



# Federal Register

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**Thursday,  
August 6, 2009**

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**Part IV**

## **Department of Education**

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**34 CFR Parts 600 and 602  
Institutional Eligibility Under the Higher  
Education Act of 1965, as Amended, and  
the Secretary's Recognition of Accrediting  
Agencies; Proposed Rule**

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

RIN 1840-AD00

[Docket ID ED-2009-OPE-0009]

**Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies****AGENCY:** Office of Postsecondary Education, Department of Education.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations in 34 CFR part 600, governing institutional eligibility, and part 602, governing the Secretary's recognition of accrediting agencies. The Secretary is amending these regulations to implement changes to the Higher Education Act of 1965, as amended (HEA), resulting from enactment of the Higher Education Reconciliation Act of 2005 (HERA), Public Law 109-171, and the Higher Education Opportunity Act (HEOA), Public Law 110-315, and to clarify, improve, and update the current regulations.

**DATES:** We must receive your comments on or before September 8, 2009.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

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

- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Ann Clough, U.S. Department of Education, 1990 K Street, NW., room 8043, Washington, DC 20006-8542.

**Privacy Note:** The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

**FOR FURTHER INFORMATION CONTACT:** Ann Clough. Telephone: (202) 502-7484 or via the Internet at: [ann.clough@ed.gov](mailto:ann.clough@ed.gov)

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

Individuals with disabilities may obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:****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 identify clearly 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 Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 8043, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, 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 aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Negotiated Rulemaking**

Section 492 of the HEA requires the Secretary, before publishing any proposed regulations for programs authorized by title IV of the HEA (title

IV, HEA programs), to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from individuals and representatives of groups involved in, or affected by, the Federal recognition of accrediting agencies, the Secretary must subject the proposed regulations for the title IV, HEA programs to a negotiated rulemaking process. All proposed regulations that the Department publishes must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants in that process stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process may be found at: [www.ed.gov/policy/highered/leg/hea08/index.html](http://www.ed.gov/policy/highered/leg/hea08/index.html).

On September 8, 2008, the Department published a notice in the **Federal Register** (73 FR 51990) announcing our intent to establish negotiated rulemaking committees to develop proposed regulations to (1) implement the changes made to the HEA by the HEOA, and (2) possibly address the provision added to section 207(c) of the HEA by the HEOA that requires the Secretary to submit to a negotiated rulemaking process any regulations the Secretary chooses to develop under amended section 207(b)(2) of the HEA, regarding the prohibition on a teacher preparation program from which the State has withdrawn approval or terminated financial support from accepting or enrolling any student who received title IV aid.

On December 31, 2008, the Department published a notice in the **Federal Register** (73 FR 80314) announcing our intent to establish five negotiated rulemaking committees to prepare proposed regulations. The notice indicated that no requests from the public were received to negotiate the provision added to section 207(c) of the HEA. The five committees that were established were: (1) A committee on lender and general loan issues (Loans Team I); (2) a committee on school-based loan issues (Loans Team II); (3) a committee on accreditation issues; (4) a committee on discretionary grant programs; and (5) a committee on general and non-loan programmatic issues. The notice informed the public that, due to the large volume of changes made by the HEOA that needed to be implemented through negotiated rulemaking, not all provisions would be addressed during this round of committee meetings. The notice requested nominations of individuals

for membership on the committees who could represent the interests significantly affected by the proposed regulations and had demonstrated expertise or experience in the relevant subjects under negotiation. The Accreditation Committee (“the Committee”) met in three sessions to develop proposed regulations: session 1, March 4–6, 2009; session 2, April 21–23, 2009; and session 3, May 18–19, 2009. This notice of proposed rulemaking (NPRM) proposes regulations relating to accreditation that were discussed by the Committee.

The Department developed a list of proposed regulatory changes from advice and recommendations submitted by individuals and organizations in testimony to the Department in a series of six public hearings held on:

- September 19, 2008, at Texas Christian University in Fort Worth, Texas.
- September 29, 2008, at the University of Rhode Island in Providence, Rhode Island.
- October 2, 2008, at the Pepperdine University in Malibu, California.
- October 6, 2008, at Johnson C. Smith University in Charlotte, North Carolina.
- October 8, 2008, at the U.S. Department of Education in Washington, DC.
- October 15, 2008, at Cuyahoga Community College in Warrensville Heights, Ohio.

In addition, the Department accepted written comments on possible regulatory changes submitted directly to the Department by interested parties and organizations. All regional meetings and a summary of all comments received orally and in writing are posted as background material in the docket and may also be accessed at [www.ed.gov/HEOA](http://www.ed.gov/HEOA). Staff within the Department also identified issues for discussion and negotiation.

The Accreditation Committee was made up of the following members:

- Michale McComis, Accrediting Commission of Career Schools and Colleges of Technology, and Roger Williams (alternate), Accrediting Council for Continuing Education and Training.
- Ralph Wolff, Accrediting Commission for Senior Colleges and Universities, Western Association of Schools and Colleges, and Belle Wheelan (alternate), Commission on Colleges, Southern Association of Colleges and Schools.
- Sharon Tanner, The National League for Nursing Accrediting Commission, and Betty Horton

(alternate), Association of Specialized and Professional Accreditors.

- Marshall Hill, Nebraska Coordinating Commission for Postsecondary Education, and Kathryn Dodge (alternate), New Hampshire Postsecondary Education Commission.
- Alan Mabe, University of North Carolina, and Mary Anne Hanner (alternate), Eastern Illinois University.
- Sonia Jacobson, Georgetown University, and Susan Hattan (alternate), National Association of Independent Colleges and Universities.
- Ronald Blumenthal, Kaplan Higher Education, and William Clohan (alternate), DeVry Inc.
- Linda Michalowski, California Community Colleges, and Jim Hermes (alternate), American Association of Community Colleges.
- Michael Offerman, Capella Education Company, and Muriel Oaks (alternate), Washington State University.
- Phyllis Worthy Dawkins, Johnson C. Smith University, and José Jaime Rivera (alternate), University of the Sacred Heart.
- Kendal Nystedt, University of Arizona, and Jacob Littler (alternate), Mesabi Range College.
- Terry Hartle, American Council on Education, and Becky Timmons (alternate), American Council on Education.
- Kay Gilcher, U.S. Department of Education.

The Committee’s protocols provided that the Committee would operate by consensus, meaning there must be no dissent by any member in order for the Committee to be considered to have reached agreement. Under the protocols, if the Committee reaches final consensus on all issues, the Department will use the consensus-based language in the proposed regulations and members of the Committee and the organizations whom they represent will refrain from commenting negatively on the package, except where permitted by the agreed-upon protocols.

During its meetings, the Committee reviewed and discussed drafts of proposed regulations. At the final meeting in May 2009, the Committee reached consensus on all of the proposed regulations in this NPRM. More information on the work of this committee may be found at: [www.ed.gov/policy/highered/reg/hearulemaking/2009/accreditation.html](http://www.ed.gov/policy/highered/reg/hearulemaking/2009/accreditation.html).

### Summary of Proposed Changes

This NPRM reflects the Department’s proposals to revise current regulations and adopt new regulations governing the recognition of accrediting agencies

as a result of the following changes made to the HEA by the HERA and the HEOA:

- The addition of a definition of “distance education” and separate references to distance education and correspondence education. (See section 103 of the HEA).
- The addition of an eligible program under title IV of the HEA—an instructional program that uses direct assessment of a student’s learning in lieu of credit or clock hours. (See section 418(b)(4) of the HEA).
- The addition of a definition of a “teach-out plan” and a new provision that agencies must require the institutions they accredit to submit a teach-out plan to the agency under certain circumstances. (See sections 487(f)(2) and 496(c)(3) of the HEA).
- The addition of several new provisions pertaining to distance education and correspondence education. (See sections 496(a)(4)(B) and 496(q) of the HEA).
- Expanded due process requirements for agencies. (See section 496(a)(6) of the HEA).
- The addition of a requirement that accrediting agencies confirm that institutions have transfer of credit policies. (See section 496(c)(9) of the HEA).
- The addition of a requirement that accreditation team members be well-trained and knowledgeable about their responsibilities regarding distance education. (See section 496(c)(1) of the HEA).
- The addition of requirements that agencies monitor enrollment growth at institutions. (See sections 496(c)(2) and 496(q) of the HEA).
- Changes to agency disclosure requirements. (See section 496(c)(7) of the HEA).

The NPRM also reflects changes to existing regulations governing institutional eligibility by revising the definition of “correspondence course” to be compatible with the new definition of “correspondence education” in the accrediting agency recognition regulations.

Further, the NPRM reflects changes to existing regulations governing the process for recognizing accrediting agencies, including the following:

- The addition of a definition of “recognition”.
- Modifications to record-keeping and confidentiality requirements.
- Combining current subparts C and D into one subpart in order to streamline procedures for agency review; establishing the senior Department official as the deciding official, with appeal to the Secretary;

and providing a list of the various laws regarding public requests for information with which the Secretary must comply.

- Additions and modifications to existing requirements related to substantive change.

### Significant Proposed Regulations

We group major issues according to subject, with appropriate sections of the proposed regulations referenced in parentheses.

### Definitions

#### *Correspondence Course (§ 600.2)*

*Statute:* There is no definition of “correspondence course” in the HEA. Institutional eligibility requirements in section 102(a)(3) of the HEA generally provide that institutions offering more than 50 percent of their courses by correspondence, or enrolling 50 percent or more of their students in correspondence courses, are ineligible for title IV, HEA program assistance.

*Current Regulations:* Current § 600.2 contains a definition of “correspondence course”. The definition describes how a correspondence course is delivered to students who are not physically attending classes at the institution. It does not address the nature of the pedagogy.

*Proposed Regulations:* The proposed regulations would amend the definition of “correspondence course” in § 600.2 to draw a clearer contrast with distance education, defined in section 103 of the HEA. The proposed definition addresses pedagogy by noting that the interaction between the instructor and the student in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student. The proposed definition also notes that a correspondence course is typically designed so that a student proceeds through the course at the student’s own pace.

*Reasons:* Because of the different statutory treatment of distance education and correspondence courses, it is critical to differentiate between the two delivery modes. A definition of correspondence course that focuses exclusively on the exchange of materials between the institution and a student does not draw a useful distinction because both distance education and correspondence courses are delivered to students who are separated from the instructor. Given that the primary distinguishing factor between the two is the nature of the interaction between the instructor and the student, the definition must include information

about this characteristic of the pedagogy, or instructional model.

#### *Distance Education (§§ 600.2; 602.3)*

*Statute:* Section 103 of the HEA defines “distance education” as education that uses one or more technologies to deliver education to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The definition contains a list of technologies.

*Current Regulations:* Current regulations in § 600.2 do not include a definition of “distance education”. However, current regulations in § 600.2 include a definition of “telecommunications course”, which was previously used in the HEA and corresponding regulations. This definition of “telecommunications course” is essentially the same as the new definition of “distance education” in the HEA, as amended by the HEOA.

Current regulations in § 602.3 include a definition of “distance education” that encompasses correspondence study.

*Proposed Regulations:* The proposed regulations would add the statutory definition of “distance education” in both §§ 600.2 and 602.3. The definition would state that “distance education” means education that uses one or more technologies to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include the internet; one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices; audio conferencing; or video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in conjunction with any of the other technologies listed.

*Reasons:* The proposed regulations reflect changes made by the HEOA.

#### *Compliance Report (§ 602.3)*

*Statute:* There is no definition of “compliance report” in the HEA. Under section 496(l) of the HEA, to continue to be recognized by the Secretary, an agency that has been determined by the Secretary to be out of compliance with any of the criteria for recognition, or to have failed to apply those criteria effectively, may be given no more than 12 months to come into compliance, except upon grant of an extension for good cause shown.

*Current Regulations:* “Compliance report” is not used in the current regulations in part 602 governing the Secretary’s recognition of accrediting agencies.

*Proposed Regulations:* The proposed regulations would add a definition of “compliance report” in § 602.3. A “compliance report” would be defined as a written report that the Department requires an agency to file to demonstrate that the agency has addressed deficiencies specified in a decision letter from the senior Department official or the Secretary.

*Reasons:* The proposed regulations would combine former subparts C and D, which detail the Secretary’s process for recognizing accrediting agencies, and the process whereby an accrediting agency’s recognition could be limited, suspended, or terminated, into a single subpart C. The proposed regulations in subpart C would allow agencies to be out of compliance for no more than 12 months, after which time a decision on recognition would be made on the basis of a compliance report. The proposed definition of “compliance report” in § 602.3 describes this key component of the recognition process.

#### *Correspondence Education (§ 602.3)*

*Statute:* There is no definition of “correspondence education” in the HEA. Section 496(a)(4)(B) and (q) of the HEA includes references to correspondence education alongside references to distance education. Section 496(a)(4)(B) provides that if an agency has, or seeks to include, within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, it must meet various requirements, which are specified in that section. It further provides that a recognized agency may add distance education or correspondence education to its scope of recognition by providing written notice to the Secretary. Section 496(q) of the HEA provides that the Secretary must require a review at the next available National Advisory Committee on Institutional Quality and Integrity (“NACIQI” or “Advisory Committee”) meeting of a change in scope of an accrediting agency that expanded its scope of recognition to include distance education or correspondence education by written notice to the Secretary, if the enrollment of an institution accredited by that agency that offers distance education or correspondence education increases by 50 percent or more within any one institutional fiscal year.

*Current Regulations:* Current regulations in § 602.3 include a

definition of “distance education” that encompasses correspondence study as well as education delivered to students using one or more technologies specified in the definition.

*Proposed Regulations:* The proposed regulations would add a definition of “correspondence education” in § 602.3. The proposed definition would clearly distinguish between correspondence education and distance education, particularly with respect to the nature of the interaction between the instructor and the students. “Correspondence education” would be defined as education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. The proposed definition would specify that interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student and that correspondence courses are typically self-paced. The proposed definition would also specify that correspondence education is not distance education.

*Reasons:* Section 496 of the HEA refers several times to “distance education or correspondence education”. For example, the HEA requires that an agency’s standards “effectively address the quality of an institution’s distance education or correspondence education” and that an agency require “an institution that offers distance education or correspondence education to have processes through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the program and receives the academic credit.” The separate references to these two types of education indicate that they are distinct from one another for HEA purposes.

The Department originally proposed a definition of “correspondence education”, adapted from the definition of “correspondence course” in current § 600.2, that included “home study” and described how information is sent back and forth between the institution and the student. The non-Federal negotiators commented that the term “home study” is no longer in general use. In addition, they stated that the significant difference between distance education and correspondence education is that correspondence education generally is designed to be self-paced, with minimal interaction between the student and the instructor.

The Department amended the proposed definition to remove the term “home study” and to include the concepts relating to pedagogy or instructional model.

#### *Designated Federal Official (§ 602.3)*

*Statute:* The HEA does not include a definition of “Designated Federal Official”. Section 10(e) and (f) of the Federal Advisory Committee Act (FACA), 5 U.S.C. Appdx. 1, refers to a “designated officer or employee of the Federal Government” who has responsibilities under FACA related to advisory committee meetings.

*Current Regulations:* Current regulations do not include a definition of “Designated Federal Official”.

*Proposed Regulations:* The proposed regulations in § 602.3 would define “Designated Federal Official” as the Federal officer designated under section 10(f) of FACA, 5 U.S.C. Appdx. 1.

*Reasons:* Section 114(d)(2)(A) of the HEA authorizes the Chairperson of the NACIQI to establish the agenda for Advisory Committee meetings. Prior to passage of the HEOA, the Chairperson of NACIQI did not have this role. FACA requires that a designated officer or employee of the Federal Government approve the agenda for an advisory committee meeting. The proposed definition of “Designated Federal Official”, which specifies the role of the Federal officer under FACA, is needed to clarify that, although the HEA now authorizes the Chairperson of the Advisory Committee to establish the agenda, it must still be approved by the Federal official designated under FACA.

#### *Direct Assessment Program (§ 602.3)*

*Statute:* Section 481(b)(4) of the HEA stipulates that for purposes of title IV, HEA programs, “eligible program” includes an instructional program that uses direct assessment of student learning, or recognizes the direct assessment of student learning by others, in lieu of credit hours or clock hours as a measure of student learning. The assessment must be consistent with the institution’s or program’s accreditation. The HEA also provides that the Secretary will determine initially whether each program for which an institution proposes to use direct assessment is an eligible program.

*Current Regulations:* There are no current regulations in part 602 that reflect direct assessment programs. Regulations for Federal Student Aid Programs in 34 CFR 668.10 list the information an institution must provide to the Secretary in order to have a direct assessment program approved as an eligible program for title IV, HEA

purposes. 34 CFR 668.10 includes a requirement that an accrediting agency review and approve the program for inclusion in the institution’s grant of accreditation, and that the agency evaluate the institution’s claim of the direct assessment program’s equivalence in terms of credit or clock hours.

*Proposed Regulations:* The proposed regulations would add a definition of “direct assessment program” in § 602.3 that incorporates the language of the HEA and includes the accrediting agency role in approving a direct assessment program for title IV, HEA purposes, consistent with the requirements in 34 CFR 668.10. A “direct assessment program” would be defined as an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, and meets the conditions of 34 CFR 668.10. For title IV, HEA purposes, the institution must obtain approval for the direct assessment program from the Secretary under 34 CFR 668.10(g) or (h), as applicable. As part of that approval, the accrediting agency must evaluate the programs and include them in the institution’s grant of accreditation or preaccreditation; and review and approve the institution’s claim of each direct assessment program’s equivalence in terms of credit or clock hours.

*Reasons:* The proposed definition of “direct assessment program” would restate definitional language from the HEA, refer to the section of the Student Assistance General Provisions regulations that relate to direct assessment programs, and indicate the accrediting agency role in approving a direct assessment program. Some of the non-Federal negotiators indicated their unfamiliarity with direct assessment programs and asked for clarification of the term and of the phrase “or recognizes the direct assessment of student learning by others.” In particular, they asked whether prior learning assessment, where students demonstrate that they possess college-level knowledge of a subject that has been acquired outside of a traditional classroom setting, such as at work, through volunteer service, or through other experiences, would be covered by the proposed definition. In response, the Department explained that, because prior learning assessment is a process that results in a student being granted a certain number of academic credits (or credit hours), prior learning does not meet the definition of a direct assessment program.

A direct assessment program is one where the institution identifies a set of competencies that a student must demonstrate through successful performance on assessments in order to be awarded an academic credential. The skills and knowledge that a student has acquired outside of the institution may help the student to complete the assessments associated with one or more of the competencies more quickly than another student, and to accelerate completion of a full program. A student who is enrolled in a direct assessment program is not required to earn a certain number of credits, or to remain in the program for a specific length of time. The institution may develop the assessments, or it may rely upon assessments developed by others, to measure the student's learning.

The Department notes that "direct assessment program" has no fixed meaning outside the context of the title IV, HEA Federal student aid programs. The process that an institution has to go through to gain approval from the Secretary for a direct assessment program to be eligible for title IV, HEA program purposes under 34 CFR 668.10, which includes reviews and actions on the part of accrediting agencies, is sufficient to satisfy program eligibility requirements of the HEA.

#### *Recognition (§ 602.3)*

*Statute:* The HEA does not include a definition of "recognition".

*Current Regulations:* There is no definition of "recognition" in the current regulations.

*Proposed Regulations:* The proposed regulations would add a definition of "recognition" in § 602.3. Under the proposed definition, "recognition" would mean an unappealed determination by the senior Department official, or a determination by the Secretary on appeal, that an accrediting agency complies with the criteria for recognition and that the agency is effective in its application of those criteria. As a result of that determination of compliance, an accrediting agency that has been given a grant of recognition by the Secretary is regarded as a reliable authority regarding the quality of education or training offered by the institutions or programs it accredits. The proposed definition would specify that the grant remains in effect for the term specified except upon a determination made in accordance with subpart C, as revised in these proposed regulations, that the agency no longer complies with the criteria for recognition or that it is no longer effective in its application of those criteria.

*Reasons:* The proposed definition would clarify that, through proceedings conducted under subpart C of part 602, the Department may withdraw recognition before the period of recognition granted expires. The definition would also reflect that, although an agency that is recognized is deemed a reliable authority regarding the quality of education or training offered by the institutions or programs it accredits, recognition is based on a determination that the agency is in compliance with the statutory and regulatory criteria for recognition and is effective in its application of those criteria.

#### *Scope of Recognition (§ 602.3)*

*Statute:* The HEA does not include a definition of "scope of recognition". Section 496(a)(4)(B) of the HEA requires an accrediting agency that has or wants to include distance education or correspondence education in its scope of recognition to demonstrate that its standards effectively address the quality of an institution's distance education or correspondence education.

*Current Regulations:* Current regulations in § 602.3 define "scope of recognition" and identify five areas for which recognition may be granted.

*Proposed Regulations:* The proposed regulations would amend the definition of "scope of recognition" in § 602.3 by adding the phrase "or correspondence education" to paragraph (5), which addresses activities related to distance education.

*Reasons:* The proposed regulations reflect changes made by the HEOA.

#### *Teach-Out Agreement (§ 602.3)*

*Statute:* Section 496(c)(6) of the HEA requires that teach-out agreements between institutions be approved by the accrediting agency in accordance with its standards. The HEA does not provide a definition of "teach-out agreement".

*Current Regulations:* Current regulations in § 602.3 provide a definition of "teach-out agreement", which is a written agreement between institutions that provides for the equitable treatment of students. It applies in situations where an institution stops offering an educational program before all students enrolled in that program have completed their program of study. Under § 602.24(c) of the current regulations, if an agency is an institutional accrediting agency, and its accreditation or preaccreditation enables institutions to obtain eligibility to participate in title IV, HEA programs, the agency must require an institution that enters into a teach-out agreement with another institution to submit that

teach-out agreement to the agency for approval.

*Proposed Regulations:* The proposed regulations would amend the definition of "teach-out agreement" by limiting its scope to situations where an institution, or a location of an institution that provides one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study. In addition, the definition would require that the agreement provide a reasonable opportunity for affected students to complete their program of study. The proposed changes to current regulations in § 602.24(c) are discussed under "Teach-out Plans and Agreements."

*Reasons:* The Department initially proposed amending the definition of "teach-out agreement" to make it clear that the agreement should provide for a reasonable opportunity for students to complete their program of study if an institution or an institutional location that provides one hundred percent of at least one program, stops offering one or more of its programs before all students have completed their program of study. There was consensus with adding the language about providing a reasonable opportunity for students to complete their program of study.

However, several of the non-Federal negotiators objected to the proposal that a teach-out agreement cover an institutional location that stops offering one or more of its programs. They noted that this is a common occurrence and that it is the responsibility of the institution to respond to the needs of its students when this happens. A teach-out agreement should only apply in situations where the institution or location providing one hundred percent of at least one program ceases to operate. The Department concurred.

#### *Teach-Out Plan (§ 602.3)*

*Statute:* Section 496(c)(3) of the HEA requires an institution to submit for approval to the accrediting agency a teach-out plan under specified conditions. Section 487(f)(2) of the HEA defines a "teach-out plan" as a written plan developed by an institution that provides for the equitable treatment of students if an institution ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

*Current Regulations:* Current regulations do not include a definition of "teach-out plan".

*Proposed Regulations:* The proposed regulations would add a definition of "teach-out plan" in § 602.3. The

proposed regulations would define a “teach-out plan” as a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution’s accrediting agency, a teach-out agreement between institutions.

*Reasons:* The Department proposes a definition that incorporates the statutory definition and clarifies that the requirement for an institution to have a teach-out plan applies when an institutional location that provides one hundred percent of at least one program ceases to operate before all students have completed their program of study. This is consistent with the treatment of locations under the closed school discharge provisions in 34 CFR 682.402(d)(1)(ii)(C) and 685.214(a)(2)(ii). Under these provisions, a student’s loan may be discharged if the student is not able to complete the program of study for which the loan was provided because the institution, or any location or branch the student attended, closed. The proposed language was acceptable to the non-Federal negotiators.

#### Other Major Issues

##### *Accreditation Team Members (§ 602.15)*

*Statute:* Section 496(c)(1) of the HEA stipulates that in order to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, the agency must perform, at regularly established intervals, on-site inspections and reviews of institutions of higher education (which may include unannounced site visits) with particular focus on educational quality and program effectiveness, and ensure that accreditation team members are well-trained and knowledgeable with respect to their responsibilities. The HEOA added a reference to distance education to the HEA’s requirement that team members be well-trained and knowledgeable with respect to their responsibilities.

*Current Regulations:* Current regulations in § 602.15(a)(2) require individuals serving on agency review teams and decision-making bodies and establishing agency policies to be competent and knowledgeable, qualified by education and experience in their own right, and trained by the agency on its standards, policies, and procedures.

*Proposed Regulations:* Proposed § 602.15(a)(2) would clarify that an

individual’s qualifications and the agency’s training of that individual on his or her responsibilities regarding the agency’s standards, policies, and procedures, to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and preaccrediting decisions, should be appropriate for that individual’s role. In addition, the proposed regulations would specify that if an agency’s scope of recognition includes the evaluation of distance education and correspondence education, then the individuals must be trained in their responsibilities regarding distance education and correspondence education.

*Reasons:* The Department noted that the statutory language included the new reference to “responsibilities regarding distance education” and that in several other provisions of section 496 of the HEA, distance education is paired with correspondence education. The Department’s initial proposal included a reference to “correspondence education” in this section but did not limit in any way the requirement that individuals be trained in their responsibilities regarding distance education and correspondence education. Some non-Federal negotiators asked that the requirement apply only to those agencies that have distance education and correspondence education in their scope of recognition. The Department agreed with this suggestion and also with the observation made during the negotiations that only those individuals who evaluate institutions that offer distance education or correspondence education would need to be qualified and trained accordingly.

A non-Federal negotiator presented a revised draft for consideration by the negotiators, which addressed this issue and further clarified the requirement. This language was acceptable to all the negotiators and is reflected in the proposed regulations.

##### *Record Keeping and Confidentiality (§§ 602.15; 602.27)*

*Statute:* Section 496(a) of the HEA requires the Secretary to establish recognition criteria by which the Secretary will determine, for the purposes of the HEA or other Federal purposes, if an agency or association is a reliable authority as to the quality of education or training offered by the institutions or programs it accredits. These criteria require that the agency adhere to sound administrative requirements. Section 496(a)(4) provides that the Secretary’s recognition criteria must require that recognized agencies consistently apply and enforce their

standards for the duration of the accreditation period. Section 496(o) requires the Secretary to promulgate regulations establishing procedures for recognition. Section 496(n) requires the Secretary to conduct a comprehensive evaluation of accrediting agencies seeking recognition, including an independent evaluation of the information provided by the agency. Section 487(a)(15) of the HEA requires, as part of the institution’s Program Participation Agreement in title IV, HEA programs, that the institution acknowledge the authority of the Secretary, the institution’s accrediting agency, and others to share information pertaining to the institution’s eligibility to participate in title IV, HEA programs, and regarding any fraud and abuse on the part of the institution.

*Current Regulations:* Section 602.15(b)(1) of the current regulations requires an accrediting agency to maintain complete and accurate records of its last two full accreditation or preaccreditation reviews of each institution or program it accredits and provides a list of the various documents that must be included in those records. Section 602.27(e) of the current regulations requires agencies to disclose to the Department the name of any accredited institution or program that the agency has reason to believe is failing to meet title IV, HEA program responsibilities or is engaged in fraud or abuse, along with the agency’s reasons for concern. Section 602.27(f) of the current regulations provides for the Secretary to ask the agency for information that may bear upon an institution’s compliance with title IV, HEA program responsibilities and stipulates that the Secretary may ask for this information in order to assist the Department in resolving problems with the institution’s participation in the title IV, HEA programs.

*Proposed Regulations:* The proposed regulations in § 602.15(b)(1) would require the accrediting agency to retain its records of its last full accreditation or preaccreditation review of each institution or program it accredits. Proposed § 602.15(b)(2) would require the agency to maintain records of all its decisions made throughout an institution’s or program’s affiliation with the agency regarding the accreditation and preaccreditation of the institution or program, which would include the accrediting agency’s decisions about substantive changes that affect the title IV, HEA program eligibility.

The Department proposes to restructure the regulations in § 602.27 to include a new paragraph (b) to address

the confidentiality of communications between the agency and the Department. Specifically, proposed § 602.27(b) would address situations in which an agency has a policy relating to notification to an accredited institution or program of communications that occur between the agency and the Department pursuant to proposed § 602.27(a)(6) and (7) (*i.e.*, current § 602.27(e) and (f)). Under the proposed regulations, these policies would need to provide for a case-by-case review by the agency of the contact with the Department and the circumstances surrounding it to assess whether that contact should remain confidential. The proposed regulation would further require that upon a specific request by the Department to keep the contact confidential, the agency must consider the contact confidential. Proposed § 602.27(a)(6) would remove the language in current § 602.27(e) acknowledging that the Secretary may ask for information to assist in resolving problems with title IV, HEA program participation.

*Reasons:* As reflected in section 496(m) of the HEA, the Department engages in recognition proceedings to ensure that accrediting agencies that serve as gatekeepers for Federal programs are reliable authorities as to the quality of postsecondary education provided by the institutions or programs they accredit. The Department has had some concern about accrediting agencies maintaining sufficient information relevant to an institution's accreditation, as is necessary for agencies to fulfill their gatekeeping roles. Additionally, there has been a significant increase over time in the number of substantive changes at institutions that affect an institution's title IV, HEA program eligibility.

Agencies have not always been able to provide the Department with information related to substantive changes. While needing to ensure that required documentation is retained by agencies, the Department does not want to overly burden agencies by requiring them to retain multiple cycles of information, which can be voluminous. Therefore, the proposed regulations in § 602.15(b)(1) would require that an agency retain all documentation of its last full accreditation or preaccreditation review of each institution or program. The proposed regulations in § 602.15(b)(2) would require agencies to retain all decisions made throughout an institution's affiliation with the agency and significantly related correspondence for substantive changes as well as for decisions regarding the accreditation or

preaccreditation of an institution or program. Appropriate documentation must be retained with all decisions.

The non-Federal negotiators agreed with the proposed changes to § 602.15(b)(1) to reduce the number of review cycles of information to be retained. None of the negotiators objected to the proposed requirement that agencies retain information about substantive changes. Several non-Federal negotiators expressed concern about the proposed changes related to confidentiality. Issues of confidentiality regarding contact between the Department and accrediting agencies have long been a concern to the Department.

The Department respects the important role that collegiality and frank exchanges play in effective accrediting practice. However, the Department has found that agency policies providing for automatic disclosure to accredited institutions and programs of all departmental communications are at odds in some circumstances with both the gatekeeping role of recognized accreditors and the Department's fiduciary responsibilities to ensure that Federal programs are run efficiently and effectively and are protected against fraud and abuse. In trying to reach the proper balance, the Department has proposed changes to § 602.27(b), including a requirement for agencies with policies regarding notification to an institution or program of contact with the Department to review each contact on a case-by-case basis to properly assess whether confidentiality should be maintained. In addition, if the Department specifically requests that a contact it has with an agency remain confidential, then the agency is required to consider that contact confidential. The Department believes these provisions strike the appropriate balance, and are necessary to ensure that the Federal fiscal interest and the interests of students and institutions are fully protected. The sentence in current § 602.27(e) referring to the Secretary's authority to request information from accrediting agencies to resolve problems with title IV, HEA program participation would be removed as extraneous.

Non-Federal negotiators expressed concern about the Department's initial proposal in this area, which would have prohibited an agency from establishing a policy of providing notification to an institution regarding contact with the Department. The Department revised its proposed approach in response, to permit agencies to have policies within the limits described above, and the non-

Federal negotiators did not object to the revised language.

#### *Student Achievement (§ 602.16)*

*Statute:* Section 496(a)(5)(A) of the HEA provides that an accrediting agency's standard by which it assesses an institution's success with respect to student achievement in relation to the institution's mission may include different standards for different institutions or programs, as established by the institution including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates. The phrase "which may include different standards for different institutions or programs, as established by the institution" was added by the HEOA.

The Rule of Construction in section 496(p) of the HEA, added by the HEOA, stipulates that an accrediting agency is not restricted from setting, with the involvement of its members, and applying, accreditation standards for or to institutions or programs that seek review by the agency. In addition, the Rule of Construction stipulates that an institution is not restricted from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

*Current Regulations:* Current regulations in § 602.16(a)(1)(i) replicate the statutory language in section 496(a)(5)(A) of the HEA, except that they do not include the phrase that was added by the HEOA.

*Proposed Regulations:* The proposed regulations in § 602.16(a)(1)(i) would replicate the new statutory language in section 496(a)(5)(A) of the HEA. The proposed regulations in § 602.16(e) would replicate the Rule of Construction in section 496(p).

*Reasons:* While section 496(g) of the HEA, as amended by the HEOA, prohibits the Secretary from establishing any criteria that specify, define, or prescribe the standards that accrediting agencies use to assess any institution's success with respect to student achievement, the Secretary is obligated to amend the current regulations that do not reflect the new language in the HEA regarding the kind of student achievement standards recognized agencies must have.

The Department's initial proposed regulations did not include the Rule of Construction from the statute. Several non-Federal negotiators asked that the Rule of Construction be incorporated into the regulations. The Department included in the proposed regulations



the Rule of Construction from the statute. The non-Federal negotiators agreed with the Department that an accrediting agency would need to make a judgment about whether an institution developed and used reasonable standards to show its success with respect to student achievement.

*Distance Education and Correspondence Education (§§ 602.16; 602.17; 602.18; 602.27)*

*Statute:* Section 496(a)(4)(B) of the HEA, as amended by the HEOA, specifies that if an agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, the agency must, in addition to meeting the other requirements, demonstrate that its standards effectively address the quality of an institution's distance education or correspondence education with respect to the standards specified in section 496(a)(5). However, the statute provides that the agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education in order to meet the requirements of section 496(a)(4)(B). Section 496(a)(4)(B) of the HEA, as amended by the HEOA, also provides that if an accrediting agency that accredits institutions is already recognized by the Secretary, it will not be required to obtain the approval of the Secretary to expand its scope of recognition to include distance education or correspondence education, provided that the agency notifies the Secretary in writing of the change in scope.

Section 496(a)(4)(B) further specifies that an agency must require an institution that offers distance education or correspondence education to have processes through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the program and receives the academic credit.

Section 496(q) of the HEA specifies that the Secretary shall require a review, at the next available Advisory Committee meeting, of any recognized accrediting agency that has included distance education or correspondence education in its scope of recognition through written notice to the Secretary, if the enrollment of an institution the agency accredits that offers distance education or correspondence education has increased by 50 percent or more within any one institutional fiscal year.

*Current Regulations:* Current regulations require an agency to submit to the Secretary any proposed change in its policies, procedures, or accreditation or preaccreditation standards that might alter its scope of recognition. Current regulations do not include any requirement for verifying the identity of students enrolled in distance education or correspondence education courses and programs.

*Proposed Regulations:* The Department proposes to restructure § 602.16 and add a new paragraph (c). The new paragraph would provide that if an agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs that offer distance education or correspondence education, the agency's standards must effectively address the quality of its institutions' distance education or correspondence education in the specified areas. The agency would not be required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education.

Section 602.17, which requires the application of accrediting standards in reaching an accrediting agency decision, would be amended by adding a new paragraph (g) to implement the new student verification requirements. The proposed regulations would provide that agencies require institutions that offer distance education or correspondence education to have processes in place through which the institution would establish that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. The agency would meet this requirement if it requires institutions to verify the identity of a student who participates in class or coursework by using methods such as a secure login and pass code or proctored examinations, and new or other technologies and practices that are effective in verifying student identity. The agency would also be required to make clear, in writing, that institutions must use processes that protect student privacy and must notify students at the time of registration or enrollment of any projected additional student charges associated with the verification of student identity.

Section 602.18 would be amended to reflect changes made by the HEOA to section 496(a)(4) regarding an institution's application and enforcement of standards that respect its stated mission, including religious mission.

As noted in the discussion of record-keeping and confidentiality, § 602.27 would be restructured. The proposed regulations would add a new paragraph (5) to redesignated paragraph (a) that would provide for notification to the Secretary that an agency is expanding its scope of recognition to include distance education or correspondence education as provided for in section 496(a)(4)(B)(i)(I) of the HEA, as amended by the HEOA. The proposed regulations would specify that the expansion of scope would be effective on the date the Department receives the notification.

*Reasons:* The proposed changes to the regulations reflect changes to the HEA made by the HEOA. The proposed regulations would require an agency's standards to address distance education and correspondence education effectively if the agency evaluates institutions offering distance education or correspondence education.

Some of the non-Federal negotiators asked whether an agency whose scope of recognition already includes distance education would be required to notify the Secretary if it wanted to expand its scope to include correspondence education, now that correspondence education is specified separately in the law. The Department's position is that, as the definition of distance education in the current regulations includes correspondence study, any previous grant of a scope of recognition that included distance education automatically encompassed correspondence education, and there is no need for further action on the part of agencies currently recognized for distance education by the Department. If the proposed regulations are finalized as drafted, the Department contemplates including on its Web site listing of recognized accrediting agencies a notation that agencies having a scope of recognition that included distance education as of the August 14, 2008, enactment of the HEOA are also recognized for correspondence education pending re-evaluation of each agency as it comes before the Department for renewal of recognition. Once the regulations become effective, agencies whose scope includes distance education that come up for renewal of their recognition would be expected to demonstrate how they evaluate both distance education and correspondence education in accordance with proposed § 602.16(c). An agency that accredits institutions and does not already include distance education or correspondence education in its scope of recognition but that desires to do so would need to either submit a

notification of expansion of scope (for distance education, correspondence education, or both), or request an expansion of scope to include these in applying for renewal of recognition, and in either event, in subsequent reviews for renewal of recognition, demonstrate how it evaluates these modes of education in accordance with proposed § 602.16(c). An agency that accredits only programs could not expand its scope by notification because section 496(q) of the HEA limits this option to institutional accreditors. Because of the limitation, programmatic accreditors would be required to apply for an expansion of scope to include distance education, correspondence education, or both. The Department proposes to include programmatic accreditors that accredit stand-alone institutions in the set of agencies that may expand their scope by notification.

In addition to the changes the Department initially proposed for § 602.27(a)(5) to reflect the substance of the new statutory provision for including distance education or correspondence education in an agency's scope of recognition upon written notice by a recognized agency to the Secretary, the non-Federal negotiators requested that the Department include the applicable statutory citation in the proposed regulation. The Department agreed. The Department also included a provision specifying the effective date of such a notification so it would be clear to both agencies and the Department when the change in scope was effective.

Much of the discussion regarding distance education at the negotiated rulemaking sessions centered on the new requirement to verify student identity. Some of the non-Federal negotiators expressed concern about the cost of implementing the new provisions, saying they wanted to ensure that the requirements would be affordable. They were reluctant to include requirements that would be considered "forward-looking" in that they would address new or emerging technologies for verifying student identity. The Department's initial position was that the concern about forward-looking requirements could be addressed by specifying that new identification technologies and practices would have to be adopted only as they become widely accepted, reasoning that a technology or practice would not become widely accepted and used unless it was affordable. Nevertheless, several non-Federal negotiators were concerned about including the "widely accepted" language and proposed revising the draft regulation to require

instead use of "new or other technologies and practices that are effective in verifying student identity," in addition to secure logins and pass codes and proctored examinations. As one of the non-Federal negotiators explained, peer reviewers conducting on-site reviews will assess an institution's use of technology and verification practices in relation to those technologies and practices that are widely used and are affordable, and if an institution is using ineffective methods of identification verification, they will note that finding. The non-Federal negotiators also wanted to make it explicit that the methods used to verify the identity of students would be determined by the institution. As the draft language provided that the methods chosen must be effective in verifying student identification, the Department accepted the changes proposed by the non-Federal negotiators.

The Department originally proposed specifying that institutions should not use or rely on technologies that interfere with student privacy. Several non-Federal negotiators recommended retaining this concept, but rephrasing the language to present the concept more positively. Non-Federal negotiators also suggested including language about processes or methods, which would be broader than referring to technologies. For these reasons, the proposed requirement related to student privacy was restated to require that institutions make clear in writing that institutions must use processes that protect student privacy. To address the concern of several non-Federal negotiators that students be made aware in advance of any additional charges associated with administering distance education or correspondence education examinations, the proposed regulations would require institutions to notify students at the time of registration or enrollment of any projected additional charges associated with verification of student identity.

*Due Process (§§ 602.18; 602.23; 602.25)*

*Statute:* The HEOA amended section 496(a)(6) of the HEA to include expanded due process requirements with which agencies must comply. The new provisions require that an agency establish and apply review procedures throughout the accrediting process, including evaluation and withdrawal proceedings, which comply with specified due process procedures. The agency must provide adequate written specification of requirements, including clear standards for an institution of higher education or program to be

accredited, and clearly identify any deficiencies at the institution or program examined. In evaluation and withdrawal proceedings, the procedures must provide sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency and prior to final action.

Upon written request of an institution or program, the agency must provide an opportunity for the appeal of any adverse action, including denial, withdrawal, suspension, or termination of accreditation, taken against the institution or program, prior to such action becoming final at a hearing before an appeals panel. The appeals panel will not include current members of the agency's underlying decision-making body that made the adverse decision, and its members must be subject to a conflict of interest policy. The agency's due process procedures must provide for the right of an institution or program to representation and participation by counsel during an appeal of an adverse action.

The due process procedures must also provide for a process, in accordance with written procedures developed by the agency, through which an institution or program, before a final adverse action based solely upon a failure to meet a standard or criterion pertaining to finances, may on one occasion seek review of significant financial information that was unavailable to the institution or program prior to the determination of the adverse action, and that bears materially on the financial deficiencies identified by the agency. If the agency determines that the new financial information submitted by the institution or program meets the criteria of significance and materiality, the agency must consider the new financial information prior to the adverse action becoming final. Any determination by the agency with respect to the new financial information is not separately appealable by the institution or program.

*Current Regulations:* Current due process regulations in § 602.25 require that an agency have procedures that afford an institution or program a reasonable period of time to comply with an agency's requests for information and documents. An agency must notify an institution or program in writing of any adverse action or action to place the institution or program on probation or show cause and the basis for the action. Institutions or programs must be permitted to appeal an adverse action, and they have the right to be

represented by counsel during the appeal. The agency must notify the institution or program in writing of the result of its appeal and the basis for the decision.

*Proposed Regulations:* The proposed regulations would amend the due process provisions in § 602.25, and two other sections, §§ 602.18 and 602.23, that bear on due process requirements.

Section 602.18, "Ensuring consistency in decision-making," would be amended to include a new paragraph (a) that would require an agency to have written specification of the requirements for accreditation and preaccreditation that includes clear standards for an institution or program to be accredited. The proposed regulations in § 602.18 would also include a new paragraph (e) that would require an agency to provide an institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with agency standards.

Section 602.23, "Operating procedures all agencies must have," would be amended by removing the phrase "upon request" from the requirement in paragraph (a) that an agency must maintain and make available to the public certain written materials. The current regulations would also be changed by adding at the end of current paragraph (c)(1), which concerns the review of complaints, a stipulation that an agency may not complete its review and make a decision regarding a complaint against an institution unless, in accordance with published procedures, it ensures that the institution or program has sufficient opportunity to provide a response to the complaint.

The proposed regulations would restructure § 602.25 of the current regulations to accommodate the appropriate placement of several new statutory requirements by redesignating several current paragraphs, removing current paragraph (c) and adding several new paragraphs. New paragraph (a) would require an agency to provide adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited. New paragraph (c) would require an agency to provide written specification of any deficiencies identified at the institution or program examined. New paragraph (d) would require an agency to provide sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined

by the agency and before any adverse action is taken.

Some of the information in current paragraph (c) would be included in a new paragraph (f), including the requirement that an agency provide an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final. New paragraph (f) would also provide that the appeal must take place before an appeals panel that may not include current members of the agency's decision-making body that took the initial adverse action and is subject to a conflict of interest policy. The appeals panel would affirm, amend, or reverse the adverse action. At the option of the agency, either the appeals panel or the original decision-making body would be responsible for implementing the decision of the appeals panel.

Under the proposed regulations in paragraph (f)(2), the agency would be required to recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, and this would include making any presentation that the agency permits the institution or program to make on its own during the appeal.

The proposed regulations in paragraph (h)(1) would require an agency to provide a process, in accordance with written procedures, through which an institution or program may seek review of new financial information if all of the following conditions are met: (1) The financial information was not available to the institution or program until after the decision that is subject to appeal was made; (2) the financial information provided is significant and bears materially on the financial deficiencies identified by the agency (the criteria of significance and materiality would be determined by the agency); and (3) the only remaining deficiency cited by the agency in support of a final adverse action decision is the institution's or program's failure to meet an agency standard pertaining to finances. Under proposed paragraph (h)(2), a review of new financial information would be permitted only one time, and a determination by the agency with respect to the new information provided would not provide the basis of an appeal.

*Reasons:* The Department proposes changes to all of the sections of the regulations that have a bearing on due process to implement the new HEA requirements contained in the HEOA. With respect to ensuring consistency in agency decisions, the Department

initially proposed requiring that agencies provide institutions or programs with a written report that assessed the institution's or program's compliance with the agency's standards, including any deficiencies identified by the agency. Some of the non-Federal negotiators suggested changing the language to require that agencies provide institutions or programs with reports that clearly identify any deficiencies in the institution's or program's compliance with agency standards. The Department agreed to adopt the alternate language proposed by the non-Federal negotiators.

The additional provisions on an agency's handling of complaints were proposed to make it clear that institutions or programs must be given sufficient opportunity to provide a response to a complaint before the agency takes any action.

There was considerable discussion during the negotiated rulemaking sessions about the proposed new language in § 602.25. Some of the non-Federal negotiators described their current appeals process, and indicated that when an appeal is received, it is reviewed by a separate appeals panel that then makes a recommendation to the board or commission, which in turn makes the decision on the appeal. It became clear during the discussion that even though the appeals panel might have members who did not serve on the original decision-making body, the appeals panel made a recommendation, rather than a decision, and the original decision-making body was under no obligation to accept the recommendation. This is problematic because, if an appeals panel conclusion is not the final decision, the effect of a successful appeal may be negated.

The Department proposed requiring that the appeals panel be a decision-making body, noting that the statute calls for an opportunity to appeal an action "prior to such action becoming final at a hearing before an appeals panel \* \* \* ." The Department also noted that the reference to the original decision being made by the agency's "underlying decisionmaking body" made clear that the appeals panel was a decision-making body. Otherwise, there would be no need to refer to the original body as the "underlying" decision-making body. This proposal generated a significant amount of discussion and concern. Several non-Federal negotiators expressed concern that if the appeals panel were a separate decision-making body that made an accreditation decision, it would need to comply with all the requirements for an agency decision-making body, including

having as one of its members a member of the public, and would result in a decision being made by a smaller and less diverse body than the board or commission.

Other non-Federal negotiators stated that, in some cases, an appeals panel might need additional information and need to solicit information from the original decision-making body. In other cases, an appeals panel might determine that the original decision did not take into account all the necessary information, and therefore should be reversed or amended. In some cases, a successful appeal would identify a procedural error made in earlier proceedings, but would not involve an inquiry into substantive issues for purposes of making the accreditation decision. In a circumstance where the appeals panel determined that some citations of deficiencies were supported and others were not, there would need to be a new decision on accreditation, but the appeals panel might not be in a position to make that decision. Upon consideration of these scenarios, the Department proposed having the appeals panel affirm, amend, or reverse the adverse action, but permitting either the appeals panel or the original decision-making body to implement the decision of the appeals panel. This would provide agencies with some flexibility. However, to make it clear that the original decision-making body could not disregard a decision made by the appeals panel, the proposed regulations include a provision that if the original decision-making body is responsible for implementing the decision, it must act in a manner consistent with the appeals panel's decision. The proposed regulations would not require agencies to provide institutions or programs with a continual opportunity to appeal.

There was also discussion during negotiated rulemaking about whether the new financial information that may now be provided would have to be reviewed during an appeal, or whether it could be reviewed at an earlier time. The Department revised the proposed regulations to allow for flexibility in handling the new financial information. The new financial information could be reviewed during an appeal or at an earlier stage. In either case the agency could exercise discretion to designate in its procedures which group of people will conduct the review. Under the proposed provisions, it would be possible to stay an appeal while a separate body reviewed the financial information.

Finally, there was extensive discussion about the circumstances

under which an agency should be deemed to be taking a final adverse action based solely on failure to comply with financial criteria. Some of the non-Federal negotiators expressed their belief that to trigger the new provision that allows for new financial information to be considered an institution or program must have been cited initially only on deficiencies related to financial criteria. The Department's position, reflecting the language in the statute, is that an institution or program could have been cited initially for multiple issues, but that if all of the issues involving non-financial criteria were resolved, new financial information could be brought forward for review before the adverse action became final. This position is reflected in the proposed regulations.

*Monitoring and Reevaluation of Accredited Institutions and Programs (§ 602.19)*

*Statute:* Section 496(c)(1) of the HEA requires accrediting agencies to perform on-site inspections and reviews of institutions of higher education at regularly established intervals. Section 496(c)(2) of the HEA includes a requirement that accrediting agencies monitor the growth of programs at institutions experiencing significant enrollment growth. Section 496(a)(4)(A) requires agencies to consistently apply and enforce standards that ensure that the courses or programs offered are of sufficient quality to achieve their stated objectives for the duration of the accreditation period.

Section 496(a)(4)(B)(i)(II) of the HEA permits a recognized agency to expand its scope of recognition to include distance education or correspondence education by notifying the Secretary of that change in writing. This eliminates the need for a recognized agency to obtain separate approval from the Secretary for the change. However, section 496(q) of the HEA requires review by the NACIQI of an agency that changed its scope through written notice to the Secretary if the enrollment of an institution that offers distance education or correspondence education that is accredited by that agency increases by 50 percent or more within any one institutional fiscal year.

*Current Regulations:* Current regulations in § 602.19 require an accrediting agency to evaluate, at regularly established intervals, the institutions or programs it has accredited or preaccredited. The agency is required to monitor institutions or programs throughout their accreditation or preaccreditation period to ensure that they remain in compliance with agency

standards. Current regulations require agencies to conduct special evaluations or site visits as necessary.

*Proposed Regulations:* The proposed regulations would amend § 602.19(b) by requiring that an agency demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables the agency to identify problems with an institution's or program's compliance with agency standards, and that takes into account institutional program strengths and stability. Proposed § 602.19(b) would require that these approaches to monitoring include periodic reports, and collection and analysis of key data and indicators identified by the agency, including, but not limited to, fiscal information and measures of student achievement. This section of the proposed regulations would include a cross-reference to § 602.16(f) to clarify that an agency is not precluded from setting and applying its own accreditation standards; nor are institutions of higher education precluded from developing and using institutional standards to show their success with respect to student achievement.

The proposed regulations would add new paragraphs (c) through (e) to this section. Section 602.19(c) of the proposed regulations would require an agency to monitor the overall growth of the institutions or programs it accredits and to collect information on headcount enrollment at least annually. Section 602.19(d) of the proposed regulations would add a requirement for institutional accrediting agencies to monitor the growth of programs at institutions experiencing significant enrollment growth and would provide that the determination of what is significant growth would be made by the agency. Finally, the proposed regulations, in § 602.19(e), would require an agency that has notified the Secretary in writing of an expanded scope, as provided in section 496(a)(4)(B)(i)(II) of the HEA, to monitor the headcount enrollment of each institution it has accredited that offers distance education or correspondence education. If any of those institutions experiences an increase in headcount enrollment of 50 percent or more within one institutional fiscal year, the agency would be required to report that information to the Secretary within 30 days of acquiring that information.

*Reasons:* Many of the proposed regulations would implement changes required by the HEOA. These changes include the requirements that agencies monitor growth of programs at institutions experiencing significant

enrollment growth and monitor headcount enrollment at institutions the agency accredits that offer distance or correspondence education. Other changes to the current regulations are being proposed, as a result of discussions both during the negotiated rulemaking process and within the Department, in an effort to ensure that the regulations properly reflect statutory requirements and provide for greater consistency while accommodating differences across institutions. The Department believes the current regulatory requirement regarding an agency's monitoring to ensure compliance with all of an agency's standards is too broad in scope and too limiting in method. Therefore the proposed regulations would stipulate that an agency monitor an institution to identify specific problems with the institution's or program's compliance with accrediting agency standards and provide more flexibility for agencies as to how they manage the review.

The Department's initial proposal for this section of the regulations would have required an agency to collect and analyze key data and performance indicators, and included an illustrative list of the data an agency might collect and analyze when monitoring institutions or programs. Some non-Federal negotiators expressed concerns about the illustrative list in the proposed regulations. Some stated their belief that certain items on that list encroached on areas where the Secretary is prohibited from regulating, while others wanted the list eliminated altogether because it could be interpreted as a requirement that agencies collect all the information included on the list and, thus, could increase institutional burdens. It was also noted that programmatic accrediting agencies do not collect specific financial data, such as audits. A few non-Federal negotiators objected to the use of the term "performance indicators" because they stated that this could lead to a requirement that an agency establish "bright lines" for assessing these indicators. Still other negotiators indicated that they had no objections to including an illustrative list in the regulations.

The Department clarified that the goal was not to be prescriptive, and that the list was intended to be illustrative, as shown by the use of the words "these may include but are not limited to." The Department also reminded the non-Federal negotiators that much of the proposed language was already in the standards section of the statute and current regulations. In addition, the Department noted that this section of

the regulations concerns monitoring—the agency's application and enforcement of its standards, policies, and procedures—rather than the substance of agency accrediting standards, as to which the Secretary is prohibited from regulating.

Based on the discussions with negotiators and among Department staff, as well as a shared goal of all participants to ensure proper monitoring of institutions and programs, the proposed language in § 602.19(b) was modified. The modifications reflect a proposal made by the non-Federal negotiators to combine some of the paragraphs from the initial proposal and to eliminate redundancy.

The proposed language would provide accrediting agencies with flexibility regarding their monitoring of institutions and programs and at the same time ensure they will review and analyze key data and indicators, including fiscal information and measures of student achievement. The Department expects agencies to examine and take appropriate action based on the fiscal, student achievement, and other data collected through the monitoring process. The Department noted that this is an area of great importance and that the Department's responsibility to ensure effective and efficient monitoring takes place is fundamental. The Department made clear that it accepted the proposals by the non-Federal negotiators because the proposals adequately reflect these principles.

#### *Substantive Change (§ 602.22)*

*Statute:* Section 496(a) of the HEA requires the Secretary to establish recognition criteria to determine if an accrediting agency is a reliable authority as to the quality of education or training offered by an institution or program it accredits.

Section 496(a)(1) of the HEA requires an agency to demonstrate the ability and experience to operate as an accrediting agency. Section 496(a)(4) of the HEA requires an agency to consistently apply and enforce standards that ensure courses or programs are of sufficient quality to achieve the stated objectives for which they are offered throughout the duration of the accreditation period. Section 496(a)(5) of the HEA requires the agency to have standards that address the quality of an institution or program in a number of areas. The first area is an institution's or program's success with respect to student achievement in relation to an institution's mission, including, as appropriate, consideration of course completion, consideration of State licensing examinations, and job

placement rates. In addition, standards must address an institution's or program's curricula; faculty; facilities, equipment, and supplies; fiscal and administrative capacity; recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising; measures of program length and the objectives of the degrees or credentials offered; record of student complaints; and record of compliance with an institution's program responsibilities under title IV of the HEA. Finally, section 496(c) of the HEA requires the agency to follow various operating procedures, including, but not limited to, conducting regular on-site visits to institutions it accredits, monitoring the growth of programs at institutions with significant enrollment growth, reviewing an institution's plans for the addition of new branch campuses, and conducting visits to new branch campuses and to institutions following a change of ownership.

*Current Regulations:* Section 602.22 of the current regulations requires an agency to maintain an adequate substantive change policy that ensures any substantive change to the educational mission or program or programs of an institution after it has been accredited does not adversely affect the capacity of the institution to continue to meet the agency's standards. Section 602.22(a)(2) lists seven types of changes that, at the least, must be included in the agency's definition of substantive change. Section 602.22(b) of the current regulations allows the agency to establish procedures to grant prior approval of a substantive change. Section 602.22(c) provides that if the agency's accreditation of an institution enables the institution to participate in title IV, HEA programs, the agency's procedures for approval of an additional location must include certain processes.

*Proposed Regulations:* The proposed regulations would amend the list of events that would constitute a substantive change. Proposed § 602.22(a)(2)(iii) would include the addition of courses or programs that represent a significant departure "from the existing offerings of educational programs," in place of the current language regarding a significant departure "in content." Proposed § 602.22(a)(2)(iv) would be amended to clarify that the addition of programs of study at a degree or credential level different from, rather than only those above the level already included in the institution's accreditation, would be considered a substantive change. (The meaning of "program of study" is elaborated on further within this

preamble in the discussion of § 602.24, teach-out plans and agreements.)

The proposed regulations would add to the list of substantive changes, a provision to implement the requirement in 34 CFR 668.5(c)(3)(ii)(C) that an eligible institution's accrediting agency determine that an institution's arrangement to contract out more than 25 percent of an educational program to entities that are not eligible on their own to participate in title IV, HEA programs meets the agency's standards for the contracting out of educational services.

The proposed regulations would further modify § 602.22(a)(2) by adding a new paragraph (viii) to provide greater flexibility to accrediting agencies in granting prior approval of additional locations where at least 50 percent of an educational program is offered. The new flexibility would apply to institutions that, according to agency criteria, have demonstrated sufficient capacity to add locations, and no longer need prior agency approval for each addition. These criteria would require an institution to provide satisfactory evidence that it has: A system to ensure quality across a distributed enterprise that includes clearly identified academic control; regular evaluation of the locations; adequate faculty, facilities, resources and academic and student support systems; financial stability; and long-range planning for expansion. To qualify for these preapprovals, an institution must also have successfully completed at least one cycle of accreditation of maximum length offered by the agency and one renewal, or been accredited for at least ten years, and already have at least three additional locations that the agency has approved. The agency must require timely reporting by the institution to the agency of each additional location established under the agency's approval and the agency's preapproval may not extend longer than five years. The proposed regulations would not allow the agency to preapprove an institution's addition of locations under this process after the institution undergoes a change in ownership until and unless the institution demonstrates it meets the conditions outlined in this section of the proposed regulations under its new ownership. Further, agencies would be required to have an effective mechanism for visiting a representative sample of additional locations approved under paragraph (a)(2)(viii) at reasonable intervals.

The proposed regulations in new paragraphs § 602.22(a)(2)(ix) and (x) would also require that agencies include as substantive changes the acquisition of

any other institution or program or location of another institution, and the addition of a permanent location at the site of a teach-out the institution is conducting.

The proposed changes to § 602.22(a) also would include the addition of a new paragraph (3) requiring an agency to define, as part of its substantive change policy, when changes made at or proposed by an institution are considered sufficiently extensive to require the agency to conduct a new comprehensive review of that institution.

Proposed changes to § 602.22(b) would retain the agency's ability to determine its own procedures for granting prior approval of a substantive change. However, those procedures must specify an effective date on which the change would be included in the program's or institution's accreditation. The proposed regulations would require that the effective date not be retroactive, with a limited exception for changes of ownership.

Finally, a proposed addition to § 602.22(c) would clarify the requirement that an agency have an effective mechanism for conducting visits to additional locations of institutions that operate more than three additional locations. The proposed regulations specify that the agency must visit a representative sample of those locations at reasonable intervals.

*Reasons:* In recognition of the pace at which change is occurring within the higher education community, including the addition of new locations of institutions, the development of new curricula, and ownership changes, the Department believed that it was important to bring these issues to the negotiators for discussion. The Department sought to ensure continued effective compliance with the statute in developing regulations that recognize the changing nature of higher education, while maintaining fiduciary responsibility.

Many institutions now operate as distributed enterprises. That business model is one that encompasses the establishment of multiple locations operated within the context of a single administrative system. The current regulations pertaining to substantive change do not accommodate this type of innovative model, because an accrediting agency must focus on individual additional locations of an institution. The current regulations do not allow an agency to determine if an institution has a system to ensure quality across a distributed enterprise and to consider the unit of analysis to

be the system as a whole rather than each individual location.

The Department's approach to address new types of institutional organizational structures was to use the substantive change provisions to modify and clarify the additional location approval requirements that apply to traditional institutions, and those that apply to institutions that operate on a model where the establishment of locations is a standard practice that is carried out in a manner that ensures quality across all of the individual locations. Initial language proposed by the Department to the negotiators did not, in the opinion of some non-Federal negotiators, provide the appropriate clarity, and some non-Federal negotiators questioned the proposed use of the phrase "addition of multiple locations" rather than simply using "the addition of locations" noting that a change in the phrasing may lead to some confusion. Some non-Federal negotiators stated that the Department's proposed restructuring of the regulations was difficult to follow and that the two headings the Department initially proposed to add in order to draw a distinction between types of institutions were misleading. The Department agreed to review the language and redrafted the proposed regulations by further restructuring the language, and removing the headings. However, the Department retained use of the phrase "distributed enterprise" because it describes the concept intended without unduly limiting the business models covered.

Some non-Federal negotiators raised a concern about the language initially proposed in § 602.22(a)(2)(iii) regarding a change in academic content, while appreciating the intent of the language, and asked the Department to amend the language to provide clarity. The revised language discussed with and agreed to by the negotiators would provide for a substantive change to include the addition of courses or programs that represent a significant departure from the existing offerings of educational programs, or methods of delivery, from those that were offered when the agency last evaluated the institution. There was further discussion about what constituted a "significant departure" from existing offerings. Several non-Federal negotiators raised examples such as changing individual courses within a program, altering the syllabus from one year to the next, or changing text books for a course or program, and asked the Department if those would constitute a significant departure in existing offerings of educational programs, or method of delivery. The

Department clarified that a significant departure from the existing offerings of educational programs, while determined by the agency, would not result from an individual course or text book change, or from the change in some faculty members. However, an agency might consider it significant if an entire department of faculty members left an institution or, as one non-Federal negotiator pointed out as an example, if an institution or program began delivering courses through distance education that were not previously available at the institution.

#### *Teach-out Plans and Agreements* (§ 602.24)

*Statute:* Section 496(c)(3) of the HEA, added by the HEOA, specifies that, among other requirements, to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, an accrediting agency must require an institution it accredits to submit a teach-out plan for approval by the accrediting agency if any of three events occurs: (1) The Department notifies the accrediting agency of an action against the institution pursuant to section 487(f) of the HEA; (2) the accrediting agency acts to withdraw, terminate or suspend the accreditation of an institution; or (3) the institution notifies the accrediting agency that the institution intends to cease operations.

Section 487(f) of the HEA defines “teach-out plan” and adds an institutional requirement that in the event the Secretary initiates a limitation, suspension, or termination of the participation of an institution of higher education in any program under title IV under the authority of section 487(c)(1)(F) of the HEA, or initiates an emergency action under the authority of section 487(c)(1)(G) of the HEA, and its prescribed regulations, the institution is required to prepare a teach-out plan for submission to the institution’s accrediting agency in compliance with section 496(c) of the HEA, the Secretary’s regulations on teach-out plans, and the standards of the institution’s accrediting agency.

*Current Regulations:* The current regulations specify that if an agency’s accreditation enables an institution to obtain eligibility to participate in the title IV, HEA programs, the agency must require the institution to submit any teach-out agreement the institution enters into with another institution for agency approval. “Teach-out agreement” is defined in the current regulations in § 602.3.

*Proposed Regulations:* The proposed regulations would restructure § 602.24(c) of the current regulations to include teach-out plans as well as teach-out agreements. The proposed regulations would expand accrediting agency responsibilities by providing that agencies require the institutions they accredit or preaccredit to submit a teach-out plan to the agency for approval upon the occurrence of any of four events: (1) The Secretary notifies the agency that the Secretary has initiated an emergency action against an institution in accordance with section 487(c)(1)(G) of the HEA, or has initiated a limitation, suspension, or termination of the participation of an institution of higher education in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required; (2) the agency acts to withdraw, terminate or suspend the accreditation or preaccreditation of the institution; (3) the institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or (4) a State licensing or authorizing agency notifies the agency that an institution’s license or legal authorization to provide an educational program has been or will be revoked.

The proposed regulations would require an agency to evaluate each teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency, specifies additional charges, if any, and provides for notification to the students of any additional charges. An agency that approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency would be required to notify that accrediting agency of its approval. The proposed regulations would also specify that an agency may require an institution it accredits or preaccredits to enter into a teach-out agreement with another institution of higher education as part of its teach-out plan.

The proposed regulations would also amend the current requirement with respect to the submission of any teach-out agreement by an institution to an agency to clarify that the agreement must be submitted for agency approval whether it was entered into at the institution’s own volition or at the request of the agency.

Current regulations would also be amended to add additional specificity to the requirement that the agency approve a teach-out agreement only if it provides for the equitable treatment of students. Under the proposed regulations, the agency’s obligation would pertain to

circumstances in which either an entire institution, or one of its locations at which it provides one hundred percent of at least one program offered, ceased operations, and would include requiring that the teach-out institution have the necessary experience, resources, and support services to remain stable, carry out its mission, and meet all obligations to existing students. The proposed regulations would also require that a teach-out institution provide students with information about additional charges, if any.

The proposed regulations would also amend paragraph (d) in the current regulations in § 602.24 to specify that if an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

*Reasons:* The Department proposes to specify that a teach-out plan would be required in the three circumstances specified in the statute: The Department initiates an emergency action or an action to limit, suspend or terminate an institution’s participation in the title IV, HEA programs; the accrediting agency acts to withdraw, terminate or suspend the institution; or the institution indicates it intends to cease operations. The Department initially proposed referencing the subpart of the Student Assistance General Provisions regulations that contain the regulations governing limitation, suspension, termination, and emergency actions. Some of the non-Federal negotiators stated that requiring a teach-out plan if the Secretary initiates an emergency action, or an action to limit, suspend, or terminate an institution in accordance with subpart G of 34 CFR part 668, might result in confusion and application of the teach-out requirements beyond the intent of the statute, because subpart G is broad and refers to requirements such as posting of surety. They stated that requiring teach-out plans when the Department requires letters of credit or places an institution on heightened cash monitoring is not mandated under the statute and should be avoided. The Department agrees that a requirement that an institution post a letter of credit, or be subject to heightened cash monitoring, imposed outside of a subpart G proceeding, should not, on its own, trigger a requirement that the institution submit a teach-out plan to its accrediting agency for approval. The Department agreed to modify the language it

originally proposed by adding a reference to the statutory provisions governing emergency actions and actions to limit, suspend, or terminate the participation of an institution in the title IV, HEA programs. In addition, to reduce any confusion over when agency action is required, the proposed regulation was further revised to specify that when the Department notifies an institution and its accrediting agency that the Department is initiating an emergency, limitation, suspension, or termination action, it will also indicate in the notice that a teach-out plan is required.

The proposed regulations also provide that an accrediting agency must require submission of a teach-out plan when a State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. This provision was added because loss of State licensing leads directly to the loss of accreditation and institutional eligibility, and may well be followed by closure. There was support from the non-Federal negotiators for including this provision.

The addition of a provision in proposed § 602.24(c)(3) that, if an agency approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency, it must notify that agency of its approval, was made to ensure appropriate sharing of important information. The new provision in proposed § 602.24(c)(4) that an agency may require an institution to enter into a teach-out agreement as part of its teach-out plan was added to reflect new statutory language in section 487(f) of the HEA. In view of this new language, the proposed regulations would also modify the requirement for submission of teach-out agreements for agency approval (found in proposed § 602.24(c)(5) as restructured), to clarify that the agreements must be submitted for approval regardless of whether the institution enters into the agreement on its own, or at the request of the agency.

There was extensive discussion about what the statutory definition of "teach-out plan" in section 487(f)(2) of the HEA means in requiring a teach-out plan or agreement when an institution ceases to operate before all students complete their "program of study." Whereas "program" is defined in the regulations in § 602.3 to mean a postsecondary educational program that leads to an academic or professional degree, certificate, or other recognized educational credential, there is no definition of "program of study." In order to implement a teach-out plan or

agreement, however, it is necessary to understand the concept of a "program of study." The Department understands a program of study to be the specific area of study, or major, within the context of a degree or certificate program. Thus, to characterize an English major at a four-year institution, the student would be enrolled in a baccalaureate program with English as the program of study. What is important, and the reason for the distinction between "program" and "program of study" with respect to teach-outs, is that students need to be provided with the opportunity to complete their specific program of study when an institution or location offering 100 percent of at least one program ceases to operate. Thus, a student in a baccalaureate degree program who is preparing to become a teacher must be able to complete all the teacher education courses needed for a degree in that major.

The Department initially proposed that agencies evaluate a teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency and does not result in duplicative or increased costs. The Department was concerned that students not be charged additional money for a program for which they had already paid tuition and fees. Moreover, the concept of accrediting agencies working with the Department and the State licensing agency, to the extent feasible, to ensure that students whose institution has closed have reasonable opportunities to complete their programs without additional charges is included in the current regulations.

Some of the non-Federal negotiators noted that institutions that take on responsibility for teach-outs often lose substantial money to ensure that students are taught out properly. Sometimes, the closing institution did not provide its students with an adequate education, and the students being taught out need additional education or training to enable them to complete their program and be successful. Sometimes this involves students re-taking a course. Hence, prohibiting "duplicative charges" through teach-out approval requirements cannot be presumed to be in students' best interests. The institution conducting a teach-out must have flexibility, and placing too many prohibitions or prescriptions on the teach-out plan may preclude the establishment of appropriate teach-out arrangements. The non-Federal negotiators agreed that it would be better to require that the teach-out plan ensure students are notified of any additional charges that the teach-out

will entail. The Department agreed with the non-Federal negotiators. It should be noted that the Department's expectations are that students will not incur additional or duplicative charges for participating in a teach-out to complete their programs of study. If, as the exception, and not the rule, an institution serving as a teach-out institution must charge the students, it should ensure that any charges are reasonable, taking into consideration the impact on the student. Further, the Department believes it is important for a teach-out plan to specify if there are additional charges. To be approved, a teach-out plan must provide for notification to the students of any additional charges.

Several non-Federal negotiators raised a question about what constitutes closure of an institution or location. They noted that there have been situations in which an institution or location moved, and did not close, but the Department deemed the institution to have closed. During the discussion, the Department clarified that normally a move of an institution or location across the street would be viewed as a change of address, and would not constitute closure. However if, for example, an institution or location moved 20 miles, there would have to be an examination of the circumstances. A 20-mile move in a rural area might not have a major impact on the majority of an institution's students, whereas a 20-mile move in an urban area could disadvantage an institution's students to the point where they could no longer attend the institution. In ascertaining whether an institution or location has closed or moved, key considerations are whether the institution's faculty, staff and students move with the institution or location.

Under the proposed regulations, the requirement that agencies work with the Department regarding closed schools would apply to those schools that close without a teach-out plan or agreement. The Department proposed to require that students be given reasonable opportunities to complete their education "without duplicative or increased charges." Several negotiators presented various points of view on the proposal regarding closed institutions and locations when there is no teach-out plan or agreement. Some non-Federal negotiators suggested focusing on what was being done to protect the students and noted that what is best for the students must be evaluated on a case-by-case basis. Other non-Federal negotiators expressed concern that the proposed language could be read to imply that the accrediting agency would



be required to assume a financial obligation for teaching out the students in such circumstances. However, a non-Federal negotiator stated a belief that, while it is understandable that accrediting agencies do not want the regulations to imply that they have any liability for the educational expenses of students when an institution or location closes without a teach-out plan or agreement in place, it is likely that accrediting agencies will incur ordinary in-kind expenses, such as some expenditure of staff time, in complying with the recognition criteria pertaining to teach-outs and school closures.

The Department agrees that it expects agencies to expend staff time and make other ordinary and customary commitments of agency resources in the course of assisting students in finding reasonable opportunities to complete their programs of study, but that agencies are not expected to pay for the educational expenses of students in this situation. In addition, to avoid the appearance that the Department is creating any new or unusual financial obligations for agencies, the Department agreed to remove the references to "ensuring" that students do not incur "additional or duplicative charges" in favor of language simply requiring that agencies "assist students" in finding reasonable opportunities to complete their programs "without additional charge."

#### *Transfer of Credit (§ 602.24)*

*Statute:* As amended by the HEOA, section 496(c)(9) of the HEA specifies, among other requirements, that to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, an accrediting agency must confirm, as part of the agency's review for initial or renewal of accreditation, that an institution has transfer of credit policies that are publicly disclosed and that include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education.

Section 485(h) of the HEA contains a new HEOA requirement that institutions publicly disclose their transfer of credit policies in a readable and comprehensible manner. This section also specifies that neither the Secretary nor the NACIQI is authorized to require particular policies, procedures, or practices by institutions with respect to transfer of credit.

*Current Regulations:* There are no current regulations addressing transfer of credit.

*Proposed Regulations:* Proposed § 602.24(e) would incorporate the provisions of the HEA regarding the new requirement in the HEOA that accrediting agencies confirm that institutions have transfer of credit policies that are publicly disclosed and include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education. The proposed regulations include a cross-reference to the paragraph in 34 CFR 668.43 that the Department plans to include in a final rule to reflect the HEOA's new institutional disclosure requirement regarding transfer of credit policies. In the final regulations governing accrediting agencies, the complete cross-reference will be inserted in § 602.24.

*Reasons:* The new paragraph would implement the new statutory provisions contained in the HEOA. Some of the non-Federal negotiators expressed concern about a perceived lack of clarity regarding availability of information and were interested in having a definition of "publicly disclosed" to make it clear that the information must be readily available to students and their advisors. To address this concern, the proposed regulations provide a reference to the new institutional disclosure requirement that will require institutions to disclose the information specified regarding transfer of credit in a readable and comprehensible manner.

Some non-Federal negotiators wanted to add language requiring that the criteria established by the institution regarding the transfer of credit earned at another institution of higher education be fair. These negotiators stated that the issue of transfer of credit is a serious one and that full disclosure of this kind of information is needed so students can assess the fairness of an institution's policies and can decide whether to apply to the institution. Other non-Federal negotiators said there was a problem with expanding the statutory language, noting the Rule of Construction in section 485 of the HEA that constrains the Secretary from elaborating on the requirement. In addition, the regulations governing accrediting agencies require only that the agencies confirm that institutions being reviewed publicly disclose their transfer of credit policies. The more specific requirements on transfer of credit in section 485 of the HEA govern institutions, not accrediting agencies. The proposed regulations reflect the statutory language, but include a cross-reference to the institutional transfer of credit provisions to address some of the non-Federal negotiators' concerns.

#### *Summary of Agency Actions (§ 602.26)*

*Statute:* Section 496(c)(7) of the HEA specifies that, among other requirements, to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, an accrediting agency must make available to the public and the State licensing or authorizing agency, and submit to the Secretary, a summary of agency actions including the accreditation or renewal of accreditation of an institution; the final denial, withdrawal, suspension, or termination of accreditation of an institution; any findings made in connection with the action taken, together with the official comments of the affected institution; and any other adverse action taken with respect to an institution or placement on probation of an institution.

*Current Regulations:* Section 602.26(b) of the current regulations requires an agency to provide written notice of (1) a final decision to place an institution or program on probation or an equivalent status, and (2) a final decision to deny, withdraw, suspend, revoke, or terminate the accreditation or preaccreditation of an institution or program. The notice must be provided to the Secretary, the appropriate State licensing or authorizing agency, and appropriate accrediting agencies at the same time the accrediting agency notifies the institution, but no later than 30 days after the decision.

Section 602.26(c) of the current regulations requires an accrediting agency to provide written notice to the public of the decisions identified in § 602.26(b)(1) and (b)(2) within 24 hours of its notice to the institution or program.

Section 602.26(d) of the current regulations requires that with respect to any decision listed in § 602.26(b)(2), the agency must make available to the Secretary, the appropriate State licensing or authorizing agency, and the public upon request, no later than 60 days after the decision, a brief statement summarizing the reasons for the agency's decision and the comments, if any, that the affected institution or program might wish to make with regard to that decision.

*Proposed Regulations:* The proposed regulations regarding disclosure of accrediting agency actions would require accrediting agencies to provide written notice of a final decision to take any other adverse action not listed in § 602.26(b)(2), as defined by the agency, to the Secretary and the State licensing or authorizing agency. The proposed

regulations would also add a cross-reference to require agencies to provide written notice to the public within 24 hours of their notice to the institution or program of any other adverse action.

Finally, the proposed regulations would specify in new paragraph (d) that the accrediting agency, in addition to providing to the public a brief statement summarizing the reasons for the agency's decision, must provide the official comments of the affected institution or program, or evidence that the institution or program was offered the opportunity to provide official comments. The information must be provided to the public whether or not the agency receives a request for the information.

*Reasons:* Many of the new provisions in the HEA are already addressed by current regulations. During negotiated rulemaking, the non-Federal negotiators requested that the accrediting agencies be permitted to define the other adverse actions, not specified in the regulations, about which the agencies would be required to provide information. The non-Federal negotiators also requested that the regulations clarify that agencies need provide only official comments of an institution or program or, if there are no official comments, evidence that the institution or program was offered an opportunity to provide official comments. The Department agreed with the non-Federal negotiators.

#### *Recognition of Agencies by the Secretary (Subpart C)*

*Statute:* Section 496(o) of the HEA authorizes the Secretary to develop regulations that provide procedures for the recognition of accrediting agencies and for administrative appeals. Section 496(l)(1)(B) of the HEA specifies the 12-month timeframe by which noncompliant agencies must take appropriate action to come into compliance, absent an extension of the timeframe by the Secretary upon good cause shown. Section 496(d) of the HEA stipulates that the period of recognition not exceed five years. Section 114 of the HEA, as amended by the HEOA, restructures the NACIQI and provides for the establishment of the NACIQI meeting agenda by the Chairperson of NACIQI; under the FACA, 5 U.S.C. Appdx. 1, approval of the meeting agenda by the Secretary's designated Federal official is also required. Section 496(q) of the HEA requires a review, at the next available NACIQI meeting, of an agency that has included distance education or correspondence education in its scope of recognition through written notice to the Secretary, if the enrollment of an accredited institution

that offers distance education or correspondence education has increased by 50 percent or more within any one institutional fiscal year. Section 496(a) and (c) of the HEA describes various kinds of institutional and agency information that must be made available to the public, the Secretary or the State licensing or authorizing agency, as applicable. Along with HEA requirements, the Department must comply with requirements in the Freedom of Information Act, 5 U.S.C. § 552; the Trade Secrets Act, 18 U.S.C. § 1905; the Privacy Act of 1974, as amended, 5 U.S.C. § 552a; the FACA, 5 U.S.C. Appdx. 1; and all other applicable laws, in considering whether and when information obtained from accrediting agencies may, or must, be disclosed to the public.

*Current Regulations:* There are two sets of recognition procedures in the current regulations. Subpart C provides review procedures only for an agency's application for initial or continued recognition, and does not stipulate procedures for other types of Departmental review pertaining to recognition proceedings. Subpart D provides procedures for limitation, suspension, or termination of recognition. Under subparts C and D, the Secretary has the authority to make a decision regarding an accrediting agency's recognition, as well as for any appeal the accrediting agency may bring related to that decision.

Section 602.30(c) of the current regulations states that the Secretary does not make available to the public any confidential agency materials Department staff review during the evaluation of an agency's application for recognition or compliance with the criteria for recognition.

*Proposed Regulations:* The proposed regulations would reflect changes made by the HEOA regarding the review of distance education and correspondence education, and the role of the Chairperson of the Advisory Committee in establishing the meeting agenda. Under the FACA, approval of the meeting agenda by the Secretary's designated Federal official is also required; "Designated Federal Official" is defined in proposed § 602.3.

The proposed regulations would combine subparts C and D, thereby streamlining agency review and establishing procedures for the following activities: Applications for an expansion of scope; submission and review of compliance reports, as defined in proposed § 602.3; reviews of increases in headcount enrollment described in proposed § 602.19(e); and staff analyses based on reviews of

agencies during their period of recognition. The proposed regulations would establish the senior Department official as the decision-maker on recognition proceedings and the Secretary as the decision-maker on appeals. Proposed subpart C would also make explicit the authority of the senior Department official to make a decision in a recognition proceeding in the event that the statutory authority or appropriations for the Advisory Committee ends or that there are fewer duly appointed Advisory Committee members than needed to constitute a quorum, and under extraordinary circumstances when there are serious questions about an agency's compliance that require prompt attention. Proposed subpart C would clarify that an agency may be given no more than 12 months to address identified deficiencies, after which time a decision on recognition would be made on the basis of a compliance report, unless the senior Department official (or Secretary, on appeal), on review of the report, determines good cause exists to extend that timeframe.

Proposed § 602.31 would identify laws governing the Secretary's processing and decision-making on requests for public disclosure of information obtained during agency recognition proceedings. Proposed § 602.31 would also provide procedures that an agency may follow in seeking to protect the confidentiality of trade secrets and commercial or financial information that is privileged or confidential in documents submitted to the Department in recognition proceedings. Section 602.31(f)(1) of the proposed regulations would provide the citations of the various laws to which the Secretary's release of information is subject, including the Freedom of Information Act (FOIA); the Trade Secrets Act; the Privacy Act of 1974, as amended; and the Federal Advisory Committee Act.

The proposed regulations would add a set of procedures an agency may follow when submitting documents to the Department for recognition proceedings in order to assist the Department in its efforts to avoid disclosing those materials that are entitled to protection from disclosure under applicable law. These procedures include: Allowing the agency to redact information that would identify individuals or institutions and is not essential to the Department's review of the agency; specifying that the agency make a good faith effort to designate all business information within the submission that the agency believes would be exempt from disclosure under

exemption 4 of FOIA; identifying any other material the agency believes would be exempt from public disclosure, the factual basis for the request, and any legal basis the agency has identified for withholding the document from disclosure; and ensuring that the documents submitted are only those required for Department review or as specifically requested by the Department. The proposed regulations would also make clear that a blanket designation of material submitted as meeting the exemptions in FOIA will not be considered to be in good faith and will be disregarded. Finally, the proposed regulations would clarify that the Secretary processes all FOIA requests in accordance with 34 CFR part 5 and that all documents provided to the Advisory Committee are available to the public.

*Reasons:* The Department proposes to combine subparts C and D to establish consistent procedures that govern the recognition process. The intent behind current regulations in subpart D—which establishes a separate process that involves subcommittees of the Advisory Committee for all limitation, suspension and termination actions—was to expedite these types of actions. However, in practice, scheduling and logistical issues have made it cumbersome for Department staff and the Advisory Committee to manage two processes.

Proposed subpart C would make clear the parallel processes by which the Department staff and the Advisory Committee make recommendations on recognition that are forwarded, along with the complete record, to the senior Department official for a decision. The Department clarified during negotiated rulemaking that the NACIQI is, by definition, an advisory committee that makes recommendations and is not a decision-making body. Current regulations in § 602.33 that provide procedures for appealing NACIQI's recommendation are confusing given that an appeal suggests that a decision has been made, whereas in fact, NACIQI is only making a recommendation.

In lieu of current § 602.33, proposed § 602.35 would provide a process by which the agency and Department staff may respond to the Advisory Committee's recommendation before the senior Department official makes his or her recognition decision. Under the proposed regulations, decision-making authority would reside with the senior Department official, whose decisions would be appealable by the agency to the Secretary under proposed § 602.37. The proposed changes to establish the senior Department official as the

decision-maker on recognition and the Secretary as the decision-maker on appeals would strengthen due process by ensuring that the appeal is not adjudicated by the initial decision-maker. Under the current regulations, the decision-making authority on both recognition and appeals resides with the Secretary.

The proposed regulations in §§ 602.32, 602.34, and 602.36 would increase transparency and efficiency, and implement HEOA provisions regarding distance and correspondence education. These proposed regulations would detail proceedings for staff and Advisory Committee review of applications for recognition or renewal of recognition, expansions of scope, compliance reports, and reviews of increases in headcount enrollment described in proposed § 602.19(e). Proposed § 602.33 would provide procedures for reviews of agencies during the period of recognition. Timeframes for various stages of the review process would be specified to strengthen due process for agencies.

The Department's initial proposed language in subpart C incorporated the concept that an agency's compliance with the criteria for recognition includes the requirement that an agency "is effective in its performance with respect to those criteria." Some non-Federal negotiators expressed concern regarding the word "performance" because they believed that term is difficult to define. They suggested that the language be amended to incorporate the statutory concept of "effective application" of the criteria. The Department agreed to replace the language regarding "performance" with the phrase "effectively applies those criteria." While addressing non-Federal negotiators' concerns regarding the word "performance," the proposed language would retain the statutory concept of "effectiveness" and the judgment associated with how an agency applies its standards.

During the discussions regarding proposed § 602.37, which would specify procedures for appealing the senior Department official's decision to the Secretary, some non-Federal negotiators expressed concerns regarding provisions for the consideration by the Secretary of additional information not contained in the record. In response, the Department added language specifying that the information be "relevant and material" and "pertaining to an agency's compliance with recognition criteria." A parallel change was made to proposed § 602.36 which outlines procedures for review and decision by the senior Department official. Current regulations

are silent about procedures in instances when new and relevant information becomes available after the NACIQI meeting but prior to the decision being made. In the interest of transparency and due process, the Department decided to make explicit in the proposed regulations the senior Department official's and the Secretary's authority to review all relevant information prior to making a decision on recognition. Proposed §§ 602.36 and 602.37 would outline procedures by which the senior Department official and the Secretary, respectively, may proceed in such cases.

Proposed § 602.33 would establish a procedure for review of agencies during the period of recognition so that the Department may ensure an agency's continued compliance with subpart B, and initiate action as necessary. Some non-Federal negotiators expressed concern that the Department not act arbitrarily and provide adequate notice to and communication with the agency when conducting a review during an agency's period of recognition. In response to concerns expressed by non-Federal negotiators, the Department added language to reflect the consultation between Department staff and the agency, and the provision to the agency of the documentation concerning the inquiry.

Proposed § 602.36(b) would make explicit the senior Department official's authority to make a decision in a recognition proceeding in the event that statutory authority or appropriations for the Advisory Committee ends, or there are fewer duly appointed Advisory Committee members than needed to constitute a quorum. The intent behind proposed § 602.36(b) is to allow the Department to act expeditiously and responsibly in the absence of an Advisory Committee when the Department has concerns regarding an agency's continued compliance with subpart B. Some non-Federal negotiators suggested that the senior Department official only exercise this authority in extraordinary circumstances. In response to non-Federal negotiators' concerns, the Department added language to proposed § 602.36(b), which would specify that the senior Department official would make a decision in the absence of an Advisory Committee only in extraordinary circumstances when the Department has serious concerns regarding an agency's compliance with subpart B that require prompt attention.

One non-Federal negotiator expressed concern that the Secretary could withhold appointments to NACIQI in order to prevent the constitution of a

quorum so that the senior Department official could exercise the authority to make a decision without NACIQI review of the matter. The Department clarified that this was not the intent of the provision and further stated that the withholding of appointments by the Secretary alone would not prevent a quorum.

The Secretary is obligated to comply with the HEA and other applicable statutes, including FOIA and FACA. Current regulations do not accurately reflect the Secretary's disclosure obligations under FOIA and other statutes and must be revised to reflect the applicable law. In revising the regulations, the Department is attempting to spell out the options available to agencies when submitting material that the agencies view as confidential to the Department for review in recognition proceedings.

There was extensive discussion among the negotiators about what material is to be considered confidential. Several non-Federal negotiators expressed concern about how to safeguard confidentiality, ensure the integrity of the process, and preserve the relationship between the agency and the institution. In particular, they expressed concern that if the agency were unable to provide guarantees of confidentiality to its institutions, this would undermine the relationship between the agency and its accredited institutions or programs and indeed the entire accreditation process.

The Department acknowledged the importance of confidentiality for agencies and institutions, but at the same time, wanted to make the agencies and institutions fully aware of the requirements with which the Secretary must comply in the event a request for disclosure is made under FOIA or FACA. The Department also clarified that should the Inspector General or any other Federal entity seek to review an agency or an institution, proposed procedures under subpart C for redacting information and marking documents confidential will not apply, as these proposed regulations pertain only to the recognition process.

Several non-Federal negotiators suggested that the Department could review required documents on a secure Web site and thereby not take possession of them. Others suggested the Department send staff to the agency to review documents, but leave them in the agency's possession. The Department explained that it needed to have a complete and accurate record of the documents in its possession to substantiate the Department's review, and would, therefore, not be able to

utilize a secure Web site or an on-site review of documents. The Department's control of the documents reviewed further protects the integrity of the review process. For example, if the Department needed to retrieve a reviewed document in the future, and had to rely on obtaining the document from a Web site, it would have no way to ensure that the document on the Web site was the same document it had originally reviewed.

Another non-Federal negotiator raised concerns about complaints being released to the public before they could be substantiated. The Department clarified that FOIA pertains to all documents submitted to the Department and other Federal Government agencies.

Finally, some non-Federal negotiators expressed concerns about the conduct of unannounced site visits by Department staff to an institution or program as part of the review of an agency. This provision exists in both current § 602.31(b)(1) and proposed § 602.31(e)(1). Some non-Federal negotiators stated that this was in conflict with their responsibilities under the Health Insurance Portability and Accountability Act (HIPAA). The Department reviewed HIPAA materials and found nothing that precludes the Department from performing unannounced site visits. Nevertheless, the Department will cooperate with health care providers and their business associates with respect to applicable procedures required by HIPAA.

#### **Executive Order 12866**

##### *Regulatory Impact Analysis*

Under Executive Order 12866, the Secretary must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (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 set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this proposed regulatory action would not have an annual effect on the economy of more than \$100 million. Therefore, this action is not "economically significant" and not subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, the Secretary has assessed the potential costs and benefits of this regulatory action and has determined that the benefits justify the costs.

##### *Need for Federal Regulatory Action*

As discussed in this NPRM, these proposed regulations are needed to implement the provisions of the HEA, as amended. In particular, these proposed regulations address the provisions related to the recognition of accrediting agencies by the Secretary.

In addition, these proposed regulations are needed to ensure that the Department fulfills its fiduciary responsibility regarding the appropriate use of Federal funds made available by the Department to institutions of higher education under title IV of the HEA. The Secretary grants recognition to accrediting agencies that are considered by the Department to be reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit. Congress requires that an institution of higher education be accredited by an accrediting agency recognized by the Secretary in order to receive Federal funds authorized under title IV, HEA programs.

Section 492 of the HEA requires the Secretary, before publishing any proposed regulations for programs authorized by title IV of the HEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from individuals and representatives from relevant constituent groups, the Secretary must subject the proposed regulations for the title IV, HEA programs to a negotiated rulemaking process. All proposed regulations that the Department publishes must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants in that process stating why the Secretary has decided to depart from the agreements. The 2009 negotiated rulemaking committee for accreditation reached consensus on the proposed regulatory language contained in this

NPRM. A summary of the proposed regulatory language agreed upon by negotiators is available in the *Significant Proposed Regulations* section.

#### *Regulatory Alternatives Considered*

The following section addresses the alternatives that the Department considered in implementing the discretionary portions of the HEOA provisions. These alternatives are also discussed in more detail in the *Reasons* sections of this NPRM related to the specific proposed regulatory provisions.

A broad range of alternatives to these proposed regulations was considered as part of the negotiated rulemaking process. These alternatives were reviewed in detail in the preamble to this NPRM under both the *Regulatory Impact Analysis* and the *Reasons* sections accompanying the discussion of each proposed regulatory provision. However, the Department is interested in receiving comments related to other alternatives to the proposed regulations. To send any comments that concern alternatives to these proposed regulations, see the instructions in the **ADDRESSES** section of this NPRM.

#### *Benefit-Cost Analysis*

##### Benefits

The benefits of these proposed regulations would include: Ensuring that accrediting agencies are reliable authorities as to the quality of education or training offered by an institution or program they accredit; ensuring that the Department fulfills its fiduciary responsibility for institutional funding under title IV, HEA programs; and establishing consistency between statutory language and regulatory language. An additional benefit of the proposed regulations would be providing accrediting agencies with greater clarity on regulations regarding the following: Distance and correspondence education; accreditation team members; transfer of credit; teach-out plan approval; definition of recognition; demonstration of compliance; recognition procedures, including procedures for NACIQI; direct assessment programs; monitoring; substantive change; record keeping and confidentiality; and due process and appeals. However, it is difficult to quantify benefits related to the proposed regulations. The Department is interested in receiving comments or data that would support a more rigorous analysis of the benefits of these provisions.

##### Costs

Many of the statutory provisions implemented through this NPRM would not require accrediting agencies and institutions to develop new disclosures, materials, or accompanying dissemination processes. Other proposed regulations generally would require discrete changes in specific parameters associated with existing guidance rather than wholly new requirements. Accordingly, accrediting agencies wishing to continue to be recognized by the Secretary and institutions wishing to continue to participate in title IV, HEA programs are estimated to have already absorbed most of the administrative costs related to implementing these proposed regulations.

In assessing the potential impact of these proposed regulations, the Department recognizes that certain provisions are likely to increase workload for some program participants. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of this preamble. Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. Given the limited data available, the Department is particularly interested in comments and supporting information related to possible administrative burden to accrediting agencies and institutions stemming from the proposed regulations. Estimates included in this notice will be reevaluated based on any information received during the public comment period.

Two new statutory concepts reflected in proposed § 602.25 do not exist in current regulations: (1) An institution's or program's right to appeal adverse accrediting agency actions to an appeals panel that is subject to a conflict of interest policy and that does not contain members of the underlying decision-making body; and (2) an institution's or program's right to review of new financial information, if the institution or agency meets certain conditions, before the accrediting agency takes a final adverse action.

Although accrediting agencies must be prepared to respond to appeals and to requests for review of new financial information, institutions or programs decide whether to undertake these appeals and make these requests. We do not expect the new provisions to affect the number of institutions or programs that appeal an accrediting agency

adverse action; therefore, there would be no additional costs to institutions or programs. Based on the discussion on this issue at negotiated rulemaking and historical data on appeals, it is likely that no more than five institutions per year will be able to meet the qualifications to be considered under the new provision for review of new financial information and will seek such a review. The proposed regulations would also require that an accrediting agency confirm, as part of the agency's review for initial or renewal of accreditation, that institutions that participate in title IV, HEA programs have transfer of credit policies that are publicly disclosed and that include statements of the criteria established by the institutions regarding the transfer of credit earned at another institution of higher education. As accrediting agencies are already required to review various policies and procedures at the institutions they accredit, we expect the addition of this provision will add a few minutes to an accreditation review. We do not have the data to provide a more refined estimate at this time. As indicated above, we will adjust the estimate based on any comments received.

In addition, the proposed regulations would require an agency that has or seeks to include the evaluation of distance education or correspondence education within its scope of recognition to require participating institutions that offer distance education or correspondence education to have processes in place through which the institutions establish that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. It is standard practice for institutions that offer distance or correspondence education to have processes that verify the identity of students; therefore, this provision will not have an impact on institutions. Some accrediting agencies that evaluate distance education or correspondence education already review those processes when they conduct accreditation reviews. For those agencies that will have to add a step to their evaluation process, the time added to the review process is expected to be minimal. We will refine our estimate if we receive comments that would enable us calculate any additional costs associated with this provision.

Finally, the proposed regulations would require participating institutions to submit a teach-out plan to their accrediting agency upon the occurrence of any of the following: An emergency

action of the Secretary against an institution, or an action by the Secretary to limit, suspend, or terminate an institution's participation in any title IV, HEA program; an agency action to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution; the institution notifies the accrediting agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or a State licensing or authorizing agency notifies the accrediting agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. As indicated in the *Paperwork Reduction Act* section, we expect the average time needed to develop a teach-out plan is four hours. Based on historical data that show the number of institutions that are subject to Department action, lose institutional eligibility, or close, and an estimate of the number of locations that offer one hundred percent of a program, we estimate that approximately 70 institutions per year will be required to submit a teach-out plan to their accrediting agency. Most of the institutions and locations that close offer only one or two programs. For some institutions, the plan will be very simple: the institution will teach out its students. For other institutions, preparing a plan may involve doing research to determine what nearby schools offer similar programs; in most cases, the institution will already know, as the nearby schools will have been their competitors. In a few cases, more work may be needed to develop the teach-out plan. This is likely to occur when the affected institution or location has offered several different programs. Given the wide variety of situations, our best estimate is that the average amount of time needed to complete a teach-out plan is four hours. Using May 2009 Bureau of Labor information that the average hourly wage for private, non-agricultural workers is \$18.54, the total estimated cost for carrying out this provision is \$5,191 (70 institutions  $\times$  4 hours/institution  $\times$  \$18.54/hour).

#### *Net Budget Impacts*

In general, these estimates should be considered preliminary; they will be reevaluated in light of any comments or information received by the Department prior to the publication of the final regulations. The final regulations will incorporate this information in a revised analysis.

The net budget impact of these proposed regulations on accrediting agencies and institutions of higher education is estimated to be minimal.

As previously mentioned, many of the statutory provisions implemented through this NPRM will not require accrediting agencies and institutions to develop new disclosures, materials, or accompanying dissemination processes. In addition, the Department takes steps in these proposed regulations to limit the administrative burden on accrediting agencies and institutions. The Department believes that most of the administrative costs related to implementing these proposed regulations have already been absorbed by accrediting agencies and institutions. As noted in the chart in the *Paperwork Reduction Act* section of the preamble, the net effect on the work of accrediting agencies and institutions is estimated to be 3,212 hours. Assuming that the employee cost of implementing the new requirements is \$18.54/hour (based on average wage information from the Bureau of Labor Statistics), the net budget impact of these proposed regulations is estimated to be \$59,550. The net budget impact of these proposed regulations on the Department is also estimated to be minimal. Primary additional costs would be incurred for administering these regulations should NACIQI decide to convene more than two national meetings annually. Because the HEOA provisions afford the NACIQI chair the authority to set the agenda for NACIQI meetings with the approval of the designated Federal official, it is conceivable that NACIQI may choose to meet more often than twice a year. Should this occur, the Department would incur additional administrative costs resulting from convening one or more additional meetings. The estimated cost to the Department of convening another NACIQI meeting is \$55,300. No additional costs to the Department resulting from these proposed regulations are anticipated.

In analyzing the net budget impacts of these proposed regulations, feedback was received from non-Federal negotiators during negotiated rulemaking and from Department staff. However, data on administrative burden at participating accrediting agencies and institutions are extremely limited; accordingly, as noted above, the Department is particularly interested in comments in this area.

Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading **Paperwork Reduction Act of 1995**.

#### *Assumptions, Limitations, and Data Sources*

Because these proposed regulations would largely restate statutory requirements that would be self-implementing in the absence of regulatory action, impact estimates provided in the preceding section reflect a pre-statutory baseline in which the HEOA changes implemented in these proposed regulations do not exist. In general, these estimates should be considered preliminary; they will be reevaluated in light of any comments or information received by the Department prior to the publication of the final regulations. The final regulations will incorporate this information in a revised analysis.

#### *Clarity of the Regulations*

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 600.2.)
- Could the description of the proposed regulations in the "Supplementary Information" section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

#### **Regulatory Flexibility Act Certification**

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would directly affect accrediting agencies and institutions of higher education that

participate in title IV, HEA programs. The U.S. Small Business Administration Size Standards define organizations as “small entities” if they are for-profit or nonprofit organizations with total annual revenue below \$5,000,000 or if they are organizations controlled by governmental entities with populations below 50,000.

A significant percentage of the accrediting agencies and institutions participating in title IV, HEA programs meet the definition of “small entities”. The Department estimates that approximately 40 accrediting agencies and 2,310 postsecondary institutions meet the definition of “small entity”.

The proposed regulatory action would not substantively change regulations governing institutional eligibility and the Secretary’s recognition of accrediting agencies in a way that would result in a material increase or decrease in the number of institutions participating in title IV of the HEA or in the number of accrediting agencies recognized by the Secretary. For these accrediting agencies and institutions, the new requirements under the proposed regulations are not expected to impose significant new costs. Although the proposed regulations contain some new requirements, many agencies and institutions have policies in place that are similar to the new requirements. The Department estimates that costs attributable to complying with the new requirements are likely to be small.

As noted in the Paperwork Reduction Act section of this NPRM, the net effect on the work of accrediting agencies and institutions is estimated to be 3,212 hours. For the approximately 2,350 small entities covered by the proposed regulations, the net budget impact is estimated to be 1,851 hours. Using the May 2009 Bureau of Labor data for the average hourly wage of private, non-agricultural workers, \$18.54 per hour, the estimated cost of the new provisions to small entities is \$34,318.

The impact of the proposed regulations on individuals is not subject to the Regulatory Flexibility Act.

The Secretary invites comments from small accrediting agencies and institutions as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

#### **Paperwork Reduction Act of 1995**

Proposed §§ 602.15, 602.19, 602.24, 602.25, 602.26, 602.27, 602.31, and 602.32 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education

has submitted a copy of these sections to OMB for its review.

#### *Section 602.15—Administrative and Fiscal Responsibilities*

Proposed § 602.15 would require accrediting agencies to demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution from the last full accreditation or preaccreditation review. Under the current regulations, agencies are required to maintain this documentation for the previous two accreditation or preaccreditation reviews. Accrediting agencies must maintain documents regarding substantive change decisions under this requirement in the current regulations. The proposed regulation would reduce the administrative burden to maintenance of only one full accreditation or preaccreditation review. Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, the reduced hours for maintaining only one complete review cycle are negligible because the agencies already collect the information.

#### *Section 602.19—Monitoring and Reevaluation of Accredited Institutions and Programs*

Proposed § 602.19(b) would require agencies to collect data to ensure that the institutions they accredit remain in compliance with their regulations. This proposed regulation would clarify the language in the current regulation regarding the data that agencies must collect to ensure that institutions and programs remain in compliance with their accrediting standards. Because the current regulation requires agencies to collect this information, the proposed regulatory language change would not represent any additional reporting burden under OMB Control Number 1840–0788.

Proposed § 602.19(c) would require agencies to monitor the enrollment growth of institutions or programs they accredit each year. This proposed regulation would represent a change in the information that accrediting agencies must collect currently. It would require that agencies collect information to monitor enrollment growth for the institutions or programs that they accredit. The Department believes that institutions already collect enrollment data, but estimates that this regulation would increase the burden to each of the 61 recognized accrediting agencies by a total of 122 hours under OMB Control Number 1840–0788.

Proposed § 602.19(e) would require accrediting agencies that expanded their scope to include distance education or correspondence education by notice to the Secretary to monitor enrollment growth of the institutions they accredit that offer distance education or correspondence education. These agencies must report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. The content of the report is described in § 602.31(d).

Proposed § 602.19(e) would represent a change in the information that some accrediting agencies must collect. The proposed regulation would only affect institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Department staff review of currently recognized accrediting agencies shows that 27 agencies would not be affected by this proposed regulation. However 15 of the remaining recognized agencies may be affected if any decide to include distance education in their scope of recognition in the future. The Department estimates that the additional reporting requirement would increase the burden to accrediting agencies by a total of 60 hours under OMB Control Number 1840–0788 if all 15 agencies decided to add distance education or correspondence education to their scope of recognition.

#### *Section 602.24—Additional Procedures Certain Institutional Accreditors Must Have*

Proposed § 602.24 would mandate that an accrediting agency require an institution it accredits to submit a teach-out plan for approval by the accrediting agency if any of following events occurs: The Department initiates an emergency action against an institution, or an action by the Secretary to limit, suspend, or terminate an institution participating in any title IV, HEA program; the accrediting agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution; the institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or a State licensing or authorizing agency notifies the agency that an institution’s license or legal authorization to provide an educational program has been or will be revoked. If the teach-out plan requires a teach-out agreement, proposed § 602.24 would also identify the components of the teach-out agreement. The

Department estimates that the proposed regulation would place an additional burden on 70 institutions each year for a total of 280 hours under OMB Control Number 1840-0788.

*Section 602.25—Due Process*

Proposed § 602.25 would include two new statutory concepts. Proposed § 602.25(f) would provide for an institution's or program's right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body. Proposed § 602.25(h) would provide for an institution's or program's right for the review of new financial information, if it meets certain conditions, before the accrediting agency takes a final adverse action.

Although accrediting agencies must be prepared to respond to appeals and to requests for review of new financial information, the decision to undertake these actions is a voluntary one on the part of an institution. The new provisions are not expected to have any effect on the number of institutions that appeal an accrediting agency adverse action, and therefore, there would be not additional costs to institutions. Based on the discussion on this issue at negotiated rulemaking, and historical data on appeals, it is likely that no more than five institutions per year will be able to meet the qualifications to be considered under the new provision for review of new financial information and will seek such a review.

Agencies are already required to have an appeal process; the burden associated with revising existing procedures to conform with the new requirements is estimated to be 610 hours, which is based on 61 accrediting agencies  $\times$  10 hours. The estimated burden is associated primarily with implementing the regulation in the initial year as agencies establish new procedures. The burden is estimated to be 2,440 hours, based on 61 accrediting agencies  $\times$  40 hours. The burden for maintaining this process in subsequent years is expected to be minimal, given that we expect no more than five agencies will meet the requirements for such a review.

*Section 602.26—Notification of Accrediting Decisions*

Proposed § 602.26(b) would require agencies to provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action and of final decisions withdrawing, suspending, revoking, or terminating an institution's or program's

accreditation or preaccreditation. Proposed § 602.26(d) would require agencies to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include either comments from the affected institution or program regarding that decision or evidence that the affected institution or program was offered the opportunity to provide comments. The proposed change would clarify existing language and would require that the statement provide evidence that the affected institution or program was offered an opportunity to provide comments if no comments were received. The proposed changes do not constitute any new reporting requirements and, therefore, do not represent any additional burden on accrediting agencies under OMB Control Number 1840-0788.

*Section 602.27—Other Information an Agency Must Provide the Department*

Proposed § 602.27(a) would require an accrediting agency to provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes to its policies, procedures, or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, an agency must provide a summary of the major accrediting activities conducted during the year. The proposed regulation also would require an accrediting agency to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities.

Although the proposed changes would primarily clarify language in the current regulations, the changes would also affect the reporting requirement regarding adding distance education or correspondence education to an agency's scope of recognition. The proposed regulation would remove the requirement for institutional accrediting agencies, and programmatic accrediting agencies that accredit freestanding institutions, to submit an application to the Department if an agency wished to add distance education or correspondence education to its scope of recognition; the proposed changes would only require agencies to notify the Department that its scope has been

changed to include distance education or correspondence education. Therefore, the proposed changes to the regulation would not impose any new burden on accrediting agencies and, in the case of adding distance education or correspondence education to a scope of recognition, it would reduce the burden on agencies. Department staff estimates the burden on the 15 agencies that would be affected by the proposed regulation would be reduced by 300 hours under OMB Control Number 1840-0788 if all the agencies decided to add distance education or correspondence education to their scope of recognition.

*Section 602.31—Agency Submissions to the Department*

Proposed § 602.31(a) would require accrediting agencies to submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years. The application would be required to demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 part 602. The proposed regulation would clarify what documents should be provided with an agency's application for recognition. The language of the proposed regulation would not impose a new reporting burden on agencies under OMB Control Number 1840-0788.

Proposed § 602.31(b) would require accrediting agencies that wish to expand their scope of recognition to submit an application to the Secretary. The proposed language would not place any additional reporting burden on accrediting agencies because the current regulations also require the submission of an application when an agency seeks to expand its scope of recognition. The language of the proposed regulation would not impose a new reporting burden on agencies under OMB Control Number 1840-0788.

Proposed § 602.31(c) would require that agencies provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered by their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602, subpart B. Therefore, while no requirement to submit a compliance report exists in the current regulations, the proposed language reflects the existing practice of the Department. The proposed changes to the regulation



would not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Proposed § 602.31(d) would require agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education to annually monitor enrollment growth of the institutions they accredit that offer distance education. A report would be required to be sent to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. As noted in the discussion of proposed § 602.19(e), this section of the regulation would only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit

freestanding institutions that currently do not have distance education in their scope of recognition. Based on the Department’s previous experience with institutions that have experienced significant growth, this provision may affect no more than 3 institutions per year. Therefore, the proposed changes would increase the burden to the 15 affected accrediting agencies by 60 hours under OMB Control Number 1840–0788 if they all add distance education to their scope of recognition.

*Section 602.32—Procedures for Department Review of Applications for Recognition or for Change in Scope, Compliance Reports, and Increases in Enrollment*

Proposed § 602.32(f) would require the Department to forward to the agency a draft analysis of an agency’s application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the

Department received. The agency could then provide a written response to the draft staff analysis and the third-party comments. The proposed change would simplify the language of the current regulation in that it combines several paragraphs of the current regulation into a single paragraph. The current regulations also require that the Department invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department. Therefore, the proposed changes would not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Consistent with the discussion above, the following chart describes the sections of the proposed regulations involving information collection, the information being collected, and the collection that the Department will submit to the Office of Management and Budget for approval and public comment under the Paperwork Reduction Act.

Regulatory section	Information section	Collection
§ 602.15 .....	Accrediting agencies must demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution from the last full accreditation or preaccreditation review. Previously, agencies were required to maintain this information covering the previous two accreditation or preaccreditation reviews. Although the current regulation does not explicitly mention documents relating to substantive change decisions, the requirement for agencies to maintain these documents was covered under the current regulation’s requirement to maintain all documents related to accrediting decisions and special reports. A substantive change request would be considered a special report that had to be submitted to the agency for a decision. Further, an agency’s decision regarding the substantive change request was, in fact, an accreditation decision and was reflected in a decision letter that either allowed the substantive change to be covered under the agency’s grant of accreditation or denied the request and did not allow the change to be covered under the agency’s grant of accreditation. Section 496(c)(1) of the HEA.	OMB 1840–0788 Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, since the agencies already collect the information, the reduced hours for maintaining only one complete review cycle is negligible.
§ 602.19(b) .....	Agencies must collect data to ensure that the institutions they accredit remain in compliance with their regulations. This proposed regulation would clarify the language in the current regulation regarding the data agencies should collect to ensure that institutions and programs remain in compliance with their accrediting standards. Section 496(a)(4)(A) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.19(c) .....	Agencies must monitor the enrollment growth of institutions each year. This proposed regulation would represent a change in the information that accrediting agencies must collect. It would require that agencies collect information to monitor enrollment growth for the institutions or programs that they accredit. Section 496(c)(2) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden to the 61 recognized accrediting agencies by 122 hours.
§ 602.19(e) .....	Accrediting agencies that expand their scope to include distance education or correspondence education by notice to the Secretary must monitor enrollment growth of institutions that offer distance education or correspondence education and report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. Section 496(q) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden for 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future.

Regulatory section	Information section	Collection
§ 602.24 .....	Approximately 70 institutions per year will be required to submit a teach-out plan to their accrediting agency. Most of the institutions and locations that close offer only one or two programs. For some institutions, the plan will be very simple: The institution will teach out its students. For other institutions, preparing a plan may involve doing some research to determine what nearby schools offer similar programs but in most cases, the institution will already know, as the nearby schools will have been their competitors. In a few cases, more work may be needed to develop a plan. Given the wide variety of situations, our best estimate is that the average amount of time needed to complete a plan is 4 hours. Therefore, the total amount of time is 280 hours (70 institutions × 4 hours). Section 496(c)(3) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden on 70 institutions each year for a total of 280 hours.
§ 602.25(f) .....	Section 602.25(f) includes the new statutory concept of an institution's or program's right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body.  Agencies are already required to have an appeal process; the negligible burden is estimated to be 610 hours, which is based on 61 accrediting agencies × 10 hours. Section 496(a)(6) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 610 hours.
§ 602.25(h) .....	Section 602.25(h) includes the new statutory concept of an institution's or program's right to review new financial information, if it meets current provisions, before the accrediting agency takes a final adverse action.  The estimated burden is associated primarily with implementing the regulation in the initial year as agencies establish new procedures. The time is estimated to be 2440 hours, based on 61 accrediting agencies × 40 hours. Section 496(a)(6) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 2440 hours.
§ 602.26(b) .....	Agencies must provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action as well as final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Section 496(c)(7) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.26(d) .....	Requires agencies to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include any comments that affected institutions or programs want to make with regard to that decision or evidence that the institution or program was offered the opportunity to provide comments. The proposed changes provide clarifying language and add that the statement must provide evidence that an institution or program was offered an opportunity to provide comments if no comments were received. Section 496(c)(7) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.27(a) .....	Requires agencies to provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes in an agency's policies procedures or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, agencies must provide a summary of the major accrediting activities conducted during the year. It also would require agencies to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities. Although the proposed changes to the regulation primarily clarify language that is in the current regulation, the changes would impact the reporting requirement regarding adding distance education or correspondence education to an agency's scope of recognition. The proposed regulation would remove the requirement for institutional accrediting agencies to submit an application to the Department if an agency wished to add distance education or correspondence education to its scope of recognition and only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education. Sections 496(a)(4) and 487(a)(15) of the HEA.	OMB 1840–0788 It is estimated that burden on the 15 agencies that would be affected by the proposed regulation would be reduced by 300 hours if all the agencies decided to add distance education or correspondence education to their scope of recognition.
§ 602.31(a) .....	Requires accrediting agencies to submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years. The application must demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 Part 602. The proposed regulation clarifies what documents should be provided with an agency's application for recognition. Section 496(d) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.

Regulatory section	Information section	Collection
§ 602.31(b) .....	Requires accrediting agencies that wish to expand their scope of recognition to submit an application to the Secretary. The proposed language would not place any additional reporting burden on accrediting agencies since the current regulations also require the submission of an application when an agency seeks to expand its scope of recognition. Section 496(a)(4)(B) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.31(c) .....	Requires agencies to provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered through their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602 subpart B. Therefore, while the requirement to submit a compliance report is not identified in the current regulation, the proposed language would place in writing what has been the practice of the Department in order to comply with Higher Education Act, as amended. Sections 496(a) and (c) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.31(d) .....	Requires agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education to annually monitor enrollment growth of the institutions they accredit that offer distance education. A report would be required to be sent to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. As noted in the discussion of proposed § 602.19(e) this section of the regulation would only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Section 496(a)(4)(B) and (q) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden of 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future. Based on prior experiences with institutions experiencing significant growth, the burden is estimated to apply to 3 institutions per year.
§ 602.32 .....	Requires the Department to forward to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency could then provide a written response to the draft staff analysis and the third-party comments. The proposed change would simplify the language of the current regulation in that it combines several paragraphs of the current regulation into a single paragraph. The current regulations also require that the Department invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department. Section 496(o) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, *Attention*: Desk Officer for U.S. Department of Education. Send these comments by e-mail to [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble.

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. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

OMB is required to make a decision concerning the 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 the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

#### Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

#### 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.

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(Catalog of Federal Domestic Assistance Number does not apply.)

**List of Subjects in 34 CFR 600 and 34 CFR 602**

Colleges and universities, Education, Reporting and recordkeeping requirements.

Dated: July 28, 2009.

**Arne Duncan,**

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600 and 602 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 definition of *Correspondence course*.

B. Adding in alphabetical order a new definition of *Distance education*.

C. Removing the definition of *Telecommunications course*.

The addition and revision read as follows:

**§ 600.2 Definitions.**

\* \* \* \* \*

*Correspondence course:* (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor.

Interaction between the instructor and student is limited, is not regular and substantive, and is primarily initiated by the student. Correspondence courses are typically self-paced.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

\* \* \* \* \*

*Distance education* means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver

instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

\* \* \* \* \*

**PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES**

3. The authority citation for part 602 continues to read as follows:

**Authority:** 20 U.S.C. 1099b, unless otherwise noted.

4. Section 602.3 is amended by:

A. Adding in alphabetical order a new definition of *Compliance report*.

B. Adding in alphabetical order a new definition of *Correspondence education*.

C. Adding in alphabetical order a new definition of *Designated Federal Official*.

D. Adding in alphabetical order a new definition of *Direct assessment program*.

E. Revising the definition of *Distance education*.

F. Adding in alphabetical order a new definition of *Recognition*.

G. Revising paragraph (5) of the definition of *Scope of recognition*.

H. Revising the definition of *Teach-out agreement*.

I. Adding in alphabetical order a new definition of *Teach-out plan*.

The additions and revisions read as follows:

**§ 602.3 What definitions apply to this part?**

\* \* \* \* \*

*Compliance report* means a written report that the Department requires an agency to file to demonstrate that the agency has addressed deficiencies specified in a decision letter from the senior Department official or the Secretary.

*Correspondence education* means:

(1) Education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to

students who are separated from the instructor.

(2) Interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student.

(3) Correspondence courses are typically self-paced.

(4) Correspondence education is not distance education.

*Designated Federal Official* means the Federal officer designated under section 10(f) of the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1.

*Direct assessment program* means an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, and meets the conditions of 34 CFR 668.10. For title IV, HEA purposes, the institution must obtain approval for the direct assessment program from the Secretary under 34 CFR 668.10(g) or (h) as applicable. As part of that approval, the accrediting agency must—

(1) Evaluate the program(s) and include them in the institution's grant of accreditation or preaccreditation; and

(2) Review and approve the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

*Distance education* means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

\* \* \* \* \*

*Recognition* means an unappealed determination by the senior Department official under § 602.36, or a determination by the Secretary on appeal under § 602.37, that an accrediting agency complies with the criteria for recognition listed in subpart B of this part and that the agency is

effective in its application of those criteria. A grant of recognition to an agency as a reliable authority regarding the quality of education or training offered by institutions or programs it accredits remains in effect for the term granted except upon a determination made in accordance with subpart C of this part that the agency no longer complies with the subpart B criteria or that it has become ineffective in its application of those criteria.

\* \* \* \* \*

*Scope of recognition or scope* \* \* \*

(5) Coverage of accrediting activities related to distance education or correspondence education.

\* \* \* \* \*

*Teach-out agreement* means 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 one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study.

*Teach-out plan* means a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

\* \* \* \* \*

5. Section 602.15 is amended by:

A. Revising paragraph (a)(2).

B. In paragraph (b)(1), removing the word "two" and removing the letter "s" from the word "reviews" the first time it appears.

C. Revising paragraph (b)(2).

The revisions read as follows:

**§ 602.15 Administrative and fiscal responsibilities.**

\* \* \* \* \*

(a) \* \* \*

(2) Competent and knowledgeable individuals, qualified by education and experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles, regarding the agency's standards, policies, and procedures, to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and preaccrediting decisions, including, if applicable to the agency's scope, their responsibilities regarding distance education and correspondence education;

\* \* \* \* \*

(b) \* \* \*

(2) All decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of any institution or program and substantive changes, including all correspondence that is significantly related to those decisions.

\* \* \* \* \*

6. Section 602.16 by amended by:

A. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively.

B. Revising paragraph (a)(1)(i).

C. Adding new paragraphs (c) and (f). The additions and revision read as follows:

**§ 602.16 Accreditation and preaccreditation standards.**

(a) \* \* \*

(1) \* \* \*

(i) Success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates.

\* \* \* \* \*

(c) If the agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, the agency's standards must effectively address the quality of an institution's distance education or correspondence education in the areas identified in paragraph (a)(1) of this section. The agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education.

\* \* \* \* \*

(f) Nothing in paragraph (a) of this section restricts—

(1) An accrediting agency from setting, with the involvement of its members, and applying accreditation standards for or to institutions or programs that seek review by the agency; or

(2) An institution from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

\* \* \* \* \*

7. Section 602.17 is amended by:

A. In paragraph (e), removing the word "and" at the end of the paragraph.

B. In paragraph (f), removing the punctuation "." and adding, in its place, the words "; and".

C. Adding a new paragraph (g).

The addition reads as follows:

**§ 602.17 Application of standards in reaching an accrediting decision.**

\* \* \* \* \*

(g) Requires institutions that offer distance education or correspondence education to have processes in place through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. The agency meets this requirement if it—

(1) Requires institutions to verify the identity of a student who participates in class or coursework by using, at the option of the institution, methods such as—

- (i) A secure login and pass code;
- (ii) Proctored examinations; and
- (iii) New or other technologies and practices that are effective in verifying student identification; and

(2) Makes clear in writing that institutions must use processes that protect student privacy and notify students of any projected additional student charges associated with the verification of student identity at the time of registration or enrollment.

\* \* \* \* \*

8. Section 602.18 is amended by:

A. Revising the introductory text.

B. Redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d), respectively.

C. In newly redesignated paragraph (c), removing the word "and" at the end of the paragraph.

D. In newly redesignated paragraph (d), removing the punctuation "." and adding, in its place, the words "; and".

E. Adding new paragraphs (a) and (e).

The additions and revision read as follows:

**§ 602.18 Ensuring consistency in decision-making.**

The agency must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission, and that ensure that the education or training offered by an institution or program, including any offered through distance education or correspondence education, is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency. The agency meets this requirement if the agency—

- (a) Has written specification of the requirements for accreditation and preaccreditation that include clear

standards for an institution or program to be accredited;

\* \* \* \* \*

(e) Provides the institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards.

\* \* \* \* \*

9. Section 602.19 is amended by:

A. Revising paragraph (b).

B. Adding new paragraphs (c), (d), and (e).

The revision and additions read as follows:

**§ 602.19 Monitoring and reevaluation of accredited institutions and programs.**

\* \* \* \* \*

(b) The agency must demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables the agency to identify problems with an institution's or program's continued compliance with agency standards and that takes into account institutional or program strengths and stability. These approaches must include periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of § 602.16(f). This provision does not require institutions or programs to provide annual reports on each specific accreditation criterion.

(c) Each agency must monitor overall growth of the institutions or programs it accredits and, at least annually, collect headcount enrollment data from those institutions or programs.

(d) Institutional accrediting agencies must monitor the growth of programs at institutions experiencing significant enrollment growth, as reasonably defined by the agency.

(e) Any agency that has notified the Secretary of a change in its scope in accordance with § 602.27(a)(5) must monitor the headcount enrollment of each institution it has accredited that offers distance education or correspondence education. If any such institution has experienced an increase in headcount enrollment of 50 percent or more within one institutional fiscal year, the agency must report that information to the Secretary within 30 days of acquiring such data.

\* \* \* \* \*

10. Section 602.22 is amended by:

A. In paragraph (a)(2)(iii), removing the words “, in either content” and adding, in their place, the words “from the existing offerings of educational programs,”.

B. In paragraph (a)(2)(iv), removing the words “courses or”, adding the words “of study” after the word “programs” the first time it appears, and removing the word “above” and adding, in its place, the words “different from”.

C. Revising paragraph (a)(2)(vii).

D. Adding new paragraphs (a)(2)(viii), (a)(2)(ix), and (a)(2)(x).

E. Adding a new paragraph (a)(3).

F. Revising paragraph (b).

G. Revising paragraph (c), introductory text.

H. In paragraph (c)(2), adding the words “a representative sample of” immediately after the words “visits to”.

The additions and revisions read as follows:

**§ 602.22 Substantive change.**

(a) \* \* \*

(2) \* \* \*

(vii) If the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the entering into a contract under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 percent of one or more of the accredited institution's educational programs.

(viii)(A) If the agency's accreditation of an institution enables it to seek eligibility to participate in title IV, HEA programs, the establishment of an additional location at which the institution offers at least 50 percent of an educational program. The addition of such a location must be approved by the agency in accordance with paragraph (c) of this section unless the accrediting agency determines, and issues a written determination stating that the institution has—

(1) Successfully completed at least one cycle of accreditation of maximum length offered by the agency and one renewal, or has been accredited for at least ten years;

(2) At least three additional locations that the agency has approved; and

(3) Met criteria established by the agency indicating sufficient capacity to add additional locations without individual prior approvals, including at a minimum satisfactory evidence of a system to ensure quality across a distributed enterprise that includes—

(i) Clearly identified academic control;

(ii) Regular evaluation of the locations;

(iii) Adequate faculty, facilities, resources, and academic and student support systems;

(iv) Financial stability; and

(v) Long-range planning for expansion.

(B) The agency's procedures for approval of an additional location, pursuant to paragraph (a)(2)(viii)(A) of this section, must require timely reporting to the agency of every additional location established under this approval.

(C) Each agency determination or redetermination to preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section may not exceed five years.

(D) The agency may not preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section after the institution undergoes a change in ownership resulting in a change in control as defined in 34 CFR 600.31 until the institution demonstrates that it meets the conditions for the agency to preapprove additional locations described in this paragraph.

(E) The agency must have an effective mechanism for conducting, at reasonable intervals, visits to a representative sample of additional locations approved under paragraph (a)(2)(viii)(A) of this section.

(ix) The acquisition of any other institution or any program or location of another institution.

(x) The addition of a permanent location at a site at which the institution is conducting a teach-out for students of another institution that has ceased operating before all students have completed their program of study.

(3) The agency's substantive change policy must define when the changes made or proposed by an institution are or would be sufficiently extensive to require the agency to conduct a new comprehensive evaluation of that institution.

(b) The agency may determine the procedures it uses to grant prior approval of the substantive change. However, these procedures must specify an effective date, which is not retroactive, on which the change is included in the program's or institution's accreditation. An agency may designate the date of a change in ownership as the effective date of its approval of that substantive change if the accreditation decision is made within 30 days of the change in ownership. Except as provided in paragraph (c) of this section, these procedures may, but need not, require a visit by the agency.

(c) Except as provided in paragraph (a)(2)(viii)(A) of this section, if the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the agency's procedures for the approval of an additional location where at least

50 percent of an educational program is offered must provide for a determination of the institution's fiscal and administrative capacity to operate the additional location. In addition, the agency's procedures must include—

\* \* \* \* \*

11. Section 602.23 is amended by:

A. Revising paragraph (a) introductory text.

B. Revising paragraph (c)(1).

The revisions read as follows:

**§ 602.23 Operating procedures all agencies must have.**

(a) The agency must maintain and make available to the public written materials describing—

\* \* \* \* \*

(c) \* \* \*

(1) Review in a timely, fair, and equitable manner any complaint it receives against an accredited institution or program that is related to the agency's standards or procedures. The agency may not complete its review and make a decision regarding a complaint unless, in accordance with published procedures, it ensures that the institution or program has sufficient opportunity to provide a response to the complaint;

\* \* \* \* \*

12. Section 602.24 is amended by:

A. Revising paragraph (c).

B. Adding new paragraphs (d) and (e).

The addition and revision read as follows:

**§ 602.24 Additional procedures certain institutional accreditors must have.**

\* \* \* \* \*

(c) *Teach-out plans and agreements.*

(1) The agency must require an institution it accredits or preaccredits to submit a teach-out plan to the agency for approval upon the occurrence of any of the following events:

(i) The Secretary notifies the agency that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required.

(ii) The agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution.

(iii) The institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program.

(iv) A State licensing or authorizing agency notifies the agency that an institution's license or legal

authorization to provide an educational program has been or will be revoked.

(2) The agency must evaluate the teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency, specifies additional charges, if any, and provides for notification to the students of any additional charges.

(3) If the agency approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency, it must notify that accrediting agency of its approval.

(4) The agency may require an institution it accredits or preaccredits to enter into a teach-out agreement as part of its teach-out plan.

(5) The agency must require an institution it accredits or preaccredits that enters into a teach-out agreement, either on its own or at the request of the agency, to submit that teach-out agreement for approval. The agency may approve the teach-out agreement only if the agreement is between institutions that are accredited or preaccredited by a nationally recognized accrediting agency, is consistent with applicable standards and regulations, and provides for the equitable treatment of students by ensuring that—

(i) The teach-out institution has the necessary experience, resources, and support services to—

(A) Provide an educational program that is of acceptable quality and reasonably similar in content, structure, and scheduling to that provided by the institution that is ceasing operations either entirely or at one of its locations; and

(B) Remain stable, carry out its mission, and meet all obligations to existing students; and

(ii) The teach-out institution demonstrates that it can provide students access to the program and services without requiring them to move or travel substantial distances and that it will provide students with information about additional charges, if any.

(d) *Closed institution.* If an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

(e) *Transfer of credit policies.* The accrediting agency must confirm, as part of its review for initial accreditation or preaccreditation, or renewal of accreditation, that the institution has transfer of credit policies that—

(1) Are publicly disclosed in accordance with § 668.43(x); and

(2) Include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education.

\* \* \* \* \*

13. Section 602.25 is revised to read as follows:

**§ 602.25 Due process.**

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. The agency meets this requirement if the agency does the following:

(a) Provides adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited.

(b) Uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.

(c) Provides written specification of any deficiencies identified at the institution or program examined.

(d) Provides sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken.

(e) Notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis for the action.

(f) Provides an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final.

(1) The appeal must take place at a hearing before an appeals panel that—

(i) May not include current members of the agency's decision-making body that took the initial adverse action;

(ii) Is subject to a conflict of interest policy; and

(iii) Affirms, amends, or reverses the adverse action, which will be implemented by the appeals panel or by the original decision-making body, at the agency's option. If the original decision-making body is responsible for implementing the appeals panel's decision, that body must act regarding the institution's or program's accreditation status in a manner consistent with the appeals panel's decision.

(2) The agency must recognize the right of the institution or program to employ counsel to represent the

institution or program during its appeal, including to make any presentation that the agency permits the institution or program to make on its own during the appeal.

(g) The agency notifies the institution or program in writing of the result of its appeal and the basis for that result.

(h)(1) The agency must provide for a process, in accordance with written procedures, through which an institution or program may, before the agency reaches a final adverse action decision, seek review of new financial information if all of the following conditions are met:

(i) The financial information was unavailable to the institution or program until after the decision subject to appeal was made.

(ii) The financial information is significant and bears materially on the financial deficiencies identified by the agency. The criteria of significance and materiality are determined by the agency.

(iii) The only remaining deficiency cited by the agency in support of a final adverse action decision is the institution's or program's failure to meet an agency standard pertaining to finances.

(2) An institution or program may seek the review of new financial information described in paragraph (h)(1) of this section only once and any determination by the agency made with respect to that review does not provide a basis for an appeal.

(Authority: 20 U.S.C. 1099b)

14. Section 602.26 is amended by:

A. In paragraph (b)(2), removing the punctuation “;” and adding, in its place, the punctuation “.”.

B. Adding a new paragraph (b)(3).

C. In paragraph (c), removing the words “(b)(1) and (b)(2)” and adding, in their place, the words “(b)(1), (b)(2), and (b)(3)”.

D. Revising paragraph (d).

The addition and revision read as follows:

**§ 602.26 Notification of accrediting decisions.**

\* \* \* \* \*

(b) \* \* \*

(3) A final decision to take any other adverse action, as defined by the agency, not listed in paragraph (b)(2) of this section;

\* \* \* \* \*

(d) For any decision listed in paragraph (b)(2) of this section, makes available to the Secretary, the appropriate State licensing or authorizing agency, and the public, no later than 60 days after the decision, a

brief statement summarizing the reasons for the agency's decision and the official comments that the affected institution or program may wish to make with regard to that decision, or evidence that the affected institution has been offered the opportunity to provide official comment;

\* \* \* \* \*

15. Section 602.27 is revised to read as follows:

**§ 602.27 Other information an agency must provide the Department.**

(a) The agency must submit to the Department—

(1) A copy of any annual report it prepares;

(2) A copy, updated annually, of its directory of accredited and preaccredited institutions and programs;

(3) A summary of the agency's major accrediting activities during the previous year (an annual data summary), if requested by the Secretary to carry out the Secretary's responsibilities related to this part;

(4) Any proposed change in the agency's policies, procedures, or accreditation or preaccreditation standards that might alter its—

(i) Scope of recognition, except as provided in paragraph (a)(5) of this section; or

(ii) Compliance with the criteria for recognition;

(5) Notification that the agency has expanded its scope of recognition to include distance education or correspondence education as provided in section 496(a)(4)(B)(i)(I) of the HEA. Such an expansion of scope is effective on the date the Department receives the notification;

(6) The name of any institution or program it accredits that the agency has reason to believe is failing to meet its title IV, HEA program responsibilities or is engaged in fraud or abuse, along with the agency's reasons for concern about the institution or program; and

(7) If the Secretary requests, information that may bear upon an accredited or preaccredited institution's compliance with its title IV, HEA program responsibilities, including the eligibility of the institution or program to participate in title IV, HEA programs.

(b) If an agency has a policy regarding notification to an institution or program of contact with the Department in accordance with paragraph (a)(6) or (a)(7) of this section, it must provide for a case-by-case review of the circumstances surrounding the contact, and the need for the confidentiality of that contact. Upon a specific request by the Department, the agency must consider that contact confidential.

(Authority: 20 U.S.C. 1099b)

16. Subpart C is revised to read as follows:

**Subpart C—The Recognition Process**

**Application and Review by Department Staff**

Sec.

602.30 Activities covered by recognition procedures.

602.31 Agency submissions to the Department.

602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.

602.33 Procedures for review of agencies during the period of recognition.

**Review by the National Advisory Committee on Institutional Quality and Integrity**

602.34 Advisory Committee meetings.

602.35 Responding to the Advisory Committee's recommendation.

**Review and Decision by the Senior Department Official**

602.36 Senior Department official's decision.

**Appeal Rights and Procedures**

602.37 Appealing the senior Department official's decision to the Secretary.

602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.

**Subpart C—The Recognition Process**

**Application and Review by Department Staff**

**§ 602.30 Activities covered by recognition procedures.**

Recognition proceedings are administrative actions taken on any of the following matters:

(a) Applications for initial or continued recognition submitted under § 602.31(a).

(b) Applications for an expansion of scope submitted under § 602.31(b).

(c) Compliance reports submitted under § 602.31(c).

(d) Reviews of agencies that have expanded their scope of recognition by notice, following receipt by the Department of information of an increase in headcount enrollment described in § 602.19(e).

(e) Staff analyses identifying areas of non-compliance based on a review conducted under § 602.33. (Authority: 20 U.S.C. 1099b)

**§ 602.31 Agency submissions to the Department.**

(a) *Applications for recognition or renewal of recognition.* An accrediting agency seeking initial or continued recognition must submit a written application to the Secretary. Each accrediting agency must submit an application for continued recognition at



least once every five years, or within a shorter time period specified in the final recognition decision. The application must consist of—

(1) A statement of the agency's requested scope of recognition;

(2) Evidence, including documentation, that the agency complies with the criteria for recognition listed in subpart B of this part and effectively applies those criteria; and

(3) Evidence, including documentation, of how an agency that includes or seeks to include distance education or correspondence education in its scope of recognition applies its standards in evaluating programs and institutions it accredits that offer distance education or correspondence education.

(b) *Applications for expansions of scope.* An agency seeking an expansion of scope by application must submit a written application to the Secretary. The application must—

(1) Specify the scope requested;

(2) Include documentation of experience in accordance with § 602.12(b); and

(3) Provide copies of any relevant standards, policies, or procedures developed and applied by the agency and documentation of the application of these standards, policies, or procedures.

(c) *Compliance reports.* If an agency is required to submit a compliance report, it must do so within 30 days following the end of the period for achieving compliance as specified in the decision of the senior Department official or Secretary, as applicable.

(d) *Review following an increase in headcount enrollment.* If an agency that has notified the Secretary in writing of its change in scope to include distance education or correspondence education in accordance with § 602.27(a)(5) reports an increase in headcount enrollment in accordance with § 602.19(e) for an institution it accredits, or if the Department notifies the agency of such an increase at one of the agency's accredited institutions, the agency must, within 45 days of reporting the increase or receiving notice of the increase from the Department, as applicable, submit a report explaining—

(1) How the agency evaluates the capacity of the institutions or programs it accredits to accommodate significant growth in enrollment and to maintain educational quality;

(2) The specific circumstances regarding the growth at the institution(s) or program(s) that triggered the review and the results of any evaluation conducted by the agency; and

(3) Any other information that the agency deems appropriate to demonstrate the effective application of the criteria for recognition or that the Department may require.

(e) *Consent to sharing of information.* By submitting an application for recognition, the agency authorizes Department staff throughout the application process and during any period of recognition—

(1) To observe its site visits to one or more of the institutions or programs it accredits or preaccredits, on an announced or unannounced basis;

(2) To visit locations where agency activities such as training, review and evaluation panel meetings, and decision meetings take place, on an announced or unannounced basis;

(3) To obtain copies of all documents the staff deems necessary to complete its review of the agency; and

(4) To gain access to agency records, personnel, and facilities.

(f) *Public availability of agency records obtained by the Department.* (1) The Secretary's processing and decision making on requests for public disclosure of agency materials reviewed under this part are governed by the Freedom of Information Act, 5 U.S.C. 552; the Trade Secrets Act, 18 U.S.C. 1905; the Privacy Act of 1974, as amended, 5 U.S.C. 552a; the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1; and all other applicable laws. In recognition proceedings, agencies may—

(i) Redact information that would identify individuals or institutions that is not essential to the Department's review of the agency;

(ii) Make a good faith effort to designate all business information within agency submissions that the agency believes would be exempt from disclosure under exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). A blanket designation of all information contained within a submission, or of a category of documents, as meeting this exemption will not be considered a good faith effort and will be disregarded;

(iii) Identify any other material the agency believes would be exempt from public disclosure under FOIA, the factual basis for the request, and any legal basis the agency has identified for withholding the document from disclosure; and

(iv) Ensure documents submitted are only those required for Department review or as requested by Department officials.

(2) The Secretary processes FOIA requests in accordance with 34 CFR part 5 and makes all documents provided to

the Advisory Committee available to the public.

(Authority: 20 U.S.C. 1099b)

**§ 602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.**

(a) After receipt of an agency's application for initial or continued recognition, or change in scope, or an agency's compliance report, or an agency's report submitted under § 602.31(d), Department staff publishes a notice of the agency's application or report in the **Federal Register** inviting the public to comment on the agency's compliance with the criteria for recognition and establishing a deadline for receipt of public comment.

(b) The Department staff analyzes the agency's application for initial or renewal of recognition, compliance report, or report submitted under § 602.31(d) to determine whether the agency satisfies the criteria for recognition, taking into account all available relevant information concerning the compliance of the agency with those criteria and in the agency's effectiveness in applying the criteria. The analysis of an application for recognition and, as appropriate, of a compliance report, or of a report required under § 602.31(d), includes—

(1) Observations from site visit(s), on an announced or unannounced basis, to the agency or to a location where agency activities such as training, review and evaluation panel meetings, and decision meetings take place and to one or more of the institutions or programs it accredits or preaccredits;

(2) Review of the public comments and other third-party information the Department staff receives by the established deadline, and the agency's responses to the third-party comments, as appropriate, as well as any other information Department staff assembles for purposes of evaluating the agency under this part; and

(3) Review of complaints or legal actions involving the agency.

(c) The Department staff analyzes the materials submitted in support of an application for expansion of scope to ensure that the agency has the requisite experience, policies that comply with subpart B of this part, capacity, and performance record to support the request.

(d) Department staff's evaluation of an agency may also include a review of information directly related to institutions or programs accredited or preaccredited by the agency relative to their compliance with the agency's standards, the effectiveness of the

standards, and the agency's application of those standards.

(e) If, at any point in its evaluation of an agency seeking initial recognition, Department staff determines that the agency fails to demonstrate compliance with the basic eligibility requirements in §§ 602.10 through 602.13, the staff—

(1) Returns the agency's application and provides the agency with an explanation of the deficiencies that caused staff to take that action; and

(2) Recommends that the agency withdraw its application and reapply when the agency can demonstrate compliance.

(f) Except with respect to an application that has been returned or is withdrawn under paragraph (e) of this section, when Department staff completes its evaluation of the agency, the staff—

(1) Prepares a written draft analysis of the agency;

(2) Sends the draft analysis including any identified areas of non-compliance and a proposed recognition recommendation, and all supporting documentation, including all third-party comments the Department received by the established deadline, to the agency;

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation and third-party comments, specifying a deadline that provides at least 30 days for the agency's response;

(4) Reviews the response to the draft analysis the agency submits, if any, and prepares the written final analysis. The final analysis includes a recognition recommendation to the senior Department official, as the Department staff deems appropriate, including, but not limited to, a recommendation to approve, deny, limit, suspend, or terminate recognition, require the submission of a compliance report and continue recognition pending a final decision on compliance, approve or deny a request for expansion of scope, or revise or affirm the scope of the agency; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and any other available information provided to the Advisory Committee under § 602.34(c).

(g) The agency may request that the Advisory Committee defer acting on an application at that Advisory Committee meeting if Department staff fails to provide the agency with the materials described, and within the timeframes provided, in paragraphs (f)(3) and (f)(5) of this section. If the Department staff's failure to send the materials in

accordance with the timeframe described in paragraph (f)(3) or (f)(5) of this section is due to the failure of the agency to submit reports to the Department, other information the Secretary requested, or its response to the draft analysis, by the deadline established by the Secretary, the agency forfeits its right to request a deferral of its application.

(Authority: 20 U.S.C. 1099b)

**§ 602.33 Procedures for review of agencies during the period of recognition.**

(a) Department staff may review the compliance of a recognized agency with the criteria for recognition at any time—

(1) At the request of the Advisory Committee; or

(2) Based on any information that, as determined by Department staff, appears credible and raises issues relevant to recognition.

(b) The review may include, but need not be limited to, any of the activities described in § 602.32(b) and (d).

(c) If, in the course of the review, and after provision to the agency of the documentation concerning the inquiry and consultation with the agency, Department staff notes that one or more deficiencies may exist in the agency's compliance with the criteria for recognition or in the agency's effective application of those criteria, it—

(1) Prepares a written draft analysis of the agency's compliance with the criteria of concern. The draft analysis reflects the results of the review, and includes a recommendation regarding what action to take with respect to recognition. Possible recommendations include, but are not limited to, a recommendation to limit, suspend, or terminate recognition, or require the submission of a compliance report and to continue recognition pending a final decision on compliance;

(2) Sends the draft analysis including any identified areas of non-compliance, and a proposed recognition recommendation, and all supporting documentation to the agency; and

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation, specifying a deadline that provides at least 30 days for the agency's response.

(d) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has demonstrated compliance with the criteria for recognition, the staff notifies the agency in writing of the results of the review. If the review was requested by the Advisory Committee, staff also provides the Advisory

Committee with the results of the review.

(e) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has not demonstrated compliance, the staff—

(1) Notifies the agency that the draft analysis will be finalized for presentation to the Advisory Committee;

(2) Publishes a notice in the **Federal Register** including, if practicable, an invitation to the public to comment on the agency's compliance with the criteria in question and establishing a deadline for receipt of public comment;

(3) Provides the agency with a copy of all public comments received and, if practicable, invites a written response from the agency;

(4) Finalizes the staff analysis as necessary to reflect its review of any agency response and any public comment received; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and a recognition recommendation and any other information provided to the Advisory Committee under § 602.34(c).

(f) The Advisory Committee reviews the matter in accordance with § 602.34.

(Authority: 20 U.S.C. 1099b)

**Review by the National Advisory Committee on Institutional Quality and Integrity**

**§ 602.34 Advisory Committee meetings.**

(a) Department staff submits a proposed schedule to the Chairperson of the Advisory Committee based on anticipated completion of staff analyses.

(b) The Chairperson of the Advisory Committee establishes an agenda for the next meeting and, in accordance with the Federal Advisory Committee Act, presents it to the Designated Federal Official for approval.

(c) Before the Advisory Committee meeting, Department staff provides the Advisory Committee with—

(1) The agency's application for recognition or for expansion of scope, the agency's compliance report, or the agency's report submitted under § 602.31(d), and supporting documentation;

(2) The final Department staff analysis of the agency developed in accordance with § 602.32 or § 602.33, and any supporting documentation;

(3) At the request of the agency, the agency's response to the draft analysis;

(4) Any written third-party comments the Department received about the agency on or before the established deadline;

(5) Any agency response to third-party comments; and

(6) Any other information Department staff relied upon in developing its analysis.

(d) At least 30 days before the Advisory Committee meeting, the Department publishes a notice of the meeting in the **Federal Register** inviting interested parties, including those who submitted third-party comments concerning the agency's compliance with the criteria for recognition, to make oral presentations before the Advisory Committee.

(e) The Advisory Committee considers the materials provided under paragraph (c) of this section in a public meeting and invites Department staff, the agency, and other interested parties to make oral presentations during the meeting. A transcript is made of all Advisory Committee meetings.

(f) The written motion adopted by the Advisory Committee regarding each agency's recognition will be made available during the Advisory Committee meeting. The Department will provide each agency, upon request, with a copy of the motion on recognition at the meeting. Each agency that was reviewed will be sent an electronic copy of the motion relative to that agency as soon as practicable after the meeting.

(g) After each meeting of the Advisory Committee at which a review of agencies occurs, the Advisory Committee forwards to the senior Department official its recommendation with respect to each agency, which may include, but is not limited to, a recommendation to approve, deny, limit, suspend, or terminate recognition, to grant or deny a request for expansion of scope, to revise or affirm the scope of the agency, or to require the agency to submit a compliance report and to continue recognition pending a final decision on compliance.

(Authority: 20 U.S.C. 1099b)

**§ 602.35 Responding to the Advisory Committee's recommendation.**

(a) Within ten days following the Advisory Committee meeting, the agency and Department staff may submit written comments to the senior Department official on the Advisory Committee's recommendation. The agency must simultaneously submit a copy of its written comments, if any, to Department staff. Department staff must simultaneously submit a copy of its written comments, if any, to the agency.

(b) Comments must be limited to—

(1) Any Advisory Committee recommendation that the agency or

Department staff believes is not supported by the record;

(2) Any incomplete Advisory Committee recommendation based on the agency's application; and

(3) The inclusion of any recommendation or draft proposed decision for the senior Department official's consideration.

(c)(1) Neither the Department staff nor the agency may submit additional documentary evidence with its comments unless the Advisory Committee's recognition recommendation proposes finding the agency noncompliant with, or ineffective in its application of, a criterion or criteria for recognition not identified in the final Department staff analysis provided to the Advisory Committee.

(2) Within ten days of receipt by the Department staff of an agency's comments or new evidence, if applicable, or of receipt by the agency of the Department staff's comments, Department staff, the agency, or both, as applicable, may submit a response to the senior Department official. Simultaneously with submission, the agency must provide a copy of any response to the Department staff. Simultaneously with submission, Department staff must provide a copy of any response to the agency.

(Authority: 20 U.S.C. 1099b)

**Review and Decision by the Senior Department Official**

**§ 602.36 Senior Department official's decision.**

(a) The senior Department official makes a decision regarding recognition of an agency based on the record compiled under §§ 602.32, 602.33, 602.34, and 602.35 including, as applicable, the following:

(1) The materials provided to the Advisory Committee under § 602.34(c).

(2) The transcript of the Advisory Committee meeting.

(3) The recommendation of the Advisory Committee.

(4) Written comments and responses submitted under § 602.35.

(5) New evidence submitted in accordance with § 602.35(c)(1).

(6) A communication from the Secretary referring an issue to the senior Department official's consideration under § 602.37(e).

(b) In the event that statutory authority or appropriations for the Advisory Committee ends, or there are fewer duly appointed Advisory Committee members than needed to constitute a quorum, and under extraordinary circumstances when there

are serious concerns about an agency's compliance with subpart B of this part that require prompt attention, the senior Department official may make a decision in a recognition proceeding based on the record compiled under § 602.32 or § 602.33 after providing the agency with an opportunity to respond to the final staff analysis. Any decision made by the senior Department official absent a recommendation from the Advisory Committee may be appealed to the Secretary as provided in § 602.37.

(c) Following consideration of an agency's recognition under this section, the senior Department official issues a recognition decision.

(d) Except with respect to decisions made under paragraph (f) or (g) of this section and matters referred to the senior Department official under § 602.37(e) or (f), the senior Department official notifies the agency in writing of the senior Department official's decision regarding the agency's recognition within 90 days of the Advisory Committee meeting or conclusion of the review under paragraph (b) of this section.

(e) The senior Department official's decision may include, but is not limited to, approving, denying, limiting, suspending, or terminating recognition, granting or denying an application for an expansion of scope, revising or affirming the scope of the agency, or continuing recognition pending submission and review of a compliance report under §§ 602.32 and 602.34 and review of the report by the senior Department official under this section.

(1)(i) The senior Department official approves recognition if the agency complies with the criteria for recognition listed in subpart B of this part and if the agency effectively applies those criteria.

(ii) If the senior Department official approves recognition, the recognition decision defines the scope of recognition and the recognition period. The recognition period does not exceed five years, including any time during which recognition was continued to permit submission and review of a compliance report.

(iii) If the scope or period of recognition is less than that requested by the agency, the senior Department official explains the reasons for approving a lesser scope or recognition period.

(2)(i) Except as provided in paragraph (e)(3) of this section, if the agency either fails to comply with the criteria for recognition listed in subpart B of this part, or to apply those criteria effectively, the senior Department

official denies, limits, suspends, or terminates recognition.

(ii) If the senior Department official denies, limits, suspends, or terminates recognition, the senior Department official specifies the reasons for this decision, including all criteria the agency fails to meet and all criteria the agency has failed to apply effectively.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, if a recognized agency fails to demonstrate compliance with or effective application of a criterion or criteria, but the senior Department official concludes that the agency will demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less, the senior Department official may continue the agency's recognition, pending submission by the agency of a compliance report, review of the report under §§ 602.32 and 602.34, and review of the report by the senior Department official under this section. In such a case, the senior Department official specifies the criteria the compliance report must address, and a time period, not longer than 12 months, during which the agency must achieve compliance and effectively apply the criteria. The compliance report documenting compliance and effective application of criteria is due not later than 30 days after the end of the period specified in the senior Department official's decision.

(ii) If the record includes a compliance report, and the senior Department official determines that an agency has not complied with the criteria for recognition, or has not effectively applied those criteria, during the time period specified by the senior Department official in accordance with paragraph (e)(3)(i) of this section, the senior Department official denies, limits, suspends, or terminates recognition, except, in extraordinary circumstances, upon a showing of good cause for an extension of time as determined by the senior Department official and detailed in the senior Department official's decision. If the senior Department official determines good cause for an extension has been shown, the senior Department official specifies the length of the extension and what the agency must do during it to merit a renewal of recognition.

(f) If the senior Department official determines, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application of, a criterion or criteria of recognition not

identified earlier in the proceedings as an area of noncompliance, the senior Department official provides—

(1) The agency with an opportunity to submit a written response and documentary evidence addressing the finding; and

(2) The staff with an opportunity to present its analysis in writing.

(g) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the senior Department official's attention while a decision regarding the agency's recognition is pending before the senior Department official, and if the senior Department official concludes the recognition decision should not be made without consideration of the information, the senior Department official either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and consideration by the Advisory Committee under § 602.34; or

(2)(i) Provides the information to the agency and Department staff;

(ii) Permits the agency to respond to the senior Department official and the Department staff in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides Department staff with an opportunity to respond in writing to the agency's submission under paragraph (g)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on the record described in paragraph (a) of this section, as supplemented by the information provided under this paragraph.

(h) No agency may submit information to the senior Department official, or ask others to submit information on its behalf, for purposes of invoking paragraph (g) of this section. Before invoking paragraph (g) of this section, the senior Department official will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(i) If the senior Department official does not reach a final decision to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the senior Department official automatically extends the recognition period until a final decision is reached.

(j) Unless appealed in accordance with § 602.37, the senior Department

official's decision is the final decision of the Secretary.

(Authority: 20 U.S.C. 1099b)

### Appeal Rights and Procedures

#### § 602.37 Appealing the senior Department official's decision to the Secretary.

(a) The agency may appeal the senior Department official's decision to the Secretary. Such appeal stays the decision of the senior Department official until final disposition of the appeal. If an agency wishes to appeal, the agency must—

(1) Notify the Secretary and the senior Department official in writing of its intent to appeal the decision of the senior Department official, no later than ten days after receipt of the decision;

(2) Submit its appeal to the Secretary in writing no later than 30 days after receipt of the decision; and

(3) Provide the senior Department official with a copy of the appeal at the same time it submits the appeal to the Secretary.

(b) The senior Department official may file a written response to the appeal. To do so, the senior Department official must—

(1) Submit a response to the Secretary no later than 30 days after receipt of a copy of the appeal; and

(2) Provide the agency with a copy of the senior Department official's response at the same time it is submitted to the Secretary.

(c) Neither the agency nor the senior Department official may include in its submission any new evidence it did not submit previously in the proceeding.

(d) On appeal, the Secretary makes a recognition decision, as described in § 602.36(e). If the decision requires a compliance report, the report is due within 30 days after the end of the period specified in the Secretary's decision. The Secretary renders a final decision after taking into account the senior Department official's decision, the agency's written submissions on appeal, the senior Department official's response to the appeal, if any, and the entire record before the senior Department official. The Secretary notifies the agency in writing of the Secretary's decision regarding the agency's recognition.

(e) The Secretary may determine, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application with respect to, a criterion or criteria for recognition not identified as an area of noncompliance earlier in the proceedings. In that case, the

Secretary, without further consideration of the appeal, refers the matter to the senior Department official for consideration of the issue under § 602.36(f). After the senior Department official makes a decision, the agency may, if desired, appeal that decision to the Secretary.

(f) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the Secretary's attention while a decision regarding the agency's recognition is pending before the Secretary, and if the Secretary concludes the recognition decision should not be made without consideration of the information, the Secretary either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and review by the Advisory Committee under § 602.34; and consideration by the senior Department official under § 602.36; or

(2)(i) Provides the information to the agency and the senior Department official;

(ii) Permits the agency to respond to the Secretary and the senior Department official in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides the senior Department official with an opportunity to respond in writing to the agency's submission under paragraph (f)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on all the materials described in paragraphs (d) and (f) of this section.

(g) No agency may submit information to the Secretary, or ask others to submit information on its behalf, for purposes of invoking paragraph (f) of this section. Before invoking paragraph (f) of this section, the Secretary will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(h) If the Secretary does not reach a final decision on appeal to approve, deny, limit, suspend, or terminate an

agency's recognition before the expiration of its recognition period, the Secretary automatically extends the recognition period until a final decision is reached.

(Authority: 20 U.S.C. 1099b)

**§ 602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.**

An agency may contest the Secretary's decision under this part in the Federal courts as a final decision in accordance with applicable Federal law. Unless otherwise directed by the court, a decision of the Secretary to deny, limit, suspend, or terminate the agency's recognition is not stayed during an appeal in the Federal courts.

(Authority: 20 U.S.C. 1099b)

17. Subpart D is removed in its entirety.

18. Subpart E is redesignated as subpart D.

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