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## **Proposed Amendment to 34 CFR 668.603(b): Alternate Earnings Appeal for Earnings Premium Failures**

The following language is proposed to amend § 668.603(b) to allow an institution to appeal a failing result under the earnings premium measure based on reliable alternate earnings evidence demonstrating that program graduates' median earnings meet or exceed the applicable earnings threshold. This approach is consistent with the OBBB framework's provision for appeals and draws on the alternate-earnings appeal concept utilized under prior iterations of the Gainful Employment regulations, with enhanced methodological safeguards aligned to current definitions and data practices.

Proposed regulatory text:

"§ 668.603 Low-earning outcome programs.

...

(b) Basis for appeal.

(1) General. If the Secretary initiates an action under paragraph (a) of this section, the institution may initiate an appeal under subpart G of this part on either of the following bases: (i) the institution believes the Secretary erred in the calculation of the program's earnings premium measure under § 668.403; or (ii) the institution submits an alternate earnings appeal under paragraph (b)(2) of this section demonstrating that the program's graduates' median annual earnings meet or exceed the applicable earnings threshold as defined in § 668.2 and applied under § 668.403. Institutions may not dispute a program's Direct Loan Program ineligibility based upon its earnings premium measure except as described in this paragraph (b).

(2) Alternate earnings appeal.

(i) Permissible evidentiary sources. An institution may submit alternate earnings evidence consisting of one or more of the following sources that directly measure earnings for the program's graduates in the relevant cohort period: (A) Audited graduate earnings surveys that meet the methodological and validation standards in paragraph (b)(2)(iii); (B) State-administered wage record data (e.g., State Unemployment Insurance wage files or State tax records), obtained under an agreement that authorizes use for accountability purposes; or (C) Federal government sources of earnings or income data accessible to the institution under law or agreement, including the Social Security Administration or the Treasury Department (including the Internal Revenue Service), to the extent permitted by law.

(ii) Cohort alignment, population, and measure. The alternate earnings evidence must:

(A) Cover the programmatic cohort of students who received title IV, HEA funds for

enrollment in the program, who completed during the academic year that is four years prior to the year of determination, who are not enrolled in any institution of higher education at the time of earnings measurement, and who are working, as those terms are used in § 668.403; (B) Exclude individuals on the same bases the Secretary excludes under § 668.403(c), and include only individuals identified as working in the measurement year; and (C) Produce a single median annual earnings figure for the cohort that is methodologically comparable to the median earnings used by the Secretary under § 668.403(b).

(iii) Methodological and validation standards. Alternate earnings evidence must: (A) Be independently audited by a certified public accountant in accordance with generally accepted government auditing standards or another standard acceptable to the Secretary, with an attestation that the data collection, matching, and computation procedures were applied as described and yielded the reported median; (B) For graduate surveys, achieve a minimum response rate and nonresponse bias analysis acceptable to the Secretary and include verifiable documentation of earnings (e.g., W-2s, 1099s, pay stubs, or employer payroll attestations), including tip income where applicable, sufficient for the auditor to validate reported earnings; (C) For State or Federal administrative earnings, be supported by an agreement or legal authorization permitting the use of matched individual-level records to compute an aggregate median, returned only in aggregate, with a minimum matched count sufficient to protect privacy and support stable estimates; and (D) Include at least 16 matched individuals contributing to the median, consistent with the threshold used by Federal agencies with earnings data for returning aggregated medians.

(iv) Earnings threshold and comparison. The Secretary will compare the audited alternate median annual earnings to the earnings threshold as defined in § 668.2 and applied under § 668.403(b), including the applicable comparison group (e.g., State or national, and by field of study where required for graduate programs). If the alternate median equals or exceeds the applicable earnings threshold, the program receives a passing result for the earnings premium measure for that award year.

(v) Timing and procedures. An institution must submit the alternate earnings appeal within the timeframe established for appeals under subpart G following receipt of the notice of determination under § 668.405. The submission must include: (A) a detailed methodological statement; (B) auditor's report and working papers upon request; (C) underlying data documentation sufficient for the Secretary to replicate the median in aggregate, consistent with applicable privacy protections; and (D) certifications by an authorized institutional official and the auditor regarding the accuracy and completeness of the submission.

(vi) Secretary's review and standard of decision. The Secretary will determine whether the alternate earnings submission demonstrates, by a preponderance of the evidence and consistent with the requirements of this section, that the program's graduates' median annual earnings meet or exceed the applicable earnings threshold. If so, the Secretary will issue a revised determination indicating a passing result under the earnings premium measure for that award year; otherwise, the Secretary will deny the appeal.

(vii) Privacy and data security. All alternate earnings submissions must comply with applicable Federal, State, and privacy-protective protocols for handling and reporting aggregate data derived from administrative records; no personally identifiable information may be submitted to the Secretary except as expressly permitted by law and required for audit or verification purposes.

(viii) Program integrity. Submissions found to contain material misstatements or omissions may be referred for action under subpart G and other applicable enforcement authorities, and any resulting approval may be rescinded. ”

#### Explanation and justification

- Current § 668.603(b) limits appeals to alleged calculation errors by the Secretary. The proposed amendment adds an alternate earnings appeal path, consistent with OBBB Sec. 454(c)(5)’s appeal mandate and prior GE practice, enabling institutions to demonstrate that a failing program in fact meets the earnings threshold when measured using rigorous alternate sources.
- The alternate earnings concept was previously part of the Obama-era GE rule, though a 2017 decision in *AACS v. DeVos* addressed specific implementation concerns without invalidating the broader regulatory scheme; the proposed language addresses those concerns by specifying stringent audit, documentation, and comparability requirements and by aligning to the current “working graduates” cohort and four-year look-back.
- The Department has acknowledged that limitations in available administrative earnings data can affect the accuracy of the earnings threshold used in the earnings premium measure. Allowing institutions to submit reliable alternate earnings evidence showing that program graduates’ earnings meet or exceed the applicable threshold adds a necessary element of fairness and due process to the accountability framework.
- Requirements for cohort alignment, exclusions, and use of working graduates mirror the current earnings premium methodology to ensure apples-to-apples comparison with the Secretary’s measure.
- The evidentiary standards leverage existing definitions and practices regarding “Federal agency with earnings data,” aggregation thresholds for medians, and privacy protocols. The 16-person threshold reflects current agency practices for returning aggregate medians and supports statistical reliability.
- By specifying that a successful alternate earnings appeal yields a passing earnings premium result for the applicable award year, the proposal integrates cleanly with § 668.402(c) and § 668.403, avoiding broader structural changes.