justify the institution's continued participation in the FFEL or Direct Loan programs. Other institutions argued that it would be unfair to take L, S, and T action against an institution before the institution has had a chance to demonstrate to the Secretary that its rate is not accurate and that a recalculated rate would be equal to or less than 40 percent.

Other commenters suggested that the Secretary should not initiate an L, S, and T action against an institution that has few participants in the FFEL or Direct Loan programs.

Discussion: First, the Secretary notes that the initiation of an L, S, and T action is discretionary. The Secretary does not plan to initiate such action against an institution unless the FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate on which the action is based is final. Moreover, institutions are further protected since the hearing officer will find that the action is not warranted if the rate is not final. The Secretary believes that these provisions will ensure that an institution will not be harmed from action taken against it on the basis of a cohort default rate that is not final.

The Secretary does not agree with the commenters that an institution should be exempt from L, S, and T action until an institution's appeal under exceptional mitigating circumstances is decided. However, the Secretary does agree with the commenters that if an institution successfully appeals its loss of eligibility based on its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate on the basis of exceptional mitigating circumstances, any L, S, and T action taken solely on the basis of that cohort rate should be withdrawn.

With respect to the commenter's concerns that an institution with few participants in the FFEL and Direct Loan programs should be exempt from L, S, and T action, the Secretary would like to assure the commenters that he does not intend to take L, S, and T action against an institution if that institution has less than five students borrowing under the FFEL and Direct Loan programs.

Changes: The final regulations have been revised in § 668.17(a)(5) so that the Secretary will cease any L, S, and T action taken against an institution solely on the basis of its FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate if the institution successfully appeals under the exceptional mitigating circumstances.

Comments: Many commenters believed that the Secretary should take L, S, and T action against an institution's participation in the Direct Loan Program if that institution has FFEL Program cohort default rates that are equal to or exceed 25 percent for three consecutive fiscal years. The commenters believed that this change is needed for comparability in the FFEL and Direct Loan programs, because the Secretary is proposing to take L, S, and T action against an institution's participation in the FFEL Program if it has a Direct Loan Program cohort rate or weighted average cohort rate that equals or exceeds 25 percent for three consecutive fiscal years.

Discussion: The Secretary does not agree with the commenters that a change is needed for purposes of comparability between the FFEL and Direct Loan programs. The statute provides the Secretary the authority to establish institutional participation requirements for the Direct Loan Program. Under the current Direct Loan Program regulations in 34 CFR 685.400, an institution is not eligible to continue to participate in the Direct Loan Program if it has an FFEL Program cohort default rate that equals or exceeds 25 percent for three consecutive fiscal years. The Secretary does not have the authority to establish similar institutional participation requirements for FFEL Program institutions. Therefore, the Secretary believes that the regulations already address the commenter's concerns.

Changes: None.

Section 668.17(c)

Comments: Many commenters suggested that the 30-day timeframe under which an institution may appeal a loss of eligibility under inaccurate data or exceptional mitigating circumstances be extended. The commenters argued that 30 days did not provide enough time to compile the data needed to support an appeal under exceptional mitigating circumstances, nor did it provide a guaranty agency enough time to verify any inaccurate data in the institution's rate. Many commenters also suggested that the proposed requirement to have an appeal under exceptional mitigating circumstances verified by an independent auditor would not be possible within the 30-day timeframe.

Discussion: The 30-day timeframe to appeal under exceptional mitigating circumstances or inaccurate data is mandated by section 435(a)(2) of the HEA. The Secretary does not have the authority to extend this timeframe. The Secretary believes that an institution

and a guaranty agency should, in most cases, be able to comply with the 30-day timeframe, particularly in light of the draft cohort default rate review process.

However, the Secretary realizes that there may be exceptional cases in which a guaranty agency fails to respond to an institution in a timely manner. Therefore, the Secretary has decided to retain the current regulations and permit an institution to continue to participate in the FFEL Program during the appeal process when a guaranty agency's failure to respond to an institution's timely request results in the appeal being submitted later than 30day deadline, provided the institution notifies the Secretary that it is appealing its FFEL Program cohort default rate data at the same time it requests verification of its cohort default rate data from the relevant guaranty agency(ies). An institution will be required to submit its verified data to the Secretary within five working days from the date it receives the verified data from such guaranty agency(ies).

Based on the comments received, the Secretary appreciates that an institution may have difficulty obtaining an independent auditor's verification of the information that must be submitted in the appeal within the 30-day timeframe. However, the Secretary believes that this verification is necessary. The Secretary has been persuaded that a 60day timeframe would be more appropriate for submission of the independent auditor's verification. The institution must submit the appeal data within 30 days; only the auditor's attestation may be submitted after the 30-day deadline.

Changes: The final regulations have been amended in  $\S 668.17(c)(8)$  to provide that an institution may continue to participate in the FFEL Program if that institution fails to submit an appeal based on inaccurate data by the 30-day deadline if that failure is the result of a guaranty agency's failure to respond to the institution's timely request for verification of its FFEL Program cohort default rate data. The final regulations have also been amended in  $\S 668.17(c)(7)$  to provide that the independent auditor's verification of the information in the appeal must be submitted to the Secretary within 60 days after the institution is notified that it will lose its eligibility to participate in the FFEL or Direct Loan programs.

Comments: Many commenters suggested that an independent auditor should be able to verify the accuracy of the information submitted in an exceptional mitigating circumstances appeal based on a sample. The commenters indicated that this would