

## Small Entity Compliance Guide

### Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit

#### Introduction

This guide was prepared by the staff of the U.S. Department of Education as a “small entity compliance guide” under Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, as amended. The guide summarizes and explains the Financial Responsibility, Administrative Capability, Certification Procedures, and Ability to Benefit (ATB) final rule published in the *Federal Register* by the Department on October 31, 2023 (88 FR 74568). This guide is not a substitute for the rule itself. Only the rule itself can provide complete and definitive information regarding its requirements.

#### Purpose of This Regulatory Action

This final rule addresses four areas: financial responsibility, administrative capability, certification procedures, and ATB. The Institutional and Programmatic Eligibility Committee (Committee) reached consensus on ATB at its final negotiated rulemaking session on March 18, 2022.

The financial responsibility regulations at §§ 668.15, 668.23, 668.171, and 668.174 through 668.177 increase our ability to identify high-risk events and require the financial protection we believe is needed to protect students and taxpayers. The administrative capability regulations at § 668.16 strengthen institutional requirements, improve the administration of the title IV, Higher Education Act (HEA) programs, and address concerning practices that were previously unregulated.

The certification procedures regulations in §§ 668.13, 668.14, and 668.43 create a more rigorous process for certifying institutions to participate in the title IV, HEA programs. We expect these regulations to better protect students and taxpayers through the Program Participation Agreement (PPA), our written agreement with institutions.

Finally, we amended the regulations for ATB at §§ 668.156 and 668.157 to clarify the requirements for the State process to determine eligibility for programs serving non-high school graduates and the documentation requirements for eligible career pathway programs.

#### Summary of the Major Provisions

The Financial Responsibility final regulations:

- Remove and reserve § 668.15 and consolidate all financial responsibility factors, including those dealing with changes in ownership, under subpart L of part 668.

- Amend § 668.23 to require that audit reports are timely submitted, by the earlier of 30 days after the completion of the report or six months after the end of the institution's fiscal year.
- Amend § 668.23 to require that, for any domestic or foreign institution that is owned directly or indirectly by any foreign entity holding at least a 50 percent voting or equity interest in the institution, the institution must provide documentation of the entity's status under the law of the jurisdiction under which the entity is organized.
- Amend § 668.171, which requires institutions to demonstrate that they are able to meet their financial obligations, by adding events that constitute a failure to do so, including failure to make debt payments for more than 90 days, failure to make payroll obligations, or borrowing from employee retirement plans without authorization.
- Amend in § 668.171 the set of conditions that require an institution to post financial protection if certain events occur. These mandatory triggers are certain external events, financial circumstances that may not be reflected in the institution's regular financial statements, and financial circumstances that are not yet reflected in the institution's composite score.
- Amend in § 668.171 the set of conditions that may, at the discretion of the Department, require an institution to post financial protection. These discretionary triggers are external events or financial circumstances that may not appear in the institution's regular financial statements and are not yet reflected in the institution's calculated composite score.
- In § 668.174, clarify the language related to compliance audit or program review findings that lead to a liability of at least 5 percent of title IV, HEA volume at the institution, to more clearly state that the relevant reports are those issued in the two most recent years, rather than reviews conducted in the two most recent years.
- Add a new § 668.176 to consolidate the financial responsibility requirements for institutions undergoing a change in ownership in subpart L of part 668.
- Redesignate the existing § 668.176, establishing severability, as § 668.177.

The Administrative Capability regulations:

- Amend § 668.16(h) to require institutions to provide adequate financial aid counseling to enrolled students that includes more information about the cost of attendance, sources and amounts of each type of aid separated by the type of aid, the net price, and instructions and applicable deadlines for accepting, declining, or adjusting award amounts.

- Amend § 668.16(k) to require that an institution not have any principal or affiliate that has been subject to specified negative actions, including being convicted of or pleading nolo contendere or guilty to a crime involving governmental funds.
- Add § 668.16(n) to require that an institution has not been subject to a significant negative action by a State or Federal agency, a court, or an accrediting agency and has not lost eligibility to participate in another Federal educational assistance program due to an administrative action against the institution.
- Amend § 668.16(p) to strengthen the requirement that institutions must develop and follow adequate procedures to evaluate the validity of a student's high school diploma.
- Add § 668.16(q) to require that institutions provide adequate career services to eligible students who receive title IV, HEA program assistance.
- Add § 668.16(r) to require institutions to provide students with geographically accessible clinical or externship opportunities related to and required for completion of the credential or licensure in a recognized occupation, within 45 days of the completion of other required coursework.
- Add § 668.16(s) to require institutions to disburse funds to students in a timely manner consistent with the students' needs.
- Add § 668.16(t) to require that, for institutions that offer GE programs, less than half of their total title IV, HEA revenue comes from programs that are "failing" under subpart S.
- Add § 668.16(u) to require that an institution does not engage in misrepresentations or aggressive recruitment.

The Certification Procedures regulations:

- Amend § 668.13(b)(3) to eliminate the requirement that the Department approve participation for an institution if the Department has not acted on a certification application within 12 months.
- Amend § 668.13(c)(1) to include additional events that lead to provisional certification.
- Amend § 668.13(c)(2) to require provisionally certified schools that have major consumer protection issues to recertify after three years.
- Add § 668.13(e) to establish supplementary performance measures the Secretary may consider in determining whether to certify or condition the participation of the institution.

- Amend § 668.14 to establish, in new paragraph (a)(3), the requirement for an authorized representative of any entity with direct or indirect ownership of a private institution to sign a PPA.
- Amend § 668.14(b)(17) to include all Federal agencies and State attorneys general on the list of entities that have the authority to share with each other and the Department any information pertaining to an institution's eligibility for or participation in the title IV, HEA programs or any information on fraud, abuse, or other violations of law.
- Amend § 668.14(b)(26)(ii) to limit the number of hours in a gainful employment (GE) program to the greater of the required minimum number of clock hours, credit hours, or the equivalent required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is located, or the required minimum number of hours required for training in another State, if the institution provides documentation of that State meeting one of three qualifying requirements to use a State in which the institution is not located that is substantiated by the certified public accountant who prepares the institution's compliance audit report as required under § 668.23. This provision does not apply to fully online programs or where the State entry level requirements include the completion of an associate or higher-level degree.
- Add § 668.14(b)(32)(i) and (ii) to require all programs that prepare students for occupations requiring programmatic accreditation or State licensure to meet those requirements.
- Add § 668.14(b)(32)(iii) to require all programs to comply with all State laws related to closure of postsecondary institutions, including record retention, teach-out plans or agreements, and tuition recovery funds or surety bonds.
- Add § 668.14(b)(33) to provide that an institution may not withhold official transcripts or take any other negative action against a student related to a balance owed by the student that resulted from an error in the institution's administration of the title IV, HEA programs, or any fraud or misconduct by the institution or its personnel.
- Add § 668.14(b)(34) to require an institution to provide an official transcript that includes all the credit or clock hours for payment periods in which a student received title IV, HEA funds and for which all institutional charges were paid at the time the request is made.
- Add § 668.14(b)(35) to prohibit institutions from maintaining policies and procedures to encourage, or that condition institutional aid or other student benefits in a manner that induces, a student to limit the amount of Federal student aid, including Federal loan funds, that the student receives, except that the institution may provide a scholarship on the condition that a student forego borrowing if the amount of the scholarship provided is

equal to or greater than the amount of Federal loan funds that the student agrees not to borrow.

- Amend § 668.14 to establish, in new paragraph (e), a non-exhaustive list of conditions that the Secretary may apply to provisionally certified institutions.
- Amend § 668.14 to establish, in new paragraph (f), conditions that may apply to institutions seeking to convert from a for-profit institution to a nonprofit institution following a change in ownership.
- Amend § 668.14 to establish, in new paragraph (g), conditions that apply to any nonprofit institution or other institution seeking to convert to a nonprofit institution.
- Amend § 668.43(a)(5) to require all programs that prepare students for occupations requiring State licensure or certification to list all the States where the institution has determined, including as part of the institution's obligation under § 668.14(b)(32), that the program does and does not meet such requirements.

The Ability-to-Benefit regulations:

- Amend § 668.2 to codify the definition of “eligible career pathway program.”
- Amend § 668.32 to differentiate between the title IV, HEA aid eligibility of non-high school graduates who enrolled in an eligible program prior to July 1, 2012, and those who enrolled after July 1, 2012.
- Amend § 668.156 to separate the State process into an initial two-year period and a subsequent period for which the State may be approved for up to five years.
- Amend § 668.156 to require, with respect to the State process, that: (1) The application contains a certification that each eligible career pathway program intended for use through the State process meets the definition of an “eligible career pathway program.” (2) The application describes the criteria used to determine student eligibility for participation in the State process. (3) The withdrawal rate for a postsecondary institution listed for the first time on a State's application does not exceed 33 percent. (4) Upon initial application the State will enroll no more than the greater of 25 students or one percent of enrollment of each participating institution.
- Amend § 668.156 to remove the support services requirements from the State process, including orientation, assessment of a student's existing capabilities, tutoring, assistance in developing educational goals, counseling, and follow up by teachers and counselors, which duplicate the requirements in the definition of “eligible career pathway program.”
- Amend the monitoring requirement in § 668.156 to provide a participating institution that has failed to achieve the 85 percent success rate up to three years to achieve compliance.

- Amend § 668.156 to require that the State prohibit an institution from participating in the State process for at least five years if the State terminates its participation.
- Amend § 668.156 to: clarify that the State is not subject to the success rate requirement at the time of the initial application but is subject to the requirement for the subsequent period; reduce the required success rate from 95 percent to 85 percent; require the success rate to be calculated for each participating institution; and amend the comparison groups to include the concept of “eligible career pathway programs.”
- Amend § 668.156 to require that States report information on race, gender, age, economic circumstances, education attainment, and such other information that the Secretary specifies in a notice published in the *Federal Register*.
- Amend § 668.156, with respect to the Secretary’s ability to revise or terminate a State’s participation in the State process, by providing that the Secretary may (1) approve a State process once for a two-year period if the State is not in compliance with the regulations, and (2) lower the success rate to 75 percent if 50 percent of the participating institutions across the State do not meet the 85 percent success rate.
- Add a new § 668.157 to clarify the documentation requirements for eligible career pathway programs.

### **Compliance Date for Entities Subject to These Regulations**

Section 482(c) of the Higher Education Act (HEA) requires that regulations affecting programs under title IV of the HEA be published in final form by November 1, prior to the start of the award year (July 1) to which they apply. Under section 482(c) of the HEA, these final regulations become effective July 1, 2024.

### **Entities Subject to the Rule**

The regulations affect institutions that participate in the title IV, HEA programs. For purposes of these final regulations, the Department continues to define “small entities” by reference to enrollment, to allow meaningful comparison of regulatory impact across all types of higher education institutions. The enrollment standard for small less-than-two-year institutions (below associate degrees) is less than 750 full-time-equivalent (FTE) students and for small institutions of at least two but less-than-4-years and 4-year institutions, less than 1,000 FTE students. The Department consulted with the Office of Advocacy for the Small Business Administration, and the Office of Advocacy approved these size standards for this rulemaking. As many of the entities subject to the regulations are “small entities,” we have prepared this Small Entity Compliance Guide.

### **Description of (and Where Feasible) an Estimate of the Number of Small Entities to Which the Regulations Will Apply**

The following table summarizes the number of institutions potentially affected by these final regulations.

	Small	Total	Percent
Proprietary	2,114	2,331	91%
2-year	1,875	1,990	94%
4-year	239	341	70%
Private not-for-profit	997	1,831	54%
2-year	199	203	98%
4-year	798	1,628	49%
Public	524	1,924	27%
2-year	461	1,145	40%
4-year	63	779	8%
Total	3,635	6,086	60%

Source: 2020-21 IPEDS data reported to the Department.

**Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations (Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skills Necessary for Preparation of the Report or Record)**

The final regulations require provisionally certified institutions at risk of closure to submit to the Department acceptable teach-out plans and acceptable record retention plans. For provisionally certified institutions at risk of closure, are teaching out or closing, or are not financially responsible or administratively capable, the change requires the release of holds on student transcripts. Other provisions require institutions to provide adequate financial aid counseling and financial aid communications to advise students and families to accept the most beneficial types of financial assistance available to enrolled students and strengthen the requirement to evaluate the validity of students' high school diplomas. The final regulations also require information about relevant foreign ownership, the State process for ability to benefit qualification, eligible career pathways programs, financial responsibility trigger events, and, for some institutions, confirmation that they are public institutions backed by the full faith and credit of that government entity to be considered as financially responsible.

**Other Resources**

The final regulations published for Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit regulations can be found at [2023-22785.pdf \(govinfo.gov\)](#).

### **Contacting the Department of Education**

The Department of Education's Office of Postsecondary Education is happy to assist small entities with questions regarding the Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit regulations. Please direct questions for financial responsibility to Kevin Campbell, telephone: (214) 661-9488, email: [Kevin.Campbell@ed.gov](mailto:Kevin.Campbell@ed.gov). For administrative capability to Andrea Drew, telephone: (202) 987-1309, email: [Andrea.Drew@ed.gov](mailto:Andrea.Drew@ed.gov). For certification procedures to Vanessa Gomez, telephone: (202) 987-0378, email: [Vanessa.Gomez@ed.gov](mailto:Vanessa.Gomez@ed.gov). For ATB to Aaron Washington, telephone: (202) 987-0911, email: [Aaron.Washington@ed.gov](mailto:Aaron.Washington@ed.gov).