DEPARTMENT OF EDUCATION

34 CFR Part 600

RIN 1840–AD10

[Docket ID ED–2011–OPE–0011]

Application and Approval Process for New Programs

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations for Institutional Eligibility under the Higher Education Act of 1965, as amended (HEA), to streamline the application and approval process for new educational programs that qualify for student financial assistance under title IV of the HEA.

DATES: We must receive your comments on or before November 14, 2011.

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. To ensure that we do not receive duplicate copies, please submit your comments only one time. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *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 Jessica Finkel, U.S. Department of Education, 1990 K Street, NW., room 8031, Washington, DC 20006–8502.

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 *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: John Kolotos, U.S. Department of Education, 1990 K Street, NW., room 8018, Washington, DC 20006–8502. Telephone: (202) 502–7762 or by e-mail: *John.Kolotos@ed.gov.*

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

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. Please do not submit comments outside the scope of the specific proposals in this notice of proposed rulemaking (NPRM). We will not respond to comments that do not specifically relate to the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and Executive Order 13563 and their overall direction to Federal agencies to reduce regulatory burden where possible. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's student aid regulations.

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 8031, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

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

Negotiated Rulemaking and Background of These Proposed Regulations

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 the public, including individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary must subject the proposed regulations to a negotiated rulemaking process. All proposed regulations that the Department publishes on which the negotiators reached consensus must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process can be found at: *http://www2.ed.gov/policy/highered/leg/hea08/index.html#neg-reg.*

Between November, 2009 and January, 2010, the Department held three negotiated rulemaking sessions aimed at improving integrity in the title IV, HEA programs. As a result of these discussions, during which consensus was not reached, the Department published two notices of proposed rulemaking, one on June 18, 2010 (June 18th NPRM) and one on July 26, 2010 (July 26th NPRM). The July 26th NPRM focused specifically on the issue of ''gainful employment'' and the June 18th NPRM covered the remaining Program Integrity issues. After considering public comments on the June 18th NPRM, the Department published final regulations on October 29, 2010 (75 FR 66832) (Program Integrity Issues), which included requirements for institutions to disclose and report information about gainful employment programs. After considering comments on the July 26th NPRM related to new programs, the Department published final regulations on October 29, 2010 (75 FR 66665) (Gainful Employment—New Programs), which included requirements for institutions to notify the Department before offering a new educational program that provides training leading to gainful employment in a recognized occupation (gainful employment program). Through this notification process, the Department may advise an institution that it must obtain approval to establish the eligibility of an additional gainful employment program for purposes of the title IV, HEA programs.

The Department established the notification requirement out of concern that some institutions might attempt to circumvent the proposed gainful employment standards in § 668.7(a)(1)

of the July 26th NPRM by adding new programs before those standards could take effect. The Department explained that the notification process requirements, referred to as ''interim requirements,'' were intended to remain in effect until the final regulations that established eligibility measures for gainful employment programs would take effect. Specifically, we stated that with regard to approving additional programs, ''[w]e intend to establish performance-based requirements in subsequent regulations'' and that ''[u]ntil those subsequent regulations take effect, institutions must comply with the interim requirements in [the Gainful Employment—New Programs final] regulations'' (75 FR 66671).

We published the final regulations establishing the gainful employment eligibility measures on June 13, 2011 (76 FR 34386) (Gainful Employment—Debt Measures). In those regulations, the Department established measures for gainful employment programs that are intended to identify the worst performing programs. For gainful employment programs that fail those measures, an institution will be required to provide warnings to enrolled and prospective students for up to three years or until the programs lose eligibility for title IV, HEA funds. Under these measures, institutions may also choose to voluntarily discontinue a failing program.

The Gainful Employment—Debt Measures final regulations also place restrictions on when an institution may reestablish the eligibility of an ineligible program or a failing program that was voluntarily discontinued, or establish the eligibility of a new program that is substantially similar to an ineligible program. However, we do not believe that when these new provisions go into effect on July 1, 2013, the notification process for all new gainful employment programs established in the Gainful Employment—New Programs final regulations will be needed and therefore are seeking input from the public on this issue through these proposed regulations.

In this NPRM, among other changes, we propose to eliminate the notification process for new gainful employment programs by amending the Gainful Employment—New Programs final regulations to establish a smaller group of gainful employment programs for which an institution must obtain approval from the Department. We believe that with these changes, these proposed regulations will significantly reduce burden on institutions and the Department while still ensuring the effectiveness of the debt measures established in the Gainful Employment—Debt Measures final regulations.

The Department used the negotiated rulemaking process to discuss its proposal to define eligibility for gainful employment programs using metrics. Following the completion of the negotiated rulemaking sessions, the Department published the July 26th NPRM and received over 90,000 comments in response to those proposed regulations. These proposed regulations arise from those discussions, proposals, and comments submitted, and, per the Department's stated goal in the Gainful Employment—New Programs final regulations, would establish a simplified process for institutions to establish the eligibility of new gainful employment programs now that the gainful employment measures have been finalized. The discussions about new programs during negotiated rulemaking, and the comments received on the July 26th NPRM, were focused on the nature of the requirements that would be in place at the conclusion of the rulemaking process. For these reasons, the Department has determined that it is not necessary to conduct additional negotiations to discuss the proposed requirements regarding the approval of new gainful employment programs. The Department is publishing new proposed regulations and requesting additional public comment because the proposed changes will modify the Gainful Employment—New Programs final regulations that require institutions to provide notice to the Department for all new gainful employment programs.

Summary of Proposed Changes

These proposed regulations would amend the application process for new programs by—

- Limiting the new gainful employment programs for which an institution must apply to the Department to those programs that are (1) the same as, or substantially similar to, failing programs that the institution voluntarily discontinued or programs that became ineligible under the debt measures for gainful employment programs, and (2) programs that are substantially similar to failing programs;
- Specifying that a program is substantially similar if it has the same credential level and the same first four digits of the CIP code as that of a failing program, a failing program the institution voluntarily discontinued, or an ineligible program;
- Clarifying that there are separate application requirements for establishing the eligibility of other educational programs such as direct assessment programs and comprehensive transition and postsecondary programs;
- Providing that if the Secretary notifies an institution, the institution must apply for approval of a new educational program;
- Revising the documentation that must be included in an institution's application to establish the eligibility of a new gainful employment program;
- Specifying that the Secretary may request additional information from the institution prior to making an eligibility determination for a new gainful employment program;
- Specifying that the Secretary, in making an eligibility determination, will take into account whether the processes used and determinations made by the institution to offer the program are sufficient and will consider the performance of the institution's other gainful employment programs; and
- Specifying that if the Secretary denies the eligibility of a new gainful employment program, the Secretary will inform an institution of the reasons for the denial and the institution may request that the Secretary reconsider the determination.

Significant Proposed Regulations

Part 600 Institutional Eligibility Under the Higher Education Act of 1965, as Amended

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory changes that are technical or otherwise minor in effect.

Classification of Instructional Programs (CIP) Code

Statute: Section 481 of the HEA (20 U.S.C. 1088) provides definitions for the General Provisions Relating to Student Financial Assistance Programs. It does not provide a definition of *Classification of instructional programs or CIP.*

Current regulations: The classification of instructional programs (CIP) code is described under current § 600.10(c)(2)(i).

Proposed regulations: We propose to relocate the current description of the CIP to § 600.2, Definitions. Under this section, the CIP would be defined as ''a taxonomy of instructional program classifications and descriptions developed by the U.S. Department of Education's National Center for Education Statistics.''

Reasons: This is merely a technical change that would include the definition of the term *Classification of*

instructional programs or CIP among the definitions of other terms used in part 600 of the title IV, HEA program regulations.

New Educational Programs

Statute: With regard to eligibility for funds under title IV of the HEA, section 481 of the HEA defines an eligible program (20 U.S.C. 1088(b)), and section 498 of the HEA provides for the eligibility of institutions of higher education (20 U.S.C. 1099c).

Current regulations: Under current § 600.10(c)(1), an institution that intends to add a gainful employment program, as provided under 34 CFR 668.8(c)(3) or (d), must notify the Department at least 90 days before the first day of class for that program. The institution may proceed to offer the program described in its notice to the Secretary, unless the Department advises the institution that the program must be approved under § 600.20(c)(1)(v). Except for direct assessment programs under 34 CFR 668.10, or pursuant to a requirement included in an institution's program participation agreement (PPA) under 34 CFR 668.14, an institution does not have to apply to the Department for approval to add any other type of educational program.

Under § 600.20(c)(2), an institution that wishes to expand the scope of its eligibility by increasing its level of program offerings (e.g., adding graduate degree programs when it previously offered only baccalaureate degree programs) must apply to the Secretary for approval of that expanded scope.

Under 34 CFR 668.10(b), an institution that offers a direct assessment program must apply to the Secretary to establish the eligibility of that program for title IV, HEA program funds.

Under 34 CFR 668.13(c)(4)(ii), the Secretary may condition the provisional certification of an institution by specifying compliance requirements in the institution's PPA.

Under 34 CFR 668.14(a), the Secretary may condition an institution's participation in the title IV, HEA programs by specifying compliance requirements in the institution's PPA. We note that the Secretary may specify compliance requirements regardless of whether the institution is provisionally certified under 34 CFR 668.13(c).

Under 34 CFR 668.232, an institution that offers a comprehensive transition and postsecondary program must apply to the Secretary to establish the eligibility of that program for title IV, HEA program funds.

Proposed regulations: In proposed § 600.10(c)(1), we specify that an institution would not have to apply to the Secretary for approval of a new educational program unless the institution is required to obtain the Secretary's approval under the provisions in § 600.20(c)(2), § 600.20(d)(2), 34 CFR 668.10(b), 34 CFR 668.14(a)(1), or 34 CFR 668.232, or the Secretary notifies the institution that it must apply for approval.

Instead of subjecting all gainful employment programs to a notice process or a notice and approval process, we propose in § 600.10(c)(1), by reference to § 600.20(d)(2), to limit required approvals to new gainful employment programs that are the same as or substantially similar to programs that performed poorly under the debt measures in 34 CFR 668.7(a). As discussed more fully under the heading *Application requirements,* in proposed § 600.20(d) an institution would have to obtain the Department's approval only if a gainful employment program (1) is the same as, or substantially similar to, a failing program that the institution voluntarily discontinued under 34 CFR 668.7(l)(1) or a program that became ineligible under 34 CFR 668.7(i), or (2) is substantially similar to a failing program under 34 CFR 668.7(h).

Reasons: The changes we are proposing in § 600.10(c)(1)(i), would clarify the approval provisions that apply to new programs by providing references for existing approval requirements in one regulatory provision. We are proposing in § 600.10(c)(1)(ii) that institutions must apply for approval of new programs if the Secretary notifies them they must do so, in order to ensure that the Secretary has sufficient discretion to assess whether a new program would serve students effectively. For example, the Secretary would have the discretion to notify an institution that it must apply for approval for a new program due to material audit or program review deficiencies such as late or unmade refunds, verification issues, failure to provide timely notices of significant events, or other conditions that adversely affect its administrative or financial capability, including the performance of its gainful employment programs under the debt measures in 34 CFR 668.7.

Our proposed approach in § 600.10(c)(1) and § 600.20(d)(2) is consistent with the approach taken in the Gainful Employment—Debt Measures final regulations in that both sets of regulations focus on poorly performing gainful employment programs. Moreover, by publishing these proposed regulations we are carrying out the commitment made in the Gainful Employment—New Programs final regulations (75 FR 66669), to establish performance-based standards for approving new programs. Compared to the current regulations for new programs, this performance-based approach would decrease burden for institutions and the Department by eliminating the notice and approval process for many new gainful employment programs. We believe that this tailored program approval process would protect student borrowers while reducing institutional costs and burden.

Application requirements.

Statute: With regard to eligibility for funds under title IV of the HEA, section 481 of the HEA defines an eligible program (20 U.S.C. 1088(b)), and section 498 of the HEA provides for the eligibility of institutions of higher education (20 U.S.C. 1099c).

Current regulations: Under the current procedures in § 600.20(d)(1), an institution must notify the Department of its intent to offer an additional educational program, or submit an application requesting approval to expand the institution's eligibility. The institution must provide, in a format prescribed by the Secretary, all the information and documentation requested by the Department to make a determination of the program's eligibility or institutional certification. For a new gainful employment program, an institution must notify the Department at least 90 days before the first day of class for that program. Unless the Department alerts the institution at least 30 days before the first day of class that the program must be approved for title IV, HEA program purposes, the institution may disburse title IV, HEA program funds to students enrolled in the program. However, if an institution does not notify the Department before the 90-day period, it must obtain the Department's approval before disbursing title IV, HEA program funds to students in the program. In any case, whenever a new gainful employment program must be approved, the Department treats the institution's notice as an application for that program. The Department may approve the institution's application or request more information prior to making a determination of whether to approve or deny the eligibility of the new educational program.

In reviewing the institution's application, the Department takes into account the following factors:

(1) The institution's demonstrated financial responsibility and

administrative performance in operating its existing programs.

(2) Whether the additional program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.

(3) Whether the number of additional programs being added is inconsistent with the institution's historic program offerings, growth, and operations.

(4) Whether the process and determination by the institution to offer the additional program is sufficient.

If the Department denies an application from an institution to offer a new education program, the Department explains how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation. The institution may respond to the reasons for the denial, and request that the Department reconsider its determination. The Department bases its determination to deny an application on factors (2), (3) and (4).

Under § 600.20(d)(2), whenever an institution notifies the Department of its intent to offer an additional gainful employment program, the institution must include in its notice:

- A description of how the institution determined the need for the program and how the program was designed to meet local market needs, or for an online program, regional or national market needs. The description must contain any wage analysis the institution may have performed, including any consideration of Bureau of Labor Statistics (BLS) data related to the program;
- A description of how the program was reviewed or approved by, or developed in conjunction with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program;
- Documentation that the program has been approved by its accrediting agency or is otherwise included in the institution's accreditation by its accrediting agency, or comparable documentation if the institution is a public postsecondary vocational institution approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation; and
- The date of the first day of class of the new program.

Proposed regulations: In § 600.20(d)(1) we propose to eliminate the current notice requirements in favor of a more streamlined approach under which an institution would simply apply to establish the eligibility of a gainful employment program.

Under proposed § 600.20(d)(2), an institution that seeks to establish the eligibility of a gainful employment program must submit an application to the Department only if that program (1) is the same as, or substantially similar to, a failing program that was voluntarily discontinued by the institution under 34 CFR 668.7(l)(1) or a program that became ineligible for title IV, HEA program funds under 34 CFR 668.7(i), or (2) is substantially similar to a program designated as a failing program under 34 CFR 668.7(h) for any one of the two most recent fiscal years (FYs). For this purpose, a program is substantially similar if it has the same credential level and the same first four digits of the CIP code as that of a failing program, a failing program the institution voluntarily discontinued, or an ineligible program. In proposed § 600.20(d)(3), while we are not proposing to change the core requirements under current § 600.20(d)(2)(i), (d)(2)(ii), (d)(2)(iii), or (d)(2)(iv), we would augment those requirements by having the institution include in its application:

- A wage analysis of the new program performed by or on behalf of the institution. This wage analysis would need to include supporting documentation based on the best data that is reasonably available to the institution;
- Compared to the failing or ineligible program, a description of the enhancements or modifications the institution made to improve the new program's performance under the gainful employment standards in 34 CFR 668.7(a); and
- The CIP code and credential level of the new program, along with a description of how the institution determined that CIP code.

We would relocate the approval provisions in current § 600.20(d)(1)(ii)(E) and (F) to proposed § 600.20(d)(4) and amend those provisions. Under this section, the Department would determine whether to approve the eligibility of a new program by taking into account (1) the institution's demonstrated financial responsibility and administrative capability in operating its existing programs, (2) whether the processes used and determinations made by the institution to offer the new program, as described by the institution in its application, are sufficient, and (3) the performance under 34 CFR 668.7 of the institution's other gainful employment programs. Before making that determination, the Department may request additional information from the institution. If the Department denies the institution's eligibility for a new gainful employment program, we inform the institution of the reasons for the denial and the institution may request that we reconsider our determination.

These proposed regulations reflect the approach taken in the Gainful Employment—Debt Measures final regulations under which the Department identifies failing programs under the debt measures for gainful employment programs and uses those measures over time to determine if a program becomes ineligible or when it may apply to regain eligibility. Thus, we are proposing to require institutions to submit applications for approval for new programs that are substantially similar to failing programs that they offer and failing programs that they voluntarily discontinued. Consequently, in proposed § 600.20(d)(2) an institution must apply for approval of a new program if it is (1) substantially similar to a program designated as a failing program for any one of the two most recent fiscal years, (2) the same as or substantially similar to a failing program the institution voluntarily discontinued, or, (3) the same or substantially similar to an ineligible program that the institution offered. We note that under 34 CFR 668.7(l) of the Gainful Employment—Debt Measures final regulations, an institution must delay submitting an application for two or three years if it seeks to (1) Reestablish the eligibility of a program that became ineligible under the debt measures, (2) reestablish the eligibility of a failing program that the institution voluntarily discontinued, or (3) establish the eligibility of a program substantially similar to an ineligible program. For clarity, we are restating these requirements in proposed § 600.20(d)(2)(iii). Under these proposed regulations, an institution would not have to delay submitting an application for a program that is substantially similar to a failing program that an institution offers or substantially similar to a failing program that the institution voluntarily discontinued.

Reasons: Because we will use the debt measures under 34 CFR 668.7 to identify the gainful employment programs that are subject to approval, it is no longer necessary to screen all potential program applications through the current notice process. Therefore, we are proposing to revise the application requirements in § 600.20(d)(2). We note that the Department will obtain an updated

listing of all gainful employment programs, including new programs, under the annual reporting requirements in 34 CFR 668.6. Using that information, the Department will be able to monitor whether an institution obtained any needed approvals for new programs.

With regard to the provision in proposed § 600.20(d)(2)(i)(B), that an institution must apply for approval of a program that is substantially similar to a program designated as a failing program for any one of the two most recent fiscal years, we note that this approach parallels the approach for ineligible programs under 34 CFR 668.7(i). Under that section, a program becomes ineligible if it fails the debt measures under 34 CFR 668.7(a) for three out of the four most recent fiscal years. For example, a program becomes ineligible if it fails the first and second FYs, passes the third FY, but fails the fourth FY. This approach prevents a program that generally fails the debt measures from remaining eligible by simply passing the measures in one year. Likewise, under the approach proposed in these regulations, an institution would have to apply for approval of a program that is substantially similar to a program designated as a failing program under 34 CFR 668.7(h) for any one of the two most recent fiscal years.

Our proposal to require a wage analysis in § 600.20(d)(3)(v) stems, in part, from comments received on the July 26th NPRM regarding the proposal under which an institution would have to submit employer affirmations and enrollment projections when obtaining approval of a new program. The Department deferred addressing those comments in the Gainful Employment—New Programs final regulations. For the benefit of the reader, we summarize those comments in the following discussion and respond to them to provide context and our reasons for the proposed regulations regarding wage analysis.

Several of the commenters supported the employer affirmation requirements as a borrower protection, but suggested that the Department should also require (1) Employers to specify the location of anticipated job vacancies, (2) employers to identify the number of current or expected job vacancies and whether the vacancies are for full-time, part-time, or temporary jobs, (3) that affirmations apply to time periods related to the length of the program, (4) that employers may not provide affirmations to several different institutions if the employer does not have jobs for the graduates from all those institutions, and (5) a standardized form to ensure that employer affirmations are clear and uniform.

Many other commenters, however, objected to the requirement to provide employer affirmations, stating that such a process would be costly and cumbersome to implement for both institutions and the Department and that the proposal requiring employer affirmations was too vague. Some commenters were concerned that employers would not be qualified to assess the quality of an institution's curriculum and that employers would be unwilling to affirm job openings or expected demand because of the liability risks of making such an affirmation and uncertainty about future economic conditions. Several commenters objected to the requirement that employers cannot be affiliated with the institution to which they provide the affirmation. The commenters stated that, as a common business practice, many schools work closely with employers that hire their students, and that such a prohibition would, in many cases, eliminate an institution's ability to offer new gainful employment programs. Finally, several commenters suggested that the Department rely on BLS data instead of employer affirmations to evaluate expected demand because it is readily available and institutions can confirm demand before spending substantial sums for the development of an additional program.

With regard to enrollment projections, several commenters asked the Department to clarify the enrollment projection requirement in proposed § 668.7(g)(1)(ii) of the July 26th NPRM. Specifically, the commenters asked how an institution would determine projected enrollment, how the Department would use the projections, and whether an institution would be able to update its projections. Another commenter stated that rather than the Department attempting to control the number of individuals entering an occupation by limiting the students who enroll in a particular program, students should have the option of choosing a program as long as the program satisfies the standards of quality established by the institution's accrediting agency.

Although we believe that employer affirmations can be useful in evaluating whether a program is designed to meet, or historically met, employer and student needs and market demand, in view of the comments that the affirmations could be costly or difficult to obtain, or that some employers are not qualified to assess the quality of a program's curriculum, we are not proposing in these regulations that institutions obtain employer affirmations. Instead, we propose that an institution must submit a wage analysis whenever it seeks to reestablish the eligibility of an ineligible program or a failing program that it voluntarily discontinued, or to establish the eligibility of a substantially similar program. The wage analysis would need to include supporting documentation based on the best data that is reasonably available to the institution.

We believe the following elements should be included in a wage analysis based on the best data reasonably available to the institution:

(1) The typical first-year annual earnings of students who would complete the program and the typical earnings of those students after a few years of employment;

(2) The short- and long-term market demand for jobs or occupations stemming from the training provided by the program;

(3) A sample of the types and names of the businesses or employers most likely to employ the program's graduates; and

(4) The amount of tuition and fees the institution will charge for the program and the typical loan debt a student would incur in completing the program.

Data that may be reasonably available to the institution could include BLS data or data provided by businesses or employers consulted in developing the program. However, if the institution uses BLS data we expect the institution to show how the BLS data correlates to, or sufficiently represents, the likely earnings of its program graduates and the likely demand for jobs or occupations stemming from the program. We invite comments on the proposed wage analysis requirement, and are particularly interested in comments on the elements to be included in the wage analysis and the types of data that we should require to support these elements. We believe that a wage analysis is a necessary part of the institution's due diligence in developing or revising a previously ineligible or a failing program that it voluntarily discontinued, or a substantially similar program, because it supports an overall eligibility determination that, due to the program improvements, there is a reasonable expectation that the program will satisfy the debt measures.

We also reject the suggestion by some commenters that asking an institution to provide enrollment projections for an additional program is tantamount to controlling enrollment in that program. This information may be useful when evaluating whether a program is supposed to replace an existing program

over time, and provides some measure of the relative impact that program would have compared to the size of the institution and other programs it offers. Nevertheless, in view of the comments that providing estimated enrollment data may be complicated, we are not proposing this requirement in these regulations. However, the Department may request, as needed, additional information from an institution about its enrollment projections on a case-by-case basis.

With regard to the other application requirements in proposed § 600.20(d)(3)(vi) and (vii), the Department needs assurance from an institution that (1) the enhancements and modifications it made to a failing or ineligible program are likely to improve the new program's performance under the debt measures in 34 CFR 668.7(a), and (2) it assigned the correct CIP code to the new program. We are proposing these regulations because we are concerned that an institution may attempt to circumvent the two- or three-year ineligibility period for a failing program that it voluntarily discontinued by portraying that program in its application as a substantially similar program.

With regard to the eligibility determination provisions in proposed § 600.20(d)(4), we note that most of these provisions are the same as those in the current regulations under § 600.20(d)(1)(ii)(E) and (F). The primary difference is in proposed § 600.20(d)(4)(i)(B), under which we would take into account the performance of an institution's other gainful employment programs under the debt measures in § 668.7(a) in determining whether to approve the institution's application for a new program. We believe that it would be useful to consider the performance history of the institution's programs, particularly since the debt measures under § 668.7(a) will not be calculated for the new program for at least three or four years. Moreover, we believe that an institution's performance history is an important component in determining whether to approve the eligibility of a new gainful employment program because it provides an understanding of the program in context, and thus, allows for a more informed determination.

Executive Orders 12866 and 13563

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 regulations 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 ''economically significant'' regulations); (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.

It has been determined that this regulatory action is a significant regulatory action subject to review by OMB under section 3(f)(4) of Executive Order 12866.

In accordance with the Executive order, the Department has assessed the potential costs and benefits of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently. 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

In assessing the potential costs and benefits of this regulatory action, we have determined that the benefits of the regulatory action justify the costs.

The Department has also reviewed these regulations pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

We emphasize as well that Executive Order 13563 requires agencies ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' In its February 2, 2011, memorandum (M–11–10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these regulations only after making a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on this analysis and for the additional reasons stated in the preamble, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

Need for Federal Regulatory Action

Executive Order 12866 emphasizes that ''Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.'' When the Gainful Employment—New Programs final regulations were published, the final gainful employment debt measures had not been established. The Department specified at that time that it intended to establish performance-based requirements with regard to approving additional programs once regulations for the gainful employment debt measures were

finalized. Those debt measures have now been finalized through the Gainful Employment—Debt Measures final regulations. Thus, these proposed regulations are necessary to ensure that the procedures for establishing new gainful employment programs are aligned with those measures and our intent to target the worst-performing programs, while allowing innovation and expansion by institutions with a track record of establishing successful programs.

Regulatory Alternatives Considered

As part of an extensive rulemaking process over the last two years, the Department considered a number of alternatives to these proposed regulations.

July 26th NPRM

In the July 26th NPRM, the Department proposed a requirement that would require an institution to submit employer affirmations and enrollment projections in order to demonstrate the need for and value of the program to be established. We received a number of comments opposing our proposal. These comments noted that the fact that some programs prepare students for nationwide opportunities could make it difficult for institutions to obtain nonaffiliated employer affirmations. The commenters expressed concern that the proposed process would hamper the development of innovative programs related to emerging fields of employment. Commenters also said that they believed that employers would be reluctant to offer affirmations for fear of it being construed as a commitment to hire. With regard to enrollment projections, several commenters asked the Department to clarify the enrollment projection requirement in proposed § 668.7(g)(1)(ii) of the July 26th NPRM. Specifically, the commenters asked how an institution would determine projected enrollment, how the Department would use the projections, and whether an institution would be able to update its projections. Another commenter stated that rather than the Department attempting to control the number of individuals entering an occupation by limiting the students who enroll in a particular program, students should have the option of choosing a program as long as the program satisfies the standards of quality established by the institution's accrediting agency.

Gainful Employment—New Programs

In the Gainful Employment—New Programs final regulations, we established a process for institutions to notify the Department before enrolling students in a new gainful employment program. We took this action out of concern that some institutions might attempt to circumvent the proposed gainful employment standards in the July 26th NPRM by adding new programs before those standards could take effect. These provisions were intended to serve as interim requirements until the final gainful employment debt measures could be finalized. In those regulations, we also indicated that we would defer our consideration of the comments regarding employer affirmations until we finalized the debt measures regulations.

Under the Gainful Employment—New Programs final regulations, institutions must notify the Department within certain time limits before starting new gainful employment programs. The notice must describe or document: (1) How the institution determined the need for the new program and how the program was designed to meet local market needs, or for an online program, regional or national market needs by, for example, consulting BLS data or State labor data systems or consulting with State workforce agencies; (2) how the program was reviewed or approved by, or developed in conjunction with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program; (3) that the program has been approved by its accrediting agency or is otherwise included in the institution's accreditation by its accrediting agency, or comparable documentation if the institution is a public postsecondary vocational institution approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation; (4) how the program would be offered in connection with, or in response to, an initiative by a governmental entity; and (5) any wage analysis it may have performed, including any consideration of BLS wage data that is related to the new program.

With the publication of the Gainful Employment—Debt Measures final regulations, and as discussed elsewhere in our discussion of these proposed regulations, we no longer believe that the notification process is necessary and are therefore proposing a streamlined approval process that targets only the worst-performing programs.

Benefits

We are establishing a process for institutions to apply to the Department for approval of new programs that are (1) the same as, or substantially similar to, failing programs that the institution voluntarily discontinued or programs that became ineligible under the debt measures for gainful employment programs, and (2) programs that are substantially similar to failing programs, in part, to ensure that institutions do not circumvent the debt measures we recently established in the Gainful Employment—Debt Measures final regulations. These proposed regulations clarify and streamline the review and approval process for new gainful employment programs by eliminating the requirement that institutions submit information for all new gainful employment programs in order to obtain approval, and narrowing the scope of new programs for which an institution must submit an application for approval. This streamlined process should reduce the administrative burden on institutions and the Department and allow institutions with a strong track record of establishing programs that perform well on the gainful employment debt measures to continue to innovate and expand their program offerings without having to notify the Department each time they offer a new program.

We also see as a key benefit of our proposal that institutions would have to demonstrate, in applying for approval of a new program, how they enhanced or modified the ineligible or failing program to improve the program's performance under the debt measures. We believe that over time, this should result in increased quality in the pool of programs from which students can choose to attend.

Costs

The main costs of these proposed regulations derive from the administrative and paperwork burden associated with applying for approval of a new program. Much of the information required to be included in an application for new program eligibility would be generated as a school reaches its decision to develop a new program. Accordingly, many entities wishing to continue to participate in the title IV, HEA programs have already absorbed many of the administrative costs that would be related to implementing these proposed regulations, and additional costs would primarily be due to documenting the program development process. Other institutions may have to establish a program development process, but the regulations allow flexibility in meeting the core requirements.

In assessing the potential economic impact of these regulations, the

Department recognizes that compliance with the proposed regulations may result in an increased workload for some institutions but overall, when compared to the burden outlined in the July 26th NPRM and the burden outlined in the Gainful Employment—New Programs final regulations, there will be a net reduction in burden. Additional costs would normally be expected to result from either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities.

In the July 26th NPRM, we estimated that the burden to institutions of researching and establishing new programs would be 8,450 hours, or $175,000 per year. In the Gainful Employment—New Programs final regulations, we estimated that the burden on institutions in complying with the notification process would be 3,591 hours, or $91,032 per year.

As described in the *Paperwork Reduction Act of 1995* section of this preamble, following issuance of the Gainful Employment—New Programs final regulations, the Department continued to review the estimates of new programs that would be subject to the notice requirement in those regulations. Based on that analysis and specifically, an increase in the estimated number of new program applications, we have revised the estimated burden of the Gainful Employment—New Programs final regulations from 3,591 hours to 12,343 hours. Based on a wage rate of $25.35, this results in a revised estimate of $312,895 for complying with the Gainful Employment—New Programs final regulations.

The changes proposed in this NPRM are expected to reduce burden by 7,068 hours to an estimated 5,275 hours, primarily by restricting the application requirement to programs that are the same as or substantially similar to failing programs voluntarily discontinued or ineligible programs, or the same as a failing program under 34 CFR 668.7(h). Thus, the estimated cost is also reduced to $133,721.

Given the limited data available, the Department is particularly interested in comments and supporting information related to possible burden stemming from these proposed regulations. Estimates included in this notice will be reevaluated based on any information received during the public comment period.

Net Budget Impacts

The proposed regulations are not estimated to have a net budget impact as the changes in the process for establishing new programs is not expected to change the demand for programs. While the process to establish new programs will be easier for institutions with a track record of successful programs, it is only in their interest to establish new programs if the new programs will pass the gainful employment debt measures. Program expansion and contraction occur on a regular basis and the change in the process to establish eligibility is not expected to affect capacity in a way that would impact the Federal student aid programs.

Assumptions, Limitations, and Data Sources

In developing these estimates, a wide range of data sources was used, including data from the National Student Loan Data System (NSLDS); operational and financial data from Department of Education systems; and data from a range of surveys conducted by the National Center for Education Statistics (NCES) such as the 2007–2008 National Postsecondary Student Aid Study (NPSAS), the 2008–09 Integrated Postsecondary Education Data System (IPEDS), and the 2009 follow-up to the 2004 Beginning Postsecondary Students Longitudinal Study (BPS). Data from other sources, such as the U.S. Census Bureau and the Missouri Department of Higher Education, were also used. The estimates for the number of programs affected were derived from the estimates described in the Gainful Employment—Debt Measures final regulations. Data on administrative burden at participating institutions are extremely limited; accordingly, the Department is interested in receiving comments in this area. As additional data become available, the Department may update these estimates.

We identify and explain burdens specifically associated with information collection requirements in the *Paperwork Reduction Act of 1995* section of the preamble.

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf,* in Table A as follows, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these regulations. This table provides our best estimate of the changes in Federal student aid payments as a result of these regulations. Expenditures are classified as transfers from the Federal student aid programs to students.

TABLE A—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

Category	Costs
Reduction in Cost of Paperwork Burden	($.13).
Category	Transfers.
Annualized Monetized Transfers	$0.
From Whom To Whom?	N/A.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on ''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 Definitions.)
- 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 regulations would affect institutions that participate in title IV, HEA programs and loan borrowers. The definition of ''small entity'' in the Regulatory Flexibility Act encompasses ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' The definition of ''small business'' comes from the definition of ''small business concern'' under section 3 of the Small Business Act as well as regulations issued by the U.S. Small Business Administration (SBA). The SBA defines a ''small business concern'' as one that is ''organized for profit; has a place of business in the U.S.; operates primarily within the U.S. or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor * * *'' ''Small organizations,'' are further defined as any ''not-for-profit enterprise that is independently owned and operated and not dominant in its field.'' The definition of ''small entity'' also includes ''small governmental jurisdictions,'' which includes ''school districts with a population less than 50,000.''

Data from the Integrated Postsecondary Education Data System (IPEDS) indicate that roughly 4,379 institutions participating in the Federal student assistance programs meet the definition of ''small entities.'' The following table provides the distribution of institutions and students by revenue category and institutional control.

Table B: Institutional Characteristics of Small Entities by Sector

	Number of Institutions	Share of Sector Tuition and Fee Revenue	Total Programs	Number of Regulated Programs	Number of Large Regulated Programs	Share of Programs that Are Large Regulated	Share of Enrollment in Large Regulated Programs
4-year Institutions							
Public	4	0%	21	7	1	5%	0%
Private Nonprofit	356	2%	2,585	346	68	3%	0%
Private For-profit	52	1%	342	342	116	34%	1%
2-year Institutions							
Public	88	1%	1,669	1,382	568	34%	0%
Private Nonprofit	142	43%	549	280	170	31%	29%
Private For-profit	405	17%	2,191	2,187	1,152	53%	20%
Less-than-2-year Institutions							
Public	202	68%	1,483	1,482	669	45%	38%
Private nonprofit	61	62%	218	213	127	58%	52%
Private For-profit	983	40%	3,264	3,255	2,027	62%	45%

Source: IPEDS.

Approximately two-thirds of these institutions are for-profit schools that would be subject to these proposed regulations. Other affected small institutions include small community colleges and tribally controlled schools. The impact of the regulations on individuals is not subject to the Regulatory Flexibility Act.

We estimated in the Gainful Employment—Debt Measures final regulations that approximately 3 percent of programs at small entities across all sectors would fail the measures at least once. The changes to the process for establishing new gainful employment programs that we are proposing in this NPRM would eliminate the notice requirement for the vast majority of programs at small entities because most gainful employment programs offered at those institutions are expected to pass the gainful employment measures. For institutions that choose to pursue establishing the title IV, HEA eligibility for a new program associated with a program that failed the gainful employment measures, the proposed regulations consolidate the notice and application process from the Gainful Employment—New Programs regulations and build on existing processes for determining if the Department will approve the new program.

As detailed in the *Paperwork Reduction Act of 1995* section of this preamble, institutions would only have to apply to establish gainful employment programs that are the same as or substantially similar to programs that are ineligible or that have been voluntarily withdrawn or programs that are substantially similar to failing programs. There are no explicit growth limitations or employer verification requirements. The estimated total hours, costs, and requirements applicable to small entities from these provisions on an annual basis are 3,165 hours and $80,233, based on a wage rate of $25.35. This represents a decrease from the revised estimated burden associated with the Gainful Employment—New Programs regulations of 7,406 hours and $187,737.

The proposed regulations are unlikely to conflict with or duplicate existing Federal regulations.

Alternatives Considered

No alternative provisions were considered that would target small institutions with exemptions or additional time for compliance as this provision builds on existing industry

practices. The Secretary invites comments from small institutions and other affected entities as to whether they believed the proposed changes would have a significant economic impact on them and requests evidence to support that belief.

Paperwork Reduction Act of 1995

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

Proposed § 600.20 contains information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of this section to OMB for its review.

A Federal agency cannot conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations we will display the control number assigned by OMB to any information collection requirement in these proposed regulations and adopted in the final regulations.

Estimating the Number of New Gainful Employment Programs

Since the publication of the Gainful Employment—New Program final regulations, we have continued to analyze the number of gainful employment programs that have been submitted to the Department for approval. We now estimate, based on the following information, that institutions will submit a total of 4,527 new gainful employment programs to the Department for approval annually.

With respect to nondegree programs, in 2009, there were 4,852 new gainful employment nondegree programs submitted to the Department by institutions. In 2010, there were 3,318 new gainful employment nondegree programs submitted to the Department for approval. We have averaged these two numbers to estimate the annual number of new gainful employment nondegree programs established by institutions to be 4,085 (4,852 plus 3,318 equals 8,170, which we then divided by 2). The total number of new gainful employment nondegree programs by institutional type is 540 new nondegree programs at proprietary institutions; 433 new nondegree programs at private nonprofit institutions; and 3,112 new nondegree programs at public institutions.

With respect to degree programs, we do not currently maintain records concerning the number of new gainful employment degree programs that are established by institutions on an annual basis. Previously, we have only required that institutions report new degree programs periodically at the time of recertification. We determined from a review of the June 13, 2011 Gainful Employment—Debt Measures final regulations (76 FR 34386, June 13, 2011) that 55 percent of the gainful employment programs at proprietary institutions are nondegree programs, and that 45 percent are degree programs. As described earlier, we estimate that proprietary institutions will seek to establish 540 new gainful employment nondegree programs on an annual basis. If the 540 new nondegree programs make up 55 percent of the total number of new nondegree programs at proprietary institutions, then the total number of new programs established by such institutions would be 982 (540 divided by 0.55 equals 982). Therefore, we estimate that proprietary institutions will seek to establish a total of 442 new gainful employment degree programs on an annual basis (982 minus 540 equals 442).

The sum of the number of new gainful employment nondegree programs established annually (4,085) and new gainful employment degree programs established annually (442) is 4,527. Thus, we estimate that institutions will be establishing a total of 4,527 new gainful employment programs annually.

Proposed § 600.20—Application procedures for establishing, reestablishing, maintaining, or expanding program eligibility and institutional eligibility and certification.

The proposed regulations eliminate the current notice requirements in favor of a more streamlined approach under which an institution would simply apply to establish the eligibility of certain new gainful employment programs rather than all new gainful employment programs. As a result, there will be fewer submissions for approval of new programs under these proposed regulations, as compared to the current notification requirements that apply to all new gainful employment programs.

Section 600.20(d)(2)

In proposed § 600.20(d)(2), an institution that seeks to establish the eligibility of a gainful employment program must submit an application to the Department, except as provided under § 600.10(c)(1), only if that program (1) is the same as, or substantially similar to, a failing program that was voluntarily discontinued by the institution under 34 CFR 668.7(l)(1) or a program that became ineligible for title IV, HEA program funds under 34 CFR 668.7(i), or (2) is substantially similar to a failing program designated as a failing program under 34 CFR 668.7(h) for any one of the two most recent fiscal years. For this purpose, a program is substantially similar if it has the same credential level and the same first four digits of the CIP code as that of a failing program, a failing program the institution voluntarily discontinued, or an ineligible program. The application and eligibility determination requirements are set forth in § 600.20(d)(3) and (d)(4), respectively.

Section 600.20(d)(3)

Proposed § 600.20(d)(3) specifies the information that an institution that seeks to establish the eligibility of a program that leads to gainful employment under § 600.20(d)(2) must include in its application. In this proposed regulation, we are retaining the core requirements for information to be reported about new programs under current § 600.20(d)(2)(i), (d)(2)(ii), (d)(2)(iii), and (d)(2)(iv), and we propose to augment those requirements by having the institution include the following additional information in its application: (1) A wage analysis of the new program performed by or on behalf of the institution (§ 600.20(d)(3)(v)); (2) compared to the failing or ineligible program, a description of the enhancements or modifications the institution made to improve the new program's performance under the gainful employment standards in § 668.7(a) (§ 600.20(d)(3)(vi)); and (3) the CIP code and credential level of the new program, along with a description of how the institution determined that CIP code (§ 600.20(d)(3)(vii)).

In the Gainful Employment—New Programs final regulations, we estimated that the burden associated with notifying the Department about a new gainful employment program would be an average of 2.5 hours. With respect to the application requirements under the proposed regulations, we anticipate a small additional amount of burden associated with the collection of a wage analysis of the new program under proposed § 600.20(d)(3)(v), a description of the enhancements or modifications the institution made to improve the new program's performance under proposed § 600.20(d)(3)(vi), and the requirement that an application include the CIP code, the credential level, and a description of how the institution determined the CIP code under proposed § 600.20(d)(3)(vii). As a result of these proposed changes, we expect the per unit burden for each submission to increase from an average of 2.5 hours to 3 hours per submission.

We are estimating the application burden for new gainful employment programs based upon the type of institution and the type of program. We begin this analysis by adjusting the number of programs in each group to remove the programs that are exempt from the debt measures under § 668.7(d)(2) (*i.e.,* programs with 30 or fewer borrowers or completers), because those programs cannot trigger an application requirement for an institution (the remaining programs are ones to which the debt measures apply). We then determine how many of those remaining programs will fail the debt measures at least once. We estimate that this is the number of new programs that would need to submit an application to the Secretary for approval under proposed § 600.20(d)(2).

We estimate that the number of programs that fail the debt measures at least once will be comparable to the number of new programs that are the same as or substantially similar to failing programs that an institution voluntarily discontinued or ineligible programs, or substantially similar to failing programs because we believe schools will generally aim to modify or replace programs that fail. We understand that some institutions may already have other programs that are providing better outcomes under the debt measures and therefore may not replace a program that was less successful under those measures. We also believe that some institutions may decide to focus on establishing new gainful employment programs that are not substantially similar to a program that did not perform well on the debt measures. In these cases, an institution would not be required to obtain approval of the new program under proposed § 600.20. On the other side of this equation, however, we also believe that some institutions will seek to offer new programs that are the same as or substantially similar to failing programs the institution voluntarily discontinued or were determined ineligible or substantially similar to failing programs. In these cases, an institution would be required to obtain the Secretary's approval under proposed § 600.20. On balance, we believe that for every gainful employment program that fails the debt measures at least once, there will be a new program established that will need to obtain approval under the application requirements. We are using this same estimate across all types of affected entities (proprietary institutions, private nonprofit institutions, and public institutions). The amount of burden we are estimating for each of these sectors under these proposed regulations follows.

Nondegree Programs—Proprietary Institutions. Based on the Gainful Employment—Debt Measures final regulations analysis in Table 9–A (76 FR 34386, 34474) (Table 9–A), we estimate that there are 7,213 existing gainful employment nondegree programs at proprietary institutions (13,114 total gainful employment programs times 55 percent that are nondegree programs equals 7,213 nondegree programs). Based upon the Gainful Employment—Debt Measures final regulations analysis in Table 1 (76 FR 34386, 34457) (Table 1), we project that 39.5 percent of existing nondegree programs at proprietary institutions will be exempt from the debt measures because they have 30 or fewer borrowers or completers and that the remaining 60.5 percent of the gainful employment nondegree programs will be subject to the debt measures; therefore, 4,364 nondegree programs (7,213 times 0.605 equals 4,364) will be subject to the debt measures. Table 9–A indicates that 18 percent of proprietary nondegree programs will fail or become ineligible for a total of 786 programs (4,364 times 0.18 equals 786). Therefore, for the reasons discussed previously, we estimate that proprietary institutions would apply for approval for 786 new gainful employment nondegree programs under proposed § 600.20(d). We estimate that on average, each application would take 3 hours to prepare and submit to the Department; therefore, the total amount of burden for proprietary institutions to submit applications for new gainful employment nondegree programs would equal 2,358 hours under OMB control number 1845–0012.

Nondegree Programs—Private Nonprofit Institutions.

Based on the analysis in Table 9–A, we estimate that there are 2,790 existing gainful employment nondegree programs at private nonprofit institutions (5,073 total gainful employment programs times 55 percent that are nondegree programs equals 2,790 nondegree programs). Based upon the analysis in Table 1, we project that 75.6 percent of these programs will be exempt from the debt measures because they have 30 or fewer borrowers or completers and that 24.4 percent of these programs will be subject to the debt measures. Therefore, 681 gainful employment nondegree programs at private nonprofit institutions (2,790 times 0.244 equals 681) will be subject to the debt measures. Table 9–A indicates that 5 percent of these programs will fail or become ineligible for a total of 34 programs (681 times 0.05 equals 34). Therefore, for the reasons discussed previously, we estimate that private nonprofit institutions would apply for approval for 34 new gainful employment nondegree programs under proposed § 600.20(d)(2).

We estimate that, on average, each application would take 3 hours to prepare and submit to the Department; therefore, the total burden for private nonprofit institutions to submit applications for new gainful employment nondegree would equal 102 hours under OMB control 1845–0012.

Nondegree Programs—Public Institutions.

Based upon the analysis in Table 9–A, we estimate that there are 20,470 existing gainful employment nondegree programs at public institutions (37,218 total gainful employment programs times 55 percent that are nondegree programs equals 20,470 nondegree programs). Based upon the analysis in Table 1, we project that 68.1 percent of these programs will be exempt from the debt measures because they have 30 or fewer borrowers or completers and that the remaining 31.9 percent of these programs will be subject to the debt measures; therefore, 6,530 nondegree programs at public institutions (20,470 times 0.319 equals 6,530) will be subject to the debt measures.

Table 9–A indicates that 3 percent of gainful employment nondegree programs at public institutions will fail or become ineligible for a total of 196 programs (6,530 times 0.03 equals 196). Therefore, for the reasons discussed previously, we estimate that public

institutions would apply for approval for 196 gainful employment nondegree programs under proposed § 600.20(d)(2). We estimate that, on average, each application would take 3 hours to prepare and submit to the Department; therefore, the total amount of burden for public institutions to submit applications for new gainful employment nondegree programs would equal 588 hours under OMB control number 1845–0012.

Collectively, we project that the annual burden for the submission of applications for new gainful employment nondegree programs under proposed § 600.20(d) would be 3,048 hours under OMB 1845–0012.

Degree Programs.

Based upon the analysis in Table 9–A, we estimate that there are 5,901 existing gainful employment degree programs at proprietary institutions (13,114 total gainful employment programs at proprietary institutions times 45 percent that are degree programs equals 5,901 degree programs). Based upon the analysis in Table 1, we project that 39.5 percent will be exempt from the debt measures because they have 30 or fewer borrowers or completers and that the remaining 60.5 percent of these programs will be subject to the debt measures; therefore, 3,570 degree programs (5,901 times 0.605 equals 3,570) will be subject to the debt measures.

Table 9–A indicates that 18 percent of degree programs at proprietary schools will fail or become ineligible for a total of 643 programs (3,570 times 0.18 equals 643). Therefore, for the reasons described previously, we estimate that proprietary institutions would apply for approval for 643 new gainful employment degree programs under proposed § 600.20(d)(2).

As indicated previously, given the additional items that an institution must include in its application, we have adjusted the amount of burden per submission; therefore, we estimate that the average amount of time to prepare and submit the application would increase from 1.75 hours, as described in the Gainful Employment—New Programs final regulations, to 2.25 hours per submission under these proposed regulations.

We estimate that the burden for institutions to submit individual applications for 643 new degree programs would be 1,447 hours (643 individual submissions times 2.25 hours per submission equals 1,447 hours) under OMB control number 1845–0012. Collectively, we estimate that the annual burden on proprietary institutions for gainful employment degree program submissions under proposed § 600.20(d) would be 1,447 hours under OMB control number 1845–0012.

Section 600.20(d)(4)(ii)

The proposed regulations in § 600.20(d)(4)(ii) provide that the Secretary may request additional information from an institution that has submitted an application for approval of a new program before making an eligibility determination. Therefore, we have estimated the amount of reporting burden associated with providing the additional information. As we did with our analysis of the burden under proposed § 600.20(d)(3), we provide the following sector-by-sector analysis of the burden for nondegree programs under the provisions of § 600.20(d)(4)(ii).

Nondegree Programs—Proprietary Institutions.

As noted previously, we estimate that proprietary institutions would apply for approval for 786 new gainful employment nondegree programs under proposed § 600.20(d). We further estimate that of those 786 new programs, the Secretary will request additional information for 24 percent. We estimate that for 10 percent of the applications, the request will be for minor clarifications and would likely be resolved through a phone call or e-mail to institutional staff. The additional increase in burden associated with these minor clarifications would average an additional 0.5 hours per contact for a total increase of 40 hours under OMB control number 1845–0012 (786 applications times 0.1 equals 79 requests for minor clarifications, times 0.5 hours per request equals 40 hours).

We estimate that for 14 percent of the applications, an institution would have to submit substantive additional information in response to the Secretary's request. The additional increase in burden associated with responding to a request for additional substantive information would average an additional 3 hours per request for a total increase of 330 hours under OMB control number 1845–0012 (786 applications times 0.14 equals 110 requests for substantive additional information, times 3 hours per request equals 330 hours).

Nondegree programs—Private Nonprofit Institutions.

As noted previously, we estimate that private nonprofit institutions would apply for approval for 34 new gainful employment nondegree programs under proposed § 600.20(d)(2). We further estimate that of those 34 new programs, the Secretary will request additional information for 24 percent. We estimate that for 10 percent of the applications, the request will be for minor clarifications and would likely be resolved through a phone call or e-mail to institutional staff. The additional increase in burden associated with these minor clarifications would average an additional 0.5 hours per contact for a total increase of 2 hours under OMB control number 1845–0012 (34 applications times 0.10 equals 3 requests for minor clarifications times 0.5 hours per request equals 2 hours).

We estimate that for 14 percent of the applications, an institution would have to submit substantive additional information in response to the Secretary's request. The additional increase in burden associated with responding to a request for additional substantive information would average an additional 3 hours per request for a total increase of 15 hours under OMB control number 1845–0012 (34 applications times 0.14 equals 5 requests for substantive additional information, times 3 hours per request equals 15 hours).

Nondegree Programs—Public Institutions.

As noted previously, we estimate that public institutions would apply for approval for 196 new gainful employment nondegree programs under proposed § 600.20(d)(2). We further estimate that of those 196 new programs, the Secretary will request additional information for 24 percent. We estimate that for 10 percent of the applications, the request will be for minor clarifications and would likely be resolved through a phone call or e-mail to institutional staff. The additional increase in burden associated with these minor clarifications would average an additional 0.5 hours per contact for a total increase of 10 hours under OMB control number 1845–0012 (196 applications times 0.10 equals 20 requests for minor clarifications, times 0.5 hours per request equals 10 hours).

We estimate that for 14 percent of the applications, an institution would have to submit additional substantive information in response to the Secretary's request. The additional increase in burden associated with responding to a request for additional substantive information would average an additional 3 hours per request for a total increase of 81 hours under OMB control number 1845–0012 (196 applications times 0.14 equals 27 requests for substantive additional information, times 3 hours per request equals 81 hours).

Collectively, we estimate that the annual burden hours associated with

the submission of additional information after being contacted by the Department regarding new gainful employment nondegree programs would be 478 hours under OMB control number 1845–0012.

Degree Programs.

As stated previously, we estimate that proprietary institutions would apply for approval of 643 new gainful employment degree programs under proposed § 600.20(d)(2). We further estimate that of those 643 new programs, the Secretary will request additional information for 24 percent. We estimate that for 10 percent of the applications, the request will be for minor clarifications and would likely be resolved through a phone call or e-mail to institutional staff. The additional increase in burden associated with these minor clarifications would average an additional 0.5 hours per contact for a total increase of 32 hours under OMB control number 1845–0012 (643 applications times 0.10 equals 64 requests for minor clarifications, times 0.5 hours per request equals 32 hours). We estimate that for 14 percent of the applications, an institution would have to submit substantive additional information in response to the Secretary's request. The additional increase in burden associated with responding to a request for additional substantive information request would average an additional 3 hours per request for a total increase of 270 hours under OMB control number 1845–0012 (643 applications times 0.14 equals 90 requests for substantive additional information, times 3 hours per request equals 270 hours).

Collectively, we estimate that the annual burden hours associated with the submission of additional information after being contacted by the Department regarding new degree programs would be 302 hours under OMB control number 1845–0012.

In total, the proposed regulations in § 600.20(d) would result in a reduction in burden under OMB 1845–0012 to 5,275 hours. This is because we have revised the currently approved burden of 3,591 hours under OMB 1845–0012 to 12,343 hours of burden. To attain this result, we multiplied 4,085 nondegree programs by 2.5 hours per program, which equals 10,213 hours. To this figure, we added 774 hours of burden (442 degree programs times 1.75 hours per program) for a sum of 10,987 hours of burden. To this sum we added the burden associated with the reporting of additional information for 10 percent of the 4,527 new programs (452 programs), which we estimated would be 1,356 hours (452 times 3). This results in 12,343 hours of burden. The revision was due to the use of more recent data regarding new gainful employment nondegree program applications for 2009 and 2010. Under these proposed regulations to streamline and limit the scope of affected programs, the burden associated with the application process will decrease by 7,068 hours under OMB control number 1845–0012.

COLLECTION OF INFORMATION

Regulatory section	Information collection	Collection
600.20	The currently approved burden for this section has been revised based upon newer data which increases the burden from the currently approved 3,591 hours to 12,343 hours. This proposed regulatory section streamlines the application requirement for new gainful employment programs and limits the need to submit an application to new programs that are the same as or substantially similar to failing programs that are voluntarily discontinued by the institution or programs that became ineligible, or programs that are substantially similar to a failing program. The proposed regulations also require institutions to provide additional information about a new program when requested by the Secretary.	OMB 1845–0012. The burden has been revised from 3,591 hours to 12,343 hours based upon new nondegree program applications received in 2009 and 2010. These proposed regulations would result in a decrease in burden to 5,275 hours, a decrease of 7,068 hours.

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.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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(Catalog of Federal Domestic Assistance Numbers: 84.007 FSEOG; 84.032 Federal Family Education Loan Program; 84.033 Federal Work-Study Program; 84.037 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 LEAP; 84.268 William D. Ford Federal Direct Loan Program; 84.375 Academic Competitiveness Grant (ACG); 84.376 National Science and Mathematics Access to Retain Talent (National SMART); 84.379 TEACH Grant Program)

List of Subjects in 34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

Dated: September 20, 2011.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 600 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 adding, in alphabetical order, the definition of ''*Classification of instructional programs or CIP*'' to read as follows:

§ 600.2 Definitions.

* * * * *

Classification of instructional programs or CIP: A taxonomy of instructional program classifications and descriptions developed by the U.S. Department of Education's National Center for Education Statistics.

* * * * *

3. Section 600.10 is amended by:

A. Revising paragraph (c)(1).

B. Removing paragraph (c)(2).

C. Redesignating paragraph (c)(3) as paragraph (c)(2).

The revision reads as follows:

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

* * * * *

(c) *New educational programs.* (1) An eligible institution that seeks to establish the eligibility of an educational program after it has been designated as an eligible institution by the Secretary does not have to apply to the Secretary to have that program approved unless—

(i) The institution is required to obtain the Secretary's approval under the provisions in § 600.20(c)(2), § 600.20(d)(2), 34 CFR 668.10(b), 34 CFR 668.14(a)(1), or 34 CFR 668.232; or

(ii) The Secretary notifies the institution that it must apply for approval.

* * * * *

4. Section 600.20 is amended by:

A. Revising the section heading.

B. Revising paragraph (d).

The revisions read as follows:

§ 600.20 Application procedures for establishing, reestablishing, maintaining, or expanding program eligibility or institutional eligibility and certification.

* * * * *

(d) *Application requirements.* (1) *General.* To satisfy the requirements of paragraphs (a), (b), and (c) of this section, an institution must submit an application to the Secretary in a format prescribed by the Secretary for that purpose and provide all the information and documentation requested by the Secretary to make a determination of its eligibility and certification.

(2) *Gainful employment programs.* (i) Except as provided under § 600.10(c)(1), an institution that seeks to establish the eligibility of a program that leads to gainful employment, as described under 34 CFR 668.7(a)(2)(i), must apply to the Secretary only if the program is—

(A) The same as, or substantially similar to, a program that—

(*1*) Was a failing program that was voluntarily discontinued by the institution under 34 CFR 668.7(l)(1); or

(*2*) Became ineligible for title IV, HEA program funds under 34 CFR 668.7(i); or

(B) Substantially similar to a program designated as a failing program under 34 CFR 668.7(h) for any one of the two most recent fiscal years.

(ii) For the purposes of this section, a program is substantially similar if it has the same credential level and the same first four digits of the CIP code as that of a failing program, a failing program the institution voluntarily discontinued, or an ineligible program.

(iii) An institution that submits an application for a gainful employment program must obtain the Secretary's approval before providing title IV, HEA program funds to students enrolled in the program. However, an institution may not apply to reestablish the eligibility of a failing program that was voluntarily discontinued by the institution, or a program that is the same as or substantially similar to an ineligible program, until the ineligibility period for that program has expired, as provided under 34 CFR 668.7(l)(2).

(3) *Application.* An institution that seeks to establish the eligibility of a program that leads to gainful employment under paragraph (d)(2) of this section must include in its application—

(i) A description of how the institution determined the need for the new gainful employment program and how the program was designed to meet local market needs, or for an online program, regional or national market needs;

(ii) A description of how the new program was reviewed or approved by, or developed in conjunction with, business advisory committees, program integrity boards, public or private oversight or regulatory agencies, and businesses that would likely employ graduates of the program;

(iii) Documentation that the new program has been approved by its accrediting agency or is otherwise included in the institution's accreditation by its accrediting agency, or comparable documentation if the institution is a public postsecondary vocational institution approved by a recognized State agency for the approval of public postsecondary vocational education in lieu of accreditation;

(iv) The date of the first day of class of the new program.

(v) A wage analysis of the new program performed by or on behalf of the institution. The wage analysis must include supporting documentation based on the best data that is reasonably available to the institution;

(vi) Compared to the failing or ineligible program, a description of the enhancements or modifications the institution made to improve the new program's performance under the gainful employment standards in 34 CFR 668.7(a); and

(vii) The CIP code and credential level of the new program, along with a description of how the institution determined that CIP code.

(4) *Eligibility determination.* (i) In determining whether to approve the eligibility of a new gainful employment program, the Secretary takes into account—

(A) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs;

(B) Based on the information provided by the institution under paragraph (d)(3) of this section, whether the processes used and determinations made by the institution to offer the program are sufficient; and

(C) The performance under 34 CFR 668.7 of the institution's other gainful employment programs.

(ii) The Secretary may request additional information from the institution before making an eligibility determination.

(iii) If the Secretary denies the institution's eligibility for a new gainful employment program, the Secretary informs the institution of the reasons for the denial. The institution may request that the Secretary reconsider the determination.

* * * * *

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