site visits required under circumstances other than PEP evaluation must take place within six months. The Department recognizes that this may not be practicable due to the logistics of performing a site visit in a correctional facility; therefore, we propose in § 668.237(b)(3) to provide an extension to one full year for the site visit to be conducted.

Finally, a Committee 1 member recommended that the accrediting agency or State approval agency review and approve the methodology for how the institution, in collaboration with the oversight entity, made the determination that the PEP meets the same standards as substantially similar programs that are not PEPs at the institution. The Department agreed with this recommendation and adopted it in paragraph (b)(4). This would provide an additional backstop for the ''best interest determination'' requirements in proposed § 668.241, some of which would require the oversight entity to ensure that the services provided to confined or incarcerated individuals are the same or substantially similar to services provided to other students who are not confined or incarcerated. Promoting and requiring collaboration between the institution and oversight entity would ensure confined or incarcerated individuals get the services afforded to all other students at the institution, resulting in more equitable access to postsecondary educational opportunities. It would also provide an additional guardrail of accreditor evaluation and approval.

§ 668.238 Application requirements.

Statute: Section 484(t) of the HEA authorizes Pell Grants for confined or incarcerated individuals enrolled in an eligible PEP.

Current Regulations: None.

Proposed Regulations: Proposed § 668.238(a) reiterates that the postsecondary institution would need to seek approval for the first PEP at the first two additional locations as required under § 600.10. Paragraph (b) spells out the application requirements for such PEPs. For all other PEPs not subject to initial approval by the Secretary, postsecondary institutions would simply be required to submit the documentation outlined in § 668.238(c). PEPs at any location, including the first two additional locations, would be required to adhere to enrollment caps described in § 600.7 and reporting requirements in § 600.21. Under § 600.20(c)(1), if a postsecondary institution is provisionally certified to participate in the title IV programs or that has been notified it must apply for approval of new programs or locations, the institution cannot add an additional location or educational program, including a PEP, without prior approval from the Secretary. The same requirements apply to any postsecondary institution that receives title IV, HEA program funds under the reimbursement or cash monitoring payment method, that acquires the assets of another institution that provided educational programs at that location during the preceding year and participated in the title IV, HEA programs during that year, or that would be subject to a loss of eligibility if it adds that location.

Proposed § 668.238(b) outlines the components of the PEP application, which would include: (1) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study; (2) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of one or more PEPs and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency; (3) The name of the correctional facility and documentation from the oversight entity that the PEP has been approved to operate in the correctional facility; (4) Documentation detailing the methodology including thresholds, benchmarks, standards, metrics, data, or other information the oversight entity used in making its determination that the program is operating in the best interest of students for all indictors under § 668.241, and how such information was collected; (5) Information about the types of services offered to admitted students, including orientation, tutoring, and academic and reentry counseling. If reentry counseling is provided by a community-based organization that has partnered with the eligible PEP, institution, or correctional facility to provide reentry services, then the application would be required to include information about the types of services offered by the community-based organization; (6) Affirmative acknowledgement that the Secretary can limit or terminate approval of an institution to provide a PEP as described in § 668.237; (7) Affirmative agreement to submit the report to the Secretary as described in § 668.239; (8) Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of confined or incarcerated individuals, which would be reported to the Department; and (9) Such other information as the Secretary deems necessary.

Paragraph (c) would require that, for all PEPs that do not require the Secretary's approval, the postsecondary institution must submit documentation that it has not been subject to any adverse actions by its accrediting agency or any action by the State to revoke a license to operate. The postsecondary institution also would be required to submit documentation that it has entered into an agreement with the oversight entity to obtain data on the transfer and release dates of the confined or incarcerated individuals enrolled in its PEP(s).

Reasons: The Department seeks to ensure that postsecondary institutions that offer eligible PEPs would be able to comply with the various statutory and regulatory requirements laid out in proposed subpart P. Because there likely will not be as many program options for confined or incarcerated individuals, and because, for some institutions, offering programming within the context of correctional facilities will be new, the more extensive up-front review proposed in § 668.238 would allow us to ensure that the first programs offered at the first two additional locations will meet applicable standards. Subsequently, except where the postsecondary institution changes the method of delivery, the institution would only need to submit documentation from the accrediting agency or State approval agency at the State showing that the institution was not subject to various adverse actions (as described in the proposed regulations section) and provide an agreement with the oversight entity to obtain transfer and release data. The latter would be necessary to allow the Department to calculate and provide information to the oversight entity for use in its best interest determination (see § 668.241).

We intend to propose a template to assist postsecondary institutions in submitting applications to the Department. Use of the template would be voluntary and non-binding, but submission of the template would fulfill the requirements of the regulation.

§ 668.239 Reporting requirements.

Statute: Section 484(t)(5) of the HEA requires that the Secretary submit an annual report to Congress regarding PEPs and make that report publicly available on the Department's website.

Current Regulations: None.

Proposed Regulations: Proposed § 668.239 would require a postsecondary institution to submit reports as required by a notice the Secretary publishes in the **Federal Register**. As in § 668.238, proposed § 668.239 reiterates that the institution would report information required by the Secretary regarding transfer and release dates of confined or incarcerated individuals, through an agreement with the oversight entity.

Reasons: Section 484(t)(4) and (5) requires postsecondary institutions and the Secretary to report various information regarding PEPs. In order to fulfill statutory mandates, the Secretary may need to collect additional information not identified in the statute. Rather than dictate these data items through regulation, the Department proposes to notify institutions of data requirements through notices in the **Federal Register**, which would allow the Department to periodically add, subtract, or modify requests for certain information. Our experience with the Second Chance Pell experiment has been that revisions to data collection requirements may be necessary to ensure the collection of current and accurate data reflective of the experiences of incarcerated students, to obtain valuable new types of data that may become available due to statutory or regulatory changes or changes in recordkeeping practices at prison facilities or postsecondary institutions, and to address challenges related to data-sharing or burden that were unanticipated or that have evolved since establishing the data requirements.

Institutions would be required to enter into an agreement with the oversight entity to report the transfer or release date of PEP students so the Department can calculate and provide information to the oversight entity for use in its best interest determination (*see* § 668.241). A data-sharing agreement with the oversight entity would allow the institution, and thus the Department, to calculate data such as labor market outcomes only for students who are released from the facility and to avoid measuring those who are still incarcerated in such measures.

§ 668.240 Limit of termination of approval.

Statute: Section 484(t) of the HEA authorizes Pell Grant eligibility for confined or incarcerated individuals enrolled in an eligible PEP.

Current Regulations: None.

Proposed Regulations: The proposed regulations would allow the Secretary to limit or terminate approval of an institution to provide an eligible PEP if the Secretary determines that the institution violated any terms of proposed subpart P or determines that the information the institution submitted to the Secretary, accrediting agency, State agency, or oversight entity in support of its PEP application was materially inaccurate.

If the Secretary initiates a limitation or termination action with respect to an institution's PEP approval, the regulations would also require the postsecondary institution to submit a teach-out plan as defined under 34 CFR 600.2 and, if practicable, a teach-out agreement(s) to the institution's accrediting agency. A teach-out plan is a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides 100 percent of at least one program, ceases to operate, or plans to cease operations, before all enrolled students have completed their program of study. A teach-out agreement is a written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides 100 percent of at least one program offered, ceases to operate, or plans to cease operations, before all enrolled students have completed their program of study.

Reasons: It is necessary for the Secretary to establish in regulation the ability to remove programs that violate the terms of the regulations if the basis for approval was materially inaccurate. A Subcommittee member recommended that the Department add a teach-out plan requirement and, if practicable, a teach-out agreement(s) for an initiated limitation or termination action, to ensure proper planning in the event of a program closure. Confined or incarcerated individuals should be treated equitably and be provided a reasonable opportunity to complete their programs through a teach-out in the event that such programs lose eligibility for the title IV, HEA programs. Teach-out plans typically include such information as how students should request official transcripts, alternative options for program completion, and may include how students may continue their education after being released from the facility; these elements are critical for students to have access to in the event their programs close.

§ 668.241 Best interest determination.

Statute: Section 484(t) of the HEA authorizes Pell Grant eligibility for confined or incarcerated individuals enrolled in an eligible PEP.

Current Regulations: None.

Proposed Regulations: We propose that an oversight entity's determination that a PEP is operating in the best interest of students must include an assessment of all of the following:

- Whether the rate of confined or incarcerated individuals continuing their education post-release, as determined by the percentage of students who reenroll in higher education reported by the Department, meets thresholds established by the oversight entity with input from relevant stakeholders.
- Whether job placement rates in the relevant field for such individuals meet any applicable standards required by the agency that accredits the institution or program or a State in which the institution is authorized. If no job placement rate standard applies to a PEP offered by the institution, the oversight entity would need to define, and the institution would need to report, a job placement rate with input from relevant stakeholders.
- Whether the earnings for such individuals, or the median earnings for graduates of the same or similar programs at the institution, as measured by the Department, exceed those of a typical high school graduate in the State.
- Whether the experience, credentials, and rates of turnover or departure of PEP instructors are substantially similar to other programs at the institution, accounting for the unique constraints of PEPs.
- Whether the transferability of credits for courses available to confined or incarcerated individuals and the applicability of such credits toward related degree or certificate programs is substantially similar to those at other similar programs at the institution, accounting for constraints of PEPs.
- Whether the PEP's offering of relevant academic and career-advising services to individuals while they are confined or incarcerated, in advance of reentry, and upon release, is substantially similar to offerings to a student who is not a confined or incarcerated individual and who is enrolled in, and may be preparing to transfer from, the same institution, accounting for constraints of PEP.

• Whether the institution ensures that all formerly incarcerated students are able to fully transfer their credits and continue their programs at any location of the institution that offers a comparable program, including by the same mode of instruction, barring exceptional circumstances relating to the student's conviction.

We also propose several other assessment items that are important to assessing program quality, but that would be optional for the oversight entity:

• Whether the rates of recidivism, which do not include any recidivism by the student within a reasonable number of years of release and which only include new felony convictions as defined by United States Sentencing Guideline § 4A1.1(a) as ''each sentence of imprisonment exceeding one year and one month,'' meet thresholds set by the oversight entity.

• Whether the rates of completion reported by the Department, which do not include any students who were transferred across facilities and which account for the status of part-time students, meet thresholds set by the oversight entity with input from relevant stakeholders.

• Other indicators pertinent to program success as determined by the oversight entity.

In addition, we propose the following:

• The oversight entity would make the best interest determination through a feedback process that considers input from relevant stakeholders and considers approval of the eligible PEP given the totality of the circumstances.

• If the oversight entity does not find a program to be operating in the best interest of students, it would allow for the program to re-apply within a reasonable timeframe.

• The oversight entity initially could approve a PEP without the required assessments under this section for two years. After the two years of initial approval under § 668.236, the oversight entity would need to determine that the PEP is operating in the best interest of students pursuant to § 668.241.

• After the oversight entity's initial best interest determination, the institution would be required to obtain subsequent final evaluations of each eligible PEP from the responsible oversight entity not less than 120 calendar days prior to the expiration of each of the institution's PPAs, except that the oversight entity could make a determination between subsequent evaluations based on its regular monitoring and evaluation of program outcomes. Each subsequent evaluation would include the entire period following the prior determination, a review of the best interest factors for all students enrolled in the program, and input from relevant stakeholders through the oversight entity's feedback process. Subsequent evaluations would be submitted to the Secretary no later than 30 days after the evaluation is completed.

• Finally, we propose that postsecondary institutions would obtain and maintain documentation of the methodology by which the oversight entity made each best interest determination, including the initial approval determination, for as long as the program is active or, if the program is discontinued, for three years following the date of discontinuance.

Reasons: The authorizing statute requires the Federal Bureau of Prisons, a State Department of Corrections, or other entity responsible for oversight of the correctional facility (referred to as the ''oversight entity'' throughout the preamble) to determine whether a PEP is operating in the best interest of the students in its correctional facility. PEPs are unlike most other postsecondary institutions and programs, where oversight is managed by the Department, the State, and the institution's accrediting agency, not an external entity such as a correctional agency. Providing a regulatory framework for making the determination about the best interests of students would ensure that the oversight entities, which are generally new to this role, have adequate direction as to how to implement the statute, a concern raised by several Subcommittee members. Without adequate direction, oversight entities may fall short, and students may be left without the critical protection that Congress envisioned to ensure that students with fewer educational options—who cannot easily elect to attend another institution—have access to programs operating in their best interest.

In paragraph (a)(1), the Department would make clear that the oversight entity must assess all of the indicators listed in that section, although the final determination that the program is operating in the best interest of students would be made based on the totality of the circumstances of the program. That is, while each indicator would be assessed, falling short on one or more indicators would not automatically require the oversight entity to determine the PEP is ineligible to operate at a correctional facility. Proposed § 668.238 would require an oversight entity to provide documentation for all of the indicators under § 668.241, detailing its methodology in reaching a determination that the program is operating in the best interest of students. The Department would monitor and enforce the overarching requirement that a PEP operate in the best interest of confined or incarcerated individuals. Toward that end, we would retain the authority to terminate approval of the eligible PEP under proposed § 668.240 if it is determined that the institution violated any terms of subpart P or that the information the institution submitted to the Secretary, accrediting agency, State agency, or oversight entity in support of its application was materially inaccurate.

As required by the statute, paragraph (a)(1)(i) would require an oversight entity to evaluate continuing education post-release. The Department's proposed regulation would codify this indicator with greater specificity and require the oversight entity to establish a threshold for this metric with input from relevant stakeholders (as discussed in § 668.235). Establishing a threshold for this measure upfront would help ensure the oversight entity has adequate processes in place to make fair, informed, and consistent decisions about whether PEPs are operating in the best interests of students and would provide insights to the Department and the public about the processes those oversight entities are employing. In the interest of reducing the data collection burden on institutions and oversight entities, we would provide data on post-release continuation of education by confined or incarcerated individuals to institutions and oversight entities. We would also publish aggregate data on post-release education continuation in our annual report.

The second ''best interest'' determination factor, in paragraph (a)(1)(ii), would require the oversight entity to consider a job placement rate measure. This factor is also named in the statute. While the Department does not currently have an established measure for job placement rates, we are aware that some accrediting agencies or States may have policies and procedures regarding the calculation of job placement rates, and oversight entities could use those existing calculations where applicable. If no applicable requirements exist, however, then the oversight entity would need to establish a job placement rate definition with input from relevant stakeholders, and the institution would report using that definition.

Paragraph (a)(1)(iii) would require the oversight entity to consider data regarding whether the median post-release earnings of graduates of the eligible PEPs are higher than those of a typical high school graduate in the State, if available. This is consistent with the statutory provision that oversight entities may consider the earnings of formerly confined or incarcerated individuals from the PEP. It also would help ensure that the typical confined or incarcerated individual is financially better off after having completed the PEP than someone with a high school diploma or its equivalent who did not attend such a program. Subcommittee members raised concerns that such data would not be readily available. Accordingly, if the oversight entity does not have data, the Department would provide median earnings for graduates of the same or similar programs in order to conduct the proper assessment. Such data are generally already made available through the College Scorecard, and the Department is committed to continuing to produce and improve upon those data.

Proposed paragraphs (a)(1)(iv), (v), and (vi) outline additional indicators that the oversight entity would be required to assess related to the faculty, credit transfer, and advising and support services for incarcerated students in the PEP. All are listed in the statute. Specifically, we propose to require that the oversight entity assess whether the experience, credentials, and turnover rates of instructors (paragraph (a)(1)(iv)), credit transfer (paragraph (a)(1)(v)), and academic and career advising services (paragraph (a)(1)(vi)) for the confined or incarcerated individuals in the PEP are substantially similar to other students at the institution. A Subcommittee member was concerned that the unique constraints of PEPs may make it challenging to offer ''substantially similar'' experiences to PEP students; for example, instructor turnover may be higher in a correctional facility setting due to background check requirements. The Department agreed and incorporated that concept into the proposed regulations by noting that each of these provisions should account ''for the unique geographic and other constraints of prison education programs.'' As discussed above in connection with proposed § 668.237, the institution's accrediting agency would review and approve the institution's methodology for making its ''substantially similar'' determinations, which the institution would be required to develop in collaboration with the oversight entity.

Paragraph (a)(1)(vii) was added based on a recommendation from a Subcommittee member. There was concern expressed during the Subcommittee meetings that institutions may enroll confined or incarcerated individuals into an eligible PEP, but later deny their eligibility to enroll in an on-campus program post-release, leaving at least some students potentially unable to complete their educational programs. The Department agreed that this presents an academic and equity concern and proposes to require that the oversight entity assess whether formerly incarcerated students are able to fully transfer their credits and continue their programs at any location of the institution that offered the PEP, including by the same mode of instruction, taking into account any exceptional circumstances related to the student's conviction, which are typically outside the institution's control. For example, exceptional circumstances might exist if, as a part of the terms of the individual's release from a correctional facility, the formerly confined or incarcerated individual is not permitted to be within a certain distance of an individual or group of individuals who are likely to be on the campus where the student wishes to enroll. In such circumstances, the Department would encourage institutions to work to identify alternative opportunities for re-enrollment for the student.

The proposed regulations also would provide three optional ''best interest'' factors in paragraphs (a)(2)(i), (ii) and (iii) that the oversight entity may choose to assess in the course of determining whether the program operates in the best interests of students, namely the recidivism rates of formerly confined or incarcerated individuals who attended the PEP; other indicators related to program success that the oversight entity identifies; and completion rates reported by the Department to the oversight entity. The recidivism rate assessment in paragraph (a)(2)(i) is listed in the statute but drew sharp criticism from the Subcommittee as being challenging to measure and less directly related to program quality. The Department accordingly proposes parameters for the consideration of recidivism rates if the oversight entity opts to review that metric. Specifically, the Department proposes to exclude recidivism after ''a reasonable number of years of release,'' and to include only new felony convictions that, as defined by the U.S. Sentencing Guideline § 4A1.1(a), exceed a sentence of one year and one month. Since felony definitions and sentence lengths vary from State to State, we believe that aligning reporting to the U.S. Sentencing Guidelines will ensure more consistent treatment. These protections would also minimize the impact of more minor convictions or sentences, or technical violations such as probation revocations, and ensure greater uniformity in how recidivism is measured, if the oversight entity opts to measure it.

Under proposed paragraph (a)(2)(ii), the oversight entity may opt to assess completion rates as part of the best interest determination. Completion rates are used by many entities in higher education, including for consumer information purposes under the HEA; by States and accrediting agencies in assessing college outcomes; and by institutions themselves in identifying gaps in performance and opportunities for continuous improvement. We provide this information to the public through the College Scorecard, to members of an accreditation advisory committee, and in many other contexts to support practitioners' and policymakers' efforts to understand and improve institutional outcomes. The Federal government also invests billions each year in programs designed to increase postsecondary completion rates. Some subcommittee members were concerned with adding any metrics not explicitly mentioned in the statute as a required consideration for the oversight entity; and noted potential challenges with ensuring completion for incarcerated students who, for instance, are transferred across prison facilities and unable to continue their program. Thus, while the Department continues to feel strongly that this measure would add value to the oversight entity's assessment of prison education programs, we agreed to make it an optional, rather than a required, consideration for the purposes of reaching consensus. With this inclusion, the Department would analyze completion rates of eligible PEPs and provide that information to Congress and the public as required in section 484(t)(5)(A)(viii), which requires the Department to report on the impact of expanding Pell Grant eligibility to confined or incarcerated individuals and which specifically requires reporting on academic outcomes such as credential and degree completion.

In proposed paragraph (a)(2)(iii), the Department would permit oversight entities to identify and consider other measures of program success in the best interest determination, beyond those specified in the statute and regulations. We believe that a collateral benefit of the stakeholder feedback processes that are required of oversight entities may be the suggestion of additional metrics, particularly those important to incarcerated students and their advocates.

Paragraph (b), which would require the oversight entity to solicit feedback and explain how to make the best interest determination, is already described in this section of the preamble and in § 668.235. As previously stated, these proposed ''best interest'' factors would be part of a holistic assessment of the institution's ability to operate in the best interests of students and would not be pure eligibility requirements.

A Subcommittee member recommended that the regulations establish an appeal process for programs that the oversight entity determines are not operating in the best interest of students. While the Department does not believe it is appropriate to prescribe a specific appeal process for use by external agencies, we incorporated the suggestion by proposing in paragraph (c) that oversight entities permit institutions that were not found to be operating in the best interests of students to reapply within a reasonable timeframe.

The oversight entity would always have to approve the operation of an eligible PEP at a correctional facility that it oversees. However, in paragraph (d), we propose to provide two years before the oversight entity would need to make a formal ''best interest determination.''

As discussed in § 668.236, it would take time for the postsecondary institution, the Department, and the oversight entity to collect the necessary data to make an informed decision based on the indicators. The two-year timeframe would ensure students receive the protections of the best interest framework in a timely manner, while recognizing the need for some time to gather the necessary information to meet the statutory requirement for a data-informed decision by the oversight entity.

In paragraph (e), the Department proposes that any reassessment of an eligible PEP by the oversight entity be conducted at least 120 days prior the expiration of the institution's PPA to ensure the assessment is complete and available by the time we review the institution's application for recertification. Reassessment is important to ensure that eligible PEPs continue to operate in the best interests of confined or incarcerated individuals. This timeframe would ensure that institutions' determination dates are staggered, based to an extent on the risk of the institution (since higher-risk institutions will have shorter recertification timelines than lower-risk institutions), and that determinations are available to the Department when the agency is making its own assessment of the institution for title IV purposes.

The records retention described in paragraph (f) is necessary for oversight and review purposes.

§ 668.242 Transition to a prison education program.

Statute: Section 484(t) of the HEA authorizes Pell Grant for confined or incarcerated individuals enrolled in an eligible PEP.

Current Regulations: None.

Proposed Regulations: The Department proposes that, for institutions operating eligible PEPs in a correctional facility that is not a Federal or State correctional facility, a confined or incarcerated student who otherwise meets the eligibility requirements to receive a Pell Grant and is enrolled in an eligible program that does not meet the requirements under subpart P would continue to receive a Pell Grant until the earlier of July 1, 2029; the date the student reaches the maximum timeframe for program completion as defined under § 668.34; or the date the student exhausts Pell Grant eligibility as defined under § 690.6(e).

We propose that an institution cannot enroll a confined or incarcerated student on or after July 1, 2023, who was not enrolled in an eligible program prior to July 1, 2023, unless the institution first converts the eligible program into an eligible PEP as defined in § 668.236.

Reasons: This proposed regulation does not apply to the Second Chance Pell experiment under the Experimental Sites Initiative, for which an end date has not yet been determined. The Department will release subregulatory guidance for institutions participating in the Second Chance Pell Experiment.

Instead, this section of the proposed regulations is focused on incarcerated students enrolled in educational programming in correctional facilities that is not currently subject to the prohibition on Federal Pell Grants. As previously noted, the statute and regulations currently prohibit students confined or incarcerated in a State or Federal correctional facility from access to Pell Grants (outside of the Second Chance Pell experiment). Programs operating in correctional facilities other than State or Federal correctional facilities are currently eligible, however. For example, currently, a proprietary institution may be operating an eligible program in a local jail or juvenile justice facility, and students may be accessing Pell Grants for that program. On July 1, 2023, the statute will require all confined or incarcerated individuals pursuing postsecondary education to enroll in an eligible PEP at a public, private nonprofit, or vocational institution to access Pell Grants; at that time, therefore, an individual enrolled in any program at a proprietary institution would be ineligible for a Pell Grant.

The Department does not want to interrupt a student's enrollment in a program; therefore, we propose limited flexibility, discussed in the proposed regulations section, to allow current students to finish their programs if those programs do not align with final PEP regulations that may be in effect on July 1, 2023 (or before that time if the regulations are implemented early). Under the proposed regulations, any such flexibility would end on July 1, 2029, which would be the final date a confined or incarcerated individual would be able to receive a Pell Grant in a program that is not an eligible PEP. This provides six years from the effective date of the authorizing statute for current students to either finish their programs or enroll in an eligible PEP, similar to the maximum timeframe to complete a four-year program as defined in § 668.34(b).

§ 690.62 Calculation of a Federal Pell Grant.

Statute: The Consolidated Appropriations Act, 2021 amended section 401(b)(3) of the HEA to require that no Pell Grant exceed the cost of attendance (as defined in section 472 of the HEA) at the postsecondary institution at which that student is in attendance. If, with respect to any student, it is determined that the amount of a Pell Grant for that student exceeds the cost of attendance for that year, the amount of the Pell Grant must be reduced until the Pell Grant does not exceed the cost of attendance at such postsecondary institution.

Current Regulations: None.

Proposed Regulations: We propose to add paragraph (b)(1)(i) to § 690.62 to codify in regulation that a Pell Grant cannot exceed the cost of attendance. In proposed § 690.62(b)(1)(ii), we propose that the postsecondary institution must reduce the Pell Grant award if the amount exceeds cost of attendance so that it does not result in a credit balance as defined under § 668.164(h).

The Department is aware that confined or incarcerated individuals may receive other financial assistance in addition to a Pell Grant. In § 690.62(b)(2)(i), we propose that, if the Pell Grant exceeds the student's cost of attendance when combined with other financial assistance, the financial assistance other than the Pell Grant must be reduced by the amount by which the total financial assistance exceeds the student's cost of attendance. Finally, we propose § 690.62(b)(2)(ii) to require that the Pell Grant be reduced to not exceed the cost of attendance if the confined or incarcerated individual's other financial assistance cannot be reduced.

Below are examples of how the calculation of a student's Pell Grant awards and lifetime eligibility is affected by the proposed regulations. The Pell amounts in the examples are based on the 2021–2022 Federal Pell Grant Payment and Disbursement Schedule.

Jerry, Sam, Amy, Paul, and Eliza are enrolled at the University of ABC in an eligible PEP in General Studies that leads to an associate degree. The eligible PEP is a standard term program with one fall and one spring payment period. Their COA for the program is $6,495.

A. Jerry attends the institution as a full-time student for the full award year. Jerry has an expected family contribution (EFC) of $0. Jerry's Pell Grant scheduled award is $6,495 (maximum award for the 2021–22 award year). Jerry also gets a Veteran's Administration (VA) education and training benefit of $5,495 that, by law, cannot be reduced. Jerry's total award is now $11,990 for the year.

Under current § 690.63(b), if Jerry were not incarcerated, he would receive $3,247.50 for the fall payment period and $3,247.50 for the spring payment period (totaling $6,495). However, under proposed § 690.62(b)(2)(ii), the University of ABC would reduce Jerry's $6,495 Pell award to $1,000 so that the combination of the student's Pell Grant and VA education and training benefit does not exceed Jerry's COA. The University of ABC would determine this by subtracting $11,990–$6,495 (Jerry's COA) which is $5,495 above Jerry's COA. Then University of ABC would subtract the amount above Jerry's Pell award from Jerry's original award ($6,495–$5,495), leaving $1,000 in Pell. The University of ABC would pay Jerry $500 for the fall payment period and $500 for the spring payment period. Jerry begins attendance in all coursework and maintains full-time enrollment status for the entire award year. Jerry's lifetime eligibility used (LEU)—defined in § 690.6(e)—increases by ($1,000/$6,495) = 15.3964 percent.

B. Sam also attends as a full-time student for the full award year. Sam has an EFC of 0. Sam's Pell Grant scheduled award is $6,495 (maximum award for the 2021–22 award year). Sam receives no other financial assistance. Sam receives $3,247.50 for the fall payment period and $3,247.50 for the spring payment period. Sam begins attendance in all coursework and maintains full time status for the entire award year. Sam's LEU increases by ($6,495/$6,495) = 100 percent for the year.

C. Amy attends the institution as a half-time student for the full award year. Amy has an EFC of $3,000. Amy's Pell Grant award is $1,773 because Amy's enrollment status is half-time. Amy's maximum Pell award (the scheduled award) would be $3,545 if she attended full-time for the full year. Amy qualifies for an institutional scholarship from University of ABC for $5,000.

Per the proposed § 690.62(b)(2)(i), the University of ABC decides to reduce Amy's institutional scholarship by $278 so that the combination of the student's Pell Grant and scholarship does not exceed Amy's COA. Because Amy's Pell Grant award was not reduced, Amy would receive $886.50 for the fall payment period and $886.50 for the spring payment period.

Amy begins attendance in all coursework and maintains half-time enrollment status for the entire award year. Amy's LEU would increase by ($1,773/$3,545) = 50.0141 percent. This is because Amy's scheduled award (the amount Amy would have received if Amy attended full-time for the full year) is $3,545.

D. Paul attends as a three-quarter-time student for the full award year. Paul has an EFC of $2,000.

Paul's Pell award is $3,409 for the year because his enrollment is three-quarter time. Paul's maximum Pell award (the scheduled award) would be $4,545 if he attended full-time for the full year. Paul also receives a State grant for $4,000. State law does not permit the State to reduce Paul's grant. This brings Paul's total aid to $7,409 for the year.

Paul would receive $1,704.50 for the fall payment period and $1,704.50 for the spring payment period. However, per the proposed § 690.62(b)(2)(ii), the University of ABC would reduce Paul's Pell award by $914 so that the combined amount of the Pell Grant and State grant would not exceed Paul's COA. The University of ABC would determine this by subtracting $7,409–$6,495 (Paul's COA), which is $914 above Paul's COA. Then University of ABC would subtract the amount above Paul's Pell Grant award from Paul's original award ($3,409–$914) leaving Paul $2,495 in Pell funds. The University of ABC would pay Paul $1,247.50 for the fall payment period and $1,247.50 for the spring payment period.

Paul begins attendance in all coursework and maintains three quarter enrollment status for the entire award year. Paul's LEU would increase by ($2,495/$4,545) = 54.8954 percent.

E. Eliza plans to attend as a half-time student in the fall payment period and full-time in the spring payment period. Eliza has an EFC of $500.

Eliza's Pell Grant disbursement amount for the fall payment period is $1,511.50 and $3,022.50 for the spring payment period. This is because Eliza attended half-time for the fall and full-time for the spring. Eliza's maximum Pell award (the Scheduled Award) would be $6,045 if she attended full-time for the full year. Eliza also receives a scholarship of $3,000 from an outside provider toward Eliza's educational expenses that cannot be reduced. This brings Eliza's total aid to $7,534 for the year.

Per the proposed § 690.62(b)(2)(ii), the University of ABC would reduce Eliza's Pell Grant award by $1,039 so that the combined amount of Pell Grant and other scholarship assistance would not exceed Eliza's COA. The University of ABC would determine this by subtracting $7,534–$6,495 (Eliza's COA), which is $1,039 above Eliza's COA. Then University of ABC would subtract the amount above from Eliza's total award for the year ($4,534–$1,039), leaving Eliza $3,495 in Pell funds. The University of ABC would pay Eliza $992 for the fall payment period and $2,503 for the spring payment period. Eliza's LEU would increase by ($3,495/$6,045) = 57.8163 percent.

Reasons: This is a technical update to ensure that the amount of Pell Grant funds that a confined or incarcerated student receives, combined with other types of educational assistance, would not exceed that student's educational expenses for tuition, fees, books, and supplies, which are the only items that may be included in such a student's cost of attendance under section 472 of the HEA.

§ 690.68 Severability.

Statute: None.

Current Regulations: None.

Proposed Regulations: Proposed § 690.68 would make clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: Each of the proposed provisions discussed in this NPRM serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families, to the public, taxpayers, and the Government, and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we would include this administrative provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

90/10 Rule (34 CFR 668.28)

§ 668.28 Definition of the revenue requirement for proprietary institutions of higher education.

Statute: Section 487(a)(24) of the HEA, as amended by the ARP, states that proprietary institutions must derive at least 10 percent of their revenue from non-Federal sources, and section 487(d) provides details on how proprietary institutions must calculate the percentage of their revenue from non-Federal sources.

Current Regulations: The current regulations provide that a proprietary institution must derive at least 10 percent of its revenue from sources other than title IV, HEA program funds.

Proposed Regulations: Proposed § 668.28(a)(1) would change the terminology from non-title IV revenue to non-Federal revenue and title IV funds to Federal funds.

Reasons: This proposed change in the regulatory language would reflect the change in the statutory language to ''non-Federal'' sources.

§ 668.28(a)(1) Calculating the revenue percentage.

Statute: Section 487(a)(24) of the HEA states that proprietary institutions must derive no less than 10 percent of their revenue from non-Federal sources as calculated according to section 487(d) of the HEA. Prior to passage of the ARP, the HEA only used title IV revenue from the Department when calculating compliance with the 90/10 rule. The ARP amended these sections to require proprietary institutions to include other sources of Federal revenue, in addition to title IV revenue from the Department, in the calculation that proprietary institutions make to determine if they are in compliance with the 90/10 rule.

Current Regulations: Current § 668.28(a)(1) provides that proprietary institutions must determine if they meet the requirement in § 668.14(b)(16) that at least 10 percent of their revenue is derived from non-title IV sources by using the formula laid out in Appendix C of subpart B.

Proposed Regulations: The Department proposes to add language to § 668.28(a)(1) detailing how proprietary institutions would calculate the revenue percentage. Paragraph (a)(1)(i) would provide that proprietary institutions with fiscal years beginning on or after January 1, 2023, must count title IV, HEA program funds and any other education assistance funds provided by a Federal agency directly to an institution or a student during that fiscal year, including the Federal portion of any grant funds provided or administered by a non-Federal agency, to cover tuition, fees, and other institutional charges as Federal revenue in the revenue calculation. It would also exclude from the revenue percentage calculation Federal funds for that fiscal year that are non-title IV Federal funds that go directly to a student and are specifically designated by the Federal agency providing those funds to cover expenses other than tuition, fees, and other institutional charges. Additionally, it would provide that the Secretary will identify the agency and Federal assistance funds that must be included in the revenue calculation in a **Federal Register** notice that will be updated as needed. Section 668.28(a)(1)(ii) proposes that Federal funds subject to the 90 percent limitation be limited to title IV, HEA program funds for any fiscal years beginning prior to January 1, 2023. Finally, we propose to update Appendix C to reflect the other changes proposed to the 90/10 calculation as additional guidance to accountants and auditors.

Reasons: The Department proposes to differentiate requirements for calculating the revenue percentage for fiscal years beginning before January 1, 2023, and those occurring on or after that date to grandfather in existing calculations in compliance with the ARP modifications to the HEA. The ARP specifies that the earliest the modification to the revenue requirement for proprietary institutions could apply to would be for institutions' fiscal years beginning on or after January 1, 2023.

Similarly, the Department proposes to include any Federal funds distributed directly to a student or proprietary institution to cover the cost of tuition, fees, and other institutional charges in the calculation of Federal funds in fiscal years beginning on or after January 1, 2023. This proposed change would implement the new statutory language in section 487(a)(24) of the HEA, which provides that the revenue percentage must count Federal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution. The Department proposes to only count Federal education assistance funds that are designated by a Federal agency to be used to pay tuition, fees, and other institutional charges as Federal revenue to reflect the statutory language related to funds that are ''used to attend the institution.''

During the negotiated rulemaking sessions, some non-Federal negotiators raised the concern that it would be difficult for proprietary institutions to include Federal funds that go directly to students, as the institutions may not be aware of what funds to include in the revenue calculation. Nonetheless, most non-Federal negotiators agreed that proprietary institutions should include these funds in the calculation. In the proposed regulations, the Department expects that proprietary institutions would report any Federal revenue that they are aware of in their 90/10 calculation, unless those funds were provided to a student who did not pay any institutional charges. To address the concern that proprietary institutions may not be aware of all sources of Federal revenue, the Department proposes to publish in the **Federal Register** a list of Federal education assistance programs that proprietary institutions must include as Federal revenue, and proprietary institutions would be considered to be aware of any Federal funds included on this list when determining the Federal sources of revenue they receive. The Department expects that proprietary institutions would make a good-faith effort to collect information about Federal funds distributed to students in instances where agencies do not provide this information or make it readily available to institutions. The Department would publish subsequent **Federal Register** notices if it identified additional Federal education assistance programs to add to the list in subsequent years or if it needs to remove defunct programs. During negotiations, some non-Federal negotiators advocated for the Department to publish a list of programs to the **Federal Register** annually to ensure that the list was kept up-to-date. However, the Department has observed that, generally, the sources of Federal funds for proprietary institutions do not vary much from year to year. Thus, the Department believes it would be more appropriate to publish one list and update as necessary.

One negotiator raised a concern about how proprietary institutions would count funds from programs that the Secretary added to the notice midway through a proprietary institution's fiscal year. To be responsive to this concern, proprietary institutions would only need to include revenues from new Federal sources when those funds paid for institutional costs for the fiscal year starting after the Federal program has been identified on the published list.

§ 668.28(a)(2) Disbursement rule.

Statute: Section 487(d) of the HEA provides that proprietary institutions must perform the 90/10 revenue calculation using cash basis accounting, with the exception of certain institutional loans issued between 2008 and 2012 as described in section 487(d)(1)(D)(i) of the HEA.

Current Regulations: Current § 668.28(a)(2) is titled ''Cash basis accounting'' and mandates that proprietary institutions use cash basis accounting to calculate their 90/10 percentage, with the exception of certain institutional loans issued between 2008 and 2012 as described in § 668.28(a)(5)(i).

Proposed Regulations: Proposed § 668.28(a)(2) would maintain existing regulations regarding proprietary institutions' use of cash basis accounting to calculate their revenue percentage and would also specify that proprietary institutions must include Federal funds used to pay tuition, fees, and other institutional charges that were provided either directly to the institution or paid by a student who received Federal funds.

The Department also proposes to add regulatory language creating a disbursement rule and change the name of the section to ''Disbursement rule.'' The disbursement rule would create a deadline for title IV, HEA program disbursements for a proprietary institution's 90/10 calculation. Specifically, the proposed regulations would require proprietary institutions requesting title IV, HEA funds using the advanced payment method (§ 668.162(b)(2)) or the heightened cash monitoring method (§ 668.162(d)(1)) to request and disburse any funds to an eligible student before the end of the proprietary institution's fiscal year. In the proposed regulations, proprietary institutions requesting title IV, HEA program funds under the reimbursement or heightened cash monitoring methods in § 668.162(c) or (d)(2) would be required to make timely disbursements pursuant to § 668.164 to student accounts before the end of their fiscal years and report the funds that were disbursed to the student accounts as Federal funds in the 90/10 calculations.

Reasons: The Department proposes to maintain the current requirement that proprietary institutions use cash-basis accounting to match statutory requirements. The Department also proposes that proprietary institutions consistently and accurately count the amount of Federal funds they receive in a fiscal year through a requirement recognizing the timely disbursements to student accounts as the payment of title IV funds, even when it is the institution advancing those funds to later be reimbursed by the Department. The intent, in part, is to clearly outline how proprietary institutions would implement the changes to the Federal revenue calculation. We believe this additional clarity would be needed given that calculating the Federal revenue portion of the 90/10 calculation would require the inclusion of more sources of Federal funds than proprietary institutions may be accustomed to tracking in their financial accounting systems.

Additionally, the Department proposes to define title IV, HEA program funds and Federal funds that count as Federal revenue in the 90/10 calculation as funds ''used to pay tuition, fees, and other institutional charges.'' Some non-Federal negotiators suggested that the Department include Federal funds for housing, while other non-Federal negotiators supported defining Federal funds as we have proposed. The Department proposes to use this definition to align with the statutory language that Federal funds ''will be used to pay the student's tuition, fees, or other institutional charges.'' [17] We propose to clarify here that, to the extent another Federal agency has designated payments to a student for housing and the student is not paying the institution for housing, those funds would not count as payments to an institution.

Finally, the Department proposes to require proprietary institutions to make timely disbursements of title IV, HEA program funds to eligible students by the end of the fiscal year to prevent proprietary institutions from delaying disbursements to the next fiscal year as a means of reducing the Federal funds that would be included in the 90/10 calculation for the earlier fiscal year. Per the HEA, proprietary institutions must use cash basis accounting to calculate 90/10. Because this form of accounting counts revenues when the institution actually receives the funds, proprietary institutions can reduce their Federal revenue percentages for one fiscal year by delaying the requests and disbursements of title IV, HEA program funds to students until after the start of the next fiscal year. Through reviews of some 90/10 calculations and audit workpapers, the Department has found that some proprietary institutions have delayed disbursements at the end of one fiscal year until the next as a way to avoid failing 90/10 for a second consecutive year, which failure could result in losing title IV, HEA program eligibility. Under this maneuver, the delayed disbursements were instead counted in the next fiscal year, where the proprietary institution might fail the 90/10 requirement but remained eligible due to the passing 90/10 score for the intervening fiscal year. To preserve the statutory intent of the 90/10 rule, the Department believes that it is necessary to create guardrails preventing proprietary institutions from gaming the revenue calculation.

Proprietary institutions currently have the discretion to set up disbursement timelines that are consistent with regulatory requirements. These proposed regulations are not intended to—and would not—limit a proprietary institution's flexibility in this area.[18] One negotiator raised the concern that the end of a fiscal year could coincide with the beginning of a semester or term, creating a situation in which it is impossible for a proprietary institution to disburse all funds before the end of the fiscal year. The Department does not intend for these proposed regulations to change proprietary institutions' timely disbursement policies in this situation. In these instances, the Department would evaluate whether a proprietary institution made timely disbursements and consider whether the proprietary institution deviated from its standing disbursement policies or created disbursement policies for the purpose of impacting the 90/10 revenue calculation.

§ 668.28(a)(3) Revenue generated from programs and activities.

Statute: Section 487(d) of the HEA provides that proprietary institutions may count in their 90/10 calculation funds generated from activities conducted by the institution that are necessary for the education and training of the institution's students as non-Federal revenue.

Current Regulations: Current § 668.28(a)(3) provides that institutions must count as non-Federal revenue funds generated from: (1) tuition, fees, and other institutional charges for students enrolled in eligible programs; (2) activities conducted by the institution that are necessary for the education and training of its students; and (3) funds paid by a student, or on behalf of a student by a party other than the institution, for an ineligible program as long as the program meets certain criteria.

Proposed Regulations: The regulations in proposed § 668.28(a)(3) would add a requirement that activities conducted by the institution necessary for the education and training of its students must be related directly to services performed by students for the revenue to be counted in 90/10. Additionally, the proposed regulations would modify the criteria for revenue

[17] Public Law 89–329.

[18] 34 CFR 668.164.

generated from programs ineligible for title IV, HEA program funds required to be included as non-Federal revenues. Specifically, the proposed regulations would add a requirement that these funds be paid by a student or on behalf of a student by a party unrelated to the institution, an institution's owners, or affiliates. Additionally, for a proprietary institution to count revenue generated from an ineligible program, the proposed regulations would require that the ineligible program: (1) not include any courses offered in a program eligible for title IV, HEA program funds; (2) be provided by the institution and taught by one of its instructors of an eligible program; and (3) be located at its main campus, one of its approved additional locations, a location approved by the appropriate State agency or accrediting agency, or an employer facility. Furthermore, the proposed regulations would provide that the proprietary institution may not count revenue generated from an ineligible program where it only ''provides facilities or test preparation courses, acts as a proctor, or oversees a course of self-study.'' Finally, the proposed regulations would no longer include funds generated from an ineligible program that simply prepares students to take an examination for an industry-recognized credential or certification issued by an independent third party as allowable non-Federal revenue; such programs must provide the industry-recognized credential or certification in order to be included as revenue.

Reasons: The Department proposes to require funds generated from activities conducted by the institution that are necessary for the education and training of its students to also be related directly to services performed by students in order to be counted as non-Federal funds in the 90/10 calculation. The Department understands that certain programs require students to undertake specific activities to complete their program, such as providing hair-styling services for a cosmetology program, and those activities may generate allowable non-Federal funds. However, the Department wants to ensure that the revenue generated from these activities would be directly related to the services the students perform and that proprietary institutions are not including revenues from tangential activities indirectly related to the services the students provide, such as the proceeds from the sale of beauty products to customers receiving services from students in a cosmetology program.

Further, the Department also believes it is necessary to provide additional guardrails for which funds generated from ineligible title IV, HEA programs can count as non-Federal aid for the purposes of 90/10, as proposed in § 668.28(a)(3)(iii). Title IV, HEA eligible programs have built-in consumer protection mechanisms, including accreditation by an accrediting agency and State authorizing agency. Ineligible programs do not have any of these protections and may not have any guarantee of value for the student. Given the other proposed changes to the 90/10 calculation, the Department is concerned that proprietary institutions may have an increased incentive to create ineligible programs, with little oversight and that may not serve students well, to generate non-Federal revenue for 90/10. By establishing minimum benchmarks for the revenue from non-eligible programs that institutions may include in the calculation, the Department wishes to discourage such activity.

As a guardrail, the proposed § 668.28(a)(3)(iii) would clarify that for a proprietary institution to count the funds as non-Federal revenue in 90/10, funds paid on behalf of a student must come from a source unrelated to the institution, its owners, or affiliates. Funds coming from the institution, its owners, or its affiliates are not sources ''other than the institution.'' [19] For this reason, the Department proposes to clarify that funds from these sources do not count as non-Federal revenue for purposes of 90/10.

As an additional guardrail, proposed § 668.28(a)(3)(iii) would allow proprietary institutions to count funds as non-Federal revenue only for programs that: (1) do not include any courses offered in an eligible program that is provided by the institution; (2) are taught by one of its instructors of an eligible program; and (3) are located at its main campus, one of its approved additional locations, a location approved by the State agency or accrediting agency, or at an employer facility. As mentioned, the Department is interested in ensuring that proprietary institutions are not creating programs that are not aligned with the institution or programs the proprietary institution offers and that have little to no oversight to boost its non-Federal revenue in its 90/10 calculation. The Department worked with negotiators to develop consensus language in proposed § 668.28(a)(3)(iii) that allows proprietary institutions flexibility to offer programs more likely to provide value to students due to built-in consumer protection mechanisms—such as those that have been approved by an accreditor or the relevant State agency, those leading to an industry-recognized credential or certification, or those needed for students to maintain or meet additional State licensing requirements—while limiting non-Federal funds included in the 90/10 calculation that are generated from programs with little oversight or consumer protection mechanisms.

The guardrails in § 668.28(a)(3)(iii) were created based on negotiations with non-Federal negotiators and are intended to provide proprietary institutions with the flexibility to count funds from ineligible programs that help students, such as those provided specifically for employees at an employer facility, while balancing protections for students against incentivizing proprietary institutions from creating programs with little oversight to generate non-Federal funds. However, the Department continues to have concerns that allowing institutions to count funds from these programs may serve as an incentive for proprietary institutions to create and market ineligible programs—which lack oversight or consumer protections or may be unrelated to preparing students for gainful employment—to increase the amount of non-Federal funds institutions receive for gainful employment programs in a fiscal year. The Department seeks feedback about how to provide flexibility to proprietary institutions to offer ineligible programs that provide value to students while ensuring that revenues from those programs is related to the institution's eligible programs that are subject to the 90/10 revenue requirement. The Department also seeks feedback on appropriate mechanisms to ensure that these opportunities to generate non-Federal funds are adequately monitored to identify institutions that may be passing the 90/10 requirements as a result of such programs.

Additionally, proposed § 668.28(a)(3)(iii) would disallow revenue from ineligible programs where the proprietary institution primarily provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study or prepares students to take an examination for an industry-recognized credential or certification issued by an independent third party. The Department does not believe that the institution providing facilities, acting as a proctor, or overseeing a course of self-study represents the proprietary institution providing training or education. Additionally, the Department proposes to disallow revenue from programs where the proprietary institution prepares students

[19] Public Law 89–329, as amended.

to take an examination for an industry-recognized credential or certification issued by an independent third party because the Department does not believe that these programs represent new education and training, but rather review material. Further, the Department believes that high-quality programs of study generally prepare students to take an examination for the relevant credential or certification. It therefore does not want to inadvertently incent institutions to lower the quality of these programs by the institution requiring students to take an additional test preparation course in addition to the original program of study to be able to pass the exam for a relevant certification or credential in order to increase its non-Federal revenue.

§ 668.28(a)(4) Application of funds.

Statute: Section 487(d)(1)(C) of the HEA, as amended, provides that proprietary institutions will presume that any Federal education assistance funds that are disbursed or delivered to, or on behalf of, a student will be used to pay the student's tuition, fees, or other institutional charges. It provides exceptions in instances where a student's charges are satisfied by other payments, including: (1) grant funds provided by non-Federal public agencies or private sources independent of the institution; (2) funds provided under a contractual arrangement with a Federal, State, or local government agency to provide job training to low-income individuals; (3) funds used by a student that come from a savings plan for education expenses that qualify for special tax treatment under the Internal Revenue Code of 1986; or (4) institutional scholarships from outside sources.

Current Regulations: Current § 668.28(a)(4) provides that a proprietary institution must presume that any title IV, HEA program funds it disburses, or delivers to or on behalf of a student, will be used to pay the student's tuition, fees, or institutional charges, except to the extent that those charges are covered by: (1) grant funds provided by non-Federal public agencies or private sources independent of the institution; (2) funds provided under a contractual arrangement with a Federal, State, or local government agency for the purpose of providing job training to low-income individuals; (3) funds used by a student from a savings plan for education expenses established by or on behalf of the student if the plan qualifies for special tax treatment under the Internal Revenue Code of 1986; or (4) institutional scholarships that meet specific requirements and are counted as revenue generated from institutional aid for the purposes of the 90/10 calculation.

Proposed Regulations: Proposed § 668.28(a)(4) would maintain the presumption that Federal funds the institution disburses, or delivers to a student, will be used to pay the student's tuition, fees, or institutional charges. The proposal would also add a requirement that the presumption applies if the institution determines Federal funds were provided to a student and the student makes a payment to the proprietary institution within the same fiscal year to pay tuition, fees, and other institutional charges.

Proposed § 668.28(a)(4)(i) and (ii) would modify the treatment of other Federal and non-Federal funds used to pay a student's tuition, fees, or other charges to: (1) clarify that grant funds from non-Federal public agencies can be counted as satisfying a student's tuition, fees, or institutional charges as long as those grant funds do not include Federal or institutional funds. If a portion of those grant funds are Federal, the proposal would allow the non-Federal portion of the grant to be counted as satisfying a student's tuition, fees, or institutional charges as long as the Federal portion is included as Federal funds under this section; (2) clarify that private sources must be unrelated to the institution, its owners, or affiliates; and (3) clarify that any contractual arrangement to provide job training must be between the proprietary institution and a Federal, State, or local government agency.

Reasons: In § 668.28(a)(4), the Department proposes to require proprietary institutions to presume that any Federal funds disbursed to a student by the proprietary institution, or Federal funds the institution determines were provided to a student by another Federal source, will be used to pay the student's tuition, fees, or other institutional charges as long as the institution receives a payment from the student during the same fiscal year. Proposed § 668.28(a)(4) aligns with amendments to the statutory requirements implemented in the ARP. If a student receives funds from a Federal source but does not make a payment to the proprietary institution, then the Department does not believe it would be reasonable for the institution to presume that these Federal funds paid for tuition, fees, or other institutional charges since the institution did not receive any payments from said student. Thus, the Department proposes to clarify that the proprietary institution makes the presumption that the Federal funds the student received in the same fiscal year were used to make any payments received from a student during the year only if the institution received a payment from the student.

The Department proposes to clarify in § 668.28(a)(4)(i)(A) that the Federal portion of grants provided by non-Federal public agencies cannot be counted as a non-Federal payment of a student's tuition, fees, and other institutional charges. However, the non-Federal portion of the grant may be counted in these instances provided that the Federal portion of the grant is counted as Federal revenue. Without this clarification, a proprietary institution could use Federal funds from such a grant to reduce the amount of Federal funds from another source included in a proprietary institution's 90/10 calculation, which would not align with the statutory intent. During negotiations, most non-Federal negotiators supported this inclusion and stated that non-Federal public agencies are required to strictly track how Federal funds are spent in accordance with Federal funding requirements. Thus, the Department believes that proprietary institutions could work with the non-Federal agency to obtain the Federal/non-Federal breakdown of grant funds.[20] In the limited instances where a proprietary institution cannot determine the breakdown of grant funds, the Department proposes that no amount of the funds may be included as paying the student's institutional charges. The Department believes that it is necessary to exclude the entirety of the grants in these situations to prevent the Federal portion of the combined grants from being treated as non-Federal funds in a proprietary institution's 90/10 calculation. The Department also believes, in most instances, a proprietary institution would be able to determine the portion of Federal funds included in these grants and allocate them properly by source.

The Department also proposes to clarify in § 668.28(a)(4)(i)(B) that grant funds from private sources used to satisfy a student's tuition, fees, and other institutional charges to reduce the amount of Federal funds counted in the 90/10 calculation must come from a source unrelated to the institution, its owners, or affiliates. The Department interprets ''independent of the institution'' [21] to also be independent of an institution's owners and affiliates,

[20] OMB Circular A–87, revised May 10, 2004: *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A87/a87_2004.pdf.*

[21] Public Law 89–329, as amended.

and thus this proposal would clarify the Department's standing expectation.

The Department's proposed change in § 668.28(a)(4)(ii), which addresses funds provided through contractual arrangements for job training between an institution and a Federal, State, or local government agency, is not believed to change the meaning of the current regulations in this area. The Department is simply proposing to add the words ''the institution and'' before the reference to the applicable government agency, which will clarify that the proprietary institution is the entity entering into an agreement with a Federal, State, or local government agency, already the implied meaning of the regulations.

§ 668.28(a)(5) Revenue generated from institutional aid.

Statute: Section 487(d)(1)(D) of the HEA outlines allowable institutional revenue that can be counted as non-Federal revenue in the 90/10 calculation.

Current Regulations: Current § 668.28(a)(5) provides that a proprietary institution must include certain institutional aid as revenue: (1) the net present value of loans made to students on or after July 1, 2008, and prior to July 1, 2012, as long as the loans are bona fide, issued at intervals related to the institution's enrollment periods, are subject to regular repayment and collections, and are separate from enrollment contracts; (2) payments that the proprietary institution received for loans made to students before July 1, 2008, and after July 1, 2012; and (3) the amount disbursed to students for scholarships made to students on the basis of academic achievement or financial need as long as the scholarships are disbursed from an established restricted account and represent designated funds from an outside source or income earned on those funds.

Proposed Regulations: Proposed § 668.28(a)(5) would:

(1) Change ''must'' to ''may'' include institutional aid as allowable non-Federal revenue in a proprietary institution's 90/10 calculation;

(2) Consolidate, simplify, and codify accounting practices in the regulations to provide that allowable revenue from institutional loans be treated as the amount of principal payments made on those loans, as long as those loans meet the same criteria as the current regulations;

(3) Create clear guidelines for allowing proprietary institutions to count payments representing principal payments on ISAs or other alternative financing agreements as non-Federal revenue in its 90/10 calculation;

(4) Prohibit the sale of ISAs or other financing agreements owned by an institution from being included as non-Federal revenue; and

(5) Maintain current regulations in § 668.28(a)(5)(iv) allowing certain qualifying scholarships for academic achievement or financial need to be counted as non-Federal revenue but clarifying what the term ''outside sources'' means in the regulation.

Reasons: The Department proposes to allow, but not require, that proprietary institutions include revenue generated from institutional aid in their 90/10 calculations. This is current practice, as the Department's interest is ensuring that a proprietary institution obtains at least 10 percent of its revenue from non-title IV sources. If the institution meets this standard but does not wish to include other revenue generated from institutional aid in its calculation, perhaps to reduce burden or for other reasons, this is less relevant to the Department's interest in the institution's calculation. Additionally, maintaining ''must'' here would imply that the Department would reject an institution's calculation if it did not include all revenue generated from institutional aid, even if the calculation indicates that the institution already met the 90/10 requirement, which the Department does not believe is necessary if it can establish that the institution is compliant with the 90/10 requirements. The Department believes that this proposed change would clarify the reporting expectations for institutions when they submit their 90/10 calculation, while remaining consistent with current treatment of institutional aid in the calculation.

The Department proposes to remove current § 668.28(a)(5)(ii) and (iii) and move those provisions on how proprietary institutions may count payments made on institutional loans as non-Federal revenue to § 668.28(a)(5)(i). The Department proposes to remove from § 668.28(a)(5)(i) the net present value calculation language for loans made to students in a given fiscal year between July 1, 2008, and July 1, 2012, because this requirement no longer applies.

Additionally, proposed § 668.28(a)(5)(i) would codify that only the amount of principal payments made on institutional loans count as non-Federal revenue. This is already how the Department treats 90/10 calculations in practice because the interest portion of the payments does not represent revenue the institution receives for tuition, fees, and other permitted charges. The Department believes that the proposed regulations would clarify expectations and the Department's current practice.

Some non-Federal negotiators raised concerns that proprietary institutions may be incentivized to offer predatory ISAs and recommended that the Department add a section to § 668.28(a)(5) stating that ISAs are institutional loans since the Consumer and Financial Protection Bureau (CFPB) issued a consent order on September 7, 2021, finding that a student loan originator's ISAs are private education loans under the Truth in Lending Act (TILA) and the CFPB's implementing regulations Regulation Z.[22] The negotiators also pointed to the Department's electronic announcement on March 2, 2022, stating that ''any product, including an ISA, that meets the TILA and Regulation Z definitions of a private education loan also meets the definition of that term under the HEA and the Department's regulations.'' [23] The Department agrees with negotiators that it is prudent not to incentivize this behavior. However, the Department believes that having a separate section in the regulations pertaining to these products will help promote consistency in how these products are included in the 90/10 calculation. Thus, the Department proposes to add § 668.28(a)(5)(ii) and § 668.28(a)(5)(iii) pertaining to ISAs and alternative financing agreements, limiting the proposed language to those agreements meeting particular requirements.

Proposed § 668.28(a)(5)(ii)(A) and (B) include specific information about what would be required to be included in an ISA or other alternative financing agreement if it comes from the institution or a related party—including clear information about the payments that are required and the charges covered, the maximum time and amount a student would be required to pay, and a reasonable imputed or implied interest rate—for that agreement to qualify for the purposes of inclusion in 90/10. With this proposal, the Department aims to

[22] United States of America Consumer Financial Protection Bureau Consent Order against Better Future Forward, Inc.; Better Future Forward Manager, LLC; Better Future Forward Opportunity ISA Fund, LLC; and Better Future Forward Opportunity ISA Fund, LLC, September 7, 2021. *https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf.*

[23] (GENERAL–22–12) ''Income Share Agreements and Private Education Loan Requirements'', March 2, 2022, *https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-02/income-share-agreements-and-private-education-loan-requirements.*

avoid an incentive for proprietary institutions to encourage students to take out certain credit products, particularly where those products are unclear in their implications for students who may be comparing the products to more traditional funding options.

The Department proposes in § 668.28(a)(5)(ii)(C) that a proprietary institution may only count the payments made by the recipient of the ISA or other alternative financing agreement as revenue instead of counting the ISA as revenue when applied to a student's account if the agreement is between the student and the institution only or with a related party to include any entity in the ownership tree, any common ownership, or any other contractual agreement or continuing financial relationship. Only counting payments made on the ISA or alternative financing agreement mirrors how payments on private loans are treated in the 90/10 calculation under § 668.28(a)(5)(i). Additionally, the Department proposes this regulation to encompass the range of actors that may be connected to the interests of the proprietary institution and to reflect that the funding for the ISA may be directly or indirectly paid or subsidized from the institution or related party rather than from a private source.

Proposed § 668.28(a)(5)(ii)(D) would require ISAs or other alternative financing agreements between the student and the institution or related party to have an implied or imputed interest rate equal to or less than the Federal Direct Unsubsidized Loan interest rate for the same borrower type at the time the agreement was signed for a proprietary institution to count payments made on the product for purposes of 90/10. Given that high interest rates can cause balances to balloon beyond a borrower's ability to repay, the Department believes it is prudent to avoid incentives for proprietary institutions or entities associated with them to encourage students to take ISAs or other alternative financing products with higher interest rates, especially given that private loans or other private credit products do not have the same consumer protection measures as Federal loans. The Department proposes that the implied or imputed interest rate not be higher than the Federal Direct Loan interest rate at the time the agreement is signed, given that that type of loan is the most common type of Federal loan that students take out.[24] The Department proposes to use the rate at the time of signing the agreement, since the rate is set by Congress and can fluctuate year to year. The Federal Direct Loan interest rate is different for undergraduate and graduate students; thus, to have a comparable product, the Department proposes to differentiate the allowable interest rate based on borrower type.

As with private loans, proposed § 668.28(a)(5)(iii) would disallow proceeds from the sale of the ISA or other alternative financing agreement and would count as non-Federal revenue only cash payments on the ISA or other alternative financing agreement. Like our rationale for adding the sale of private loans as an excluded source of funds, we do not believe that proceeds from the sale of ISAs or other alternative financing agreements represent non-Federal funds paid to an institution for tuition, fees, or other permitted costs.

Proposed § 668.28(a)(5)(iv) would clarify how proprietary institutions can count institutional scholarships as revenue generated from institutional aid. We propose to clarify that scholarships must be designated funds from an outside source that is unrelated to the institution, its owners, or affiliates. The Department interprets current § 668.28(a)(5)(iv), which provides that funds must come from ''an outside source,'' to exclude funds from an institution's owners or affiliates, as those are not outside sources. The proposed regulations simply codify and more clearly explain how the Department interprets ''outside sources.''

§ 668.28(a)(6) Revenue generated from loan funds in excess of loan limits prior to the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA).

Statute: Section 487(d)(1)(E) of the HEA allows proprietary institutions to count as non-Federal revenue loan disbursements in excess of the loan limit before the enactment of ECASLA in their 90/10 calculation for each student who received a loan on or after July 1, 2009, and prior to July 1, 2011.

Current Regulations: Current § 668.28(a)(6) provides that proprietary institutions may count the amount of a loan disbursement for a payment period that exceeds the amount of a disbursement that a student would have been eligible for before the enactment of ECASLA as non-title IV revenue, as long as the excess amount pays for tuition, fees, or institutional charges remaining on a student's account after other title IV, HEA program funds are applied.

Proposed Regulations: The Department proposes to remove this provision.

Reasons: The Department proposes to remove current § 668.28(a)(6) because it is outdated, and this provision of the regulations is no longer applicable. Presently, the loan disbursements in excess of the pre-ECASLA amount would only count as revenue in the fiscal years that the loan was disbursed between July 1, 2008, and June 30, 2011, and so it is not relevant to an institution's current calculation. The Department believes that removing this provision will help proprietary institutions more clearly understand how the regulations apply to their current revenue calculations.

Revised § 668.28(a)(6) Funds excluded from revenues.

Statute: Section 487(d)(1)(F) of the HEA directs proprietary institutions to exclude from its 90/10 calculation certain revenues received from States: (1) Federal Work Study (FWS) funds, unless the proprietary institution uses those funds to pay a student's institutional charges; (2) the amount of funds a proprietary institution receives for the Leveraging Educational Assistance Partnership program (LEAP), Grants for Access and Persistence program (GAP), and Special Leveraging Educational Assistance Partnership program (SLEAP); (3) the amount of matching funds a proprietary institution provides for a title, IV HEA program; (4) the amount of title IV, HEA program funds a proprietary institution is required to return or refund; and (5) the amount charged for books, supplies, and equipment, unless those are included in a student's tuition, fees, or other institutional charges.

Current Regulations: Current § 668.28(a)(7) restates the statutory exclusions. The regulations also provide additional requirements for proprietary institutions that must return title IV, HEA program funds due to a student withdrawing if that student received a FFEL or Direct Loan where some of that funding counted as non-title IV, HEA aid in the 90/10 calculation due to the ECASLA statutory allowance. In that situation, current § 668.28(a)(7)(iv) provides that the amount that the proprietary institution returns is considered to consist of pre-ECASLA loan amounts and loan amounts in excess of the loan limits prior to ECASLA in the same proportion to the loan disbursement.

[24] As of quarter 1 of fiscal year 2022, nearly 86 percent of borrowers with loans in the Federal Student Aid loan portfolio was Direct Loans. Of those borrowers, nearly 81 percent held Direct Unsubsidized Loans. See Federal Student Aid's data center: *https://studentaid.gov/data-center/student/portfolio.*

Proposed Regulations: The proposed regulations would redesignate § 668.28(a)(7) as § 668.28(a)(6). Furthermore, the proposed regulations would remove the second sentence of current § 668.28(a)(7)(iv) governing how proprietary institutions must account for title IV, HEA program funds returned to the Department that are subject to the ECASLA allowance. Finally, proposed § 668.28(a)(6)(vi) and (vii), respectively, would add two new sources of revenue that must be excluded from the 90/10 calculation: any amount from the proceeds of the factoring or sale of accounts receivable or institutional loans, regardless of whether the loans were sold with or without recourse; and any funds, including loans, provided by a third party related to the institution owners or affiliates to a student in any form.

Reasons: The Department proposes to remove the provision of the regulations governing how proprietary institutions must treat the return of title IV, HEA program funds because these regulations are no longer relevant.

The Department proposes the § 668.28(a)(6)(vi) prohibition on counting the proceeds of the factoring or sale of accounts receivable or institutional loans, regardless of whether the loans were sold with or without recourse, because the Department believes that excluding the proceeds of these sales is necessary to implement the intent of the 90/10 revenue requirement. One non-Federal negotiator raised concerns about prohibiting this source of revenue when loans are sold with recourse, because the institution is responsible for non-performing loans. Through program reviews and other oversight activities, the Department has observed instances where sales of institutional loans were made at inflated prices to entities that were later identified as being parties to other business relationships with the institution. Even when sales of these accounts are made to unrelated parties, the revenue to the institution is for an asset sale and not a payment by that party for the education provided by the institution, as intended under the statutory 90/10 revenue requirement.

The proposed addition of § 668.28(a)(6)(vii) would restate that an institution, its owners, or its affiliates cannot provide any funds, including loans, that are counted as non-Federal revenue for 90/10. This proposed addition aligns with section 487(d)(1)(C)(i) and (d)(1)(D)(iii) of the HEA, respectively, which provide that only grants and scholarships from ''private sources independent of the institution'' and ''an outside source,''[25] can count as non-Federal revenue for purposes of 90/10. The Department's proposed and current regulations align with these statutory requirements.

§ 668.28(c) Sanctions.

Statute: Under section 487(a)(24) of the HEA, proprietary institutions that do not meet the 90/10 revenue requirements will be subject to sanctions described in section 487(d)(2). Section 487(d)(2)(A) of the HEA provides that proprietary institutions will be ineligible to participate in title IV, HEA programs after two consecutive years of failing to meet 90/10 revenue requirements. Additionally, section 487(d)(2)(B) of the HEA provides that the Secretary can implement other additional means to enforce the 90/10 requirements.

Current Regulations: Current § 668.28(c) provides that a proprietary institution will lose eligibility to participate in the title IV, HEA programs for at least two fiscal years if it fails to derive at least 10 percent of its revenue from non-title IV, HEA program funds for two consecutive fiscal years. To regain access, it must demonstrate that it complied with State licensure and accreditation requirements and financial responsibility requirements for a minimum of two fiscal years after the fiscal year it became ineligible. Additionally, if a proprietary institution fails to meet the 90/10 revenue requirement for one year, it becomes provisionally certified for at least the two fiscal years after the fiscal year in which it failed. The provisional certification terminates on either the expiration date of the proprietary institution's PPA or the date that the proprietary institution loses its eligibility to participate due to failing the 90/10 revenue requirement for two consecutive fiscal years. Current § 668.28(c)(3) also provides that the proprietary institution must notify the Secretary no later than 45 days after the end of its fiscal year that it failed to meet the requirement.

Proposed Regulations: Proposed § 668.28(c)(3) and (c)(5), respectively, would add two requirements in cases where a proprietary institution fails the 90/10 revenue requirement: (1) the institution must notify students that if it fails to meet the 90/10 revenue requires at the end of the current fiscal year, it could potentially lose title IV, HEA program eligibility at the end of the current fiscal year if it failed to meet the 90/10 revenue requirements for the prior fiscal year; and (2) the institution would be liable to repay any title IV, HEA program funds that it disburses after the fiscal year it becomes ineligible to participate in the title IV, HEA program due to failing the 90/10 revenue requirements for two fiscal years, excluding funds the institution was entitled to disburse under the regulations.

Additionally, proposed § 668.28(c)(4) would continue to require a proprietary institution report if it failed 90/10 for the prior year no later than 45 days after the end of the fiscal year. It would further provide that a proprietary institution must immediately report a 90/10 failure if it determines after the 45-day reporting period that it failed the 90/10 requirement for the prior fiscal year.

Reasons: The Department proposes to add a requirement that proprietary institutions that fail 90/10 revenue requirements must notify students of the institution's failure and potential implications of that failure in § 668.28(c)(3). During negotiations, several non-Federal negotiators suggested that the Department add this disclosure requirement due to the potentially deleterious impacts on students if the institution loses access to title IV, HEA funds. The Department agrees with negotiators that notifying students of the potential loss of student aid is an important consumer protection mechanism. As negotiators stated, students may no longer be able to attend the institution without access to title IV, HEA funds. Additionally, losing access to title IV, HEA funds may cause a proprietary institution to abruptly close, leaving students in the lurch, and thus students should be made aware that that the institution is at-risk of becoming ineligible to participate in the title IV, HEA programs.

Multiple negotiators raised the possibility that there may be instances where proprietary institutions obtain additional information pertaining to the amount of Federal aid awarded to students during the previous fiscal year after the required 45-day reporting window. The Department believes it is important for proprietary institutions to disclose if they meet the 90/10 revenue requirements in a timely manner because the Department believes it is prudent to quickly stop the flow of title IV, HEA program funds to institutions that lose eligibility for title IV, HEA funds to prevent improper payments. Thus, the Department proposes to maintain the 45-day reporting requirement. To address the concerns that negotiators raised, the Department proposes to add a requirement that a proprietary institution notify the Secretary immediately if it obtains

[25] Public Law 89–329, as amended.

additional information indicating that it did not pass the 90/10 revenue requirement for the prior fiscal year in § 668.28(c)(4).

The Department also proposes to add a requirement in § 668.28(c)(5) that proprietary institutions are liable for title IV, HEA program funds they disburse after the fiscal year they become ineligible due to failing 90/10, with the exception of funds they are entitled to disburse under § 668.26. This liability for grant and loan funds disbursed after an institution loses eligibility due to the 90/10 rule remains unchanged, but the Department previously established repayment liabilities only for the portion of ineligible loan funds made to students that the Department estimated would default. Through audit reviews, the Department has observed cases where institutions delayed notifying the Department of their 90/10 failure in order to delay their loss of eligibility for title IV, HEA funds. The Department believes that limiting the liability of funds disbursed to only a portion of disbursements may create incentives for such behavior. Thus, the Department proposes to require the proprietary institution to repay all grant and loan funds disbursed to students under these circumstances. The Department also believes that this proposal is more equitable to students because previously students were responsible for repaying loans disbursed after the institution was not eligible to disburse, even where the students may not have known the institution was ineligible. This proposal will shift responsibility for these funds to institutions, avoiding unnecessary and disallowed borrowing by students.

The Department believes that this proposed change would likely minimally impact institutions. The Department has observed that losing eligibility for title IV, HEA funds, which would always happen in these instances, is what has the largest impact on institutions. Additionally, the Department believes that this proposed change would discourage institutions from delaying reporting their 90/10 failure or disbursing funds when they are not eligible to do so.

Appendix C to subpart B of 34 CFR 668.

Statute: Section 487(a)(24) of the HEA, as amended by the ARP, provides that proprietary institutions must derive at least 10 percent of their revenue from non-Federal sources as outlined in section 487(d) of the HEA.

Current Regulations: Appendix C to subpart B of part 668 currently provides a sample student ledger and step-by-step directions for how proprietary institutions calculate 90/10.

Proposed Regulations: The proposed revisions to Appendix C would revise the sample student ledger and steps for how to report the institution's 90/10 calculation to the Department. The revised ledger and steps would incorporate regulatory changes previously discussed, including by adding examples of Federal funds counted as Federal revenue, examples of how to disaggregate Federal and non-Federal funds in grants from public agencies, and ISAs. Additionally, the proposed revisions would remove references to net present value of loans and ECASLA.

Reasons: The proposed revisions to Appendix C would align the exemplar and reporting formula with the proposed changes to the 90/10 calculation discussed throughout the preamble, including by modifying funds counted in the numerator, modifying how grant funds from public agencies would be calculated, adding an example of how ISAs would be categorized in the calculation, and removing references to net present value and ECASLA. Appendix C provides an example for proprietary institutions on how to implement the regulations and report 90/10 calculation in alignment with the regulations. The Department believes that revising the appendix is necessary to provide guidance for proprietary institutions to implement the regulatory changes in § 668.28.

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

§ 600.2 Definitions

Additional Location

Statute: Section 410 of the General Education Provisions Act (20 U.S.C. 1221e–3) provides the Secretary with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by, the Department. Furthermore, under section 414 of the Department of Education Organization Act (20 U.S.C. 3474), the Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department. These authorities, together with the provisions in the HEA, thus include promulgating regulations that, in this case amend the definition of ''additional location''.

Current Regulations: The current definition of an ''additional location'' in § 600.2 is a ''facility that is geographically apart from the main campus of the institution and at which the institution offers at least 50 percent of a program and may qualify as a branch campus.''

Proposed Regulations: The proposed changes to this definition in § 600.2 would specify that an additional location is a physical facility that is separate from the main campus and within the same ownership structure of the institution. They would also specify that an additional location participates in the title IV, HEA programs only through the certification of the main campus.

Reasons: The proposed revisions would allow for greater alignment with other related proposed regulatory changes. The proposed changes to the definition of an additional location should be considered alongside the proposed changes to the definition of a branch campus. By providing more specificity to both definitions, the Department hopes to resolve confusion about how institutions should classify and report their locations and campuses to the Department.

Branch Campus

Statute: Section 498(j) of the HEA refers to branch campuses and provides that they are to be defined by the Department through regulation. This section also provides that branch campuses must be certified under the certification procedures of Section 498 of the HEA before being able to participate as part of the institution in the title IV programs.

Current Regulations: Branch campuses are defined as additional locations that are geographically apart and independent from the main campus and are independent by virtue of being permanent; offering degrees, certificates, or recognized credentials; and having their own faculty, administration, and budgetary and hiring authority.

Proposed Regulations: The proposed amendments to the definition of a ''branch campus'' in § 600.2 would retain the existing requirements in modified language, but also specify that branch campuses are physical facilities that are in the same ownership structure of the institution and that are approved by the Department as branch campuses.

Reasons: As with additional locations, the proposed changes would address existing confusion and add clarity to a postsecondary environment that consists increasingly of institutions that provide hybrid instruction and institutions with virtual classrooms only. These proposed changes, which would codify the Department's longstanding interpretations, are intended to clearly delineate between an institution's main campus, additional locations, and branch campuses in the regulations—all physical locations. In this section of the proposed regulations, we separately propose to clarify that distance education programs be reported through the main campus of the institution.

Distance Education

Statute: Section 103 of the HEA defines distance education as instruction that occurs between students and instructors who are separated and that provides regular and substantive interaction between them via methods such as the internet, other electronic transmissions, audio conferencing, and videos.

Current Regulations: The current regulations in § 600.2 reiterate the elements of the statutory definition and supplement it by clarifying who instructors are, what constitutes substantive interaction between students and instructors, and how an institution shall ensure regular interaction between them.

Proposed Regulations: The only proposed change is the addition of proposed paragraph (6), which provides that, except for an additional location at a correctional institution, for institutions that offer on-campus and distance education programs, the distance education programs are associated with the main campus. For an institution that offers only distance education, the institution is located where its administrative offices are located and approved by its accrediting agency.

Reasons: This addition clarifies how an institution's programs offered through distance education or correspondence courses should be considered in the context of reporting students' locations and where a distance education-only institution should be reported as located, which is a necessary clarification as remote instruction has become more prevalent. In addition to improving consistency in data reporting to the Department, this change should aid in providing equitable treatment to students enrolled in distance education, when compared to those at a physical location, for the purposes of closed school discharges and related policies.

This proposal reflects an existing policy that requires the distance education programs of an institution to be associated with the main campus of the institution. In general, the vast majority of institutions that offer distance education programs are already associated with the institution's main campus. However, one negotiator raised concerns that the policy was not consistent with some institutions' current practice. The Department is committed to working with institutions to implement any needed changes to ensure they can comply with the Department's proposed definition of additional locations and distance education. The Department would also provide a reasonable period of implementation time to ensure institutions are able to come into compliance with these proposed provisions, should they be finalized. We seek comment from the public about what period of time would be reasonable for full implementation of this requirement as proposed.

Main Campus

Statute: Section 498(j) of the HEA refers to main campus in connection with branch campuses; it does not define ''main campus.''

Current Regulations: None.

Proposed Regulations: We propose to define ''main campus'' in § 600.2 as the primary physical location where the institution offers programs, that is within the same ownership structure, and that is certified as the main campus by the accrediting agency and the Department.

Reasons: This definition would provide needed clarification of a widely used term and of the role the main campus has in relation to the proposed definitions of additional location, branch campus, and distance education. We propose a definition that reflects a common understanding of how the term ''main campus'' is generally used by institutions, accreditors, and the Department.

Nonprofit Institution

Statute: Sections 101 and 102 of the HEA define institutions of higher education and postsecondary vocational institutions as being public or other nonprofit institutions, in addition to meeting other criteria.

Current Regulations: A nonprofit institution is specified as being owned and operated by a nonprofit corporation or association, having no part of its net earnings benefitting a private party, being authorized to operate as a nonprofit organization by each State where it is located, and having been determined by the IRS to be a 501(c)(3) entity.

Proposed Regulations: While not a substantive change from current regulations, the proposed definition in § 600.2 would provide greater precision to the language of the current requirement that no part of an institution's net earnings benefits any private entity or person, rather than the existing reference to ''any private shareholder or individual.'' As in current regulations, private nonprofit institutions would continue to be required to be owned and operated by a nonprofit corporation(s) or association(s), legally authorized to operate as a nonprofit in the State where the institution is located and determined by the U.S. Internal Revenue Service to be described in section 501(c)(3) of the Internal Revenue Code. Also, the Department proposes to clarify its current policy that, in general, an institution does not meet the definition of a nonprofit (public or private) if it is an obligor on debt owed to a former owner of the institution; holds a revenue-sharing agreement or any other agreement with a former owner or a current or former employee or board member or an affiliated person or entity related to the former owner, except where the Secretary determines that payments and terms under the agreement are reasonable based on the market price for the services or agreements; or engages in excess benefit transactions with a natural person or entity. We proposed to include foreign institutions in this portion of the definition.

Reasons: As GAO described in its report regarding conversions of proprietary institutions, the Department did not generally conduct comprehensive reviews of conversions of proprietary institutions prior to 2016.[26] The Department is concerned that not all institutions classified as a nonprofit institution may be complying with the expectations of the HEA for such an institution, especially where an institution has converted from proprietary status to public or nonprofit status. These concerns are especially significant as the Department expects to see additional institutions seeking to convert from proprietary status in the future. These proposed changes are intended to address those concerns, which have also been raised by outside stakeholders, including the Government Accountability Office (GAO). According to GAO, in several earlier cases the Department ''did not focus on assessing the risk of improper benefit,'' and did not ''request or review independent appraisal reports or thoroughly assess purchase and sale agreements to

[26] GAO Report, GAO–21–89, ''Higher Education: IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions'', Dec. 31, 2020. Accessed at *https://www.gao.gov/assets/gao-21-89.pdf.*

determine whether former owners were paid more than fair market value.''

However, in 2016, a new process began that substantially strengthened the Department's review. For conversions reviewed after that time, the Department has carefully reviewed the terms of the transaction, including ongoing agreements or relationships with former owners to determine whether such former owners improperly benefitted. The Department's stronger review process more reliably assesses whether the institutions that underwent such reviews met the requirements for a nonprofit institution than did earlier reviews. As the Department's approach has evolved, in more recent cases the Department has correctly interpreted the current language in 600.2 to encompass a more detailed analysis in order for the Secretary to make a determination about whether any part of a school's 'net earnings benefits any private shareholder or individual,' which is required by the HEA. These regulations propose to clarify the definition of a nonprofit institution in furtherance of the Department's efforts to address inappropriate requests for conversion to nonprofit status. This is consistent with the Department's current treatment of nonprofit institutions, and by including it in the regulations, we seek to provide more clarity to the field about the Department's existing policy.

The Department would clarify that it considers these types of transactions and agreements when it reviews an application for a change in ownership resulting in a change of control in which the institution seeks to convert from proprietary status to nonprofit or public status. The Department may also consider such agreements or transactions at recertification of the institution's eligibility to participate in the title IV, HEA programs, or when information otherwise becomes available to the Department, including as a result of action taken by, or information received from, the IRS or a State. In general, the Department considers, and would clarify that it will continue to consider under these proposed rules, an institution to meet the definition of a nonprofit institution if it has undergone a comprehensive review by the Department of its revenue-based or other agreements, its debts owed to a former owner of the institution, and other relevant information; if the Department approved such agreements; and if those agreements remain largely unchanged since the latest review.

Some members of the negotiating committee raised concerns that the proposed definition of a nonprofit, which prohibits the net earnings of the institution from benefitting any private entity or natural person, would prevent an institution from engaging in business relationships with other types of vendors. However, the Department notes that the purpose of this proposed clarification is not to encompass traditional vendor relationships an institution engages in with an unrelated party, such as a contract with a campus bookstore or with a company providing food preparation services. Rather, the Department's proposed language would codify existing requirements for nonprofit organizations, and (through the examples the Department proposes to explain how it considers the net earnings calculation) would seek to address contractual relationships, particularly with the former owner of an institution, that are overpriced according to the market for associated goods and services in that sector. Accordingly, we are committed to requiring and assessing independent valuation reports that meaningfully address the reasonable relationship between a price charged to an institution for a revenue-sharing or other agreement and the market price for that service or agreement, along with any restrictions on an institution's ability to obtain similar services from independent providers. A valuation report would be closely scrutinized to ensure it meets the Department's high standards for independence and methodology. The Department seeks feedback about whether the proposed language is sufficient to ensure that nonprofit institutions are operating in ways consistent with the principles and expectations for nonprofit organizations.

The Department also considered whether improvements are needed to the definition of a foreign nonprofit institution, including to ensure such institutions meet the definition under the Higher Education Act to require that no part of the net earnings benefits any private entity or natural person, and proposed to include such institutions within that requirement. We seek feedback from commenters about the appropriate documentation that the Department should require from foreign institutions in evaluating their consistency with the requirements of a nonprofit institution.

Finally, the Department considered the concerns that negotiators raised that the process would be too onerous for the Department to effectively demonstrate a revenue-sharing or other agreement with a former owner is not consistent with reasonable market value for such services. We note that the Department has more experience in recent years with evaluating such agreements and reviewing valuation reports to inform our analysis. Moreover, the Department's expertise in administering the title IV, HEA programs provides specific and important context for assessing questions as to whether revenue-sharing and other agreements, particularly with a former owner of the institution, have unique impacts in the context of educational programs and title IV in particular. As such the Department is uniquely situated to conduct this important analysis in the context of the HEA and specifically in the context of title IV participation. The Department is confident that we can continue to maintain high standards for these evaluations, and we are committed to doing so. We also believe the proposed regulations would retain sufficient flexibility for the Department to assess these types of agreements, determine whether they are appropriate and compliant with the intent of the proposed regulations, and enforce the new provisions of the proposed rules. We invite feedback on ways to codify these processes.

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

Application for provisional extension of certification.

Statute: Section 498(h) of the HEA discusses provisional certification of institutional eligibility to participate in the title IV programs. This can occur for up to one year if the institution is seeking initial certification, and for up to three years if the institution's administrative capability and financial responsibility are being determined for the first time, there is a change of ownership, or the Department determines that an institution seeking to renew its certification is in an administrative or financial condition that may jeopardize its ability to perform its financial responsibilities. Section 498(i)(4) further explains that the Secretary may provisionally certify an institution seeking approval of a change in ownership based on the review of a materially complete application that is received by the Secretary within 10 business days of the transaction for which the approval is sought. Such a provisional certification expires at the end of the month following the month in which the transaction occurred, unless the Secretary has not issued a decision in that time, in which case the provisional certification may continue on a month-to-month basis.

Current Regulations: Current § 600.20(g) explains that an institution may continue to participate in the title IV programs on a provisional basis after undergoing a change in ownership resulting in a change of control if it submits a materially complete application. Such an application is defined as one that has a completed application (as designated by the Department) that is supplemented by a copy of the institution's State license authorizing it to provide postsecondary education, a copy of its accreditation document, audited financial statements of its two most recently completed fiscal years, and audited financial statements of the new owner's two most recently completed fiscal years.

Proposed Regulations: We are proposing to add a requirement in § 600.20(g)(1)(i) that institutions must apprise the Department at least 90 days in advance of a proposed change in ownership. This includes submission of a completed form, State authorization and accrediting documents, and copies of audited financial statements. It would also include reporting any subsequent changes to the proposed ownership structure at least 90 days prior to the date the change in ownership is to occur. The institution would also need to notify enrolled and prospective students of the proposed change in ownership at least 90 days in advance and submit evidence to the Department that such disclosure was made. The institution would have to meet this proposed 90-day deadline or risk having its title IV participation interrupted upon the change of ownership.

The proposed regulations would add in § 600.20(g)(2) that, even with the submission of the above items, the Department may determine that the participation of the institution should not be continued following the change in ownership. The proposed rules also add that the institution would need to include, with the submission of its State license to operate and the document showing its accreditation, documentation that, as of the day before the change in ownership, both the State license and accreditation remained in effect.

When a new owner does not have any acceptable audited financial statements, the new owner would be required to provide financial protection in the amount of at least 25 percent of the institution's prior year volume of title IV aid. When a new owner does not have two years of acceptable audited financial statements but has one year, the new owner would be required to provide financial protection in the amount of at least 10 percent of the institution's prior year volume of title IV aid. This proposal is similar to existing requirements for participating institutions that fail the composite score under the financial responsibility regulations.

Financial protection in the amount of an additional 10 percent (or more) of the institution's prior year volume of title IV aid may also be required under the proposed rules in § 600.20(g)(3)(v) if deemed necessary by the Department. If any entity in the new ownership structure holds a 50 percent or greater voting or equity interest in another institution or institutions, the financial protection may also include the prior year volume of title IV aid (or more) for all institutions under such common ownership.

Reasons: These proposed changes would ensure that the Department receives adequate notice of impending changes in ownership, and that institutions have adequate time to prepare for the transaction without an interruption to title IV aid for their students. Often, the Department receives notices from institutions of impending changes in ownership with too little time to review the application to ensure the institution can meet the regulatory requirements for a change of ownership. In some cases, the Department reviews the materials and determines the application is not materially complete, or a letter of credit will be required due to insufficient audited financial statements, and the institution undergoing the change in ownership is forced to abandon or alter the transaction at the last minute to continue to meet the Department's requirements for title IV participation. Based on the Department's experience in working with institutions and reviewing applications for changes in ownership, we believe that advance notice of 90 days will be adequate for the Department to ensure staff will be available to review the materially complete application when it is submitted within 10 days of the transaction. Also, students are rarely, if ever, given notice of this significant transaction; the Department proposes that institutions disclose the transaction to students in advance to provide them with adequate notice and information about the operations of their institution. The Department similarly believes that, once institutions have provided notice to the Department regarding the transaction, students deserve to receive the same information. Accordingly, we propose to align the timeframes between notice to students and the Department of the transaction. We invite comment regarding whether these timeframes are appropriate or sufficient.

The Department has proposed to retain additional flexibility in the review and approval of a change in ownership application. Under § 600.20(g)(2), the Department preserves the ability to deny an institution's application to continue participating in the title IV programs following the change in ownership. This recognizes that some transactions have proven extremely risky for students and taxpayers, particularly as documented by the GAO report on college conversions.[27] In such cases where the Department is concerned about imminent or excessive risk to students and taxpayers as a result of the change, it is prudent for the agency to ensure it has the ability to end the institution's participation in the Federal aid programs.

To better inform the Department's decision about whether to approve the application for the change of ownership or to approve it with conditions, § 600.20(g)(3) would further specify the types of documentation that must be submitted to support the change in ownership application. Specifically, the proposed regulations would capture existing practice related to the submission of a new owner's audited financial statements, along with the state authorization and accreditation documentation that is required under current regulations. The proposed language specifies that the institution must submit documentation that confirms that, as of the day prior to the change in ownership, the institution's State license to operate and accreditation remained in effect. This would ensure that the documents the Department receives to evaluate the institution's standing are not ''stale,'' and accurately reflect the institution's current standing. The proposed change would also add a regulatory provision resembling the existing practice of requiring financial surety if the new owner cannot provide one or two years of audited financial statements. In such cases, the Department's practice is to require the new owner to post at least a 10 percent letter of credit if only one year of audited financial statements are unavailable or at least 25 percent if two years of audited financial statements are unavailable. This practice was designed to recognize that the Department is taking a chance on a new owner who has not met the requisite documentation

[27] GAO Report, GAO–21–89, ''Higher Education: IRS and Education Could Better Address Risks Associated with Some For-Profit College Conversions'', Dec. 31, 2020. Accessed at *https://www.gao.gov/assets/gao-21-89.pdf.*

requirements, while affording some protection to students and taxpayers in the event that the transaction leads to other liabilities. Generally speaking, a 10 percent letter of credit provides about one month's worth of title IV, HEA volume in an award year; and a 25 percent letter of credit provides about three months' worth. This larger letter of credit requirement for institutions whose new owners are missing both years of financial statements affords taxpayers greater protections in the event of closed school discharge or other liabilities that may be incurred following a transaction, which is inherently riskier because the new owner does not have the required financial statements.

The proposed regulations would also provide that the Department may require additional financial surety as needed to ameliorate financial or administrative risk on a case-by-case basis. This financial surety may be based on the title IV volume received in the prior year by the institution or—in the case of an entity in the new ownership structure that has at least a 50 percent interest in another institution(s)—by all institutions that fall under that common ownership. This is intended to allow setting the size of the financial surety provided to be commensurate with the level of financial risk that the institution may present to taxpayers, a concern raised by non-Federal negotiators at the table. The Department is particularly concerned about surety levels where, for instance, a smaller institution acquires a much larger one. In such cases, a letter of credit requirement based only on the title IV volume of the smaller institution would severely underestimate the financial risk that the transaction presents.

Terms of the extension.

Statute: Section 498(i) of the HEA indicates that for an institution seeking approval of a change in ownership, a Department review of a materially complete application may result in a provisional certification that expires by the end of the month following the month in which the transaction occurred unless the Secretary has not issued a decision in that time, in which case the provisional certification may continue on a month-to-month basis.

Current Regulations: Current § 600.20(h) provides that, when a materially complete application is approved, an institution will receive a provisional PPA expiring the earlier of: the day the Department approves a new PPA, the day the school's application is denied, or the last day of the month following the month that the change in ownership occurred. The Department currently calls this provisional PPA a ''temporary provisional PPA'' (TPPPA). If the TPPPA will expire under the latter provision, the Department will extend the PPA on a month-to-month basis if the institution provides a ''same-day'' balance sheet showing the financial position of the institution, a default management plan unless the institution is exempt from providing it under § 668.14(b)(15), and, if not already provided, the State approval and the accrediting agency's approval of the change of ownership.

Proposed Regulations: The Department proposes to amend § 600.20(h) by replacing ''provisional PPA'' with ''temporary provisional PPA (TPPPA)'' and removing the language extending the terms of the PPA in effect for the institution before its change of ownership.

Among the items needed for the Department to extend the TPPPA on a month-to-month basis following expiration, the proposed amendments would specify that the ''same-day'' audited balance sheet is for proprietary institutions and the audited statement of financial position is for nonprofit institutions. For the State approval of the change of ownership, the proposed regulation would require approval of all States in which the institution is physically located, or for distance education-only institutions, approval of the relevant State as determined under the revised definition of distance education in § 600.2.

Reasons: The proposed changes would add clarity to the process for extension of title IV aid following a change in ownership and would better recognize that the Department may need to take additional steps to protect students and taxpayers in light of a particular change in ownership, depending on the circumstances. For instance, the Department proposes in § 600.20(h)(1) to remove the requirement that any TPPPA include the same terms and conditions of the institution's PPA prior to a change in ownership. This would provide the Department with additional leeway to add appropriate terms and conditions to the institution's TPPPA with respect to the change in ownership, regardless of the conditions that were applied to the institution prior to the change. The proposed technical adjustment clarifying that following a change in ownership, an institution is place on a TPPPA and not a ''provisional PPA'' is designed to align the terminology in the regulations with the actual terminology already employed by the Department.

The Department proposes to retain the requirements in current § 600.20(h)(3) that specify the institution must provide a ''same-day'' balance sheet, approval of change in ownership from the State, approval of change in ownership from the accrediting agency, and a default management plan. However, the Department proposes several clarifying changes to those requirements. In response to a suggestion from a non-Federal negotiator, we propose clarifying that proprietary institutions must provide a ''same-day'' audited balance sheet. As proposed, nonprofit institutions would instead submit an audited statement of financial position. These proposed changes would align terminology with the appropriate accounting terminology in those sectors. Additionally, the Department has further clarified that the approval of the change in ownership would apply to any State in which the institution is physically located and that, for institutions that offer only distance education, the approval should be provided for the State in which the institution is authorized to provide postsecondary education. These are proposed technical changes to clarify how institutions are expected to obtain and submit the appropriate approvals. With more institutions growing to operate across many states and more institutions operating entirely online, we are seeking to provide clarity to the field about the Department's expectations.

§ 600.21 Updating application information.

Reporting requirements.

Statute: Section 498(i) of the HEA discusses when a change in ownership results in a change in control and requires that, to maintain title IV eligibility, the institution shall establish that it meets the requirements of sections 102 and 498 of the HEA after the change in control.

Current Regulations: Section 600.21(a) lists all of the reporting requirements for events in which an institution must notify the Department of a given change. Paragraph (a)(6) applies to changes of a person's ability to substantially affect the actions of the institution if that person did not have the ability before and explains when the Department considers a person to have this ability. Such control of the institution is generally defined as when the person is a general partner, CEO, or CFO of the institution or when the person, alone or with others, has at least a 25 percent ownership interest in the institution.

Proposed Regulations: The proposed amendments to § 600.21(a)(6) would distinguish between reportable changes in ownership and changes of control as well as between natural persons and legal entities. Reportable changes in ownership would occur when a natural person or entity acquires at least a 5 percent direct or indirect ownership interest of the institution but where that change does not result in a change of control as described in § 600.31. For reportable changes of control, the existing 25 percent threshold would generally apply to several criteria: the person, alone or with other members of the person's family, or the entity, alone or with affiliated persons or entities, acquires at least 25 percent ownership interest in the institution (as defined in § 600.31(b)); the person or entity acquires, alone or with another person or entity, under a voting trust, power of attorney, proxy, or similar agreement, at least a 25 percent ownership interest; the natural person becomes a general partner, managing member, trustee or co-trustee of a trust, chief executive officer, chief financial officer, director, or other officer of the institution or of an entity that has at least a 25 percent ownership interest in the institution; or the entity becomes a general partner or managing member of an entity that has at least a 25 percent ownership interest in the institution.

We propose to add a new paragraph (a)(15), which would require that any change in the ownership of the institution would be reportable if it does not result in a change of control under proposed § 600.31 and is not addressed under proposed § 600.21(a)(6), including the addition or elimination of any entities in the ownership structure, a change of entity from one type of business structure to another, and any excluded transactions under the proposed revisions to § 600.31(e).

Reasons: The proposed amendments would clarify the reporting requirements for a change in ownership to better reflect the many types of ownership reforms that may occur and that must be reported to the Department, including clarifying when a ''person'' (defined in current § 600.31) refers to a natural person or also includes an entity. As part of these changes, the Department proposes to increase reporting, generally by moving from reporting only at a 25 percent change in ownership to reporting at a 5 percent change in ownership, to ensure that the Department has greater visibility into voting blocs and other types of corporate ownership changes that may warrant greater scrutiny. As described in proposed § 600.21(a)(15), this would also include reporting on changes in ownership that do not result in a change of control and that are not otherwise specified on the list of types of changes in ownership that must be reported, to ensure that novel ownership structures are covered under the regulations and to anticipate the possibility that, without this provision, owners could seek to avoid reporting requirements by terming their arrangement in a way not explicitly covered by the scenarios in § 600.21(6). In selecting a proposed reporting requirement for a change in ownership of at least 5 percent of the interest in the institution, the Department sought to balance the burden of reporting all such changes with the need for the Secretary to evaluate the terms of those arrangements. We also considered how institutions might seek to evade Department oversight. We selected 5 percent to establish a threshold low enough to capture the likeliest of those scenarios, without requiring reporting of every such change even where it is very unlikely to provide relevant information to the Department. Concerns were raised during negotiated rulemaking that this reporting threshold of 5 percent would result in an excessive burden to institutions and the Department. The Department believes that because it is a reporting requirement that will not occur often, and because the burden of reporting itself is small, the overall increased burden would not be excessive and the benefits of the reporting requirement would outweigh the burden.

§ 600.22 Severability.

Statute: None.

Current Regulations: None.

Proposed Regulations: Proposed § 600.22 would make clear that if any provision of subpart B of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: We believe that each of the proposed provisions discussed in this NPRM serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families, to the public, taxpayers, and the Government, and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we would include this severability provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision would not affect the remainder of the provisions.

§ 600.31(b) Change in ownership resulting in a change in control for private nonprofit, private for-profit, and public institutions.

Definition of ownership or ownership interest.

Statute: Section 498(e)(3) of the HEA defines ownership interest as a share of the ownership or control of, or a right to share in the proceeds of, an institution or its parent corporation. An ownership interest may include, for example, a sole proprietorship, a partnership, or an interest in a trust.

Current Regulations: The definition in § 600.31(b) refers to an ownership or ownership interest as a legal or beneficial interest in an institution or its corporate parent or a right to share in the profits derived from it. It does not include an ownership interest held by a mutual fund that is regularly and publicly traded, a U.S. institutional investor, a profit-sharing plan of the institution or its corporate parent in which all of the full-time permanent employees are included, or an employee stock ownership plan.

Proposed Regulations: The proposed amendments would remove the language about a corporate parent and define ownership or ownership interest as a direct or indirect legal or beneficial interest in an institution or legal entity, which may include a voting interest or a right to share in the profits.

Reasons: These changes would ensure that it is clearer when a change in ownership has and has not occurred. The removal of the term ''institution or its corporate parent'' in favor of a reference to an ''institution or legal entity'' is intended to cover a broader range of corporate structures than under the current rule and reflect the terminology used elsewhere in the regulation related to institutions.

Definition of person.

Statute: Section 498(e)(2) of the HEA provides that the Secretary may determinate an individual has substantial control over an institution, including one or more persons with a substantial ownership interest.

Current Regulations: The current regulations at § 600.31(b) define a person as including a legal entity or natural person.

Proposed Regulations: The proposed regulations would specifically add a trust to the definition of a person.

Reasons: The Department proposes to include trusts in the definition of a person to provide greater clarity elsewhere in the regulations, including to the types of ''other entities'' that would be subject to the definition of ownership or ownership interest in § 600.31(b), the standards for identifying changes of ownership and control in § 600.31(c), and to the types of excluded transactions in § 600.31(e). The Department has received numerous questions about trusts from institutions and owners and has proposed changes to the language that will provide greater clarity about the Department's treatment of such arrangements.

§ 600.31(c) Standards for identifying changes of ownership and control.

Other entities.

Statute: Section 498(i) paragraphs (2) and (3) of the HEA provide that an action resulting in a change in control may include the sale of the institution or the majority of its assets, the transfer of the controlling interest of stock of the institution or its parent corporation, the merger or division of institutions, or the transfer of the liabilities or the controlling interest of stock of the institution to its parent corporation.

An action that may be treated as not resulting in a change in control includes a routine business practice, as determined by the Secretary, or the sale or transfer of the ownership interest in the institution of a person who dies to a family member or to a person already holding an ownership interest.

Current Regulations: Under § 600.31(c)(3) other entities include limited liability companies and partnerships, limited partnerships, and similar types of legal entities. They experience a change in control either when a person acquires both control of at least 25 percent of the outstanding voting stock of the corporation and control of the corporation or when a person ceases to own or control that proportion of the stock of the corporation or to control the corporation.

Proposed Regulations: The proposed revisions would remove the 25 percent threshold criteria for determining when a change of control occurs for other entities and replace them with a more substantial list of criteria that observe a proposed 50 percent threshold. This list includes—

- When a person, a combination of persons, or a partner in a general partnership acquires or loses at least 50 percent of the total outstanding voting interests in the entity or partnership or otherwise acquires or loses 50 percent control;
- Any change of a general partner of a limited partnership or a managing member of a limited liability company if that person also holds an equity interest;
- A person becomes or is replaced as the sole member or shareholder of an entity that has a 100 percent or equivalent direct or indirect interest in the institution;
- An entity that has a member or members ceases to have any, or one that has no members becomes an entity with a member or members;
- The addition or removal of any entity that provides or will provide the audited financial statements to meet any of the requirements in § 600.20(g) or (h) or part 668, subpart L;
- The transfer of 50 percent or more of the voting interests in the institution or an entity to an irrevocable trust, except where it meets the proposed definition of an excluded transaction under § 600.31(e); and
- Upon the death of an owner who previously transferred 50 percent or more of the voting interests in an institution or an entity to a revocable trust, except where it meets the proposed definition of an excluded transaction under § 600.31(e).

Proposed § 600.31(c)(3)(iii) would also provide what the Department considers circumstances that meet the new 50 percent threshold: family members who individually hold less than 50 percent ownership interest in an entity but together hold a combined ownership interest of at least 50 percent or, similarly, a group of persons who individually hold less than 50 percent ownership interest in an entity have a combined ownership interest of at least 50 percent either as a result of common ownership, management, or control of that entity, either directly or indirectly, or as a result of proxy agreements, voting agreements, or other agreements (whether or not the agreement is set forth in a written document), or by operation of State law.

Irrespective of proposed § 600.31(c)(3)(ii) and (iii), proposed § 600.31(c)(iv) would also provide that: (1) any person is deemed to have control who alone or in combination with others has the right to appoint a majority of any class of board members of an entity or an institution, and (2) when a person who alone or in combination with others holds less than a 50 percent ownership interest in an entity, the Secretary may yet determine that the person, alone or with the others, has actual control over that entity and is subject to the requirements of § 600.31.

Reasons: These amendments would allow the Department to address the kinds of legal arrangements that it has seen during its reviews and that are not clearly addressed in the current regulations. Many of the reported changes in ownership of at least 25 percent do not result in a change in control and therefore do not require the heightened scrutiny that a full Department review entails for continued participation in the title IV, HEA programs. As a result, with the proposed regulations the Department intends to focus its reviews of changes in ownership on those that historically more commonly result in changes in control, to include changes of at least 50 percent in control or voting interest, changes in a general partner or managing member, and the addition or removal of any person who provides the financial statements to satisfy financial responsibility requirements in the regulations. By noting these types of transactions in the proposed regulations, the Department hopes to address deficiencies in the current rules that have created confusion or a lack of clarity.

Some negotiators raised concerns that the Department would not adequately capture persons with control of an institution but who hold less than a 50 percent ownership interest because the 50 percent threshold would allow higher levels of ownership and more room to operate by those seeking to avoid scrutiny than the 25 percent level currently in regulations. The Department shares the concern of negotiators about institutions or their owners seeking to evade the Department's rules and therefore proposes to both lower the threshold for requiring reporting on changes in ownership interest under § 600.21(a)(6)(i) for increased transparency and to preserve sufficient discretion to assess changes of control below the proposed 50 percent threshold in § 600.31(c)(3)(iv). Specifically, the Department proposed defining language in § 600.31(c)(3)(iv) to provide that where a change in ownership results in a change of control, the Secretary would have authority to determine that there has been a change in control if a person holds less than a 50 percent interest in the institution but has actual control over the entity. Such control may be either alone or in combination with other individuals, such as through the establishment of voting agreements among multiple individuals, each with less than a 50 percent ownership interest. Control would also be identified where a person or combination of persons has the right to appoint a majority of any class of board members of an entity or institution—a clear-cut case of control. We believe these proposed revisions would improve the Department's ability to identify cases of changes in control below the 50 percent level without drawing unnecessary Department resources to reviewing changes in ownership where a change in control is less likely. Because the resulting cases that the Department identifies for a change in control review would be fewer than the number that the current rules require, the overall burden on schools—and on the Department—would be reduced.

Covered and excluded transactions.

Statute: Section 498(i), in paragraphs (2) and (3), of the HEA provide that an action resulting in a change in control may include the sale of the institution or the majority of its assets, the transfer of the controlling interest of stock of the institution or its parent corporation, the merger or division of institutions, or the transfer of the liabilities or the controlling interest of stock of the institution to its parent corporation.

An action that may be treated as not resulting in a change in control includes a routine business practice, as determined by the Secretary, or the sale or transfer of the ownership interest in the institution of a person who dies to a family member or to a person already holding an ownership interest.

Current Regulations: Sections 600.31(d) and (e) explain which types of transactions are covered and excluded, respectively, under a change in control. Changes in ownership that result in a change of control may include the sale of the institution; the transfer of the controlling interest of stock of the institution or its parent corporation; the merger or division of eligible institutions; the transfer of the liabilities of an institution to its parent corporation; a transfer of assets that comprise a substantial portion of the educational business of the institution, except where the transfer consists exclusively in the granting of a security interest in those assets; or a change in status as a for-profit, nonprofit, or public institution.

Ownership changes that do not result in a change of control occur when there is a transfer of ownership and control of an owner's equity or partnership interest in an institution, its parent, or another entity that has signed the PPA either from an owner to a family member or, upon the retirement or death of the owner, to a person with an ownership interest in the institution who, for at least two years prior to the transfer, has been involved in the institution's management and has established and retained the ownership interest.

Proposed Regulations: Proposed § 600.31(d)(8) would add a new type of covered transaction: the acquisition of an institution to become an additional location of another institution, excluding situations where the acquired institution closed or ceased to provide educational instruction.

Among the excluded transactions, proposed § 600.31(e)(2) and (3), respectively, would add irrevocable trusts in which the transfer of the owner's interest is to a trust and the trustee includes only the owner and/or a family member, as defined in current § 600.21(f), and revocable trusts in which an owner has transferred an interest to the trust and then dies. The trust transaction is proposed to be excluded so long as the trustee at the time of death and any successor trustees are only family members of the former owner, as defined in current § 600.21(f). Finally, proposed § 600.31(e)(4) would add to excluded transactions a transfer to an individual owner who has retained an ownership interest and has been involved in the management and ownership of the institution for at least two years preceding the transfer, either as a result of the death of another owner, or as a result of the resignation of another individual owner who has been involved in the management of the institution for at least two years and who has established and retained an ownership interest for at least two years prior to the transfer.

Reasons: These proposed amendments would aid the Department and institutions to more easily determine whether a particular type of transaction qualifies as excluded or not. These covered and excluded transactions are types the Department has seen in its reviews of institutional changes in ownership and where the Department believes additional clarity in the regulations would provide better information to the field. The proposal to address acquisition of institutions as additional locations, added as a new covered transaction in proposed § 600.31(d)(8), addresses a type of change in ownership upon which the current regulations are silent but which the Department considers to be a covered transaction. Additionally, the Department proposes to clarify that transfers of an owner's interest to an irrevocable or revocable trust are excluded transactions in proposed § 600.31(e)(2) and (3), provided the trustees include only the owner and/or family members of that owner. This is consistent with the Department's treatment of transfers of ownership among family members under the current regulations and reflects the Department's recognition that many of these transfers occur not from individual to individual but into family trusts which are commonly used for estate planning purposes. Proposed § 600.31(e)(4) also clarifies an existing type of excluded transaction, which addresses the transfer of ownership from an owner who retires or dies; rather than referring to ''retirement,'' the Department proposes to refer to the ''resignation'' of the owner because it is more straightforwardly determined. The Department receives many questions about these types of transactions, particularly about the types of irrevocable and revocable trusts that are considered excluded transactions, and believes that including them in the regulations will help to clarify many questions and allow owners to structure their transactions appropriately to avoid a loss of eligibility.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

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

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

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

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

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

The Department estimates the quantified annualized economic and net budget impacts to be $835 million, consisting of an $879 million net increase in Pell Grant transfers and $−44.3 million reduction in loan transfers among students, institutions, and the Federal Government, including annualized transfers of $82.7 million at 3 percent discounting and $81.9 million at 7 percent discounting. Additionally, we estimate annualized quantified costs of $3.4 million related to paperwork burden and $1.1 million of administrative costs to the government. Therefore, this proposed action is ''economically significant'' and subject to review by OMB under section 3(f) of Executive Order 12866. Notwithstanding this determination, based on our assessment of the potential costs and benefits (quantitative and qualitative), we have determined that the benefits of this proposed regulatory action would justify the costs.

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

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

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

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

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

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

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

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

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

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

1. *Need for Regulatory Action*:

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

Pell Grants for Confined or Incarcerated Individuals

In the Consolidated Appropriations Act, 2021, Congress added a new provision allowing confined or incarcerated individuals to access Pell Grants for enrollment in approved Prison Education Programs (PEPs). Regulatory changes are necessary to implement the law and to ensure access to high-quality postsecondary programs for incarcerated individuals. Among existing higher education programs in prisons, there is considerable variation among programs related to their available resources, the requirements they follow to operate the facilities, and the depth of stakeholder partnerships they have established.[28] Research shows that high-quality prison education programs increase learning and skills among incarcerated students, and increase the likelihood of stable employment post-incarceration.[29] Individuals who were formerly incarcerated face significant challenges in finding employment when returning to their communities. Many lack vocational skills and have little or no employment history, leading to high rates of unemployment and low wages for these individuals.[30] In a study funded by the Bureau of Justice Assistance of the U.S. Department of Justice, researchers found that postsecondary correctional education programs are highly cost effective, and can help incarcerated individuals reenter the employment arena and reduce recidivism.[31]

The Department has explored postsecondary education for incarcerated individuals through its Second Chance Pell experiment, first announced in 2015.[32] The goal of the experiment has been to learn about how Federal Pell Grant funding expands postsecondary educational opportunities for incarcerated individuals and explore how such funding fosters other positive outcomes.[33] Data reported to the Department indicates that recipients of Second Chance Pell Grants successfully completed a high percentage of the credits they attempted.[34] The institutions participating in the Second Chance Pell experiment reported that their programs had positive effects related to public safety and safe working and living conditions in their carceral facilities. Further research has illustrated that correctional education programs contribute to successful rehabilitation and subsequent reentry for those who were incarcerated, thereby improving safety within the facilities that offer postsecondary programming and recidivism and public safety outcomes overall.[35]

Correctional education can offer rehabilitation to incarcerated individuals, because the programs are able to capitalize on acquired education and skills. Soft skills in particular, such as communication and interaction with others, are a significant benefit of correctional education.[36] In one study of correctional education in Delaware, the surveyed participants noted that the program provided ''credentialing and a

[28] Castro, E.L., Hunter, R.K., Hardison, T., & Johnson-Ojeda, V. (2018). ''The Landscape of Postsecondary Education in Prison and the Influence of Second Chance Pell: An Analysis of Transferability, Credit-Bearing Status, and Accreditation.'' *The Prison Journal, 98*(4), 405–26. *https://doi.org/10.1177/0032885518776376.*

[29] Ibid.

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

[31] Davis, L., et al. ''How Effective is Correctional Education, and Where Do We Go From Here?'' Rand Corp. (2014). *https://www.rand.org/pubs/research_reports/RR564.html.*

[32] Department of Education Experimental Sites Initiative site, Updated June 8, 2022, *https://www2.ed.gov/about/offices/list/ope/pell-secondchance.pdf.*

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

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

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

[36] Bennett, B. (2015). ''An Offender's Perspective of Correctional Education Programs in a Southeastern State.'' *Walden Dissertations and Doctoral Studies.* 457. *https://scholarworks.waldenu.edu/dissertations/457.*

variety of skills . . . that they may not otherwise have obtained due to lack of confidence, missing opportunities to participate in educational programs offered in the community, and/or incapability of making time to commit to such programs outside of incarceration.'' [37]

The Department proposes a framework for PEPs that would clarify and implement statutory requirements for the benefit of incarcerated individuals and other stakeholders, including correctional agencies and institutions, postsecondary institutions, accrediting agencies, and related organizations. Our proposed regulations include clarified definitions of confined or incarcerated individuals and prison education programs that align with the statute. The Department also proposes to provide greater clarity on the processes that the oversight entity (including the State Department of Corrections or the Bureau of Prisons) would follow in determining whether a prison education program is operating in the best interests of the students. Consistent with the statute, the proposed regulations would prevent proprietary institutions or institutions subject to certain adverse actions from offering PEPs. We also propose protections for incarcerated students against programs that do not satisfy applicable licensure or certification requirements or where such students are typically prohibited under Federal or State law from employment in the field due to the specific conviction of the student. Under the proposed rules, institutions would also be required to provide disclosures for students if their program is designed to lead to occupations in which formerly incarcerated individuals typically face barriers in other States. These proposed regulations are designed to clarify how oversight entities can meet the requirements of the statute, and to guide PEP educational institutions and practitioners on access to, and eligibility for, Federal Pell Grants.

90/10 Rule

The ARP amended section 487 of the HEA to require that proprietary institutions count all Federal funds used to attend the institution as Federal revenue in the 90/10 calculation, rather than only counting title IV, HEA program funds. In FY 2021, proprietary institutions were eligible to receive funding from at least 26 non-title IV Federal programs. The largest two non-title IV, Federal programs with documented funding provided to proprietary institutions were Post-9/11 GI Bill education benefits, which accounted for approximately $1.3 billion in FY 2021, and the Department of Defense (DOD) Tuition Assistance program, which accounted for $185 million in that year. Some proprietary institutions have aggressively recruited service members and veterans in order to use funds from GI Bill education benefits and DOD Tuition Assistance to comply with the current 90/10 requirement since these funds helped offset title IV, HEA program funds in the calculation.[38]

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

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

(2) Clarifying the requirements that ineligible programs must meet in order to be included in the 90/10 calculation under current regulations. The Department is concerned that these sources of non-Federal revenue may provide an incentive for institutions to create, offer, and market programs with little oversight or few consumer protections, or to create programs that bear little, if any, relationship to eligible programs subject to the 90/10 revenue requirement in order to increase the amount of non-Federal funds proprietary institutions received in a fiscal year to comply with 90/10. The proposed changes to § 668.28(a)(3) would prevent such revenue from being included to inflate the amount of non-Federal funds.

(3) Creating guardrails for ISAs and other financing agreements between students and proprietary institutions. Payments made by students or former students on institutional loans or alternative financing agreements currently count as non-Federal revenue in a proprietary institution's 90/10 calculation, and thus some proprietary institutions may have an incentive to encourage students to utilize these products.[39] The proposed addition of § 668.28(a)(5)(ii) will provide guardrails.

(4) Modifying revenue that must be excluded from the 90/10 calculation. The Department proposes to modify allowable revenue generated from institutional aid and funds that cannot be included in the 90/10 calculation to prohibit proprietary institutions from including revenue from the sale of ISAs, alternative financing agreements, or institutional loans in their 90/10 calculation. The revenue to the institution from these transactions is for an asset sale and not a payment by that party for the education provided by the institution as intended under the 90/10 revenue requirement. Thus, the Department does not consider funds generated from these sales as representative of funds paid to the institution for the purposes of education and training. The proposed addition of § 668.28(a)(5)(iii) and § 668.28(a)(6)(vi) would explicitly exclude proceeds from such sales from being counted as non-Federal revenue in the 90/10 calculation.

Finally, the revisions would also delete several outdated provisions, such as those related to the ECASLA of 2008.

Changes in Ownership

The Department has received a growing number of applications for CIO in recent years. While most did not involve a conversion from proprietary status, over 150 transactions were processed in the three years following October 2018; dozens more remain pending. Moreover, the CIO applications that the Department has received and reviewed are increasingly complex and require significant effort and expertise to review, particularly given that the current regulations are

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

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

[39] See, for example, Loonin, D. (2011). Piling On: The Growth of Proprietary School Loans and the Consequences for Students. Student Loan Borrower Assistance Program at the National Consumer Law Center. Received from *https://www.studentloanborrowerassistance.org/wp-content/uploads/File/proprietary-schools-loans.pdf* and Consumer Financial Protection Bureau (Jan 20, 2022). Consumer Financial Protection Bureau to Examine Colleges' In-House Lending Practices. Retrieved from *https://www.consumerfinance.gov/aboutus/newsroom/consumer-financial-protection-bureau-to-examine-colleges-in-house-lending-practices/.*

not always clear for institutions or the Department. Some of these CIOs include institutions converting from proprietary to nonprofit status, which further complicates the Department's review and presents a greater risk to students and taxpayers. Given this changing landscape of CIO applications undergoing review, the Department needs to further clarify and define the CIO process to better protect students and taxpayers from potentially risky transactions, and to provide the Department and institutions with clearer processes and regulations to mitigate loss and noncompliance. These improvements would enable the Department to identify high-risk transactions and require financial protection as needed.

The Department is also proposing new regulations to clarify the requirements for institutions undergoing CIOs, including to require adequate advance notice of such transactions to ensure the Department can assess the requirements of continued participation in the title IV, HEA programs prior to the transaction being completed. Further proposed regulations would increase transparency into CIOs to better enable the Department to identify individuals with control over the institution, while reducing the burden of reviewing transactions in which a change in ownership is unlikely to result in a change in control. The proposed rules would also clarify that the Department may apply the necessary terms for continued participation in the federal financial aid programs to ensure that we are able to take appropriate steps to protect students and taxpayers from risky transactions. Proposed changes to the definition of a nonprofit institution would clarify the requirements for operating such institutions to prohibit enrichments to private parties, ensuring that proprietary institutions are not able to receive approval as nonprofit institutions without sufficiently addressing their business practices and the profit interests of former owners.[40]

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

2. *Summary:*

Provision	Regulatory section	Description of proposed provision
Pell Grants for Confined or Incarcerated Individuals		
Amend key definitions	§ 600.2	Would amend definitions of ''additional location'' and ''incarcerated student.''
Amend waiver requirements for enrollment of incarcerated students.	§ 600.7	Would amend requirements for an institution to obtain and maintain a waiver from the Secretary to allow students who are confined or incarcerated to exceed 25 percent of regular student enrollment.
Approval of additional locations	§ 600.10	Would amend language to require a postsecondary institution to obtain the Secretary's approval of the institution's first prison education program at the first two additional locations at correctional facilities.
Report new programs to the Secretary	§ 600.21	Would amend language to require that institutions report the addition of any other prison education program to the Secretary within 10 days of the program's establishment.
Establish Pell Grant eligibility for prison education programs.	§ 668.8	Would amend language to include PEPs in the list of eligible programs for purposes of title IV.
Establish Pell Grant eligibility for incarcerated students.	§ 668.32	Would amend language to allow Pell Grant eligibility for a confined or incarcerated individual who enrolls in a PEP.
Outline requirements for programs that lead to licensure.	§ 668.43	Would amend language to require disclosure of typical State or Federal prohibitions on the licensure or employment of formerly incarcerated individuals for a prison education program that is designed to meet educational requirements for a specific professional license or certification.
Establish regulations for the approval and oversight of PEPs.	Subpart P—Prison Education Programs.	Would create a new subpart that houses regulations for PEPs.
Scope for Subpart P	§ 668.234	Would create a section that describes the scope and purpose for the new subpart P, governing prison education programs.
Establish key definitions	§ 668.235	Would create a section that defines ''advisory committee'', ''feedback process'', ''oversight entity'', and ''relevant stakeholders''.
Outline requirements for eligible PEPs	§ 668.236	Would create a section that defines and sets forth the requirements for an ''eligible prison education program.'' An eligible PEP would be required to ensure transferability of credits, satisfy applicable educational requirements for professional licensure or certification, and prohibit PEPs from enrolling when a Federal or State law would prevent a program graduate from obtaining licensure or employment in the relevant field. The proposed regulation would prohibit an institution from offering a PEP if it was subject to certain adverse actions in the last 5 years. Two years after initial approval, proposed § 668.236 would require the oversight entity to determine that the PEP is in the best interest of confined or incarcerated individuals, using the factors set forth in proposed § 668.241.

[40] Shireman, R. (2020). How For-Profits Masquerade as Nonprofit Colleges, The Century Foundation.*https://tcf.org/content/report/how-for-profits-masquerade-as-nonprofit-colleges/.*

Provision	Regulatory section	Description of proposed provision
Outline PEP evaluation and review requirements.	§ 668.237	Would create a section that prescribes program evaluation and review requirements for the institution's accrediting agency or State approval agency. Proposed § 668.237 would require such accrediting or approval agency to evaluate an institution's first prison education program at the first two additional locations, evaluate any additional programs offered through a new mode of delivery, conduct a site visit within 1 year of program initiation, and review and approve the methodology for how the institution and oversight entity determined that the prison education program meets the same standards as substantially similar non-prison education programs offered by the institution.
Secretary's PEP Approval	§ 668.238	Would create a section that requires the Secretary's approval of an institution's first PEP at the first two additional locations for purposes of title IV programs. Applications for approval of subsequent programs would be subject to fewer requirements.
Outline reporting requirements	§ 668.239	Would create a section that requires a postsecondary institution to submit required reports to the Secretary and to establish an agreement with the oversight entity to report information to the Secretary about the transfer and release of confined or incarcerated individuals.
Establish the authority to terminate approval of a PEP.	§ 668.240	Would create a section that sets forth the Secretary's authority to limit or terminate approval of an institution's eligible PEP.
Outline the requirements for an oversight entity's ''best interest'' determination of a PEP.	§ 668.241	Would create a section that defines the ''best interest'' program assessment that must be conducted by the oversight entity. Such assessment must include a holistic assessment of the rates at which confined or incarcerated individuals continue their education post-release, job placement rates, and earnings for program participants; establishing confirmation that the PEP offerings are substantially similar to those in other programs offered by the institution; and ensuring confirmation that PEP students are able to fully transfer their credits and continue their education at any of the institution's other locations that offers a comparable program upon release. The proposed regulations also outline additional indicators that may be included as part of the assessment, and would require the institution offering the program to obtain and maintain documentation of the methodology by which the oversight entity initially approved the PEP and how, after 2 years, it made the ''best interest' determination. After the initial ''best interest'' determination, subsequent assessments would be conducted not less than 120 calendar days prior to the expiration of an institution's Program Participation Agreement.
Wind-down of currently eligible programs.	§ 668.242	Would prescribe the process for the wind-down of eligible programs operating at a correctional facility that is not a Federal or State correctional facility.
Amend cost of attendance limitations	§ 690.62	Would amend the relevant section to codify a statutory requirement that the Pell Grant award not exceed cost of attendance.
	90/10	
Amend non-Federal revenue provisions.	§ 668.28	Would change terminology of ''non-title IV revenue'' to ''non-Federal revenue'', and ''title IV revenue'' to ''Federal revenue'', as amended in ARP.
Clarify definition of Federal funds	§ 668.28(a)(1)	Would provide that Federal funds issued directly to the proprietary institution or to the student count as Federal funds when calculating the revenue percentages in annual audit submissions for a proprietary institution's fiscal year beginning on or after January 1, 2023, excluding non-title IV Federal funds provided directly to a student to cover expenses other than tuition, fees, and other institutional charges. Would also provide that the Department will publish the list of Federal funds that should be included in the 90/10 calculation in the **Federal Register**. Federal funds would be limited to title IV, HEA program funds for any fiscal year beginning prior to January 1, 2023.
Create disbursement rule for 90/10 calculation.	§ 668.28(a)(2)	Would clarify that proprietary institutions must include Federal funds used to pay tuition, fees, and other institutional charges in the 90/10 calculation. Would require proprietary institutions to request and disburse title IV, HEA funds to eligible students before the end of the proprietary institution's fiscal year if operating under the advanced payment method in § 668.162(b)(2) or the heightened cash monitoring method in § 668.162(d)(1). The proposed regulations would also require institutions operating under the reimbursement or heightened cash monitoring methods in § 668.162(c) or (d)(2) to make disbursements to eligible students by the end of the fiscal year and report these funds as Federal funds in the 90/10 calculations before requesting funds.
Clarify rules around services performed by students.	§ 668.28(a)(3)(ii)(D)	Would add the requirement that activities be related directly to the services performed by students for the revenue to be counted in 90/10 calculations.

Provision	Regulatory section	Description of proposed provision
Clarify treatment of revenue from ineligible programs.	§ 668.28(a)(3)(iii)	Would modify the criteria for revenue generated from ineligible programs to be allowable non-Federal funds. These programs: (1) must not include any courses offered in an eligible program; (2) be provided by the institution and taught by one of its instructors of an eligible program; and (3) be located at its main campus or one of its approved additional locations, at another school facility approved by the appropriate State agency or accrediting agency, or at an employer facility. The funds for these programs would have to be paid by a student, or on behalf of a student by a party unrelated to the institution, its owners, or affiliates. Programs cannot be included if they solely prepare students to take an examination for an industry recognized credential or certification issued by an independent third party.
Clarify application of funds in 90/10 calculation.	§ 668.28(a)(4)	Would clarify that a proprietary institution must presume that any Federal funds will be used to pay the student's tuition, fees, or institutional charges up to the amount of those Federal funds, and presume that funds it determines were provided by another Federal source will be used to pay the student's tuition, fees, or other institutional charges up to the amount of those Federal funds if a student makes a payment to the institution.
Clarify grant fund exception	§ 668.28(a)(4)(i)	Would clarify that grant funds from non-Federal public agencies can be counted as satisfying a student's tuition, fees, or institutional charges as long as those grant funds do not include Federal funds, unless the Federal portion of those grant funds can be determined. The portion of Federal funds must be included as Federal funds under this section. It also would clarify that grant funds from private sources must be unrelated to the institution, its owners, or affiliates.
Clarify revenue generated from institutional aid.	§ 668.28(a)(5)	Would change the requirement that revenue from institutional aid "must" be included to instead say it "may" be included in order to conform with existing practices how institutional aid is included as revenue. Would delete outdated paragraphs that governed loans made before July 1, 2012.
Clarify treatment of institutional loans in 90/10 calculation.	§ 668.28(a)(5)(i)	Would codify current practice by providing that the allowable revenue for purposes of 90/10 from institutional loans is the amount of principal payments made on those loans, as long as the loans meet the criteria established in current regulations.
Clarify treatment of income share agreements (ISAs) and other financing agreements issued by the institution or related entity.	§ 668.28(a)(5)(ii), (iii)	Would establish guardrails that must be included in income share agreements or any other alternative financing agreements if the institution wants to include revenue from these agreements as non-Federal revenue for purposes of 90/10; only cash payments representing principal payments that were used to satisfy tuition, fees, and other institutional charges could be included as non-Federal revenue for purposes of 90/10. Would prohibit the sales of ISAs or other financing agreements from being included as non-Federal revenue.
Clarify treatment of institutional scholarships.	§ 668.28(a)(5)(iv)	Would clarify that institutional scholarship funds that are allowed to be counted as non-Federal revenue must be from an outside source that is unrelated to the institution, its owners, or affiliates.
Eliminate outdated regulations related to loans issued prior to July 1, 2011.	§ 668.28(a)(6)	Would remove outdated regulations in current § 668.28(a)(6) governing revenue generated from loan funds in excess of loan limits prior to ECASLA.
Clarify funds excluded from revenues	§ 668.28(a)(6)	Would redesignate current § 668.28(a)(7) as § 668.28(a)(6) and would eliminate regulations governing how proprietary institutions should account for title IV, HEA program funds returned to the Department that are subject to the ECASLA allowance in subpart (iv). Would add subparts (vi) and (vii) to exclude any amount from the proceeds of the factoring or sale of accounts receivable or institutional loans and any funds, including loans, provided by a third party related to the institution, its owners, or affiliates to a student in any form.
Modify sanctions for institutions that fail the 90/10 calculation.	§ 668.28(c)	Would require the proprietary institution to notify students of the institution's possible loss of title IV eligibility for any fiscal year that the proprietary institution fails to meet the 90/10 requirements. Would also provide that the proprietary institution is liable for any title IV, HEA program funds that it disburses after the fiscal year it becomes ineligible to participate in the title IV, HEA program due to failing the 90/10 revenue requirements for 2 fiscal years, excluding funds the proprietary institution was entitled to disburse.
Establish reporting requirements	§ 668.28(c)(4)	Would require a proprietary institution to report no later than 45 days if it failed 90/10, and to report immediately thereafter if it obtained additional information indicating that it failed 90/10.
Modify Appendix C	§ 668 Subpart B	Would revise the sample student ledger and steps to reflect the regulatory changes in § 668.28 Non-Federal revenue (90/10).

Provision	Regulatory section	Description of proposed provision
Change in Ownership		
Revise key definitions	§ 600.2	Would clarify that an additional location is a physical facility separate from the main campus and within the same ownership structure of the institution; that branch campuses are physical facilities that are in the same ownership structure of the institution and that are approved by the Department as branch campuses; that except for an additional location at a correctional institution, for institutions that offer on-campus and distance education programs, the distance education programs are associated with the main campus; and that a main campus is the primary physical location where the institution offers programs, that is within the same organizational structure, and that is certified as the main campus by the accrediting agency and the Department.
Revise definition of a nonprofit institution.	§ 600.2	Would clarify that nonprofit institutions generally do not hold a revenue-sharing or other agreement with a former owner and are generally not an obligor on debt owed to a former owner of the institution.
Establish requirements for notice of impending changes in ownership.	§ 600.20(g)	Would establish a requirement that an institution must notify the Department within 90 days prior to a proposed change in ownership. An institution would need to submit a completed form, State authorization and accrediting documents, and copies of financial statements. In addition, the institution would need to notify enrolled and prospective students of the proposed change in ownership at least 90 days in advance, as well as submit evidence that the disclosure was made to students.
Codify requirements for financial protection.	§ 600.20(g)	Would establish that when the two most recent years of financial statements are unavailable, the new owner would be able to provide financial protection of at least 25 percent of the institution's prior year volume of title IV aid (if both years of financial statements are unavailable) or at least 10 percent of prior year title IV volume (if one year is unavailable). The Department may also require additional financial protection if the Secretary deems it necessary.
Clarify requirements for a Temporary Provisional PPA (TPPPA) following a change in ownership.	§ 600.20(h)	Would allow the Secretary to determine the appropriate terms for a TPPPA following a change in ownership; and would clarify the financial and other documentation requirements for proprietary and nonprofit institutions undergoing a change in ownership.
Modify reporting requirements for changes in ownership.	§ 600.21(a)(6)	Would distinguish between reportable changes in ownership and changes of control between natural persons and legal entities. Would establish reportable changes in ownership occur when a natural person or entity acquires or changes at least 5 percent of ownership interest.
Revise definition of ownership or ownership interest.	§ 600.31(b)	Would modify the definition of ownership or ownership interest as a direct or indirect legal or beneficial interest in an institution or legal entity, which may include a voting interest or a right to share in the profits.
Revise definition of "other entities" for changes in ownership.	§ 600.31(c)	Would revise the threshold for a change in ownership resulting in a change in control to be at 50 percent ownership interest, with increased reporting beginning at 5 percent of a change in ownership, with a provision that would permit the Secretary to determine a change in control has occurred at a lower level of ownership interest.
Covered and excluded transactions	§ 600.31(d); § 600.31(e)	Would establish as a covered transaction the acquisition of an institution to become an additional location of another institution unless the acquired institution closed or ceased to provide educational instruction. Would establish as excluded transactions certain irrevocable or revocable trusts in which the trustee includes only the owner or a family member of the former owner, and certain cases of the transfer or ownership interests as a result of the death or resignation of an owner.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

3. *Discussion of Costs and Benefits:*

3.1 *Pell Grants for Confined or Incarcerated Individuals:*

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

Costs of the Regulatory Changes:

The proposed regulatory changes would impose some additional costs on the Department, educational institutions, oversight entities, and accrediting agencies.

First, adding eligible Pell Grant recipients as provided for by Congress would expand the costs of the Pell Grant program for the Federal government. The Department expects these costs to be more than offset by the benefits noted in the benefits section, however, especially in the form of lower recidivism rates and increased employment opportunities. Research has found that the average cost to incarcerate an inmate per year totals more than $33,000 in the U.S.[41] However, participation in correctional postsecondary education programs have been demonstrated to reduce recidivism by 48 percent.[42]

Second, the educational institutions offering in-prison instruction would face some additional costs of achieving and maintaining compliance with new, higher standards. Thus far, correctional education programs have not had to comply with the same requirements as programs that receive title IV and Federal Pell Grant funding, although institutions that participate in the Second Chance Pell experiment have already met some of these requirements for the programs for incarcerated individuals. Additional costs of meeting the higher standards may include the cost of seeking and obtaining approval of initial PEP offerings from the accrediting agency and the Secretary, as well as the costs of providing the data necessary for the oversight entity to determine whether the PEP is operating in the best interests of students. Correctional facilities may also face some increased costs related to providing appropriate facilities and resources, including staffing, to support the prison education program as they partner with higher education institutions. Both institutions and correctional facilities would also face increased costs associated with required support services for their students, including appropriate academic and career counseling, as well as support to help prospective students complete the Free Application for Federal Student Aid®. The Department invites the public to provide comment on the potential compliance costs associated with these proposed regulations for each of the above-mentioned stakeholders to inform the final regulations.

Additionally, oversight entities may incur additional costs to oversee the development and operation of eligible PEPs. For example, as required by proposed §§ 668.236 and 668.241, the oversight entity would be required to develop an appropriate process to approve PEPs and determine if they are operating in the best interest of students. The ''best interest'' determination would require assessment of several identified inputs and outcomes and would require collaboration with relevant stakeholders. All of these would represent an increase in costs for the oversight entity.

Accrediting agencies may also face associated costs related to the approval of PEPs and the required site visit. However, the accrediting agency may, in turn, require the institution of higher education to cover the additional costs associated with the proposed regulations. This would represent a transfer of these costs from institutions to the accrediting agencies.

Finally, the Department would incur some additional burden and cost associated with its obligation to oversee PEPs and to support oversight entities and institutions. For instance, the Department has offered to provide a significant amount of data to the oversight entities to assist them in making the best interest determination. The Department is also committed to providing needed technical assistance to the field. The Department estimates that the costs of systems changes to reflect the requirements outlined in the regulations, oversight to ensure institutions comply with these rules, and training support to provide technical assistance to the field will total approximately $1.1 million for implementation of these proposed regulations.

Benefits of the Regulatory Changes:

Many of the individuals in the growing prison population have lower levels of educational attainment compared to the general population. This research finds that incarcerated adults have a postsecondary educational attainment level of just 15 percent, compared with nearly half of the general public. About two-thirds of incarcerated adults have a high school diploma or equivalent.[43] This creates an opportunity for significant expansion of correctional education programs, including postsecondary educational programs, which would begin to address those unmet needs.

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

Numerous studies have shown that providing education programs to incarcerated individuals is a significant factor in successful rehabilitation and subsequent reentry. First, research demonstrates that correctional education boosts self-confidence and self-worth for confined or incarcerated individuals, which leads confined or incarcerated individuals who attend college eduacation to engage in fewer instances of misconduct than those who did not attend.[44] Postsecondary education programs in prisons also improve incarcerated individuals' cognitive skills, especially for individuals with learning disabilities, by teaching critical thinking skills, encouraging debate, and helping students apply course lessons to their own lives, all of which may help them better adjust to social values and expectations upon reentry.[45] This is a critical benefit, given that an estimated 30 to 50 percent of the adult prison population has a learning disability.[46] Correctional education programs also improve literacy levels for the incarcerated individuals with limited past educational experience, which increases their post-release chances of furthering their studies and securing employment.[47] One of the most critical benefits correctional education programs provide to incarcerated individuals is the development of skills necessary for post-release employment. Those adults who participate in postsecondary education or job training programs while incarcerated are more likely to have higher literacy and numeracy proficiency than their peers who do not participate in such programs, helping to close the gaps in literacy and numeracy skills gaps between the incarcerated population and the general public.[48] A study

[41] *https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf.*

[42] *https://www.rand.org/pubs/external_publications/EP67650.html#:~:text=Conclusion,program%20is%20to%20reduce%20recidivism.*

[43] Ositelu, Monique, Equipping Individuals for Life Beyond Bars, New America (November 2019), *https://www.newamerica.org/education-policy/reports/equipping-individuals-life-beyond-bars/.*

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

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

[46] Koo, A., ''Correctional Education Can Make a Greater Impact on Recidivism by Supporting Adult Inmates with Learning Disabilities,'' 105 *J. Crim. L. & Criminology* (2015). *https://scholarlycommons.law.northwestern.edu/jclc/vol105/iss1/6.*

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

[48] Ositelu, Monique O. ''Equipping Individuals for Life Beyond Bars.'' *New America,* 4 Nov. 2019,

conducted by the Education Division of the Indiana Department of Correction (IDOC) comparing the outcomes of incarcerated individuals who did participate in a postsecondary education program in the correctional facility with those who did not found that employment rates—and time employed—following release was much higher for those who participated in the program. Their incomes were also higher.[49]

In addition to the benefits provided to PEP participants, there are also significant public safety benefits for their communities. Over the last 2 decades, numerous studies have been conducted on the impact of prison education on post-release outcomes for previously incarcerated individuals.[50] The recidivism rate, represents the rate at which individuals who were previously incarcerated re-offend and are re-admitted to correctional facilities and is often used as a measure of success for correctional education programs. Aggregating the findings from 57 studies published or released between 1980 and 2017, one study found that confined or incarcerated individuals participating in correctional postsecondary education programs are 28 percent less likely to recidivate when compared with confined or incarcerated individuals who did not participate in correctional education programs.[51]

Reducing recidivism also reduces economic, public safety, and personal costs, and correspondingly increases benefits in those categories, for correctional facilities, governments, and our nation as a whole. Additionally, individuals who complete college courses may be eligible for a greater number of higher-paying jobs than those without a college education. Using a hypothetical pool of 100 inmates, a 2014 RAND study illustrated the powerful economic benefit of correctional education programs by comparing the direct costs of such correctional education programs with the costs of reincarceration. The study found that the direct costs of reincarceration were far greater than the direct costs of providing correctional education. For a correctional education program to be cost-effective or ''break-even,'' it would need to reduce the 3-year reincarceration rate by between 1.9 and 2.6 percentage points. The study's findings indicate that participation in correctional education programs is associated with a 13-percentage-point reduction in the risk of reincarceration in the 3 years following release, demonstrating that correctional education programs appear to far exceed the break-even point in reducing to greatly reduce the risk of reincarceration.[52]

3.2 *90/10:*

The American Rescue Plan Act of 2021 amended section 487 of the HEA by modifying which Federal funds proprietary institutions must count in the numerator when calculating the percentage of their revenue that is non-Federal revenue, *i.e.,* the 90/10 calculation. The proposed regulations would revise § 668.28 to reflect statutory requirements implemented in the ARP.

Additionally, these proposed regulations modify allowable non-Federal revenue in the 90/10 calculation to better align the regulations with statutory intent and address practices proprietary institutions have employed or may be incentivized to use to alter their 90/10 calculation or inflate their non-Federal revenue percentage. Examples of such practices include: delaying disbursements to avoid failing 90/10 in 2 consecutive years, offering programs with little or no oversight or programs unnecessary to the education or training of students, and selling institutional loans to count the proceeds from the sale in their 90/10 calculation. These proposed regulations would also create guardrails and disclosure requirements. For instance, the regulations require proprietary institutions to notify students if they fail the 90/10 calculation in a fiscal year and may lose title IV eligibility after another year of failing the calculation and promote consumer protection measures and close potential loopholes related to ISAs and other alternative financing agreements. These proposed changes would mainly result in costs to certain proprietary institutions. Institutions unable to generate sufficient non-Federal revenues may seek to generate revenue to meet 90/10 requirements, such as by creating programs that are not title IV eligible, a permissible source of revenue under the proposed regulations. Students at proprietary institutions that fail the 90/10 calculation may no longer be able to enroll at those institutions; however, research has identified that most students affected by such sanctions on their colleges enroll at other institutions, often community colleges, which are typically lower cost.[53] It is anticipated that most students, proprietary institutions that provide high quality programs, public and nonprofit institutions, taxpayers and the Department would benefit from these new regulations.

Costs of the Regulatory Changes:

We expect the proposed revisions to the 90/10 regulations would result in extra costs to the Department and to proprietary institutions in several areas.

First, the proposed regulations would result in some additional burden and compliance costs for proprietary institutions. For example, proprietary institutions would be responsible for identifying and counting more sources of Federal funds in the 90/10 calculation, including Federal funds delivered directly to students, and for adjusting their 90/10 revenue sources and measures based upon the changes in the proposed regulations. Additionally, institutions may need to make changes to programs to align with the new regulations, which would result in extra compliance costs for proprietary institutions. The Department expects that proprietary institutions seeking to meet the 90/10 requirements may improve the overall quality of their programs to attract and enroll more students who pay for courses with sources other than Federal funds including by making any necessary changes to improve the quality and visibility of their programs; partner with employers willing to pay institutions with their own funds, ensuring alignment with labor market needs; and/or create programs that are not eligible for title IV, HEA funds or other Federal funds to generate revenue to meet the proposed 90/10 rule. Such ineligible programs may not have the same level of oversight and may result in courses and educational programs that are of lower quality but enable proprietary institutions to meet the proposed 90/10 requirements. As noted in the Summary of Proposed Changes section, the Department is concerned that allowing institutions to count funds from these ineligible programs may serve as an

https://www.newamerica.org/education-policy/reports/equipping-individuals-life-beyond-bars/.

[49] Nally, J., Lockwood, S., Knutson, K., & Ho, T. (2012). An Evaluation of the Effect of Correctional Education Programs on Post-Release Recidivism and Employment: An Empirical Study in Indiana. Journal of Correctional Education (1974-), 63(1), 69–89. *http://www.jstor.org/stable/26507622.*

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

[51] Ibid, 389–428.

[52] Davis, L.M., et al., ''How Effective Is Correctional Education, and Where Do We Go from Here? The Results of a Comprehensive Evaluation.'' Santa Monica, CA: RAND Corporation, 2014. *https://www.rand.org/pubs/research_reports/RR564.html.*

[53] Stephanie R. Cellini & Rajeev Darolia & Lesley J. Turner, 2020. ''Where Do Students Go When For-Profit Colleges Lose Federal Aid?,'' American Economic Journal: Economic Policy, vol 12(2), pages 46–83, *http://doi.org/10.1257/pol.20180265.*

incentive for proprietary institutions to create and market low-quality ineligible programs, and we seek feedback about how to monitor such programs and how to provide flexibility to proprietary institutions to offer ineligible programs that provide value to students while ensuring that revenues from those programs are related to the institution's ability to prepare students for gainful employment in recognized occupations and are aligned with the statutory intent of the 90/10 Rule in the HEA.

Second proprietary institutions that are unable to meet the proposed 90/10 requirements would lose eligibility for Federal aid after failing for two consecutive years. This may mean that some students have their studies disrupted, and may incur additional costs and burdens associated with identifying other educational opportunities and transferring across institutions. However, the Department believes that—as in other cases where institutional accountability rules were strengthened—students may transfer to higher-quality programs at other institutions, which may also be more affordable.[54] Additionally, if proprietary institutions create new programs that are of lower quality to meet the proposed 90/10 regulations, prospective students who opt to enroll in such programs could also see suboptimal outcomes as compared with higher-quality programs they might have attended, or in some cases as compared with not having enrolled in the first place.

Last, the proposed regulation would include other sources of Federal funds in addition to title IV, HEA funds as Federal sources of revenue for the purposes of calculating 90/10. Rather than specifying all Federal funding sources in the proposed regulations, the Department opts to identify non-title IV, HEA Federal education assistance funds that must be included in the 90/10 calculation in a notice published in the **Federal Register**, with updates as needed. The Department and the Secretary would bear additional administrative costs arising from identifying these Federal funds and updating the **Federal Register**, but we expect these implementation costs would be minimal.

Benefits of the Regulatory Changes:

The proposed 90/10 rule would benefit multiple groups of stakeholders, particularly military-connected students, proprietary institutions that provide programs that generate greater private market demand, public and non-profit institutions, as well as taxpayers.

First, military-connected students would receive the most significant and immediate benefits from the proposed regulations. Some proprietary institutions have allegedly engaged in predatory recruiting practices to recruit service members and veterans because their GI Bill and DOD Tuition Assistance education benefits could help the institution meet the non-Federal revenue requirements in the current 90/10 regulations.[55] The amendment in the ARP aimed to address this concern. Approximately 33 institutions would have failed the 90/10 rate in 2018–19 if DOD and VA dollars were included, and 17 would have failed for two years in 2019–20, risking eligibility; the vast majority (about 1,600) would have passed in both years. Under the proposed rule, proprietary institutions at risk of failing the calculation would no longer have an incentive to aggressively target GI Bill and DOD Tuition Assistance recipients because these programs would be counted as Federal funds for purposes of 90/10. This proposed revision would also provide service members and veterans greater opportunity to consider enrollment options at colleges that are higher quality and more affordable without undue influence or aggressive recruiting from proprietary institutions.

Students who are considering enrolling in proprietary institutions would also benefit from other potential loopholes that we are proposing to close. For example, proprietary institutions would not be able to hide their inability to receive revenue from sources other than Federal education funding if they are not permitted to count revenue sources from certain types of ineligible programs or to delay disbursements to avoid losing eligibility following a failure of the 90/10 calculation during the fiscal year. Like service members and veterans, all such students would also face fewer informational barriers in identifying enrollment options at colleges that are higher quality and more affordable, with fewer failing programs enrolling students using title IV, HEA aid.

Next, the proposed regulations would decrease proprietary institutions' incentive to rely on potentially costly student financing options to meet 90/10 requirements. Some of these student financing options may be harmful to students and result in debt that students cannot pay, such as expensive institutional loans or ISAs. In cases where students do rely on an ISA or alternative financing agreement provided by the institution or a related party, and the proprietary institution wishes to count payments from these arrangements in its 90/10 calculation, the proposed regulations would require that the terms of the agreement be transparent and that the interest rate not be higher than a comparable Direct Unsubsidized Loan to reduce the risk that the balance balloons beyond what the student can afford to repay. This would provide additional protections for students accessing these alternative financing arrangements by increasing transparency about the terms of the arrangement and, in some cases, resulting in better terms offered by the institution, while ensuring minimum standards for the revenue types counted in the 90/10 calculation.

Lastly, there is a benefit to students and taxpayers by more closely aligning allowable non-Federal revenue with the statutory intent of the HEA requiring that institutions demonstrate a willing market beyond taxpayer-financed Federal education assistance by requiring proprietary institutions to bring in at least 10 percent of their revenue from non-Federal sources, such as tuition revenue. Federal funds that go to institutions unable to obtain at least 10 percent of their revenue from non-Federal sources are expected to decrease modestly, as institutions that could not meet the proposed 90/10 rule lose eligibility for title IV, HEA funds. These proprietary institutions would then need to operate without access to title IV, HEA financial dollars provided by taxpayers; identify and enroll students who pay with sources other than Federal funds, including by making any necessary changes to improve the quality and visibility of their programs; or partner with employers willing to pay institutions with their own funds, ensuring alignment with labor market needs and reducing the reliance on taxpayer dollars.

3.3 *Change in Ownership:*

With the growing complexity of the landscape of changes in ownership in recent years, the Department is proposing to ensure a clearer, more streamlined process for CIOs that

[54] Stephanie R. Cellini & Rajeev Darolia & Lesley J. Turner, 2020. ''Where Do Students Go When For-Profit Colleges Lose Federal Aid?,'' American Economic Journal: Economic Policy, vol 12(2), pages 46–83, *http://doi.org/10.1257/pol.20180265.*

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

ensures compliance with the HEA and related regulations. Among the riskiest of those transactions for students and taxpayers are conversions from proprietary status. There have been 59 conversions to nonprofit status, involving 20 separate transactions, between 2011 and 2020.[56] Of these, three-fourths were sold to an entity that had not previously operated an institution of higher education; and one entire chain (including 13 institutions) closed before the Department was even able to make a determination about the request for the conversion.

A full, comprehensive CIO review is a significant administrative burden to both the Department and institution, which can take between 7 months and 1 year, on average, for a change in ownership that includes a conversion, and 6 months for a change in ownership that does not. Some institutions close transactions but are unprepared to meet the regulatory requirements for a change of ownership, resulting in burdening the Department with emergency situations where there is a potential loss of institutional eligibility and precipitous closure. The proposed regulations would seek to reduce that risk by ensuring adequate notice is given prior to the closing of a transaction so that the Department can ensure that the institution can meet the regulatory requirements under the time constraints of 600.20(g) and (h), and in particular, that the Department can determine whether a letter of credit is required because the new owner does not have acceptable audited financial statements to meet the requirements of 600.20(g)(3)(iv); clarifying the requirements for approval of a change in ownership application; and establishing appropriate documentation requirements in the regulations.

The Department proposes to clarify definitions related to distance education and campus locations such as the main campus, branch campus, and additional locations. In recent years, educational institutions often operate beyond a single location. Distance education, in particular, has significantly expanded and become increasingly popular in recent years, and higher education institutions that have adapted to meet distance education requirements throughout COVID–19 are often choosing to continue those educational offerings.[57]

Costs of the Regulatory Changes:

Costs associated with this proposed rule primarily relate to increased burden for institutions from provisions that would enhance the Department's review of institutional changes in ownership and their participation in the Federal aid programs, provide for increased oversight of proprietary institutions seeking to convert to nonprofit status, and increase reporting requirements for CIOs.

Some provisions of the proposed rules could be implemented without additional burden to affected institutions. For instance, institutions would not need to expend additional resources to meet the requirement to submit a basic notice to the Department at least 90 days in advance of the transaction, since the same information would be required under current regulations—just earlier. Instead, the Department believes that providing earlier notice would enable us to provide faster determinations related to any potential letter of credit requirement, and to avoid losses of eligibility for institutions failing to meet the requirements of 600.20(g) and (h) immediately after the transaction, as required by regulations. Other aspects of the proposed regulations simplify and codify existing practice by the Department, which would not increase burden to the institution relative to that current practice.

However, other provisions of the proposed regulations could require institutions undergoing CIOs after the rules take effect to meet new requirements and submit additional documentation to meet the Department's requirements. For instance, institutions would be required to provide notice to their students of a forthcoming CIO at least 90 days in advance, requiring the development of communications and resources for students. The Department proposes to lower the reporting threshold for changes in ownership to cover all changes of at least 5 percent ownership interest. A greater number of institutions would need to meet these proposed reporting requirements, which would carry some cost for affected institutions, since the Department currently requires transactions to be reported only if the transaction affects at least a 25 percent ownership interest. However, the Department also proposed to limit reviews of changes in control, which are more burdensome for the institution, generally to those involving a transfer of at least 50 percent control, rather than the current 25 percent. The Department believes that this would provide additional transparency benefits to the Department, while reducing the burden of institutions where a change in control likely has not occurred from more onerous changes in control reviews, which we believe would outweigh the expense from the increased burden of additional reporting. The Department anticipates the reporting burden cost range will be minimal. Additionally, any costs from these proposed rules would only be associated with those institutions undergoing a CIO, which are relatively uncommon. The Department anticipates that the administrative costs to the agency of implementing these changes would be very limited, given the relatively small number of such transactions and the fact that many of these requirements confirm current practice.

Benefits of the Regulatory Changes:

The Department believes that the benefits and burden reduction that would result from these proposed regulations would outweigh these new costs. The Department anticipates the proposed regulations would significantly benefit students, taxpayers, institutions, and the Department.

Students, taxpayers, institutions, and the Department would all benefit from increased oversight of proprietary institutions converting to nonprofit status. Historically, these transactions have proven to be a significant risk, resulting in some cases in college closures (and associated closed school discharges), requiring the investment of enforcement and oversight resources by States and the Federal government, and exempting some institutions from regulations governing proprietary institutions—such as the 90/10 rule—improperly. Students, taxpayers, and the Department would all benefit from increased transparency around a proposed transaction, providing more time for the Department to conduct oversight and ensure the transaction is properly conducted and does not result in an interruption of title IV, HEA benefits. Institutions would also benefit from an earlier submission that allows the Department to provide feedback on the proposed transaction before it occurs, since such feedback—for example, regarding whether a letter of credit will be required as part of the transaction—can be critical to ensuring

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

[57] Ewing, L.—National Council for State Authorization Reciprocity Agreements. (October 20, 2021). NC–SARA Institution Survey: Perspectives on the Pandemic. *https://nc-sara.org/sites/default/files/files/2021-10/Perspectives_PUBLISH_18Oct2021.pdf*; and Ewing, L.-A. (2020). Rethinking Higher Education Post COVID–19: Asian University Leaders' Perspectives. In Han, H.S., & Lee, J. (eds.), *COVID–19 and the Future of the Service Industry Post-Pandemic: Insights and Resources.* Singapore: Springer.

the institution's compliance with Federal rules.

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

Educational institutions would benefit from clearer requirements in the regulations as to how the rules apply to CIO transactions. The revised definition of nonprofit institutions would ensure that institutions seeking such a designation are not using business arrangements that improperly benefit related parties. This clarification would better ensure that institutions know how to comply, and are compliant, with the Department's expectations.

The proposed regulations would also enable a proprietary institution that seeks to convert to nonprofit status to more clearly understand, prior to submitting a CIO application, the CIO process and how the Department would review CIO applications. As these institutions assess potential transactions, they would more easily be able to identify permissible and impermissible contracts and agreements with prior owners. The streamlined process and 90-day advanced notice would also benefit institutions by ensuring that their audited financial statements can be reviewed to determine whether a letter of credit is required prior to the transaction closing. This would also provide notice that the Department may require additional financial surety to ameliorate financial or administrative risk that the institution may present to taxpayers on a case-by-case basis.

The Department would also benefit from clearer regulations and processes that are more easily interpreted and applied. Clearer definitions related to distance learning, as well as main campuses, branch campuses, and additional locations, would simplify and reduce the Department's reviews of institutions and of change in ownership transactions by ensuring greater consistency. The Department would also benefit from the clarifications made to reporting requirements, as lowering the threshold to 5 percent will increase transparency and enable more stringent oversight of changes in control. This greater visibility into voting blocs and lower-level ownership changes will enable the Department to determine where institutions may have undergone a change in control, warranting greater scrutiny by the Department, and to prevent institutions from evading our regulations through corporate changes that skirt the threshold for an automatic change in control review. These CIOs do not occur often, limiting the frequency of added burden from the reporting. The Department would also experience less burden from the proposed change to set the threshold for a change in control review at a 50 percent or greater change in ownership and control or where the Department has reason to believe a change in control has occurred, rather than all changes in ownership over 25 percent.

4. *Net Budget Impacts:*

These proposed regulations are estimated to have a net Federal budget impact in savings of $−44.3 million for loan cohorts 2025 to 2032, and $879 million in net changes to Pell Grants. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans.

The provisions most responsible for the costs of the proposed regulations are in providing Pell Grants for confined or incarcerated individuals in qualifying prison education programs. The Department does not anticipate significant costs related to the change in ownership provisions; and anticipates a small savings due to the 90/10 provisions. The specific costs for each provision are described in the following subsections covering the relevant topics.

Pell Grants for Confined or Incarcerated Individuals

The proposed revisions to the Pell Grants for confined or incarcerated individuals provisions are expected to increase educational opportunities for confined or incarcerated students, as provided for by Congress, while maintaining appropriate guidelines for program quality and requiring reporting for tracking the extent and performance of these programs.

To estimate the potential increase in Pell Grant awards related to these changes, the Department assumed based on current figures and previous experience with Pell Grant availability for incarcerated individuals that 2 percent of the incarcerated population of approximately 1.6 million individuals will participate in eligible PEPs. The size of the incarcerated population fluctuates and there are differing estimates of the number of incarcerated individuals, which is also affected by the pandemic. For example, the Department of Justice's Bureau of Justice Statistics estimates a population of 1.4 million as of year-end 2019 with a decline to 1.2 million as of year-end 2020,[58] while the Vera Institute of Justice estimates there are 1.8 million in prisons and jails as of mid-2020 and 1.77 million as of mid-2021.[59] Given the uncertainty, the Department chose 1.6 million as a midpoint between estimates. Due to enrollment intensity constraints, incarcerated Pell recipients are unlikely to receive the maximum grant available. Based on experience from the Second Chance Pell experiment, where average awards were nearly 60 percent of the maximum award, the average award used to develop the estimate was prorated to approximately $3,800 in the first year, generating the estimated costs in Table 1.

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

[59] Vera Institute of Justice, People in Jail and Prison, Spring 2021, available at *https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf.*

TABLE 1—ESTIMATED COST OF PEPs [60]

Cost of Expanding Pell Eligibility to Incarcerated Students (PB23 Assumptions)

	AY 2023–24	AY 2024–25	AY 2025–26	AY 2026–27	AY 2027–28	AY 2028–29
Discretionary Program Cost	96	100	101	101	102	103
Mandatory Program Cost	23	22	22	22	22	23
Total Program Cost	119	122	123	123	124	126
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Discretionary Outlays	32	63	99	101	101	102
Mandatory Outlays	11	23	22	22	22	22
Total Outlays	43	86	121	123	123	124

	AY 2029–30	AY 2030–31	AY 2031–32	AY 2032–33	10-year total
Discretionary Program Cost	104	104	105	104	1,020
Mandatory Program Cost	23	23	23	23	226
Total Program Cost	127	127	128	127	1,246
	FY 2029	FY 2030	FY 2031	FY 2032	10-year total
Discretionary Outlays	103	104	104	104	913
Mandatory Outlays	23	23	23	23	214
Total Outlays	126	127	127	127	1,127

Based on these assumptions, the estimated cost of the Pell Grants for confined or incarcerated individuals provisions is approximately $1.1 billion over 10 years. This amount of Pell Grants awarded from these changes will depend heavily on the institutions that choose to participate and the number of students that they enroll. Another factor that will affect the increase in transfers is how quickly institutions begin to offer these programs using Pell Grants. We assume a fast roll-out since these changes have been known for several years before the proposed regulations take effect, but the ramp-up could be more gradual, shifting the timing back and reducing the overall number of additional transfers. The Department welcomes comments on the assumptions used for this estimate—particularly related to how quickly programs will obtain approval as qualifying prison education programs, how many students will enroll, and whether the average award will differ from programs under the Second Chance Pell experiment—and will consider them in development of cost estimates for the final rule.

[60] The Federal Pell Grant program has discretionary costs associated with the maximum award set in the annual appropriation and mandatory costs associated with the additional award amount determined by statute. These changes affect both mandatory and discretionary costs.

90/10 Rule

To help estimate the effect of the proposed changes, the Department analyzed information about additional Federal aid received by institutions subject to the 90/10 requirements and found that an additional 92 institutions with $524.8 million in Pell grants and $1.09 billion in loan volume in AY 2019–20 would be above the 90 percent threshold, and 49 institutions would be above the 90 percent threshold for both 2018–19 and 2019–20, risking eligibility.

However, the Department recognizes that institutions have historically managed to meet the 90/10 threshold in order to operate, and we expect the majority would be able to adapt to the new requirements. Additionally, students would still qualify for similar levels of aid even if they choose to attend a different institution or shift sectors. Therefore, we do not expect a 100 percent loss of volume and aid awarded. The proposed change to include additional types of Federal aid in the 90/10 calculation are estimated to decrease Pell Grants awarded by −$248 million from AY2024–24 25 to AY2032–33 and have a net budget impact of $−44.3 million from reduced loan volumes for cohorts 2025–2032.

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

To estimate the reduction in volume related to the change in the 90/10 regulations, the Department assumed that institutions with a revised 90/10 rate over 95 percent would not be able to reduce their rate below 90. While institutions in the 2018–19 and 2019–20 90/10 files used for this revised estimate did not have the same motivations that would exist under the proposed regulations because the 90/10 calculation was different for them than it would be under the proposed regulations, no institution with a 90/10 rate above 95 in the first year was under 90 in the second year in the Department's analysis. Seventeen institutions with $94.9 million in Pell Grants and $194.1 million in loans were above the 95 percent rate, representing between 0.2 percent to 3.3 percent of proprietary volume depending on level and Grant or loan type. Student choice would affect the potential reduction as well as they would be eligible to receive similar title IV amounts in attending a different institution. For this estimate, we assume that 60 percent of students would pursue their education elsewhere if their initial choice were not available as a result of the proposed changes to the 90/10 regulations. Finally, we anticipate that the reduction in volume will decrease over the years as institutions over the threshold no longer participate and others adapt to the new threshold. To account for this, we reduced the percentage applied to the Pell Grant and loan volume by 30 percent in 2027–28 and 2028–29, 40 percent in 2029–30 and 2030–31, and 50 percent in 2031–32 and 2032–33. Table 2 shows the effect on Pell Grants of the proposed changes.

TABLE 2—ESTIMATED EFFECT ON PELL GRANTS

	AY 2023–24	AY 2024–25	AY 2025–26	AY 2026–27	AY 2027–28	AY 2028–29
PB23 Baseline Total Cost	29,652	33,251	33,795	34,349	34,928	36,631
% over 95 with 60% student adj		0.000%	0.134%	0.134%	0.094%	0.094%
Total Policy Cost			(45)	(46)	(33)	(34)
Discretionary Policy Cost			(38)	(38)	(27)	(29)
Mandatory Policy Cost			(8)	(8)	(6)	(6)
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Discretionary Outlays			(13)	(24)	(34)	(32)
Mandatory Outlays			(4)	(8)	(7)	(6)
Total Outlays			(17)	(32)	(41)	(38)

	AY2029–30	AY2030–31	AY 2031–32	AY 2032–33	10-Year Total
PB23 Baseline Total Cost	37,202	37,810	38,450	38,931	354,999
% over 95 with 60% student adj	0.080%	0.080%	0.067%	0.067%	
Total Policy Cost	(30)	(30)	(26)	(26)	(271)
Discretionary Policy Cost	(25)	(25)	(21)	(22)	(225)
Mandatory Policy Cost	(5)	(5)	(4)	(4)	(46)
	FY 2029	FY 2030	FY 2031	FY 2032	10-Year Total
Discretionary Outlays	(27)	(26)	(24)	(23)	(203)
Mandatory Outlays	(6)	(5)	(5)	(4)	(45)
Total Outlays	(33)	(31)	(29)	(27)	(248)

The reduction in loan volume was processed as a reduction in the baseline volumes by loan type and risk group. In assigning the volume associated with 4-year programs to a risk group, we assumed 66 percent would be in the 4-year first year/sophomore risk group and 34 percent to the 4-year junior/senior risk group. Application of the adjustment factors shown in Table 3 resulted in the $−44.32 million loan estimate shown in Table 4.

TABLE 3—LOAN VOLUME ADJUSTMENT FACTORS

Cohort Range	2025–2026 %	2027–2028 %	2029–2030 %	2031–2032 %
2-year proprietary:				
Subsidized	0.645	0.452	0.387	0.323
Unsubsidized	0.632	0.443	0.379	0.316
PLUS	0.265	0.185	0.159	0.132
4-year FR/SO:				
Subsidized	0.112	0.078	0.067	0.056
Unsubsidized	0.144	0.101	0.086	0.072
PLUS	0.004	0.002	0.002	0.002
4-year JR/SR:				
Subsidized	0.112	0.078	0.067	0.056
Unsubsidized	0.144	0.101	0.086	0.072
PLUS	0.004	0.002	0.002	0.002
GRAD:				
Unsubsidized	0.075	0.053	0.045	0.038
Grad Plus	0.008	0.005	0.005	0.004

TABLE 4—ESTIMATED 90/10 EFFECT ON LOANS

$ millions	2025	2026	2027	2028	2029	2030	2031	2032	Total
Subsidized	−2.35	−3.18	−2.63	−2.50	−2.28	−2.21	−1.96	−1.89	−18.99
Unsubsidized	−2.58	−4.31	−3.76	−3.60	−3.30	−3.15	−2.81	−2.72	−26.22
PLUS	0.13	0.18	0.13	0.11	0.10	0.09	0.08	0.08	0.90
Total	−4.79	−7.31	−6.26	−5.99	−5.48	−5.26	−4.69	−4.54	−44.32

These reductions in transfers depend on institutional and student responses that are uncertain. Students' decision to continue their education would depend on the availability of programs of interest at other institutions that fit their commuting or other constraints. Fewer institutions may be able to get their rate below 90 or more students may decide not to pursue their education if the institution they would have chosen is not available. Both of those scenarios would further reduce Pell Grant and loan transfers. For example, if the 49 institutions with revised rates above 90 in both years were assumed to not be able to get below the threshold, the estimated savings in Pell would be −$521 million and in loans −$84 million for a total of $605 million in reduced transfers to students. The mix of institutions and the volume they represent means the assumption about what rate or which institutions could adapt and get below the threshold does have a significant effect on the net budget impact.

Change in Ownership

The proposed regulations would provide greater clarity about the definition of additional locations and branch campuses for clearer reporting and clarity of ownership structures within postsecondary education. The proposed rules would also increase reporting to ensure greater transparency into change in ownership transactions and strengthen the Department's review of changes in control. Increased oversight of changes in ownership and proposed provisions related to the definition of a nonprofit institution may affect the distribution of title IV aid across sectors, including by approving requested conversions from for-profit status to non-profit status only when institutions have met the requirements of a nonprofit institution, and some students' choice of institution may be affected. However, the Department does not expect a significant cost from the change in ownership provisions and would not estimate one without additional data demonstrating a clear effect.

5. *Accounting Statement:*

As required by OMB Circular A–4, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these regulations. This table provides our best estimate of the changes in annual monetized transfers as a result of these proposed regulations. Expenditures are classified as transfers from the Federal government to affected student loan borrowers.

TABLE 5—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

Category	Benefits	
Increased access to educational opportunities for incarcerated individuals	Not quantified.	
Improved information about changes in ownership	Not quantified.	
Category	**Costs**	
	7%	3%
Costs of compliance with paperwork requirements	$3.4	$3.4
Increased administrative costs to Federal government to update systems to implement the proposed regulations	$11.1	$11.1
Category	**Transfers**	
	7%	3%
Reduced Pell Grants and loan transfers to students as some institutions lose eligibility from revised 90/10	$−27.1	$−28.3
Increased Pell Grant transfers to institutions providing educational opportunities to incarcerated individuals	$109	$111

6. *Alternatives Considered:*

As part of the development of these proposed regulations, the Department engaged in a negotiated rulemaking process in which we received comments and proposals from non-Federal negotiators representing numerous impacted constituencies. These included higher education institutions, consumer advocates, students, financial aid administrators, accrediting agencies, and State attorneys general. Non-Federal negotiators submitted a variety of proposals relating to the issues under discussion. Information about these proposals is available on our negotiated rulemaking website at *https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.*

6.1. *Pell Grants for Confined or Incarcerated Individuals:*

The Department considered establishing only implementing regulations that restated the requirements in the statute. We were concerned, however, that because the requirements were new to institutions, oversight entities, and other stakeholders, the field would benefit from greater clarity and technicality in the regulations. As a result, we opted to negotiate on the specific requirements in the regulations and were pleased to reach consensus on those items.

With regard to an oversight entity's holistic determination that a PEP is operating in the best interest of students, the Department considered a variety of metrics, both within the statute and those more widely used within the higher education system. We decided that the list on which the negotiators reached consensus appropriately balanced the high-quality data that are available to programs and oversight entities, measures of program success used throughout higher education, and the statutory requirements for such a determination. The Department also considered making use of the "best determination" metrics voluntary, or allowing oversight entities additional discretion as to which metrics they consider, but we determined that making the bulk of the metrics mandatory would establish consistency across states, ensure oversight entities' consideration of relevant information and benchmarks, and provide enough information for the Department to determine whether an oversight entity's process was sufficient.

The Department also considered allowing the PEPs to enroll students in eligible prison education programs that lead to occupations that typically involve prohibitions on licensure and employment for formerly incarcerated individuals, if the affected individuals attest that they are aware of the restrictions. We are concerned, however, that such programs would not generally be the most productive use of students' limited Pell Grant eligibility or time, or of taxpayer dollars. While we acknowledge that some individuals may be able to meet such restrictive licensure requirements, if the typical student in such a program would not be able to find employment or obtain licensure, we are concerned that students may enroll in programs that exhaust their Pell Grant lifetime eligibility before they are able to complete a credential that would allow them to earn a job in the field. The Department is aware that many states have engaged in efforts to reduce barriers to employment for formerly incarcerated individuals, which we strongly encourage. Our proposed language ensures that institutions must regularly re-review these requirements to ensure they keep up with any such changes and make potential students aware.

6.2. *90/10 Rule:*

To address the statutory changes in the ARP, the Department considered including only DOD and Department of Veteran Affairs (VA) funds as additional Federal funds considered for 90/10 calculations, since these are the two largest programs with data that demonstrates a significant amount of funds flow to some proprietary institutions outside of title IV, HEA funds, and because military-connected students have been targeted by some proprietary institutions in the past. The Department also considered including other large sources of Federal funds, such as funds authorized under the Workforce Innovation and Opportunity Act of 2014 (WIOA) but excluding smaller sources. However, the Department determined that its proposal would include all Federal education assistance programs, with the exception of funds that go directly to students to cover costs outside of tuition, fees, and other institutional charges, because Federal appropriations for education assistance programs and disbursements to institutions may change from year to year, and the Department does not want to inadvertently create a new loophole where proprietary institutions identify a large source of Federal funds and target students that receive this source of funding, such as WIOA. The broader inclusion is also consistent with the statutory language in the ARP, which refers to ''Federal education assistance funds.''

The Department considered including only Federal funds that go directly to proprietary institutions, as it may be difficult for proprietary institutions to obtain timely information about funds that go directly to students, especially if a student needs to pay back an agency for funds received due to dropping a class, enrollment intensity decreasing, or other reasons. The Department also considered including all student funds, including those earmarked for purposes other than tuition and fees, such as housing. However, to be consistent with the statutory language in the ARP and HEA, the Department decided to include funds that go directly to students. The Department did not include funds that go directly to students that are earmarked for purposes other than tuition, fees, and other institutional charges because this funding does not apply to institutional charges, as required by the HEA.

The Department considered listing all Federal educational assistance programs in the proposed regulations. However, these programs and institutional eligibility may change over time, so the Department instead decided to identify sources of funds that are to be included in a **Federal Register** notice, which gives greater flexibility to account for changes over time and can be updated as needed.

6.3. *Change in Ownership:*

The Department considered establishing a definition of nonprofit institutions that closed off all revenue-based or other agreements with a former owner, as opposed to just those that exceed reasonable market value. However, we determined that there could be appropriate agreements with a former owner that our language would preclude. We invite feedback from stakeholders on this question in the public comment period.

The Department considered maintaining the current definitions that require ED to evaluate whether there has been a change of control at 25 percent of a change in ownership interest, rather than the proposed 50 percent. However, in general we have found that control is much more common at 50 percent and that control below 50 percent is relatively rare. To accommodate concerns that institutions might begin to establish changes of control at, for example, 49 percent to evade the regulations, we propose to lower the threshold for reporting changes in ownership to 5 percent from 25 percent and propose to retain discretion for the Secretary to review and determine a change of control based on information available to the Secretary. While the Department also considered requiring reporting of all changes in ownership at any level, we instead proposed 5 percent to avoid unnecessary reporting on extremely minor changes and to limit inappropriate burden on institutions.

The Department considered whether to maintain the provision that requires the Secretary to continue an institution's participation after a CIO with the same terms and conditions as it held in its participation before the CIO. However, we are concerned that such terms may not adequately account for the added risk the institution may present to students and taxpayers as a result of the transaction. Based on past review of CIO applications by the Department, we are aware of numerous cases in which the transaction fundamentally altered the operations of the institution. We believe that additional conditions and new terms are more appropriate for institutions undergoing a CIO and are accordingly proposing language that allows the Department to establish such appropriate terms.

7. *Regulatory Flexibility Act:*

The Secretary certifies, under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that this proposed regulatory action would not have a significant economic impact on a substantial number of ''small entities.''

The Small Business Administration (SBA) defines ''small institution'' using data on revenue, market dominance, tax filing status, governing body, and population. The majority of entities to which the Office of Postsecondary Education's (OPE) regulations apply are postsecondary institutions, however, which do not report such data to the Department. As a result, for purposes of this NPRM, the Department proposes to continue defining ''small entities'' by reference to enrollment, to allow meaningful comparison of regulatory impact across all types of higher education institutions.[61]

[61] In previous regulations, the Department categorized small businesses based on tax status. Those regulations defined ''non-profit organizations'' as ''small organizations'' if they were independently owned and operated and not dominant in their field of operation, or as ''small entities'' if they were institutions controlled by governmental entities with populations below 50,000. Those definitions resulted in the categorization of all private nonprofit organization as small and no public institutions as small. Under the previous definition, proprietary institutions were considered small if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. Using FY 2017 IPEDs finance data for proprietary institutions, 50 percent of 4-year and 90 percent of 2-year or less proprietary institutions would be considered small. By contrast, an enrollment-based definition applies the same metric to all types of institutions, allowing consistent comparison across all types.

TABLE 6—SMALL INSTITUTIONS UNDER ENROLLMENT–BASED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	328	1182	27.75
2-year	Private	182	199	91.46
2-year	Proprietary	1777	1952	91.03
4-year	Public	56	747	7.50
4-year	Private	789	1602	49.25
4-year	Proprietary	249	331	75.23
Total		3381	6013	56.23

Source: 2018–19 data reported to the Department.

Table 7 summarizes the number of institutions affected by these proposed regulations.

TABLE 7—ESTIMATED COUNT OF SMALL INSTITUTIONS AFFECTED BY THE PROPOSED REGULATIONS

	Small institutions affected	As percent of small institutions
Pell Grants for Confined or Incarcerated Individuals	136	4.02
90/10	1,650	17.00
Change in Ownership	203	10.00

The Department has determined that the economic impact on small entities affected by the regulations would not be significant. As seen in Table 8, the average total revenue at small institutions ranges from $2.3 million for proprietary institutions to $21.3 million at private institutions. These amounts are significantly higher than the $2,953 to $4,593 in estimated costs per small institution for the proposed regulations presented in Table 9.

TABLE 8—TOTAL REVENUES AT SMALL INSTITUTIONS

Control	Average total revenues for small institutions	Total revenues for all small institutions
Private	21,288,171	20,670,814,269
Proprietary	2,343,565	4,748,063,617
Public	15,398,329	5,912,958,512

Note: Based on analysis of IPEDS enrollment and revenue data for 2018–19.

The impact of the PEP proposed regulations would be minimal to small institutions and would involve meeting disclosure requirements and complying with requirements of the oversight entity and the Department.

The changes proposed to 90/10 would have a minor impact on proprietary institutions. These impacts include calculating the non-Federal revenue and providing a notification to students and the Department if an institution fails to comply with the 90/10 requirement.

While the CIO-proposed regulations have the potential to impact small entities, the number of prior CIO applications indicates that such changes in ownership do not often occur. There will be a minor burden on institutions that undergo a CIO to notify students at least 90 days prior to a proposed CIO. We believe this burden notification will be minor and can be disseminated electronically. The reduction in the reporting threshold for changes in ownership from 25 to 5 percent will impact more small entities than in the past; however, the burden associated with this increase in reporting is minimal and relatively uncommon.

TABLE 9—ESTIMATED COSTS FOR SMALL INSTITUTIONS

Compliance area	Number of small institutions affected	Cost range per institution ($)	Estimated overall cost range for small institutions affected ($)
Pell Grants for Confined or Incarcerated Individuals disclosure requirement	44	749.92–1,124.88	32,996.48–49,494.72
90/10 non-Federal revenue calculation	1,650	749.92–1,499.84	1,237,368–2,474,736
90/10 failure student notification	11	140.61–187.48	1,546.71–2062.28
CIO notification to students	71	187.50–281.22	13,312.50–19,966.62
CIO increased reporting burden	203	1,124.88–1,499.84	228,350.64–304,467.52

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 600.7, 600.10, 600.20, 600.21, 668.28, 668.43, 668.237, and 668.238 of this proposed rule contain information collection requirements. These proposed regulations include requirements for institutions to obtain a waiver allowing them to enroll more than 25 percent of their students as incarcerated students; obtaining approval to offer prison education programs; submit an application seeking continued title IV participation for a change in ownership; reporting changes in ownership and/or control; and for proprietary institutions to demonstrate compliance with the 90/10 rule. Under the PRA, the Department has or will at the required time submit a copy of these sections and an Information Collection Request to OMB for its review. For some of the regulatory sections, including those relating to PEPs, PRA approval will be sought via a separate information collection process. Specifically, the Department will publish notices in the **Federal Register** to seek public comment on and review of these collections when they are published.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number. In the final regulations, we will display the control numbers assigned by OMB to any information collection requirements proposed in this NPRM and adopted in the final regulations.

Section 600.7—Conditions of institutional eligibility.;

Section 600.10—Date, extent, duration, and consequences of eligibility;

Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.; and

Section 600.21—Updating application information.

Section 668.238—Application requirements.

Requirements: The proposed regulations at § 600.7(c)(1) allow that the Secretary would not approve an enrollment cap waiver for a postsecondary institution's Prison Education Program (PEP) until the oversight entity is able to make the "best interest determination" described in § 668.241, which would be at least 2 years after the postsecondary institution has continuously provided a PEP.

The proposed regulations at § 600.10(c)(1)(iv) require an institution to obtain approval from the Secretary to offer the institution's first eligible PEP at its first two additional locations at correctional facilities.

The proposed regulations at § 600.20(g)(1)(i) would require that institutions must notify the Department at least 90 days in advance of a proposed change in ownership. This includes submission of a completed form, State authorization and accrediting documents, and copies of audited financial statements. It also includes reporting any subsequent changes to the proposed ownership structure at least 90 days prior to the date the change in ownership is to occur.

The proposed regulations at § 600.21(a)(6) would amend reporting requirements to distinguish between reportable changes in ownership and changes of control and between natural persons and legal entities.

The proposed regulations at § 600.21(a)(14) would amend the reporting requirements for an institution to include the reporting of initial or additional PEPs and locations for PEPs.

The proposed regulations at § 600.21(a)(15) would also include reporting on changes in ownership that do not result in a change of control and that are not otherwise specified on the list of types of changes in ownership that must be reported, to ensure that novel ownership structures are covered under the regulations.

The proposed regulations at § 668.238(a) would specify that the postsecondary institution must seek approval for the first PEP at the first two additional locations as required under § 600.10. Proposed § 668.238 (b) would identify the application requirements for such PEPs. For all other PEPs and locations not subject to initial approval by the Secretary, postsecondary institutions would be required to submit the documentation outlined in proposed § 668.238(c).

Burden Calculation: All of these proposed regulatory changes would require an update to the current institutional application form, 1845–0012. The form update would be completed and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations. The burden changes would be assessed to OMB Control Number 1845–0012, Application for Approval to Participate in Federal Student Aid Programs.

Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

Requirements: The proposed regulations at § 600.20(g)(4) would require institutions to notify enrolled and prospective students at least 90 days prior to a proposed change in ownership.

Burden Calculation: We believe that this would result in burden for the institution. Based on the GAO report cited earlier, using the 59 institutional changes of ownership over a period of 9 years, we anticipate that an estimate of 7 institutions annually would require 4 hours to develop and post the required notice on the institution's intra- and internet sites for a total of 28 hours (7 × 4 hours = 28 hours). The burden change would be assessed to OMB Control Number 1845–NEW, Change of Ownership Notification to Students.

CHANGE OF OWNERSHIP NOTIFICATION TO STUDENTS—OMB CONTROL NUMBER: 1845–NEW

Affected entity	Respondent	Responses	Burden hours	Cost at $46.59 per hour for institutions
Proprietary	7	7	28	$1,305
Total	7	7	28	1,305

Section 668.28—Non-Federal revenue (90/10).

Requirements: The proposed regulations would amend § 668.28(a)(2) to create a disbursement rule that outlines how proprietary institutions calculate the percentage of their revenue that is Federal revenue and would create an end-of-fiscal-year deadline for proprietary institutions to request and disburse title IV funds to students. Additionally, proposed § 668.28(c)(3) would establish disclosures for proprietary institutions that fail to derive at least 10 percent of their fiscal-year revenues from allowable non-Federal funds.

Burden Calculation: We believe that this proposed change to § 668.28(a)(2) would result in burden for the institution. As of April 2022, there were 1,650 proprietary institutions eligible to participate in the title IV, HEA funded programs. We believe that all proprietary institutions would be required to perform this calculation. We believe that it will take 1,650 institutions an estimated 24 hours each to gather information about the eligible students and payment information to perform the required calculations and request any required disbursements for a total of 39,600 hours (1,650 institutions × 24 hours = 39,600 hours). The estimated costs for institutions to meet this requirement would be $1,844,964.

We believe that the proposed change to § 668.28(c)(3), which would require institutions to notify students when the institution fails the 90/10 revenue test, would result in a burden for the institution. For the 2019–2020 Award Year there were 33 institutions that failed to meet the 90/10 revenue test when adding in Post 9–11 GI Bill and DOD Tuition Assistance funds. Using this number of institutions as representative of the number of institutions that would annually fail the 90/10 revenue test, we estimate that 33 institutions would require 4 hours to develop and post the required notice on the institution's intranet and internet sites for a total of 132 hours (33 institutions × 4 hours = 132 hours). The estimated costs for institutions to meet this requirement would be $6,150.

The total burden assessed to OMB Control Number 1845–0096 is estimated at 39,732 hours and estimated costs of $1,851,114.

STUDENT ASSISTANCE GENERAL PROVISIONS—NON-TITLE IV REVENUE REQUIREMENTS (90/10)—OMB CONTROL NUMBER: 1845–0096

Affected entity	Respondent	Responses	Burden hours	Cost at $46.59 per hour for institutions
Proprietary	1,650	1,683	39,732	$1,851,114
Total	1,650	1,683	39,732	1,851,114

Section 668.43—Institutional Information.

Requirements: Proposed § 668.43(a)(5)(vi), would require a new disclosure if an eligible Prison Education Program (PEP) is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation (as described in proposed § 668.236(g) and (h)). In that case, the postsecondary institution must provide information regarding whether that occupation typically involves State or Federal prohibitions on the licensure or employment of formerly confined or incarcerated individuals. This requirement applies in the State in which the correctional facility is located or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release.

Burden Calculation: We believe that of an estimated 400 institutions who would participate in PEPs, 20 percent or 80 institutions would have programs that would be required to perform such research and disclosure development. We further believe that of an estimated 800 programs at those institutions, 20 percent or 160 programs would require such research. We anticipate that to fully research the licensure requirements in the required State or States and prepare documentation for students in the eligible PEP, an institution would need 25 hours per program for an estimate total burden of 4,000 hours (160 × 25 = 4,000). The burden of 4,000 hours would be assessed to OMB Control Number 1845–0156 with an estimated cost of $186,360.

ACCREDITATION PARTICIPATION AND DISCLOSURES—OMB CONTROL NUMBER: 1845–0156

Affected entity	Respondent	Responses	Burden hours	Cost at $46.59 per hour for institutions
Private, not-for-profit	14	28	700	$32,613
Public	66	132	3,300	153,747

ACCREDITATION PARTICIPATION AND DISCLOSURES—OMB CONTROL NUMBER: 1845–0156—Continued

Affected entity	Respondent	Responses	Burden hours	Cost at $46.59 per hour for institutions
Total	80	160	4,000	186,360

Section 668.237—Accreditation requirements.

Requirements: Proposed regulations at § 668.237, would prescribe program evaluation at the first two additional locations to ensure institutional ability to offer and implement the Prison Education Program (PEP) in accordance with the accrediting agency's standards. The proposed regulations would require the accrediting agency to conduct a site visit no later than one year after the institution has initiated a PEP at its first two additional locations at correctional facilities. Additionally, the proposed regulations would require accrediting agencies to review the methodology used by an institution in determining the PEP meets the same standards for substantially similar non-PEP programs.

Burden Calculation: Of the current 54 recognized accrediting agencies, it is estimated that 18 accrediting agencies may be called upon to perform such required reviews for institutions under their oversight. It is estimated that each of these accrediting agencies will require 8 hours per institution to evaluate the written applications for the first two programs offered by PEP or any change in methodology review. With an estimated 400 institutions participating in the PEP program, accrediting agencies would require 3,200 hours to complete this initial review (400 institutions × 8 hours = 3,200 burden hours).

It is estimated that to perform the site visits as required under the proposed regulations would require an estimated 50 hours to prepare for, perform the site visit and report the findings. With an estimated 400 institutions participating in the PEP program, accrediting agencies would require 20,000 hours to complete this initial review (400 institutions × 50 hours = 20,000 burden hours).

It is estimated that to perform the methodology review as required under the proposed regulations would require an estimated 8 hours. With an estimated 400 institutions participating in the PEP program, accrediting agencies would require 3,200 hours to complete this initial review (400 institutions × 8 hours = 3,200 burden hours).

The total estimated burden for accrediting agencies to perform these proposed tasks for the PEP evaluations is 42,400 hours under the OMB Control Number 1840–NEW.

PRISON EDUCATION PROGRAM ACCREDITATION REQUIREMENTS—OMB CONTROL NUMBER 1840–NEW

Affected entity	Respondent	Responses	Burden hours	Cost $46.59 per hour for institutions
Not-For-Profit Private	18	12,000	26,400	$1,229,976
Total	18	12,000	26,400	1,229,976

Consistent with the discussions above, the following chart describes the sections of the proposed regulations involving information collections, the information being collected and the collections that the Department will submit to OMB for approval and public comment under the PRA, and the estimated costs associated with the information collections. The monetized net cost of the increased burden for institutions and students was calculated using wage data developed using Bureau of Labor Statistics (BLS) data. For institutions we have used the median hourly wage for Education Administrators, Postsecondary, $46.59 per hour according to BLS as of May 2021. *https://www.bls.gov/oes/current/oes119033.htm.*

TABLE 10—COLLECTION OF INFORMATION

Regulatory section	Information collection	OMB control No. and estimated burden	Estimated cost $46.59 institutional unless otherwise noted
§§ 600.7, 600.10, 600.20, 600.21, and 668.238.	The proposed regulations at § 600.7(c)(1) provide for procedures for the Secretary to approve an enrollment cap waiver for incarcerated students at a postsecondary institution. The proposed regulations at §§ 600.10(c)(1)(iv) and 668.238(a) require an institution to obtain approval from the Secretary to offer the institution's first eligible PEP at its first two additional locations at correctional facilities. The proposed regulations at § 600.20(g)(1)(i) would require that institutions notify the Department at least 90 days in advance of a proposed change in ownership. The proposed regulations at § 600.21(a)(6) would amend reporting requirements to clarify reportable changes in ownership and changes of control.	1845–0012; Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form.

TABLE 10—COLLECTION OF INFORMATION—Continued

Regulatory section	Information collection	OMB control No. and estimated burden	Estimated cost $46.59 institutional unless otherwise noted
	The proposed regulation at § 600.21(a)(14) would amend the reporting requirements for an institution to include the reporting of PEPs. The proposed regulations at § 600.21(a)(15), would also include reporting on changes in ownership that do not result in a change of control and that are not otherwise specified in the regulations. § 668.238 (b) would identify the application requirements for PEPs. For all other PEPs not subject to initial approval by the Secretary, postsecondary institutions would be required to submit the documentation outlined in § 668.238(c).		
§ 600.20	The proposed regulations at § 600.20(g)(4), would require institutions to notify enrolled and prospective students at least 90 days prior to a proposed change in ownership.	1845–NEW; 28 hours	$1,305.
§ 668.28	The proposed regulations would amend § 668.28(a)(2) to clarify how proprietary institutions calculate the percentage of their revenue from Federal education assistance programs. § 668.28(c)(3) is amended to establish disclosures for proprietary institutions that fail the 90/10 calculation.	1845–0096; 39,732 hours.	1,844,964.
§ 668.43	The proposed regulations at § 668.43(a)(5)(vi) would require a new disclosure if an eligible Prison Education Program (PEP) is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation.	1845–0156; 4,000 hours	186,360.
§ 668.237	The proposed regulations at § 668.237 specify how accrediting agencies will review PEPs.	1840–NEW; 26,400 hours	1,229,976.

The total burden hours and change in burden hours associated with each OMB Control number affected by the proposed regulations follows:

Control No.	Total proposed burden hours	Proposed change in burden hours
1840–NEW	26,400	+26,400
1845–0096	39,737	+39,732
1845–0156	583,171	+4,000
1845–NEW	28	+28
Total	649, 336	+70,160

We have prepared Information Collection Requests for these information collection requirements. If you wish to review and comment on the Information Collection Requests, please follow the instructions in the **ADDRESSES** section of this notification. *Note:* The Office of Information and Regulatory Affairs in OMB and the Department review all comments posted at *www.regulations.gov.*

In preparing your comments, you may want to review the Information Collection Requests, including the supporting materials, in *www.regulations.gov* by using the Docket ID number specified in this notification Docket ID ED–2022–OPE–0062. These proposed collections are identified as proposed collections 1840–xxxx, 1845–0096, 1845–0156, 1845–NEW.

If you want to review and comment on the ICRs, please follow the instructions listed below in this section of this notice. Please note that the Office of Information and Regulatory Affairs (OIRA) and the Department of Education review all comments posted at *www.regulations.gov.*

When commenting on the information collection requirements, we consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond.

Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *www.regulations.gov* by selecting Docket ID Number ED 2022–OPE–0062. Please specify the Docket ID number and indicate ''Information Collection

Comments'' if your comment(s) relate to the information collection for this proposed rule. **FOR FURTHER INFORMATION CONTACT:** Electronically mail *ICDocketMgr@ed.gov.*

Consistent with 5 CFR 1320.8(d), the Department is soliciting comments on the information collection through this document. OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by August 26, 2022. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations do not have federalism implications.

Accessible Format: On request to the program contact person(s) listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register***,* in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Selective service system, Student aid, Vocational education.

34 CFR Part 668

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

34 CFR Part 690

Colleges and universities, Education of disadvantaged, Grant programs-education, Reporting and recordkeeping requirements, Student aid.

Miguel A. Cardona,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600, 685, 668 and 690 of title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

■ 2. Section 600.2 is amended by:
■ a. Revising the definitions of ''additional location'' and ''branch campus'';
■ b. Adding in alphabetical order a definition of ''confined or incarcerated individual''.
■ c. In the definition of ''distance education'' adding paragraph (6).
■ d. Removing the definition of ''incarcerated student'';
■ e. Adding the definition of ''main campus''.
■ f. Revising the definition of ''nonprofit institution''.

The additions and revisions read as follows:

§ 600.2 Definitions.

* * * * *

Additional location: A physical facility that is separate from the main campus of the institution and within the same ownership structure of the institution, at which the institution offers at least 50 percent of an educational program. An additional location participates in the title IV, HEA programs only through the certification of the main campus. A Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution is considered to be an additional location as defined under § 600.2 even if a student receives instruction primarily through distance education or correspondence courses at that location.

* * * * *

Branch campus: A physical facility that is separate from the main campus of the institution and within the same ownership structure of the institution, and that also—

(1) Is approved by the Secretary as a branch campus; and

(2) Is independent from the main campus, meaning the location—

(i) Is permanent in nature;

(ii) Offers courses in educational programs leading to a degree, certificate, or other recognized education credential;

(iii) Has its own faculty and administrative or supervisory organization; and

(iv) Has its own budgetary and hiring authority.

* * * * *

Confined or incarcerated individual: An individual who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. An individual is not considered incarcerated if that individual is subject to or serving an involuntary civil commitment, in a half-way house or home detention, or is sentenced to serve only weekends.

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Distance education * * *

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(6) Except for an additional location at a correctional institution as described in the definition of an additional location in this section, for an institution that offers on-campus programs and programs through distance education or correspondence courses, the programs offered through distance education or correspondence courses are associated with the main campus of the institution. For an institution that only offers distance education programs, the institution is located where its administrative offices are located and approved by its accrediting agency.

* * * * *

Main campus: The primary physical facility at which the institution offers eligible programs, within the same ownership structure of the institution, and certified as the main campus by the Department and the institution's accrediting agency.

* * * * *

Nonprofit institution: (1) A nonprofit institution is a domestic public or private institution or foreign institution as to which the Secretary determines that no part of the net earnings of the institution benefits any private entity or natural person and that meets the requirements of paragraphs (2) through (4) of this definition, as applicable.

(2) When making the determination under paragraph (1) of this definition, the Secretary considers the entirety of the relationship between the institution, the entities in its ownership structure, and other parties. For example, a nonprofit institution is generally not an institution that—

(i) Is an obligor (either directly or through any entity in its ownership chain) on a debt owed to a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution;

(ii) Either directly or through any entity in its ownership chain, enters into, or maintains, a revenue-sharing agreement with—

(A) A former owner or current or former employee of the institution or member of its board; or

(B) A natural person or entity related to or affiliated with the former owner or current or former employee of the institution or member of its board, unless the Secretary determines that the payments and the terms under the revenue-sharing agreement are reasonable, based on the market price and terms for such services or materials, and the price bears a reasonable relationship to the cost of the services or materials provided;

(iii) Is a party (either directly or indirectly) to any other agreements (including lease agreements) with—

(A) A former owner or current or former employee of the institution or member of its board; or

(B) A natural person or entity related to or affiliated with the former owner or current or former employee of the institution or member of its board under which the institution is obligated to make any payments, unless the Secretary determines that the payments and terms under the agreement are comparable to payments in an arm's-length transaction at fair market value; or

(iv) Engages in an excess benefit transaction with any natural person or entity.

(3) A private institution is a "nonprofit institution" only if it meets the requirements in paragraph (1) of this definition and is—

(i) Owned and operated by one or more nonprofit corporations or associations;

(ii) Legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Determined by the U.S. Internal Revenue Service to be an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

(4) A foreign institution is a "nonprofit institution" only if it meets the requirements in paragraph (1) of this definition and is—

(i) An institution that is owned and operated only by one or more nonprofit corporations or associations; and

(ii)(A) If a recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, is determined by that tax authority to be a nonprofit educational institution; or

(B) If no recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, the foreign institution demonstrates to the satisfaction of the Secretary that it is a nonprofit educational institution.

* * * * *

■ 3. Section 600.4 is amended by revising paragraph (a) introductory text as follows:

§ 600.4 Institution of higher education.

(a) An institution of higher education is a public or other nonprofit educational institution that—

* * * * *

■ 4. Section 600.7 is amended by revising paragraph (c) to read as follows:

§ 600.7 Conditions of institutional eligibility.

* * * * *

(c) *Special provisions regarding incarcerated students*—(1) *Waiver Exception.* The Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section, upon the application of an institution, if the institution is a nonprofit institution that provides four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma and has continuously provided an eligible prison education program approved by the Department under subpart P of part 668 for at least two years. The Secretary does not grant the waiver if—

(i) For a program described under paragraph (c)(3)(ii) of this section, the program does not maintain a completion rate of 50 percent or greater; or

(ii) For an institution described under paragraphs (c)(2) or (3) of this section—

(A) The institution provides one or more eligible prison education programs that is not compliant with the requirements of part 668 subpart P; or

(B) The institution is not administratively capable under § 668.16 or financially responsible under part 668 subpart L.

(2) *Waiver for entire institution.* If the nonprofit institution that applies for a waiver consists solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section for the entire institution.

(3) *Other waivers.* If the nonprofit institution that applies for a waiver does not consist solely of four-year or two-year educational programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma, the Secretary may waive the prohibition contained in paragraph (a)(1)(iii) of this section on a program-by-program basis—

(i) For the four-year and two-year programs for which it awards a bachelor's degree, an associate degree, or a postsecondary diploma; and

(ii) For the other programs the institution provides, if the incarcerated regular students enrolled in those other programs have a completion rate of 50 percent or greater.

(4) *Waiver Limitations.* (i)(A) For five years after the Secretary grants the waiver, the institution may not enroll more than fifty percent of the institution's regular enrolled students as incarcerated students; and

(B) For the five years following the period described in paragraph (c)(4)(i)(A) of this section, the institution may not enroll more than seventy-five percent of the institution's regular enrolled students as incarcerated students.

(ii) The limitations in paragraph (c)(4)(i) of this section do not apply if the institution is a public institution chartered for the explicit purpose of educating incarcerated students, as determined by the Secretary, and all students enrolled in a prison education program for the institution are located in the state in which the institution is chartered to serve.

(5) The Secretary limits or terminates the waiver described in this subsection if the Secretary determines the institution no longer meets the requirements established under paragraph (c)(1) of this section.

(6) If the Secretary limits or terminates an institution's waiver under paragraph (c)(4) of this section, the institution ceases to be eligible for the title IV, HEA programs at the end of the award year that begins after the Secretary's action unless the institution, by that time—

(i) Demonstrates to the satisfaction of the Secretary that it meets the requirements under paragraph (c)(1) of this section; and

(ii) The institution does not enroll any additional incarcerated students upon the limitation or termination of the waiver and reduces its enrollment of incarcerated students to no more than 25 percent of its regular enrolled students.

* * * * *

■ 5. Section 600.10 is amended by revising paragraph (c)(1) to read as follows:

§ 600.10 Date, extent, duration, and consequence of eligibility.

* * * * *

(c) * * * (1) An eligible institution that seeks to establish the eligibility of an educational program must obtain the Secretary's approval—

(i) Pursuant to a requirement regarding additional programs included in the institution's PPA under § 668.14;

(ii) For a direct assessment program under § 668.10, and for a comprehensive transition and postsecondary program under § 668.232;

(iii) For a first direct assessment program under § 668.10, the first direct assessment program offered at each credential level, and for a comprehensive transition and postsecondary program under § 668.232;

(iv) For the first eligible prison education program under subpart P of part 668 offered at the first two additional locations as defined under § 600.2 at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution.

* * * * *

■ 6. Section 600.20 is amended by revising paragraphs (g) and (h) as follows:

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

* * * * *

(g) *Application for provisional extension of certification.* (1) If a private nonprofit institution, a private for-profit institution, or a public institution participating in the title IV, HEA programs undergoes a change in ownership that results in a change of control as described in § 600.31, the Secretary may continue the institution's participation in those programs on a provisional basis if—

(i) No later than 90 days prior to the change in ownership, the institution provides the Secretary notice of the proposed change on a fully completed form designated by the Secretary and supported by the State authorization and accrediting documents identified in paragraph (g)(3)(i) and (ii) of this section, and supported by copies of the financial statements identified in paragraph (g)(3)(iii) and (iv) of this section;

(ii) The institution promptly reports to the Secretary any changes to the proposed ownership structure identified under paragraph (g)(1)(i) of this section, provided that the change in ownership cannot occur earlier than 90 days following the date the change is reported to the Secretary; and

(iii) The institution under the new ownership submits a ''materially complete application'' that is received by the Secretary no later than 10 business days after the day the change occurs.

(2) Notwithstanding the submission of the items under paragraph (g)(1) of this section, the Secretary may determine that the participation of the institution should not be continued following the change in ownership.

(3) For purposes of this section, a private nonprofit institution, a private for-profit institution, or a public institution submits a materially complete application if it submits a fully completed application form designated by the Secretary supported by—

(i) A copy of the institution's State license or equivalent document that authorized or will authorize the institution to provide a program ofpostsecondary educationin the State in which it is physically located, supplemented with documentation that, as of the day before the change in ownership, the State license remained in effect;

(ii) A copy of the document from the institution's accrediting association that granted or will grant the institutionaccreditationstatus, including approval of any non-degree programs it offers, supplemented with documentation that, as of the day before the change in ownership, the accreditation remained in effect;

(iii) Audited financial statements for the institution's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of34 CFR 668.23;

(iv)(A) Audited financial statements for the institution's new owner's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23, or equivalent financial statements for that owner that are acceptable to the Secretary; or

(B) If such financial statements are not available, financial protection in the amount of—

(*1*) At least 25 percent of the institution's prior year volume of title IV aid if the institution's new owner does not have two years of acceptable audited financial statements; or

(*2*) At least 10 percent of the institution's prior year volume of title IV aid if the institution's new owner has only one year of acceptable audited financial statements; and

(v) If deemed necessary by the Secretary, financial protection in the amount of an additional 10 percent of the institution's prior year volume of title IV aid, or a larger amount as determined by the Secretary. If any entity in the new ownership structure holds a 50 percent or greater direct or indirect voting or equity interest in another institution or institutions, the financial protection may also include the prior year volume of title IV aid, or a larger amount as determined by the Secretary, for all institutions under such common ownership.

(4) The institution must notify enrolled and prospective students of the proposed change in ownership, and submit evidence that such disclosure was made, no later than 90 days prior to the change.

(h) *Terms of the extension.* (1) If the Secretary approves the institution's materially complete application, the Secretary provides the institution with a temporary provisional Program Participation Agreement (TPPPA).

(2) The TPPPA expires on the earlier of—

(i) The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (h)(3) of this section apply;

(ii) The date on which the Secretary notifies the institution that its application is denied; or

(iii) The date on which the Secretary co-signs a new provisional program participation agreement (PPPA).

(3) If the TPPPA will expire under the provisions of paragraph (h)(2)(i) of this section, the Secretary extends the provisional TPPPA on a month-to-month basis after the expiration date described in paragraph (h)(2)(i) of this section if, prior to that expiration date, the institution provides the Secretary with—

(i) An audited ''same-day'' balance sheet for a proprietary institution or an audited statement of financial position for a nonprofit institution;

(ii) If not already provided, approval of the change of ownership from each State in which the institution is physically located or for an institution that offers only distance education in accordance with paragraph (6) of the definition of ''distance education'' in § 600.2, from the agency that authorizes the institution to legally providepostsecondary educationin that State;

(iii) If not already provided, approval of the change of ownership from the institution's accrediting agency; and

(iv) A default management plan unless the institution is exempt from providing that plan under 34 CFR 668.14(b)(15).

* * * * *

■ 7. Section 600.21 is amended by
■ a. Revising paragraphs (a) introductory text and (a)(6);
■ b. Adding paragraphs (a)(14) and (a)(15); and
■ c. Revising paragraph (b).

The revisions and additions read as follows:

§ 600.21 Updating application information.

(a) *Reporting requirements.* Except as provided in paragraph (b) of this section, an eligible institution must report to the Secretary, in a manner prescribed by the Secretary no later than 10 days after the change occurs, any change in the following:

* * * * *

(6)(i) *Changes in ownership.* Any change in the ownership of the institution, whereby a natural person or entity acquires at least a 5 percent ownership interest (direct or indirect) of the institution but that does not result in a change of control as described in § 600.31.

(ii) *Changes in control.* A natural person or legal entity's ability to affect substantially the actions of the institution if that natural person or legal entity did not previously have this ability. The Secretary considers a natural person or legal entity to have this ability if—

(A) The natural person acquires, alone or together with another member or members of their family, at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution;

(B) The entity acquires, alone or together with an affiliated natural person or entity, at least a 25 percent ownership interest (as defined in § 600.31(b)) in the institution;

(C) The natural person or entity acquires, alone or together with another natural person or entity, under a voting trust, power of attorney, proxy, or similar agreement, at least a 25 percent ''ownership interest'' (as defined in § 600.31(b)) in the institution;

(D) The natural person becomes a general partner, managing member, chief executive officer, trustee or co-trustee of a trust, chief financial officer, director, or other officer of the institution or of an entity that has at least a 25 percent ''ownership interest'' (as defined in § 600.31(b)) in the institution; or

(E) The entity becomes a general partner or managing member of an entity that has at least a 25 percent ''ownership interest'' (as defined in § 600.31(b)) in the institution.

* * * * *

(14) Its establishment or addition of an eligible prison education program at an additional location as defined under § 600.2 at a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution that was not previously included in the institution's application for approval as described under § 600.10.

(15) Any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and is not addressed under paragraph (a)(6) of this section, including the addition or elimination of any entities in the ownership structure, a change of entity from one type of business structure to another, and any excluded transactions under § 600.31(e).

(b) *Additional reporting from institutions owned by publicly-traded corporations.* An institution that is owned by a publicly-traded corporation must report to the Secretary any change in the information described in paragraph (a)(6) or (15) of this section when it notifies its accrediting agency, but no later than 10 days after the institution learns of the change.

* * * * *

■ 8. Add § 600.22 to read as follows:

§ 600.22 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 9. Section 600.31 is amended by:
■ a. In paragraph (b) revising the definitions of ''closely-held corporation'', ''ownership or ownership interest'', and ''parent'';
■ b. Revising paragraph (c)(3);
■ c. Removing paragraph (c)(4);
■ d. Redesignating paragraphs (c)(5) through (7) as paragraphs (c)(4) through (6), respectively;
■ e. In newly redesignated paragraph (c)(5) removing the phrase ''paragraph (d)'' and adding, in its place, the phrase ''paragraphs (c)(3) and (d)'';
■ f. Revising paragraphs (d)(6) and (7);
■ g. Adding paragraph (d)(8); and
■ h. Revising paragraph(e).

The revisions and addition read as follows:

§ 600.31 Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions.

* * * * *

(b) * * *

Closely-held corporation. Closely-held corporation (including the term ''close corporation'') means—

(i) A corporation that qualifies under the law of the State of its incorporation or organization as astatutory close corporation; or

(ii) If the State of incorporation or organization has no statutory close corporation provision, a corporation the stock of which—

(A) Is held by no more than 30 persons; and

(B) Has not been and is not planned to be publicly offered.

* * * * *

Ownership or ownership interest. (i) Ownership or ownership interest means a direct or indirect legal or beneficial interest in an institution or legal entity, which may include a voting interest or a right to share in profits.

(ii) For the purpose of determining whether a change in ownership has occurred, changes in the ownership of the following are not included:

(A) A mutual fund that is regularly and publicly traded.

(B) A U.S. institutional investor, as defined in17 CFR 240.15a–6(b)(7).

(C) A profit-sharing plan of the institution or its corporate parent, provided that all full-time permanent employees of the institution or its corporate parent are included in the plan.

(D) An employee stock ownership plan (ESOP).

Parent. The legal entity that controls the institution or a legal entity directly or indirectly through one or more intermediate entities.

Person. Person includes a natural person or a legal entity, including a trust.

* * * * *

(c) Standards for identifying changes of ownership and control—

* * * * *

(3) *Other entities.* (i) The term ''other entities'' means any entity that is not closely held nor required to be registered with the SEC, and includes limited liability companies, limited liability partnerships, limited partnerships, and similar types of legal entities.

(ii) The Secretary deems the following changes to constitute a change in ownership resulting in a change of control of such an entity:

(A) A person (or combination of persons) acquires at least 50 percent of the total outstanding voting interests in the entity, or otherwise acquires 50 percent control.

(B) A person (or combination of persons) who holds less than a 50 percent voting interest in an entity acquires at least 50 percent of the outstanding voting interests in the entity, or otherwise acquires 50 percent control.

(C) A person (or combination of persons) who holds at least 50 percent of the voting interests in the entity ceases to hold at least 50 percent voting interest in the entity, or otherwise ceases to hold 50 percent control.

(D) A partner in a general partnership acquires or ceases to own at least 50 percent of the voting interests in the general partnership, or otherwise acquires or ceases to hold 50 percent control.

(E) Any change of a general partner of a limited partnership (or similar entity) if that general partner also holds an equity interest.

(F) Any change in a managing member of a limited liability company (or similar entity) if that managing member also holds an equity interest.

(G) Notwithstanding its voting interests, a person becomes the sole member or shareholder of a limited liability company or other entity that has a 100 percent or equivalent direct or indirect interest in the institution.

(H) An entity that has a member or members ceases to have any members.

(I) An entity that has no members becomes an entity with a member or members.

(J) A person is replaced as the sole member or shareholder of a limited liability company or other entity that has a 100 percent or equivalent direct or indirect interest in the institution.

(K) The addition or removal of any entity that provides or will provide the audited financial statements to meet any of the requirements in § 600.20(g) or (h) or part 668, subpart L.

(L) Except as provided in paragraph (e) of this section, the transfer by an owner of 50 percent or more of the voting interests in the institution or an entity to an irrevocable trust.

(M) Except as provided in paragraph (e) of this section, upon the death of an owner who previously transferred 50 percent or more of the voting interests in an institution or an entity to a revocable trust.

(iii) The Secretary deems the following interests to satisfy the 50 percent thresholds described above:

(A) A combination of persons, each of whom holds less than 50 percent ownership interest in an entity, holds a combined ownership interest of at least 50 percent as a result of proxy agreements, voting agreements, or other agreements (whether or not the agreement is set forth in a written document), or by operation of State law.

(B) A combination of persons, each of whom holds less than 50 percent ownership interest in an entity, holds a combined ownership interest of at least 50 percent as a result of common ownership, management, or control of that entity, either directly or indirectly.

(C) A combination of individuals who are family members as defined in § 600.21, each of whom holds less than 50 percent ownership interest in an entity, holds a combined ownership interest of at least 50 percent.

(iv) Notwithstanding paragraphs (c)(3)(ii) and (iii) of this section—

(A) If a person who alone or in combination with other persons holds less than a 50 percent ownership interest in an entity, the Secretary may determine that the person, either alone or in combination with other persons, has actual control over that entity and is subject to the requirements of this section;

(B) Any person who alone or in combination with other persons has the right to appoint a majority of any class of board members of an entity or an institution is deemed to have control.

* * * * *

(d) * * *

(6) A transfer of assets that comprise a substantial portion of the educational business of the institution, except where the transfer consists exclusively in the granting of a security interest in those assets;

(7) A change in status as a for-profit, nonprofit, or public institution; or

(8) The acquisition of an institution to become an additional location of another institution, unless the acquired institution closed or ceased to provide educational instruction.

(e) *Excluded transactions.* A change in ownership and control timely reported under § 600.21 and otherwise subject to this section does not include a transfer of ownership and control of all or part of an owner's equity or partnership interest in an institution, the institution's parent corporation, or other legal entity that has signed the institution's PPA—

(1) From an owner to a ''family member'' of that owner as defined in § 600.21(f);

(2) As a result of a transfer of an owner's interest in the institution or an entity to an irrevocable trust, so long as the trustees only include the owner and/or a family member as defined in § 600.21(f). Upon the appointment of any non-family member as trustee for an irrevocable trust (or successor trust), the transaction is no longer excluded and is subject to the requirements of §§ 600.20(g) and (h);

(3) Upon the death of a former owner who previously transferred an interest in the institution or an entity to a revocable trust, so long as the trustees include only family members of that former owner, as defined in § 600.21(f). Upon the appointment of any non-family member as trustee for the trust (or a successor trust) following the death of the former owner, the transaction is no longer excluded and is subject to the requirements of §§ 600.20(g) and (h); or

(4) A transfer to an individual owner with a direct or indirect ownership

interest in the institution who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer, either upon the death of another owner or by transfer from another individual owner who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer, upon the resignation of that owner from the management of the institution.

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 10. The authority citation for part 668 is revised to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c–1, and 1231a, unless otherwise noted.

Section 668.14 also issued under 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a–3, 1099c, and 1141.

Section 668.41 also issued under 20 U.S.C. 1092, 1094, 1099c.

Section 668.91 also issued under 20 U.S.C. 1082, 1094.

Section 668.171 also issued under 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109.

Section 668.172 also issued under 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109.

Section 668.175 also issued under 20 U.S.C. 1094 and 1099c.

■ 11. Section 668.8 is amended by revising paragraph (n) to read as follows:

§ 668.8 Eligible program.

* * * * *

(n) For Title IV, HEA program purposes, *eligible program* includes a direct assessment program approved by the Secretary under § 668.10, a comprehensive transition and postsecondary program approved by the Secretary under § 668.232, and an eligible prison education program under subpart P of this part.

■ 12. Redesignate § 668.11 as § 668.12 and add a new § 668.11 to read as follows:

§ 668.11 Severability.

If any provision of this part 668 or its application to any person, act, or practice is held invalid, the remainder of the part or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 14. Section 668.14 is amended by revising paragraph (b)(16) to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(16) For a proprietary institution, the institution will derive at least 10 percent of its revenues for each fiscal year from sources other than Federal funds, as provided in § 668.28(a), or be subject to sanctions described in § 668.28(c);

* * * * *

■ 15. Amend § 668.23 by revising paragraph (d)(3) to read as follows:

§ 668.23 Compliance audits and audited financial statements.

* * * * *

(d) * * *

(3) *Disclosure of Federal revenue.* A proprietary institution must disclose in a footnote to its financial statement audit the percentage of its revenues derived from Federal funds that the institution received during the fiscal year covered by that audit. The revenue percentage must be calculated in accordance with § 668.28. The institution must also report in the footnote the dollar amount of the numerator and denominator of its 90/10 ratio as well as the individual revenue amounts identified in section 2 of appendix C to subpart B of part 668.

* * * * *

■ 16. Section 668.28 is revised to read as follows:

§ 668.28 Non-Federal revenue (90/10).

(a) *General*—(1) *Calculating the revenue percentage.* A proprietary institution meets the requirement in § 668.14(b)(16) that at least 10 percent of its revenue is derived from sources other than Federal funds by using the formula in appendix C of this subpart to calculate its revenue percentage for its latest complete fiscal year. For purposes of this section—

(i) For any annual audit submission for a proprietary institutional fiscal year beginning on or after January 1, 2023, Federal funds used to calculate the revenue percentage include title IV, HEA program funds and any other educational assistance funds provided by a Federal agency directly to an institution or a student including the Federal portion of any grant funds provided by or administered by a non-Federal agency, except for non-title IV Federal funds provided directly to a student to cover expenses other than tuition, fees, and other institutional charges. The Secretary identifies the Federal agency and the other educational assistance funds provided by that agency in a notice published in the **Federal Register**, with updates to that list published as needed.

(ii) For any fiscal year beginning prior to January 1, 2023, Federal funds are limited to title IV, HEA program funds.

(2) *Disbursement rule.* An institution must use the cash basis of accounting in calculating its revenue percentage by—

(i) For each eligible student, counting the amount of Federal funds that were used to pay tuition, fees, and other institutional charges the institution received during its fiscal year—

(A) Directly from an agency identified under paragraph (a)(1)(i) of this section; and

(B) Paid by a student who received Federal funds.

(ii) For each eligible student, counting the amount of title IV, HEA program funds the institution received to pay tuition, fees, and other institutional charges during its fiscal year. However, before the end of its fiscal year, the institution must—

(A) Request funds under the advanced payment method in § 668.162(b)(2) or the heightened cash monitoring method in § 668.162(d)(1) that the students are eligible to receive and make any disbursements to those students by the end of the fiscal year; or

(B) For institutions under the reimbursement or heightened cash monitoring methods in § 668.162(c) or (d)(2), make disbursements to those students by the end of the fiscal year and report as Federal funds in the revenue calculations the funds that the students are eligible to receive before requesting funds.

(3) *Revenue generated from programs and activities.* The institution must consider as revenue only those funds it generates from—

(i) Tuition, fees, and other institutional charges for students enrolled in eligible programs as defined in § 668.8;

(ii) Activities conducted by the institution that are necessary for the education and training of its students provided those activities are—

(A) Conducted on campus or at a facility under the institution's control;

(B) Performed under the supervision of a member of the institution's faculty; and

(C) Required to be performed by all students in a specific educational program at the institution; and

(D) Related directly to services performed by students; and

(iii) Funds paid by a student, or on behalf of a student by a party unrelated to the institution, its owners, or affiliates, for an education or training program that is not eligible under § 668.8 and that does not include any courses offered in an eligible program. The non-eligible education or training program must be provided by the institution, and taught by one of its instructors, at its main campus or one of its approved additional locations, at another school facility approved by the appropriate State agency or accrediting agency, or at an employer facility. The institution may not count revenue from a non-eligible education or training program where it merely provides facilities for test preparation courses, acts as a proctor, or oversees a course of self-study. The program must—

(A) Be approved or licensed by the appropriate State agency;

(B) Be accredited by an accrediting agency recognized by the Secretary under 34 CFR part 602;

(C) Provide an industry-recognized credential or certification;

(D) Provide training needed for students to maintain State licensing requirements; or

(E) Provide training needed for students to meet additional licensing requirements for specialized training for practitioners that already meet the general licensing requirements in that field.

(4) *Application of funds.* The institution must presume that any Federal funds it disburses, or delivers to a student, or determines was provided to a student by another Federal source, will be used to pay the student's tuition, fees, or institutional charges up to the amount of those Federal funds if a student makes a payment to the institution, except to the extent that the student's tuition, fees, or other charges are satisfied by—

(i) Grant funds provided by—

(A) Non-Federal public agencies, provided that those grant funds do not include Federal or institutional funds unless the Federal portion of those grant funds can be determined and that portion of Federal funds must be included as Federal funds under this section. If the Federal funds cannot be determined no amount of the grant funds may be included under this section; or

(B) Private sources unrelated to the institution, its owners, or affiliates;

(ii) Funds provided under a contractual arrangement with the institution and a Federal, State, or local government agency for the purpose of providing job training to low-income individuals who need that training;

(iii) Funds used by a student from a savings plan for educational expenses established by or on behalf of the student if the savings plan qualifies for special tax treatment under the Internal Revenue Code of 1986; or

(iv) Institutional scholarships that meet the requirements in paragraph (a)(5)(iv) of this section.

(5) *Revenue generated from institutional aid.* The institution may include the following institutional aid as revenue:

(i) For loans made to students and credited in full to the students' accounts at the institution and used to satisfy tuition, fees, and other institutional charges, the number of principal payments made on those loans by current or former students that the institution received during the fiscal year, if the loans—

(A) Are bona fide as evidenced by standalone repayment agreements between the students and the institution that are enforceable promissory notes;

(B) Are issued at intervals related to the institution's enrollment periods;

(C) Are subject to regular loan repayments and collections by the institution; and

(D) Are separate from the enrollment contracts signed by the students.

(ii) If an institution wants to include an income share agreement or any other alternative financing agreement as cash in its attestations in which the agreement is with the institution only or with a related party, to include any entity in the ownership tree, any common ownership, and any other contractual agreement or continuous financial relationship for this section, then the following must be included in the agreement:

(A) The institution must clearly identify the institutional charges that are being covered by the agreement, and the charges must be the same or less than the stated rate for institutional charges.

(B) The maximum time and amount a student would be required to pay is clearly identified including the implied or imputed interest rate and any fees.

(C) All payments must be applied in accordance with debt repayment regulations. Interest and fees would not be included in the attestation.

(D) The imputed or implied interest rate cannot be more than the Federal Direct Unsubsidized Loan interest rate for the same borrower type at the time the agreement was signed.

(iii) Only cash payments representing principal payments on the income share agreement or other financing agreement that were used to satisfy tuition, fees, and other institutional charges may be included in the attestation. No amounts from the sale of the income share agreement or other financing agreement may be included in the attestation.

(iv) For scholarships provided by the institution in the form of monetary aid and based on the academic achievement or financial need of its students, the amount disbursed to students during the fiscal year. The scholarships must be disbursed from an established restricted account and may be included as revenue only to the extent that the funds in that account represent—

(A) Designated funds from an outside source that is unrelated to the institution, its owners, or affiliates; or

(B) Income earned on those funds.

(6) *Funds excluded from revenues.* For the fiscal year, the institution does not include—

(i) The amount of Federal Work Study (FWS) wages paid directly to the student. However, if the institution credits the student's account with FWS funds, those funds are included as revenue;

(ii) The amount of funds received by the institution from a State under the LEAP, SLEAP, or GAP programs;

(iii) The amount of institutional funds used to match title IV, HEA program funds;

(iv) The amount of title IV, HEA program funds refunded to students or returned to the Secretary under § 668.22;

(v) The amount the student is charged for books, supplies, and equipment unless the institution includes that amount as tuition, fees, or other institutional charges;

(vi) Any amount from the proceeds of the factoring or sale of accounts receivable or institutional loans, regardless of whether the loans were sold with or without recourse; or

(vii) Any funds, including loans, provided by a third party related to the institution, its owners, or affiliates to a student in any form.

(b) [Reserved]

(c) *Sanctions.* If an institution does not derive at least 10 percent of its revenue from sources other than Federal funds—

(1) For two consecutive fiscal years, it loses its eligibility to participate in the title IV, HEA programs for at least two fiscal years. To regain eligibility, the institution must demonstrate that it complied with the State licensure and accreditation requirements under 34 CFR 600.5(a)(4) and (a)(6), and the financial responsibility requirements under subpart L of this part, for a minimum of two fiscal years after the fiscal year it became ineligible;

(2) For any fiscal year, it becomes provisionally certified under § 668.13(c)(1)(ii) for the two fiscal years after the fiscal year it failed to satisfy the revenue requirement. However, the institution's provisional certification terminates on—

(i) The expiration date of the institution's program participation agreement that was in effect on the date the Secretary determined the institution failed this requirement; or

(ii) The date the institution loses its eligibility to participate under paragraph (c)(1) of this section;

(3) For any fiscal year that it fails to meet the requirements of this section, it must notify students of the possibility of loss of title IV eligibility;

(4) It must determine whether it passed the revenue requirement and report a failure no later than 45 days after the end of its fiscal year, or immediately thereafter if subsequent information is obtained that shows an institution incorrectly determined that it passed the revenue requirement for the prior fiscal year; and

(5) It is liable for any title IV, HEA program funds it disburses after the fiscal year it becomes ineligible to participate in the title IV, HEA program under paragraph (c)(1) of this section, excluding any funds the institution was entitled to disburse under § 668.26.

(Approved by Office of Management and Budget under control number 1845–0096)

■ 17. Appendix C to subpart B of part 668 is revised to read:

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APPENDIX C TO SUBPART B OF PART 668 - 90/10 REVENUE CALCULATION

Section 1: Sample Student Account at the Institution / Funds Applied in Priority Order

Sample Student Account Ledger

Line	Date	Charge/Payment	Memo	Debit	Credit	Balance
1	12/31/2021	Federal Direct Loan			1,000.00	(1,000.00)
2	1/1/2022	Tuition and Fees		17,000.00		16,000.00
3	2/1/2022	Cash Payment			175.00	15,825.00
4	2/1/2022	Federal Funds 1			2,000.00	13,825.00
5	2/1/2022	FSEOG	(Fed. 375/Inst. 125)		500.00	13,325.00
6	5/1/2022	Cash Payment	(Federal funds 3)		500.00	12,825.00
7	7/1/2022	Federal Pell Grant			1,700.00	11,125.00
8	7/1/2022	Institutional Scholarship			500.00	10,625.00
9	7/1/2022	Federal Direct Loan			1,500.00	9,125.00
10	7/1/2022	Cash Payment	(Federal funds 4)		3,700.00	5,425.00
11	8/1/2022	Federal Funds 2			3,725.00	1,700.00
12	9/1/2022	City Grant			2,200.00	(500.00)
13	9/1/2022	Refund Check		500.00		-

Line item in the sample		Amount in the sample
	Funds Applied First	
12	Grant funds for the student from non-Federal public agencies orprivate sources independent of the institution	2,200.00
	Funds provided for the student under a contractual arrangement with a Federal, State, or local government agency for the purpose ofproviding job training to low-income individuals	
	Funds used by a student from savings plans for educational expenses established by or on behalf of the student that qualify forspecial tax treatment under the Internal Revenue Code	
8	Qualified institutional scholarships disbursed to the student	500.00

	Adjustment: If the amount of Total Funds Applied First is more thanTuition and Fees, then Adjusted Total Funds Applied First is reduced by the amount over Tuition and Fees	
	Total Funds Applied First	**2,700.00**
	Title IV Aid	
1	Prior Year Title IV Carried Over Credit Balance	1,000.00
9	Federal Direct Loan	1,500.00
7	Federal Pell Grant	1,700.00
5	FSEOG (subject less matching reduction) ($500 - $375 FSEOG and $125 Institutional Match)	500.00
	Federal Work Study Applied to Tuition and Fees (subject to matching reduction)	
5	Adjustment: The amount of FSEOG funds disbursed to a student and the amount of FWS funds credited to the student's account arereduced by the amount of the institutional matching funds	-125.00
	Adjustment: If the amount of Adjusted Total Funds Applied First +Total Student Title IV Revenue is more than Tuition and Fees, thenAdjusted Total Student Title IV Revenue is reduced by the amount over Tuition and Fees	
	Adjustment: If Title IV funds are returned for a student under § 668.22, then Student Title IV Revenue is reduced by the amount returned	
	Adjusted Total Title IV Aid	**4,575.00**

	Other Federal Funds Paid Directly to the Institution	
4	Federal Funds 1	2,000.00
11	Federal Funds 2	3,725.00
	Adjustment: If the amount of Adjusted Total Funds Applied First + Adjusted Total Student Title IV Revenue + Total Other Federal Funds Paid Directly to the Institution is more than Tuition and Fees,then Adjusted Total Other Federal Funds Paid Directly to the Institution is reduced by the amount over Tuition and Fees	
	Adjusted Total Other Federal Funds Paid Directly to theInstitution	**5,725.00**

	Other Federal Funds Paid to Student	
6	Federal Funds 3	500.00
10	Federal Funds 4	3,700.00
	Adjustment: If the amount of Adjusted Funds Applied First + Adjusted Student Title IV Revenue + Adjusted Total Other FederalFunds Paid Directly to the Institution + Total Other Federal FundsPaid Directly to Student is more than Tuition and Fees, then Adjusted Federal Funds Paid Directly to Student is reduced by theamount over Tuition and Fees	-200.00
	Adjusted Total Other Federal Funds Paid Directly to Student	**4,000.00**

	Cash Payments	
3	Student payments	175.00
5	Adjustment: The amount of FSEOG funds disbursed to a student and the amount of FWS funds credited to the student's account areadded to cash for the institutional matching funds	125.00

	Adjustment: If the amount of Adjusted Total Funds Applied First + Adjusted Total Student Title IV Revenue + Adjusted Total Other Federal Funds Paid Directly to the Institution + Adjusted Total Other Federal Funds Paid to Student + Total Cash and Other Non- Title Payments are more than Tuition and Fees, then Adjusted TotalCash and Other Non-Title Payments is reduced by the amount over Tuition and Fees.	-300.00
	Adjusted Total Cash and Other Non-Title IV Aid	0

	Adjusted Total All Federal and Cash Payments	**17,000.00**

Section 2: Revenue by Source One Student Example

Line item in the sample		Amount Disbursed	Adjusted Amount
	Student Title IV Revenue		
1	Title IV Credit Balance Carried Over from Prior Year	1,000.00	1,000.00
9	Federal Direct Loan	1,500.00	1,500.00
7	Federal Pell Grant	1,700.00	1,700.00
5	FSEOG (subject to matching reduction)	500.00	375.00
	Total Student Title IV Revenue	**4,700.00**	**4,525.00**

	Federal Funds Paid Directly to the Institution		
6	Federal Funds 1	2,000.00	2,000.00
10	Federal Funds 2	3,725.00	3,725.00
	Total Student Federal Funds Paid Directly to the Institution	**5,725.00**	**5,725.00**

	Student Federal Funds Paid Directly to the Student		
4	Federal funds 3	500.00	500.00
11	Federal funds 4	3,700.00	3,700.00
13	Refunds Paid to Student		-200.00
	Adjusted Student Federal Funds Paid Directly to Student	**4,200.00**	**4,000.00**
	Adjusted Student Federal Revenue	**14,825.00**	**14,500.00**

	Student Non-Federal Revenue		
12	Grant funds for the student from non-Federal public agencies or private sources independent of the institution	2,200.00	2,200.00
8	Institutional scholarships disbursed to the student	500.00	500.00
3,5,13	Student payments	300.00	0
	Student Non-Title IV Revenue	**3,000.00**	**2,700.00**

	Total Federal and Non-Federal Revenue	**17,500.00**	**17,000.00**

Section 2: Revenue by Source - Attestation

	Amount Disbursed	AdjustedAmount
Student Title IV Revenue		
Title IV Credit Balance Carried Over from Prior Year	45,000.00	45,0000.00
Federal Direct Loan	1,500,000.00	1,500,000.00
Federal Pell Grant	400,700.00	400,700.00
FSEOG (subject to matching reduction)	11,500.00	8,625.00
Total Student Title IV Revenue	**1,957,200.00**	**1,954,325.00**
Refunds Paid to Students		-35,500.00
Adjusted Student Title IV Revenue	**1,957,200.00**	**1,918,825.00**

Federal Funds Paid Directly to the Institution		
Federal Funds 1	200,000.00	200,000.00
Federal Funds 2	1,355,725.00	1,355,725.00
Federal Portion of Other Funds	9,000.00	9,000.00
Total Student Federal Funds Paid Directly to theInstitution	**1,564,725.00**	**1,564,725.00**
Refunds Paid to Students		-20,000.00
Adjust Student Title Federal Funds Paid Directly to the Institution	**1,564,725.00**	**1,544,725.00**

Student Federal Funds Paid Directly to Student		
Federal funds 3	50,000.00	50,000.00
Federal funds 4	3,700.00	3,700.00
Total Student Federal Funds Paid Directly to Student	**53,700.00**	**53,700.00**
Refunds Paid to Student		-200.00
Adjusted Student Federal Funds Paid Directly to Student	**53,700.00**	**53,500.00**

Adjusted Student Federal Revenue	**3,575,625.00**	**3,517,050.00**

Student Non-Federal Revenue	**Amount**	**Adjusted Amount**
Grant funds for the student from non-Federal public agencies orprivate sources independent of the institution		
---State Grant (9.0451% Federal Funds)	99,500.00	90,500.00
---ABC Scholarship	500.00	500.00
Funds provided for the student under a contractual arrangement with a Federal, State, or local government agency for the purpose of providing job training to low-income individuals		
Funds used by a student from Savings plan for educational expenses established by or on behalf of the student that qualify for special tax treatment under the Internal Revenue Code		
Qualified Institutional scholarships disbursed to the student	500.00	500.00
Student payments		
---Third Party Loans	50,000.00	50,000.00
---Third Party Loans- Related Party/Institutional Loans	100,000.00	100,000.00
---ISA Institutional or Related Party	25,000.00	25,000.00
---ISA	75,000.00	75,000.00
--- Student Cash	50,300.00	50,300.00
Student Non-Title IV Revenue	**400,800.00**	**391,800.00**
Refunds Paid to Student		-300.00
Adjusted Non-Federal Revenue	**400,800.00**	**391,500.00**

Revenue From Other Sources (Totals for the Fiscal Year)		
Activities conducted by the institution that are necessary foreducation and training	25,000.000	25,000.00
Funds paid to the institution by, or on behalf of, students foreducation and training in qualified non-Title IV eligible programs	143,000.00	143,000.00
Revenue from Other Sources	**168,000.00**	**168,000.00**
Adjusted Non-Federal Revenue and Revenue from Other Sources	**568,800.00**	**559,500.00**

Total Federal and Non-Federal Revenue	**4,144,425.00**	**4,076,550.00**

Numerator 3,517,050
Denominator 4,076,550 =
86.27%

Section 3: Calculating the Revenue Percentage

$$\frac{\sum \text{Adjusted Student Federal Revenue*}}{\sum \text{Adjusted Student Federal Revenue} + \sum \text{Adjusted Non-Federal Revenue and Revenue from Other Sources}} = \text{90/10 Revenue Percentage}$$

*Adjusted Student Federal Revenue + Adjusted Student Title IV Revenue + Adjusted Other Federal Funds Paid Directly to the Institution + Adjusted Other Federal Paid Directly to Student

∑ Adjusted Student Title IV Revenue = The sum of the amounts of all Federal funds, as adjusted, for each student at the institution during the fiscal year to whom the institution disbursed Title IV Aid and Other Federal Funds

∑ Student Non-Federal Revenue = The sum of the amounts of items applied first and adjusted cash payments for each student at the institution during the fiscal year whose Non-Title IV funds were used to pay all or some of those student's Tuition and Fee charges

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■ 18. Section 668.32 is amended by revising paragraph (c)(2)(ii) as follows:

§ 668.32 Student eligibility.

* * * * *

(c) * * *

(2) * * *

(ii) If the student is a confined or incarcerated individual as defined in 34 CFR 600.2, is enrolled in an eligible prison education program as defined in § 668.236;

* * * * *

■ 19. Section 668.43 is amended by adding paragraph (a)(5)(vi) as follows:

§ 668.43 Institutional information.

(a) * * *

(5) * * *

(vi) If a prison education program, as defined in § 668.236, is designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation (as described in § 668.236(g) and (h)), information regarding whether that occupation typically involves State or Federal prohibitions on the licensure or employment of formerly incarcerated individuals in any other State for which the institution has made a determination about State prohibitions on the licensure or certification of formerly incarcerated individuals;

* * * * *

■ 20. Section 668.171 is amended by revising paragraphs (d)(4) and paragraph (f)(1)(vii) to read as follows:

§ 668.171 General.

* * * * *

(d) * * *

(4) For its most recently completed fiscal year, a proprietary institution did not receive at least 10 percent of its revenue from sources other than Federal funds, as provided under § 668.28(c);

* * * * *

(f) * * *

(1) * * *

(vii) For the non-Federal revenue provision in paragraph (d)(4) of this section, no later than 45 days after the end of the institution's fiscal year, as provided in § 668.28(c)(4).

* * * * *

■ 21. Add subpart P to read as follows:

Subpart P—Prison Education Programs

§ 668.234 Scope and purpose.

This subpart establishes regulations that apply to an institution that offers prison education programs to confined or incarcerated individuals. A confined or incarcerated individual enrolled in an eligible prison education program is eligible for Federal financial assistance under the Federal Pell Grant program. Unless provided in this subpart, confined or incarcerated individuals and institutions that offer prison education programs are subject to the same regulations and procedures that otherwise apply to title IV, HEA program participants.

§ 668.235 Definitions.

The following definitions apply to this subpart:

Additional location has the meaning given in 34 CFR 600.2.

Advisory Committee is a group established by the oversight entity that provides nonbinding feedback to the oversight entity regarding the approval and operation of a prison education program within the oversight entity's jurisdiction.

Confined or incarcerated individual has the meaning given in 34 CFR 600.2.

Feedback Process is the process developed by the oversight entity to gather nonbinding input from relevant stakeholders regarding the approval and operation of a prison education program within the oversight entity's jurisdiction. A feedback process may include an advisory committee.

Oversight entity means—

(1) The appropriate State department of corrections or other entity that is responsible for overseeing correctional facilities; or

(2) The Federal Bureau of Prisons.

Relevant stakeholders are individuals and organizations that provide input as part of a feedback process to the oversight entity regarding the approval and operation of a prison education program within the oversight entity's jurisdiction. These stakeholders must include representatives of incarcerated students, organizations representing incarcerated individuals, state higher education executive offices, and accrediting agencies and may include additional stakeholders as determined by the oversight entity.

§ 668.236 Eligible prison education program.

An *eligible prison education program* means an education or training program that—

(a) Is an eligible program under § 668.8 offered by an institution of higher education as defined in 34 CFR 600.4, or a postsecondary vocational institution as defined in 34 CFR 600.6;

(b) Is offered by an eligible institution that has been approved to operate in a correctional facility by the oversight entity;

(c) After an initial two-year approval, is determined by the oversight entity to be operating in the best interest of students as described by § 668.241;

(d) Offers transferability of credits to at least one institution of higher education (as defined in 34 CFR 600.4 and 600.6) in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release as determined by the institution based on information provided by the oversight entity;

(e) Is offered by an institution that has not been subject, during the five years preceding the date of the determination, to—

(1) Any suspension, emergency action, or termination of programs under this title;

(2) Any final accrediting action that is an adverse action as defined in 34 CFR 602.3 by the institution's accrediting agency or association; or

(3) Any action by the State to revoke a license or other authority to operate;

(f) Is offered by an institution that is not subject to a current initiated adverse action—

(1) If an accrediting agency initiates an adverse action, the institution cannot begin its first or a subsequent prison education program unless and until the initiated adverse action has been rescinded; and

(2) If the institution currently offers one or more prison education programs and is subject to an initiated adverse action, the institution must submit a teach-out plan, as defined in 34 CFR 600.2, to the institution's accrediting agency.

(g) Satisfies any applicable educational requirements for professional licensure or certification, including licensure or certification examinations needed to practice or find employment in the sectors or occupations for which the program prepares the individual, in the State in which the correctional facility is located or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release as determined by the institution not less than annually based on information provided by the oversight entity; and

(h) Does not offer education that is designed to lead to licensure or employment for a specific job or occupation in the State if such job or occupation typically involves prohibitions on the licensure or employment of formerly incarcerated individuals in the State in which the correctional facility is located, or, in the case of a Federal correctional facility, in the State in which most of the individuals confined or incarcerated in such facility will reside upon release as determined by the institution not less than annually based on information provided by the oversight entity.

(1) In the case of State and local correctional facilities, the postsecondary institution does not enroll any student in a prison education program that any Federal law, or State law in which the correctional facility is located, bans, bars, or prohibits licensure or employment based on any criminal conviction or specific types of criminal convictions; or

(2) In the case of a Federal correctional facility, the postsecondary institution does not enroll any student in a prison education program that any Federal law or State law in which more than half of the individuals confined or incarcerated in such facility will reside upon release, bans, bars, or prohibits licensure or employment based on any criminal conviction or specific types of criminal convictions.

(3) Prohibitions on offering education to a confined or incarcerated individual do not include local laws, screening requirements for good moral character or similar provisions; State or Federal laws that have been repealed, even if the repeal has not yet taken effect or if the repeal occurs between assessments of the institution of higher education by the oversight entity; or other restrictions as determined by the Secretary.

§ 668.237 Accreditation requirements.

(a) A prison education program must meet the requirements of the institution's accrediting agency or State approval agency.

(b) In order for any prison education program to qualify as an eligible program, the accrediting agency must have—

(1) Evaluated at least the first prison education program at the first two additional locations to ensure the institution's ability to offer and implement the program based on the agency's accreditation standards, and included it in the institution's grant of accreditation or pre-accreditation;

(2) Evaluated the first additional prison education program offered by a new method of delivery to ensure the institution's ability to offer and implement the program based on the agency's standards, and included it in the institution's grant of accreditation or pre-accreditation;

(3) Performed a site visit as soon as practicable but no later than one year after initiating the prison education program at the first two additional locations; and

(4) Reviewed and approved the methodology for how the institution, in collaboration with the oversight entity, made the determination that the prison education program meets the same standards as substantially similar programs that are not prison education programs at the institution.

(c) A prison education program that does not meet the requirements of the institution's accrediting agency or State approval agency is not an eligible program under § 668.236.

§ 668.238 Application requirements.

(a) An institution that seeks to offer a prison education program must apply to the Secretary to have its first prison education program at the first two additional locations determined to be eligible programs for title IV, HEA program purposes. Following the Secretary's initial approval of a prison education program, additional prison education programs at the same location may be determined to be eligible without further approvals from the Secretary except as required by 34 CFR 600.7, 600.10, 600.20(c)(1), or 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.

(b) The institution's prison education program application must provide information satisfactory to the Secretary that includes—

(1) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;

(2) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of prison education program(s) and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency;

(3) The name of the correctional facility and documentation from the oversight entity that the prison education program has been approved to operate in the correctional facility;

(4) Documentation detailing the methodology including thresholds, benchmarks, standards, metrics, data, or other information the oversight entity used in making the determination that the program is in the best interest of students for all indictors under § 668.241 and how all the information was collected;

(5) Information about the types of services offered to admitted students, including: orientation, tutoring and academic and reentry counseling. If reentry counseling is provided by a community-based organization that has partnered with the eligible prison education program, institution, or correctional facility to provide reentry services, then information about the types of services that the community-based organization offers;

(6) Affirmative acknowledgement that the Secretary can limit or terminate approval of an institution to provide a prison education program as described in § 668.237;

(7) Affirmative agreement to submit the report to the Secretary as described in § 668.239;

(8) Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of incarcerated individuals, which will be reported to the Department of Education; and

(9) Such other information as the Secretary deems necessary.

(c) For the second or subsequent eligible prison education program at a location, to fulfill requirements under 34 CFR 600.21, an institution submits—

(1) Documentation from the institution's accrediting agency noting that the institution complies with § 668.236(f) and was not subject to any final accrediting action that is an adverse action by the institution's accrediting agency or association in the last five years;

(2) Documentation from the institution noting that the institution was not subject to any action by the State to revoke a license or other authority to operate in the last five years; and

(3) Documentation that the institution has entered into an agreement with the oversight entity to obtain data about transfer and release dates of incarcerated individuals, which will be reported to the Department of Education pursuant to § 668.239.

§ 668.239 Reporting requirements.

(a) An institution must submit reports, in accordance with deadlines established and published by the Secretary in the **Federal Register**.

(b) The institution reports such information as the Secretary requires, in compliance with procedures the Secretary describes.

(c) The institution reports information about transfer and release dates of incarcerated individuals, as required by the Secretary, through an agreement with the oversight entity.

§ 668.240 Limit or termination of approval.

(a) The Secretary limits or terminates approval of an institution to provide an eligible prison education program if the Secretary determines that the institution violated any terms of this subpart or that the information that the institution submitted as a basis for approval to the Secretary, accrediting agency, State agency, or oversight entity was materially inaccurate.

(b) If the Secretary initiates a limitation or termination action of an institution's approval to operate an eligible prison education program, the institution must submit a teach-out plan and, if practicable, a teach-out agreement(s) (as defined in 34 CFR 600.2) to its accrediting agency upon occurrence of the event.

§ 668.241 Best interest determination.

(a) An oversight entity's determination that a prison education program is operating in the best interest of students—

(1) Must include an assessment of all the following—

(i) Whether the rate of confined or incarcerated individuals continuing their education post-release, as determined by the percentage of students who reenroll in higher education reported by the Department, meets thresholds established by the oversight entity with input from relevant stakeholders;

(ii) Whether job placement rates in the relevant field for such individuals meet any applicable standards required by the accrediting agency for the institution or program or a State in which the institution is authorized. If no job placement rate standard applies to prison education programs offered by the institution, the oversight entity must define, and the institution must report, a job placement rate, with input from relevant stakeholders;

(iii) Whether the earnings for such individuals, or the median earnings for graduates of the same or similar programs at the institution, as measured by the Department, exceed those of a typical high school graduate in the State;

(iv) Whether the experience, credentials, and rates of turnover or departure of instructors for a prison education program are substantially similar to other programs at the institution, accounting for the unique geographic and other constraints of prison education programs;

(v) Whether the transferability of credits for courses available to confined or incarcerated individuals and the applicability of such credits toward related degree or certificate programs is substantially similar to those at other similar programs at the institution, accounting for the unique geographic and other constraints of prison education programs;

(vi) Whether the prison education program's offering of relevant academic and career advising services to participating confined or incarcerated individuals while they are confined or incarcerated, in advance of reentry, and upon release, is substantially similar to offerings to a student who is not a confined or incarcerated individual and who is enrolled in, and may be preparing to transfer from, the same institution, accounting for the unique geographic and other constraints of prison education programs;

(vii) Whether the institution ensures that all formerly incarcerated students are able to fully transfer their credits and continue their programs at any location of the institution that offers a comparable program, including by the same mode of instruction, barring exceptional circumstances surrounding the student's conviction; and

(2) May include an assessment of all the following—

(i) Whether the rates of recidivism, which do not include any recidivism by the student within a reasonable number of years of release and which only include new felony convictions as defined by United States Sentencing Guideline § 4A1.1(a) as ''each sentence of imprisonment exceeding one year and one month,'' meet thresholds set by the oversight entity;

(ii) Whether the rates of completion reported by the Department, which does not include any students who were transferred across facilities and which accounts for the status of part-time students, meet thresholds set by the oversight entity with input from relevant stakeholders; and

(iii) Other indicators pertinent to program success as determined by the oversight entity.

(b) An oversight entity makes the best interest determination—

(1) Through a feedback process that considers input from relevant stakeholders; and

(2) In light of the totality of the circumstances.

(c) If the oversight entity does not find a program to be in the best interest of students, it must allow for programs to re-apply within a reasonable timeframe.

(d) After the two years of initial approval under § 668.236, the institution must be determined by the oversight entity to be operating in the best interest of students, as defined in paragraph (a), of this section.

(e)(1) After its initial determination that a program is operating in the best interest of students under paragraph (c) of this section, the institution must obtain subsequent final evaluations of each eligible prison education program from the responsible oversight entity not less than 120 calendar days prior to the expiration of each of the institution's Program Participation Agreements, except that the oversight entity may make a determination between subsequent evaluations based on the oversight entity's regular monitoring and evaluation of program outcomes.

(2) Each subsequent evaluation must—

(i) Include the entire period following the prior determination and be based on the factors described under paragraph (a) of this section for all students enrolled in the program since the prior determination;

(ii) Include input from relevant stakeholders through the oversight entity's feedback process; and

(iii) Be submitted to the Secretary no later than 30 days following completion of the evaluation.

(f)(1) The institution must obtain and maintain documentation of the methodology by which the oversight entity made each determination under paragraph (a) of this section and § 668.236(b) for review by the institution's accrediting agency, submission of the application to the Department for the approval of the first program at the first two additional locations, the input of relevant stakeholders through the oversight entity's feedback process described in paragraphs (b)(1) and (e)(2)(ii) of the section, reporting to the Department, and for public disclosure.

(2) The institution must maintain the documentation described in (1) for as long as the program is active or, if the program is discontinued, for three years following the date of discontinuance.

§ 668.242 Transition to a prison education program.

For institutions operating eligible prison education programs in a correctional facility that is not a Federal or State penal institution:

(a) A confined or incarcerated student who otherwise meets the eligibility requirements to receive a Federal Pell Grant and is enrolled in an eligible program that does not meet the requirements under subpart P of this part may continue to receive a Federal Pell Grant until the earlier of:

(1) July 1, 2029;

(2) The student reaches the maximum timeframe for program completion as defined under § 668.34; or

(3) The student has exhausted Pell Grant eligibility as defined under 34 CFR 690.6(e).

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

PART 690—FEDERAL PELL GRANT PROGRAM

■ 22. The authority citation for part 90 continues to read as follows:

Authority: 20 U.S.C. 1070a, 1070g, unless otherwise noted.

■ 23. Section 690.62 is revised to read as follows:

§ 690.62 Calculation of a Federal Pell Grant.

(a) The amount of a student's Pell Grant for an academic year is based upon the payment and disbursement schedules published by the Secretary for each award year.

(b)(1)(i) For a confined or incarcerated individual enrolled in an eligible prison education program, no Federal Pell Grant shall exceed the cost of attendance (as defined in section 472 of the HEA) at the institution at which that student is in attendance.

(ii) If an institution determines that the amount of a Federal Pell Grant for that student exceeds the cost of attendance for that year, the amount of the Federal Pell Grant shall be reduced until the Federal Pell Grant does not exceed the cost of attendance at such institution and does not result in a title IV credit balance under 34 CFR 668.164(h).

(2)(i) If a confined or incarcerated student's Pell Grant, combined with any other financial assistance, exceeds the student's cost of attendance, the financial assistance other than the Pell Grant must be reduced by the amount that the total financial assistance exceeds the student's cost of attendance.

(ii) If the student's other financial assistance cannot be reduced, the student's Pell Grant must be reduced by the amount that the student's total financial assistance exceeds the student's cost of attendance.

■ 24. Add Section 690.68 to read as follows:

§ 690.68 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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