



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

Issue Paper 4: Financial Responsibility

Session 1: January 18-21, 2022

Issue: Financial Responsibility

Statutory cites: §498(c) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 668.15, 668.23, Subpart L, 668.174

Summary of issues:

The Department is required under the Higher Education Act to monitor institutions' financial responsibility, primarily in an effort to protect students and taxpayers from institutions that are not financially viable. However, standard mechanisms of measuring financial responsibility—namely, through the composite score—do not always suffice to assess the risk of closure or liabilities that an institution may face. The Department proposes regulatory changes that will increase the ability to identify high-risk events and require financial protection as needed. The Department also seeks to streamline the regulations by consolidating the financial responsibility requirements for changes of ownership in Subpart L and reserving the existing regulations at 34 CFR 668.15. The Department is not proposing changes to the composite score calculation at this time.

Proposal:

Under 668.15, Factors of financial responsibility:

- 1. Reserve the entirety of 668.15 and instead incorporate components of that section into the financial responsibility requirements in proposed 668.176** of Subpart L of the regulations. This will streamline the regulations to ensure that financial responsibility requirements are all located in Subpart L.

Under 668.23, Compliance audits and audited financial statements:

- 1. Ensure that audit reports are submitted in a timely manner**, by the earlier of 30 days after the completion of the report or six months after the end of the fiscal year. By requiring reports to be submitted when they are available, the Department will be able to evaluate the results sooner and on a rolling basis.

Under 668.171(b), General standards of financial responsibility:

- 1. Require institutions to demonstrate they are able to meet their financial obligations** by noting additional cases that constitute a failure to do so, including failure to make debt payments for more than 90 days, failure to make payroll obligations, or borrowing from employee retirement plans without authorization.

Under 668.171(c), Mandatory triggering events: The Department proposes to revise the set of conditions that automatically require posting of financial protection if the event occurs as prescribed in the regulations. These triggers are designed to measure external events or financial circumstances that may

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not appear in the institution's regular financial statements and/or that may not yet be reflected in the composite score.

1. **Revise triggering events for debts, liabilities, and losses.** This includes clarifying that settlements, final judgments, or administrative proceeding determinations will trigger a financial protection requirement pre-appeal if the amount of the liability would cause the composite score to fail. The proposed language also restores a previously eliminated trigger related to lawsuits, and clarifies that State or Federal lawsuits, or qui tam lawsuits in which the Federal government decides to intervene, will be mandatory triggering events. The language also adds a new trigger related to adjudicated borrower defense to repayment claims where the approved loan discharges total more than 5 percent of title IV volume at an institution.
2. **Clarify language related to withdrawal of owner's equity for proprietary institutions** to ensure that withdrawals are accurately captured.
3. **Restore and revise a financial protection trigger for cases where the institution is required to submit a teach-out plan and/or agreement**, pursuant to regulations at 34 CFR 602.24(c)(1), related to auditor concerns, probation or equivalent status by the accrediting agency, or a requirement by the Secretary that an institution on provisional status submit a teach-out plan and/or agreement as a condition of that status.
4. **Move a trigger related to major actions by a state authorizer** from discretionary to mandatory, ensuring financial protection if an institution may be subject to a loss of title IV eligibility and closure due to state actions against the school.
5. **Refine the language for financial protection triggers affecting publicly traded institutions** to better reflect early warning signs of problems with these schools.
6. **Move triggers related to loss of Title IV eligibility due to failure to meet 90/10 requirements or two years of a failed cohort default rate that is not successfully appealed** from discretionary triggers to mandatory triggers. Also clarify that the 90/10 triggering event requires financial protection be held by the Secretary for at least two years, ensuring that proprietary institutions provide adequate financial protection if they may fail again to meet the 90/10 requirements.
7. **Adds a new trigger assessing the impact when institutions make a contribution to the school in the quarter before the end of the fiscal year, and then make a distribution in the first two quarters of the next fiscal year.** The Department is aware of attempts to manipulate financial responsibility scores through this practice, so assessing the effects of those transactions will allow the Department to obtain financial protection where it is required.

Under 668.171(d), Discretionary triggering events: The Department proposes to revise the set of conditions that may, at the discretion of the Secretary, require posting of financial protection if the event occurs as prescribed in the regulations. These triggers are designed to measure external events or financial circumstances that may not appear in the institution's regular financial statements and/or that may not yet be reflected in the composite score.

1. **Refine the language related to accreditor actions** to clarify that probation, show cause, or equivalent statuses may all require financial protection at the discretion of the Secretary.
2. **Restore a trigger that allows the Department to seek financial protection in the event that the institution sees significant fluctuations in title IV volume.** This would allow for financial protection if volume changed significantly in consecutive award years or across a period of award years.

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- 3. Allow the Secretary to obtain financial protection on the basis of interim financial data** submitted to the Department that show significant concerns with respect to cash flows, liquidity, or withdrawal rates. This will ensure that interim financial data can be used to determine significant problems and request financial protection in a timely manner.
- 4. Restores a prior trigger related to pending claims for borrower defense relief** when the Secretary has formed a group process to consider those claims.
- 5. Adds two new triggers related to indications of possible future closure.** One relates to the discontinuation of a significant share of academic programs at the institution, which may be an indication that the institution is no longer able to offer the education for which students enrolled. The second relates to the closure of most of an institution's locations, or the closure of ground-based locations while maintaining an online presence.

Under 668.171(e), Recalculating the composite score:

- 1. Make technical changes** to adjust the cross-references to the triggering events in (c) and (d), and to more accurately reflect the triggering events as they are revised throughout that section.

Under 668.171(f), Reporting requirements:

- 1. Make technical changes** to adjust the reporting requirements to reflect changes to the mandatory and discretionary triggering events.

Under 668.171(h), Audit opinions and disclosures:

- 1. Adjust the language regarding an auditor's opinion of doubt about the institution's ability to continue operations** to clarify that the Department may independently assess whether the auditor's concerns have been addressed or whether the opinion of doubt reflects a lack of financial responsibility.

Under 668.174, Past performance:

- 1. Clarify the language related to compliance audit or program review findings that lead to a liability of at least 5 percent of Title IV volume** at the institution, so that the language more clearly suggests the reports in question were those issued in the two most recent years, rather than reviews conducted in the two most recent years.

Under 668.175, Alternative standards and requirements:

- 1. Make technical changes** to adjust cross-references and clarify the language related to financial surety.

Under 668.176, Change of ownership:

- 1. Consolidate financial responsibility requirements for institutions undergoing a change in ownership** into Subpart L through a new proposed section 668.176. This will help to clarify the regulations so that institutions are aware of the requirements that apply in the event of a change in ownership. This includes specifying the requirements for a materially complete application, which include two years of audited financial statements at the level of the change in ownership or a letter of credit requirement. Proposed section 668.176 also specifies conditions for financial responsibility, including not having operating losses, requires positive assets, and requires a

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passing composite score and compliance with other requirements of Subpart L. Finally, the proposed language requires institutions to receive a temporary provisional Program Participation Agreement following a change in ownership.

Proposed Regulation Redline:

§ 668.15 ~~Factors of financial responsibility. [Reserved]~~

~~(a) General. To begin and to continue to participate in any Title IV, HEA program, an institution must demonstrate to the Secretary that the institution is financially responsible under the requirements established in this section.~~

~~(b) General standards of financial responsibility. In general, the Secretary considers an institution to be financially responsible only if it—~~

~~(1) Is providing the services described in its official publications and statements;~~

~~(2) Is providing the administrative resources necessary to comply with the requirements of this subpart;~~

~~(3) Is meeting all of its financial obligations, including but not limited to—~~

~~(i) Refunds that it is required to make; and~~

~~(ii) Repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary;~~

~~(4) Is current in its debt payments. The institution is not considered current in its debt payments if—~~

~~(i) The institution is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statement; or~~

~~(ii) the institution fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover those funds;~~

~~(5) Except as provided in paragraph (d) of this section, in accordance with procedures established by the Secretary, submits to the Secretary an irrevocable letter of credit, acceptable and payable to the Secretary equal to 25 percent of the total dollar amount of Title IV, HEA program refunds paid by the institution in the previous fiscal year;~~

~~(6) Has not had, as part of the audit report for the institution's most recently completed fiscal year—~~

~~(i) A statement by the accountant expressing substantial doubt about the institution's ability to continue as a going concern; or~~

~~(ii) A disclaimed or adverse opinion by the accountant;~~

~~(7) For a for-profit institution—~~

~~(i)~~

~~(A) Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current~~

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~~liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables;~~

~~(B) Has not had operating losses in either or both of its two latest fiscal years that in sum result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the two year period. The Secretary may calculate an operating loss for an institution by excluding from net income: extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and, the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth shall exclude all assets defined as intangible in accordance with generally accepted accounting principles; and~~

~~(C) Had, for its latest fiscal year, a positive tangible net worth. In applying this standard, a positive tangible net worth occurs when the institution's tangible assets exceed its liabilities. The calculation of tangible net worth shall exclude all assets classified as intangible in accordance with the generally accepted accounting principles; or~~

~~(ii) Demonstrates to the satisfaction of the Secretary that it has currently issued and outstanding debt obligations that are (without insurance, guarantee, or credit enhancement) listed at or above the second highest rating level of credit quality given by a nationally recognized statistical rating organization;~~

~~(8) For a nonprofit institution—~~

~~(i)~~

~~(A) Prepares a classified statement of financial position in accordance with generally accepted accounting principles or provides the required information in notes to the audited financial statements;~~

~~(B) Demonstrates at the end of its latest fiscal year, an acid test ratio of at least 1:1. For purposes of this section, the acid test ratio shall be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio shall exclude all unsecured or uncollateralized related party receivables.~~

~~(C)~~

~~(1) Has, at the end of its latest fiscal year, a positive unrestricted current fund balance or positive unrestricted net assets. In calculating the unrestricted current fund balance or the unrestricted net assets for an institution, the Secretary may include funds that are temporarily restricted in use by the institution's governing body that can be transferred to the current unrestricted fund or added to net unrestricted assets at the discretion of the governing body; or~~

~~(2) Has not had, an excess of current fund expenditures over current fund revenues over both of its 2 latest fiscal years that results in a decrease exceeding 10 percent in either the unrestricted current fund balance or the~~

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~~unrestricted net assets at the beginning of the first year of the 2-year period. The Secretary may exclude from net changes in fund balances for the operating loss calculation: Extraordinary gains or losses; income or losses from discontinued operations; prior period adjustment; and the cumulative effect of changes in accounting principle. In calculating the institution's unrestricted current fund balance or the unrestricted net assets, the Secretary may include funds that are temporarily restricted in use by the institution's governing body that can be transferred to the current unrestricted fund or added to net unrestricted assets at the discretion of the governing body; or~~

~~(ii) Demonstrates to the satisfaction of the Secretary that it has currently issued and outstanding debt obligations which are (without insurance, guarantee, or credit enhancement) listed at or above the second highest rating level of credit quality given by a nationally recognized statistical rating organization.~~

~~(9) For a public institution—~~

~~(i) Has its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity;~~

~~(iii) Has a positive current unrestricted fund balance if reporting under the Single Audit Act;~~

~~(iii) Has a positive unrestricted current fund in the State's Higher Education Fund, as presented in the general purpose financial statements;~~

~~(iv) Submits to the Secretary, a statement from the State Auditor General that the institution has, during the past year, met all of its financial obligations, and that the institution continues to have sufficient resources to meet all of its financial obligations; or~~

~~(v) Demonstrates to the satisfaction of the Secretary that it has currently issued and outstanding debt obligations which are (without insurance, guarantee, or credit enhancement) listed at or above the second highest rating level of credit quality given by a nationally recognized statistical rating organization.~~

~~(e) Past performance of an institution or persons affiliated with an institution. An institution is not financially responsible if—~~

~~(1) A person who exercises substantial control over the institution or any member or members of the person's family alone or together—~~

~~(i)~~

~~(A) Exercises or exercised substantial control over another institution or a third party servicer that owes a liability for a violation of a Title IV, HEA program requirement; or~~

~~(B) ————Owes a liability for a violation of a Title IV, HEA program requirement; and~~

~~(ii) That person, family member, institution, or servicer does not demonstrate that the liability is being repaid in accordance with an agreement with the Secretary; or~~

~~(2) The institution has—~~

Commented [B1]: To prevent gaming of the system by public universities through acquisition of subsidiaries that they declare to be public, but exempt from sunshine laws and governance provisions applicable to all publics

ADD a new provision when moving to 668.176:

Is organized as a public institution under the laws of the governmental entity backing its liabilities, subject to all the relevant governance and public disclosure laws of that governmental entity applicable to other public institutions within its jurisdiction

Commented [B2]: To prevent moral hazard of allowing public institutions that already enjoy full faith and credit to surreptitiously extend what was explicitly extend benefits and protections explicitly extended to them to acquisitions and subsidiaries without the superseding governmental entity's approval and acceptance of consequences:

ADD a new provision when moving to 668.176:

provided that such entity is not itself a participating institution in federal student aid programs, and the institution agrees to waive sovereign immunity in case of disputes involving liabilities owed to students or the Secretary

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~~(i) Been limited, suspended, terminated, or entered into a settlement agreement to resolve a limitation, suspension, or termination action initiated by the Secretary or a guaranty agency (as defined in 34 CFR part 682) within the preceding five years;~~

~~(iii) Had—~~

~~(A) An audit finding, during its two most recent audits of its conduct of the Title IV, HEA programs, that resulted in the institution's being required to repay an amount greater than five percent of the funds that the institution received under the Title IV, HEA programs for any award year covered by the audit; or~~

~~(B) A program review finding, during its two most recent program reviews, of its conduct of the Title IV, HEA programs that resulted in the institution's being required to repay an amount greater than five percent of the funds that the institution received under the Title IV, HEA programs for any award year covered by the program review;~~

~~(iii) Been cited during the preceding five years for failure to submit acceptable audit reports required under this part or individual Title IV, HEA program regulations in a timely fashion; or~~

~~(iv) Failed to resolve satisfactorily any compliance problems identified in program review or audit reports based upon a final decision of the Secretary issued pursuant to subpart G or subpart H of this part.~~

~~(d) Exceptions to the general standards of financial responsibility.~~

~~(1)~~

~~(i) An institution is not required to meet the standard in paragraph (b)(5) of this section if the Secretary determines that the institution—~~

~~(A)~~

~~(1) Is located in, and is legally authorized to operate within, a State that has a tuition recovery fund that is acceptable to the Secretary and ensures that the institution is able to pay all required refunds; and~~

~~(2) Contributes to that tuition recovery fund.~~

~~(B) Has its liabilities backed by the full faith and credit of the State, or by an equivalent governmental entity; or~~

~~(C) As determined under paragraph (g) of this section, demonstrates, to the satisfaction of the Secretary, that for each of the institution's two most recently completed fiscal years, it has made timely refunds to students in accordance with § 668.22(j), and that it has met or exceeded all of the financial responsibility standards in this section that were in effect for the corresponding periods during the two-year period.~~

~~(ii) In evaluating an application to approve a State tuition recovery fund to exempt its participating schools from the Federal cash reserve requirements, the Secretary will consider the extent to which the State tuition recovery fund:~~

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- ~~(A) Provides refunds to both in-state and out-of-state students;~~
- ~~(B) Allocates all refunds in accordance with the order delineated in § 668.22(i); and~~
- ~~(C) Provides a reliable mechanism for the State to replenish the fund should any claims arise that deplete the funds assets.~~

~~(2) The Secretary considers an institution to be financially responsible, even if the institution is not otherwise financially responsible under paragraphs (b)(1) through (4) and (b)(6) through (9) of this section, if the institution—~~

- ~~(i) Submits to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary equal to not less than one-half of the Title IV, HEA program funds received by the institution during the last complete award year for which figures are available; or~~
- ~~(ii) Establishes to the satisfaction of the Secretary, with the support of a financial statement submitted in accordance with paragraph (e) of this section, that the institution has sufficient resources to ensure against its precipitous closure, including the ability to meet all of its financial obligations (including refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary). The Secretary considers the institution to have sufficient resources to ensure against precipitous closure only if—~~

~~(A) The institution formerly demonstrated financial responsibility under the standards of financial responsibility in its preceding audited financial statement (or, if no prior audited financial statement was requested by the Secretary, demonstrates in conjunction with its current audit that it would have satisfied this requirement), and that its most recent audited financial statement indicates that—~~

- ~~(1) All taxes owed by the institution are current;~~
- ~~(2) The institution's net income, or a change in total net assets, before extraordinary items and discontinued operations, has not decreased by more than 10 percent from the prior fiscal year, unless the institution demonstrates that the decreased net income shown on the current financial statement is a result of downsizing pursuant to a management approved business plan;~~
- ~~(3) Loans and other advances to related parties have not increased from the prior fiscal year unless such increases were secured and collateralized, and do not exceed 10 percent of the prior fiscal year's working capital of the institution;~~
- ~~(4) The equity of a for-profit institution, or the total net assets of a non-profit institution, have not decreased by more than 10 percent of the prior year's total equity;~~
- ~~(5) Compensation for owners or other related parties (including bonuses, fringe benefits, employee stock option allowances, 401k contributions, deferred compensation allowances) has not increased from the prior year at a rate higher than for all other employees;~~

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~~(6) The institution has not materially leveraged its assets or income by becoming a guarantor on any new loan or obligation on behalf of any related party;~~

~~(7) All obligations owed to the institution by related parties are current, and that the institution has demanded and is receiving payment of all funds owed from related parties that are payable upon demand. For purposes of this section, a person does not become a related party by attending an institution as a student;~~

~~(B) There have been no material findings in the institution's latest compliance audit of its administration of the Title IV HEA programs; and~~

~~(C) There are no pending administrative or legal actions being taken against the institution by the Secretary, any other Federal agency, the institution's nationally recognized accrediting agency, or any State entity.~~

~~(3) An institution is not required to meet the acid test ratio in paragraph (b)(7)(i)(A) or (b)(8)(i)(B) of this section if the institution is an institution that provides a 2-year or 4-year educational program for which the institution awards an associate or baccalaureate degree that demonstrates to the satisfaction of the Secretary that—~~

~~(i) There is no reasonable doubt as to its continued solvency and ability to deliver quality educational services;~~

~~(ii) It is current in its payment of all current liabilities, including student refunds, repayments to the Secretary, payroll, and payment of trade creditors and withholding taxes; and~~

~~(iii) It has substantial equity in institution-occupied facilities, the acquisition of which was the direct cause of its failure to meet the acid test ratio requirement.~~

~~(4) The Secretary may determine an institution to be financially responsible even if the institution is not otherwise financially responsible under paragraph (c)(1) of this section if—~~

~~(i) The institution notifies the Secretary, in accordance with 34 CFR 600.30, that the person referenced in paragraph (c)(1) of this section exercises substantial control over the institution; and~~

~~(ii)~~

~~(A) The person repaid to the Secretary a portion of the applicable liability, and the portion repaid equals or exceeds the greater of—~~

~~(1) The total percentage of the ownership interest held in the institution or third-party servicer that owes the liability by that person or any member or members of that person's family, either alone or in combination with one another;~~

~~(2) The total percentage of the ownership interest held in the institution or servicer that owes the liability that the person or any member or members of the person's family, either alone or in combination with one another, represents~~

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~~or represented under a voting trust, power of attorney, proxy, or similar agreement; or~~

~~(3) Twenty five percent, if the person or any member of the person's family is or was a member of the board of directors, chief executive officer, or other executive officer of the institution or servicer that owes the liability, or of an entity holding at least a 25 percent ownership interest in the institution that owes the liability;~~

~~(B) The applicable liability described in paragraph (c)(1) of this section is currently being repaid in accordance with a written agreement with the Secretary; or~~

~~(C) The institution demonstrates why—~~

~~(1) The person who exercises substantial control over the institution should nevertheless be considered to lack that control; or~~

~~(2) The person who exercises substantial control over the institution and each member of that person's family nevertheless does not or did not exercise substantial control over the institution or servicer that owes the liability.~~

~~(e) {Reserved}~~

~~(f) Definitions and terms. For the purposes of this section—~~

~~(1)~~

~~(i) An "ownership interest" is a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of the operation of, an institution, institution's parent corporation, a third-party servicer, or a third-party servicer's parent corporation.~~

~~(ii) The term "ownership interest" includes, but is not limited to—~~

~~(A) ————— An interest as tenant in common, joint tenant, or tenant by the entireties;~~

~~(B) A partnership; and~~

~~(C) An interest in a trust.~~

~~(iii) The term "ownership interest" does not include any share of the ownership or control of, or any right to share in the proceeds of the operation of—~~

~~(A) A mutual fund that is regularly and publicly traded;~~

~~(B) An institutional investor; or~~

~~(C) A profit-sharing plan, provided that all employees are covered by the plan;~~

~~(2) The Secretary generally considers a person to exercise substantial control over an institution or third-party servicer, if the person—~~

~~(i) Directly or indirectly holds at least a 25 percent ownership interest in the institution or servicer;~~

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~~(ii) Holds, together with other members of his or her family, at least a 25 percent ownership interest in the institution or servicer;~~

~~(iii) Represents, either alone or together with other persons, under a voting trust, power of attorney, proxy, or similar agreement one or more persons who hold, either individually or in combination with the other persons represented or the person representing them, at least a 25 percent ownership in the institution or servicer; or~~

~~(iv) Is a member of the board of directors, the chief executive officer, or other executive officer of—~~

~~(A) The institution or servicer; or~~

~~(B) An entity that holds at least a 25 percent ownership interest in the institution or servicer; and~~

~~(3) The Secretary considers a member of a person's family to be a parent, sibling, spouse, child, spouse's parent or sibling, or sibling's or child's spouse.~~

~~(g) Two-year performance requirement.~~

~~(1) The Secretary considers an institution to have satisfied the requirements in paragraph (d)(1)(C) of this section if the independent certified public accountant, or government auditor who conducted the institution's compliance audits for the institution's two most recently completed fiscal years, or the Secretary or a State or guaranty agency that conducted a review of the institution covering those fiscal years—~~

~~(i)~~

~~(A) For either of those fiscal years, did not find in the sample of student records audited or reviewed that the institution made late refunds to 5 percent or more of the students in that sample. For purposes of determining the percentage of late refunds under this paragraph, the auditor or reviewer must include in the sample only those title IV, HEA program recipients who received or should have received a refund under § 668.22; or~~

~~(B) The Secretary considers the institution to have satisfied the conditions in paragraph (g)(1)(i)(A) of this section if the auditor or reviewer finds in the sample of student records audited or reviewed that the institution made only one late refund to a student in that sample; and~~

~~(ii) For either of those fiscal years, did not note a material weakness or a reportable condition in the institution's report on internal controls that is related to refunds.~~

~~(2) If the Secretary or a State or guaranty agency finds during a review conducted of the institution that the institution no longer qualifies for an exemption under paragraph (d)(1)(C) of this section, the institution must—~~

~~(i) Submit to the Secretary the irrevocable letter of credit required in paragraph (b)(5) of this section no later than 30 days after the Secretary or State or guaranty agency notifies the institution of that finding; and~~

~~(ii) Notify the Secretary of the guaranty agency or State that conducted the review.~~

~~(3) If the auditor who conducted the institution's compliance audit finds that the institution no longer qualifies for an exemption under paragraph (d)(1)(C) of this section, the institution must submit to the Secretary the irrevocable letter of credit required in paragraph (b)(5) of this section no later than 30 days after the date the institution's compliance audit must be submitted to the Secretary.~~

~~(h) Foreign institutions. The Secretary makes a determination of the financial responsibility for a foreign institution on the basis of financial statements submitted under § 668.23(h).~~

§ 668.23 Compliance audits and audited financial statements.

(a) General -

(1) Independent auditor. For purposes of this section, the term “independent auditor” refers to an independent certified public accountant or a government auditor. To conduct an audit under this section, a government auditor must meet the Government Auditing Standards qualification and independence standards, including standards related to organizational independence.

(2) Institutions. An institution that participates in any title IV, HEA program must at least annually have an independent auditor conduct a compliance audit of its administration of that program and an audit of the institution's general purpose financial statements.

(3) Third-party servicers. Except as provided under this part or 34 CFR part 682, with regard to complying with the provisions under this section a third-party servicer must follow the procedures contained in the audit guides developed by and available from the Department of Education's Office of Inspector General. A third-party servicer is defined under § 668.2 and 34 CFR 682.200.

(4) Submission deadline. Except as provided by the Single Audit Act, Chapter 75 of title 31, United States Code, an institution must submit annually to the Secretary its compliance audit and its audited financial statements ~~no later than~~ by the earlier of 30 days following the date of the auditor's report or six months after the last day of the institution's fiscal year.

(5) Audit submission requirements. In general, the Secretary considers the compliance audit and audited financial statement submission requirements of this section to be satisfied by an audit conducted in accordance with the Office of Management and Budget Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, or the audit guides developed by and available from the Department of Education's Inspector General, whichever is applicable to the entity, and provided that the Federal student aid functions performed by that entity are covered in the submission. (Both OMB circulars are available by calling OMB's Publication Office at (202) 395-7332, or they can be obtained in electronic form on the OMB Home Page (<http://www.whitehouse.gov>).

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SUBPART L - FINANCIAL RESPONSIBILITY

§ 668.171 General.

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(b) General standards of financial responsibility. Except as provided under paragraphs ~~(c), (d), and~~ (h) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that -

(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and appendices A and B to this subpart;

(2) The institution has sufficient cash reserves to make required returns of unearned title IV, HEA program funds, as provided under § 668.173;

(3) The institution is able to meet all of its financial obligations and provide the administrative resources necessary to comply with title IV, HEA program requirements. An institution is not deemed able to meet its financial or administrative obligations if -

(i) It fails to make refunds under its refund policy, ~~or~~ return title IV, HEA program funds for which it is responsible under § 668.22, or pay title IV credit balances as required under §668.164(h)(ii);

(ii) It fails to make repayments to the Secretary for any debt or liability arising from the institution's participation in the title IV, HEA programs;

(iii) It fails to make a payment in accordance with an existing undisputed financial obligation for more than 90 days;

(iv) It fails to make payroll obligations per its published payroll schedule;

(v) It borrows funds from retirement plans or restricted funds without authorization; or

(vi) It is subject to an action or event described in paragraph (c) of this section (mandatory triggering events), or an action or event that the Secretary determines is likely to have a material adverse effect on the financial condition of the institution under paragraph (d) of this section (discretionary triggering events); and

(4) The institution or persons affiliated with the institution are not subject to a condition of past performance under § 668.174(a) or (b).

(c) Mandatory triggering events. An institution is not able to meet its financial or administrative obligations under paragraph (b)(3)(~~viii~~) of this section if -

(1) ~~After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, o~~ne or more of the following occurs:

(i) Debts, liabilities, and losses.

(A) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score, the institution is required to pay any debt or incurs any liability from a settlement, final judgment in a judicial proceeding, or final a determination arising from an administrative or judicial action or proceeding initiated by a Federal or State entity, proceeding, and as a result of the debts, liabilities, or losses that have stemmed from those actions or events, the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (e) of this

Commented [B3]: add "and federal and state payroll tax obligations"

Other suggested triggers: If the fiduciary obligations of its directors and officers reasonably expand to cover creditors because it has entered the vicinity of insolvency ("zone of bankruptcy")

Commented [B4]: , which shall include past ownership or service as director, officer, or executive with an institution whose closure resulted in closed school discharges for more than 10 percent of the previous institution's enrollment at the time of closure

~~section. A determination arising from an administrative action or proceeding initiated by a Federal or State entity means the determination was made only after an institution had notice and an opportunity to submit its position before a hearing official. A final determination arising from an administrative action or proceeding initiated by a Federal entity includes a final determination arising from any administrative action or proceeding initiated by the Secretary. For purposes of this section, the liability is the amount stated in the final judgment or final determination. A judgment or determination becomes final when the institution does not appeal or when the judgment or determination is not subject to further appeal;~~

~~(B) The institution is being sued for financial relief in an action brought on or after July 1, 2023, by a Federal or State authority, or through a qui tam lawsuit in which the Federal government has intervened and the suit has been pending for 120 days; or~~

~~(C) The Secretary has adjudicated claims in favor of borrowers under the loan discharge provisions in 34 CFR part 685 and the total amount of the loans discharged since July 1, 2023, is equal to or greater than 5 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.~~

~~(B)(i) *Withdrawal of owner's equity.*~~

~~(A) For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means, including by declaring a dividend (e.g., a capital distribution that is the equivalent of wages in a sole proprietorship or partnership, a distribution of dividends or return of capital, or a related party receivable), unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated; or is the equivalent of wages in a sole proprietorship or partnership or a required dividend or return of capital; and~~

~~(B) As a result of that liability or withdrawal, the institution's recalculated composite score is less than 1.0, as determined by the Secretary under paragraph (e) of this section.~~

~~(iii) *Teach-out plans.* The institution is required to submit a teach-out plan and/or agreement, for a reason described in §34 CFR 602.24(c)(1), that covers the closing of the institution or any of its branches or additional locations.~~

~~(iv) *State actions.* The institution is cited by a State licensing or authorizing agency for failing to meet State or agency requirements and the agency provides notice that it will withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement;~~

~~(2v) *Publicly traded institutions.* A ~~For~~ publicly traded institution is subject to one or more of the following actions or events:~~

~~(iA) *SEC actions.* The U.S. Securities and Exchange Commission (SEC) issues an order suspending or revoking the registration of the institution's securities pursuant to Section 12(j) of the Securities and Exchange Act of 1934 (the "Exchange Act") or suspends~~

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trading of the institution's securities on any national securities exchange pursuant to Section 12(k) of the Exchange Act, ~~or~~

~~(iiB) Exchange actions.~~ The national securities exchange on which the institution's securities are ~~traded-listed~~ notifies the institution that it is not in compliance with the exchange's listing requirements ~~and, as a result, the institution's or its~~ securities are delisted, ~~either voluntarily or involuntarily, pursuant to the rules of the relevant national securities exchange.~~

~~(iiiC) SEC reports.~~ The ~~SEC~~ institution failed to file a required annual or quarterly ~~is not in~~ timely receipt of a required report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25, ~~and did not issue an extension to file the report.~~

~~(vi) The institution's total debt-to-capitalization ratio, which shall include all unearned tuition fees as debt, is below 30 percent~~

~~(vii)~~

~~(vii)(viii) Non-Federal educational assistance funds.~~ 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 educational assistance, as provided under § 668.28(c). ~~The surety provided under this requirement will remain in place until the institution passes the 90/10 revenue requirement for two consecutive years;~~

~~(vii)(ix) Cohort default rates.~~ The institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless -

~~(A) The institution files a challenge, request for adjustment, or appeal under that subpart N of this part with respect to its rates for one or both of those fiscal years; and~~

~~(B) That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both of those years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification; or;~~

~~(viii)(x) Contributions and distributions.~~

~~(A) An institution made a contribution in the last quarter of the fiscal year, and then made a distribution during the first two quarters of the next fiscal year; and~~

~~(B) The removal of such contribution up to the amount of the distribution results in a recalculated composite score of less than 1.0, as determined by the Secretary under paragraph (e) of this section.~~

~~(B)(xi) The institution or one of its programs loses eligibility to participate in a federal or state tuition assistance programs due to noncompliance, or if it voluntarily withdraws from such a program without providing all students receiving such benefits at the time of withdrawal with equivalent grant and scholarship funding to enable them to finish their academic program.~~

~~(32) After the end of the fiscal year for which the Secretary has most recently calculated an institution's composite score~~ For the period described in ~~(c)(1)~~ of this section, when the institution is subject to two

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Financial Responsibility 16

or more discretionary triggering events, as defined in paragraph (d) of this section, those events become mandatory triggering events, unless a triggering event is resolved before any subsequent event(s) occurs.

(d) Discretionary triggering events. The Secretary may determine that an institution is not able to meet its financial or administrative obligations under paragraph (b)(3)(~~iii~~vi) of this section if any of the following events is likely to have a material adverse effect on the financial condition of the institution -

Financial Responsibility 17

~~(1) Accrediting agency actions. The institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards; accrediting agency for the institution issued an order, such as a show cause order or similar action, that, if not satisfied, could result in the withdrawal, revocation or suspension of institutional accreditation for failing to meet one or more of the agency's standards;~~

~~(2) Violation of a loan agreement.~~

~~(i) The institution violated a provision or requirement in a security or loan agreement with a creditor; and~~

~~(ii) As provided under the terms of that security or loan agreement, a monetary or nonmonetary default or delinquency event occurs, or other events occur, that trigger or enable the creditor to require or impose on the institution, an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees;~~

~~(3) The institution's State licensing or authorizing agency notified the institution that it has violated a State licensing or authorizing agency requirement and that the agency intends to withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement;~~

~~(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 title IV, HEA program funds, as provided under § 668.28(c);~~

~~(3) Fluctuations in Title IV volume. There is a significant fluctuation between consecutive award years, or a period of award years, in the amount of Direct Loan or Pell Grant funds, or a combination of those funds, received by the institution that cannot be accounted for by changes in those programs;~~

~~(45) High annual dropout rates. As calculated by the Secretary, the institution has high annual dropout rates; or~~

~~(6) The institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless—~~

~~(i) The institution files a challenge, request for adjustment, or appeal under that subpart with respect to its rates for one or both of those fiscal years; and~~

~~(ii) That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both of those years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification.~~

~~(5) Interim reporting. For an institution required to provide additional financial reporting to the Department due to a failure to meet the financial responsibility standards in Subpart L or due to a change in ownership, there are negative cash flows, failure of other liquidation ratios, cash flows that significantly miss the projections submitted to the Department, or withdrawal rates that increase significantly;~~

(6) The Secretary has pending claims for borrower relief discharge under § 685.206 and has formed a group process to consider claims under § 685.402;

(6)(7) For publicly traded institutions, any adverse action by the Securities and Exchange Commisi

(7)(8) The institution discontinues a significant share of its academic programs; or

(8)(9) The institution closes most of its locations, or obtains approval from the Department to close most or all of its ground-based locations while maintaining an online program.

(e) Recalculating the composite score. The Secretary recalculates an institution's most recent composite score by recognizing the actual amount of the liability, or cumulative liabilities, incurred by an institution under paragraph (c)(1)(i)(A) of this section as an expense or accounting for the actual withdrawal, or cumulative withdrawals, of owner's equity under paragraph (c)(1)(i)(B) of this section as a reduction in equity, and accounts for that expense or withdrawal by -

(1) For liabilities incurred by a proprietary institution -

(i) For the primary reserve ratio, increasing expenses and decreasing adjusted equity by that amount;

(ii) For the equity ratio, decreasing modified equity by that amount; and

(iii) For the net income ratio, decreasing income before taxes by that amount;

(2) For liabilities incurred by a non-profit institution -

(i) For the primary reserve ratio, increasing expenses and decreasing expendable net assets by that amount;

(ii) For the equity ratio, decreasing modified net assets by that amount; and

(iii) For the net income ratio, decreasing change in net assets without donor restrictions by that amount; and

(3) For the amount of owner's equity withdrawn from a proprietary institution -

(i) For the primary reserve ratio, decreasing adjusted equity by that amount; and

(ii) For the equity ratio, decreasing modified equity by that amount.

(f) Reporting requirements.

(1) In accordance with procedures established by the Secretary, an institution must notify the Secretary of the following actions or events -

(i) For a liability incurred under paragraph (c)(1)(i)(A) of this section, no later than 10 days after the date of written notification to the institution of the final judgment or final determination;

(ii) For a lawsuit under paragraph (c)(1)(i)(B) of this section, no later than 10 days after the institution is served with the complaint and 10 days after the suit has been pending for 120 days;

(iii) For a withdrawal of owner's equity described in paragraph (c)(1)(i)(B) of this section -

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(A) For a capital distribution that is the equivalent of wages in a sole proprietorship or partnership, no later than 10 days after the date the Secretary notifies the institution that its composite score is less than 1.5. In response to that notice, the institution must report the total amount of the wage-equivalent distributions it made during its prior fiscal year and any distributions that were made to pay any taxes related to the operation of the institution. During its current fiscal year and the first six months of its subsequent fiscal year (18-month period), the institution is not required to report any distributions to the Secretary, provided that the institution does not make wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year, less any distributions that were made to pay any taxes related to the operation of the institution. However, if the institution makes wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year less any distributions that were made to pay any taxes related to the operation of the institution at any time during the 18-month period, it must report each of those distributions no later than 10 days after they are made, and the Secretary recalculates the institution's composite score based on the cumulative amount of the distributions made at that time;

(B) For a distribution of dividends or return of capital, no later than 10 days after the dividends are declared or the amount of return of capital is approved; or

(C) For a related party receivable, not later than 10 days after that receivable occurs;

(iv) For a contribution and distribution under paragraph (c)(1)(viii), not later than 10 days following each transaction.

(vi) For the provisions relating to a publicly traded institution under paragraph (c)(12)(v) of this section, no later than 10 days after the date that -

(A) The SEC issues an order suspending or revoking the registration of the institution's securities pursuant to Section 12(j) of the Exchange Act or suspends trading of the institution's securities on any national securities exchange pursuant to Section 12(k) of the Exchange Act; or

(B) The national securities exchange on which the institution's securities are ~~traded listed~~ notifies the institution of noncompliance with the rules of the relevant national securities exchange, takes any adverse action, or involuntarily delists its securities, or the institution voluntarily delists its securities, ~~pursuant to the rules of the relevant national securities exchange;~~

~~(iv)~~ For a ~~State or agency~~ action under paragraphs (c)(1)(iii), (c)(1)(iv), or (d)(1) of this section, 10 days after the date on which the institution is notified by its State or accrediting agency of that action;

(vii) For the loan agreement provisions in paragraph (d)(2) of this section, 10 days after a loan violation occurs, the creditor waives the violation, or the creditor imposes sanctions or penalties in exchange or as a result of granting the waiver; and

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~~(vi) For a State agency notice relating to terminating an institution's licensure or authorization under paragraph (d)(3) of this section, 10 days after the date on which the institution receives that notice; and~~

~~(viii) For the non-title IV revenue provision in paragraph (c)(1)(vi) (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)(3); and~~

~~(ix) For the discontinuation of academic programs provision in paragraph (d)(7), no later than 10 days after the discontinuation of programs in the institution's fiscal year affecting at least 25 percent of enrolled students.~~

(2) The Secretary may take an administrative action under paragraph (i) of this section against an institution, or determine that the institution is not financially responsible, if it fails to provide timely notice to the Secretary as provided under paragraph (f)(1) of this section, or fails to respond, within the timeframe specified by the Secretary, to any determination made, or request for information, by the Secretary under paragraph (f)(3) of this section.

(3)

(i) In its notice to the Secretary under this paragraph, or in its response to a preliminary determination by the Secretary that the institution is not financially responsible because of a triggering event under paragraph (c) or (d) of this section, in accordance with procedures established by the Secretary, the institution may -

(A) Demonstrate that the reported withdrawal of owner's equity under paragraph (c)(1)(i) ~~(B)~~ of this section was used exclusively to meet tax liabilities of the institution or its owners for income derived from the institution;

(B) Show that the creditor waived a violation of a loan agreement under paragraph (d)(2) of this section. However, if the creditor imposes additional constraints or requirements as a condition of waiving the violation, or imposes penalties or requirements under paragraph (d)(2)(ii) of this section, the institution must identify and describe those penalties, constraints, or requirements and demonstrate that complying with those actions will not adversely affect the institution's ability to meet its financial obligations;

(C) Show that the triggering event has been resolved, or demonstrate that the institution has insurance that will cover all or part of the liabilities that arise under paragraph (c)(1)(i)(A) of this section; or

(D) Explain or provide information about the conditions or circumstances that precipitated a triggering event under paragraph (c) or (d) of this section that demonstrates that the triggering event has not or will not have a material adverse effect on the institution.

(ii) The Secretary will consider the information provided by the institution in determining whether to issue a final determination that the institution is not financially responsible.

(g) Public institutions.

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(1) The Secretary considers a domestic public institution to be financially responsible if the institution -

(i)

(A) Notifies the Secretary that it is designated as a public institution by the State, local, or municipal government entity, Tribal authority, or other government entity that has the legal authority to make that designation; and

(B) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(ii) Is not subject to a condition of past performance under § 668.174.

(2) The Secretary considers a foreign public institution to be financially responsible if the institution -

(i)

(A) Notifies the Secretary that it is designated as a public institution by the country or other government entity that has the legal authority to make that designation; and

(B) Provides documentation from an official of that country or other government entity confirming that the institution is a public institution and is backed by the full faith and credit of the country or other government entity; and

(ii) Is not subject to a condition of past performance under § 668.174.

(h) Audit opinions and disclosures. Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if, in the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the ~~institution was required to include financial statements contain~~ a disclosure in the notes to the financial statements that ~~contains information there is substantial doubt~~ about the institution's ability to continue ~~operations as a going concern as required by accounting standards~~, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition, or that the ~~substantial doubt about the~~ institution's ability to continue ~~as going concern operations~~ has been alleviated.

(i) Administrative actions. If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date and in the manner required under § 668.23, the Secretary may -

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs;

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d); or

(3) Deny the institution's application for certification or recertification to participate in the title IV, HEA programs.

* * *

§ 668.174 Past performance.

(a) Past performance of an institution. An institution is not financially responsible if the institution -

(1) Has been limited, suspended, terminated, or entered into a settlement agreement to resolve a limitation, suspension, or termination action initiated by the Secretary or a guaranty agency, as defined in 34 CFR part 682, within the preceding five years;

(2) In either of its two most recent compliance audits had an audit finding, or in a report issued by the Secretary had a program review finding for its current fiscal year or either of its preceding two fiscal years had a program review finding, that resulted in the institution's being required to repay an amount greater than 5 percent of the funds that the institution received under the title IV, HEA programs during the year covered by that audit or program review;

(3) Has been cited during the preceding five years for failure to submit in a timely fashion acceptable compliance and financial statement audits required under this part, or acceptable audit reports required under the individual title IV, HEA program regulations; or

(4) Has failed to resolve satisfactorily any compliance problems identified in audit or program review reports based upon a final decision of the Secretary issued pursuant to subpart G or H of this part.

(5) (i) The institution or a person who exercises substantial control over the institution, as determined according to § 668.176, has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds; or

(ii) A person who exercises substantial control over the institution, as determined according to § 668.176, has previously been a ten-percent-or-higher equity owner, director, officer, principal or executive at an institution whose activities or closure resulted in a loss of federal funds in excess of five percent of its annual student aid volume in any given year.

(iii) The institution employs a person in a capacity that involves the administration of Title IV, HEA programs or the receipt of Title IV, HEA program funds who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or who has been administratively or judicially determined to have committed fraud or any other material violation of law involving those funds; or

(iv) The institution uses or contracts in a capacity that involves any aspect of the administration of the Title IV, HEA programs with any other person, agency, or organization that has been or whose officers or employees have been -

(A) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(C) Were ten-percent-or-higher equity owners, directors, officers, principal or executives at an institution or contractor whose participation as an institution or as a contractor to a

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participating institution resulted in a loss of federal funds in excess of five percent of the annual student aid volume in question in any given year

(4)

* * *

§ 668.175 Alternative standards and requirements.

(a) General. An institution that is not financially responsible under the general standards and provisions in § 668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) Letter of ~~c~~redit or surety alternative for new institutions. A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Secretary, or providing other surety described under paragraph (h)(2)(i) of this section, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) Financial protection alternative for participating institutions. A participating institution that is not financially responsible, either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b), (c), or (d), or because of an audit opinion or going concern disclosure described under § 668.171(h), qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Secretary, or providing other ~~financial protection-surety~~ described under paragraph (h)(2)(i) of this section, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution. For purposes of a failure under § 668.171(b), the institution must also remedy the issue(s) that gave rise to the failure.

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(d) Zone alternative.

(1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score under § 668.172 is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative.

(i)

(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years, or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under the zone alternative, the Secretary -

(i) Requires the institution to make disbursements to eligible students and parents, and to otherwise comply with the provisions, under either the heightened cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events -

(A) Any event that causes the institution, or related entity as defined in Accounting Standards Codification (ASC) 850, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement; or

(B) Any losses that are unusual in nature or infrequently occur, or both, as defined in accordance with Accounting Standards Update (ASU) No. 2015-01 and ASC 225;

(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must -

(i) For any oversight or financial event described in paragraph (d)(2)(ii) of this section for which the institution is required to provide information, in accordance with procedures established by the Secretary, notify the Secretary no later than 10 days after that event occurs; and

(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's

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administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraph (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

(e) [Reserved]

(f) Provisional certification alternative.

(1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if -

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b), its recalculated composite score under § 668.171(e) is less than 1.0, it is subject to an action or event under § 668.171(c), or an action or event under paragraph (d) that has an adverse material effect on the institution as determined by the Secretary, or because of an audit opinion or going concern disclosure described in § 668.171(h); or

(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition; and

(2) Under this alternative, the institution must -

Provide to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, or provide other financial protection described under paragraph (h) of this section, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year and, which when added to its tangible net worth less its total debts and liabilities, would hold its students and the Secretary harmless from losses incurred due to its precipitous closure.

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(i) , except that this requirement does not apply to a public institution that the Secretary determines is backed by the full faith and credit of the State;

(ii) Remedy the issue(s) that gave rise to its failure under § 668.171(b); Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3), for its two most recent fiscal years; and

(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d)(2) and (3) of this section.

* * *

§ 668.176 Change in Ownership

(a) Purpose. To continue participation in the title IV, HEA programs during and following a change in ownership, institutions must meet the financial responsibility requirements in this section.

(b) Materially complete application. To meet the requirements of a materially complete application as required in 34 CFR 600.20(g)(2)(iii) and (iv)-

(1) An institution undergoing a change of ownership and control as provided under 600.31 must submit audited financial statements of its two most recently completed fiscal years, at the level of the change in

ownership or the level of financial statements required by the Secretary, that are prepared and audited in accordance with the requirements of §668.23(d);-

(2) The institution must submit audited financial statements of 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 at the highest level of unfractured ownership or at the level required by the Secretary.

(i) If the institution's new owner does not have two years of acceptable audited financial statements, the institution must provide financial protection in the form of a letter of credit or cash to the Secretary in the amount of 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year; or

(ii) If the institution's new owner only has one year of acceptable financial statements, the institution must provide financial protection in the form of a letter of credit or cash to the Secretary in the amount of 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year;-

(3) The institution must—

(i) Meet the financial responsibility requirements. In general, the Secretary considers an institution to be financially responsible only if it –

(A) For a for-profit institution -

(1) Has not had operating losses in either or both of its two latest fiscal years that in sum result in a decrease in tangible net worth in excess of 10 percent of the institution's tangible net worth at the beginning of the first year of the two-year period. The Secretary may calculate an operating loss for an institution by excluding: prior period adjustment and the cumulative effect of changes in accounting principle. For purposes of this section, the calculation of tangible net worth must exclude all related party accounts receivable/other assets and all assets defined as intangible in accordance with the composite score;

(2) Has, for its two most recent fiscal years, a positive tangible net worth. In applying this standard, a positive tangible net worth occurs when the institution's tangible assets exceed its liabilities. The calculation of tangible net worth excludes all related party accounts receivables/other assets and all assets classified as intangible in accordance with the composite score; or

(3) Has a passing composite score and meets the other financial requirements of 34 CFR 668 subpart L for its most recently completed fiscal year;

(B) For a nonprofit institution -

(1) Has, at the end of its two most recent fiscal years, positive net assets without donor restrictions. The Secretary will exclude all related party receivables/other assets from net assets without donor restrictions and all assets classified as intangibles in accordance with the composite score;

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Commented [B8]: Replace with "in an amount that, in the Secretary's sole judgment, would hold students and the Secretary harmless from losses due to sudden closure when added to the institution's tangible net assets less total debts and liabilities" and DELETE (ii)

(2) Has not had an excess of current fund expenditures over current fund revenues over both of its two latest fiscal years that results in a decrease exceeding 10 percent in either the net assets without donor restrictions from the start to the end of the two-year period or the net assets without donor restrictions in either one of the two years. The Secretary may exclude from net changes in fund balances for the operating loss calculation: prior period adjustment and the cumulative effect of changes in accounting principle. In calculating the net assets without donor restriction, the Secretary will exclude all related party accounts receivables/other assets and all assets classified as intangible in accordance with the composite score; or

(3) Has a passing composite score and meets the other financial requirements of 34 CFR 668 subpart L for its most recently completed fiscal year; or

~~(3)~~

(C) For a public institution, has its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity other than a participating institution; or

(ii) For a for-profit or nonprofit institution that is not financially responsible under paragraph (b)(3)(i) of this section, provide financial protection in the form of a letter of credit or cash in an amount that is not less than 10 percent of the prior year title IV funding or an amount determined by the Secretary; and must follow the zone requirements of § 668.175(d).

(c) Terms of the extension. To meet the requirements for a temporary provisional Program Participation Agreement following a change in ownership, as described in 34 CFR 600.20(h)(3)(i)—

(1)(i) The institution provides the Secretary with—

(A) A “same day” balance sheet for a proprietary institution or a statement of financial position for a nonprofit institution that shows the financial position of the institution under its new owner, as of the day after the change in ownership, at the level required by the Secretary;

(B) The “same day” balance sheet or statement of financial position must be prepared in accordance with Generally Accepted Accounting Principles (GAAP) published by the Financial Accounting Standards Board and audited in accordance with Generally Accepted Government Auditing Standards (GAGAS) published by the U.S. General Accounting Office;

(C) As part of the “same day” financial statement, the institution must include a disclosure that includes all related-party transactions and such details as would enable the Secretary to identify the related party. Such information may include, but is not limited to, the name, location, and description of the related entity, including the nature and amount of any transaction between the related party and the institution, financial or otherwise, regardless of when it occurred; and

(ii) Such financial statement must be a consolidated “same day” financial statement at the level of highest unfractured ownership or at a level determined by the Secretary for an ownership of less than 100 percent;:

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(2) The “same day” financial statement must demonstrate an acid test ratio of at least 1:1. The acid test ratio must be calculated by adding cash and cash equivalents to current accounts receivable and dividing the sum by total current liabilities. The calculation of the acid test ratio must exclude all related party receivables/other assets and all assets classified as intangibles in accordance with the composite score;-

(3) A proprietary institution’s submission must demonstrate a positive tangible net worth the day after the change in ownership. A positive tangible net worth occurs when the financial statements tangible assets exceed its liabilities. The calculation of tangible net worth must exclude all related party accounts receivables or other assets and all assets classified as intangible in accordance with the composite score;

(4) A nonprofit institution’s submission must have a positive net assets without donor restrictions the day after the change in ownership. The calculation of net asset without donor restrictions must exclude all related party accounts receivables/other assets and all assets classified as intangible in accordance with the composite score;-

(5) If an institution fails to meet the standards of paragraphs (c)(2), (3), or (4) of this section, the institution must provide financial protection in the form of a letter of credit or cash to the Secretary in the amount of at least 25 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, or an amount determined by the Secretary, and must follow the zone requirements of § 668.175(d); and

(6) A public institution must have its liabilities backed by the full faith and credit of a State, or by an equivalent governmental entity, or must follow the requirements of this section for a nonprofit or proprietary institution.

§ 668.176~~7~~ 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 will not be affected thereby.