

greatly assist them in meeting the appeal deadlines, as well as reduce the cost of an appeal.

*Discussion:* The Secretary believes that the verification process should be the same for all institutions. Further, the Secretary believes that requiring an independent auditor's statement on management's assertions in accordance with the Standards for Attestation Engagement #3 would ensure consistency and allow a sample as an acceptable means for an independent auditor to verify the information submitted in an appeal based on exceptional mitigating circumstances.

*Changes:* The final regulations have been amended in § 668.17(c)(7) to provide that an independent auditor must provide a statement on management's assertions that the information contained in the appeal is complete, accurate, and determined in accordance with the requirements of § 668.17. The examination level engagement must be performed in accordance with the Statement on Standards for Attestation Engagements #3. This authorizes an independent auditor to do whatever testing of management's assertions that the auditor feels is necessary. Sampling may be an acceptable technique for an auditor to use under this situation.

*Comments:* Some commenters suggested that the chief executive officer of an institution be required to certify under penalty of perjury that the information submitted in an appeal is true and correct.

*Discussion:* The Secretary agrees with the commenters. The Secretary believes that this additional certification is appropriate to help ensure that the information submitted in an appeal is correct. The Secretary's experience in reviewing such appeals based on exceptional mitigating circumstances has demonstrated that some institutions have submitted false or erroneous information in their appeals.

*Changes:* The final regulations have been changed in § 668.17(c)(6) to provide that an institution's chief executive officer must certify under penalty of perjury that the information included in the appeal is true and correct.

#### *Section 668.17(c)(1)(ii)(A)*

*Comments:* Many commenters suggested that the institution's participation rate index and the determination of the percent of students coming from disadvantaged economic backgrounds should be calculated based on the number of regular students at the institution rather than all the students enrolled at the institution. The

commenters argued that, for purposes of the economically disadvantaged rate, it would be difficult to determine if a student who was not a regular student had an EFC of zero if that student did not apply for a Pell Grant or if the student was not eligible for a Pell Grant. Further, many of the commenters indicated that they do not maintain data relating to students who are not regular students, therefore, it would be difficult to provide data regarding such students in an appeal.

*Discussion:* The Secretary is willing to accommodate the commenters' concerns to the fullest extent possible and to minimize any burden associated with preparing an exceptional mitigating circumstances appeal when these changes do not undermine the integrity of the appeal process. The Secretary understands that it may be problematic for some institutions to obtain EFC data or other data relevant to an appeal for a student who is not a regular student. The Secretary believes that using data for regular students will provide an accurate assessment of an institution's students with economically disadvantaged backgrounds.

Also, the Secretary believes that it is appropriate to base the institution's participation rate index on the percentage of the institution's students who are eligible for loans and who actually borrow under the FFEL or Direct Loan programs. The Secretary agrees that the inclusion of students who are not eligible for loans would not contribute to a meaningful indicator of the percentage of an institution's students who participate in the loan programs.

*Changes:* The Secretary has amended the formula in § 668.17(c)(1)(ii)(A) for the participation rate index to base the index on regular students enrolled at least half-time at the institution. The Secretary has also amended the formula in § 668.17(c)(1)(ii)(B) for determining the percent of an institution's students that come from economically disadvantaged backgrounds to be based on regular students at the institution.

*Comments:* Many commenters objected to the Secretary's statement in the preamble of the proposed rule that only institutions with FFEL Program cohort default rates, Direct Loan Program cohort rates, or weighted average cohort rates equal to or less than 40 percent would be eligible to appeal under the participation rate index. The commenters argued that an institution with a high default rate but an extremely low percentage of students that borrow under the FFEL or Direct Loan programs was not abusing the loan programs. Commenters also argued that

the establishment of the participation rate index would only help institutions with exceedingly low participation rates and, thus, would help very few institutions. For example, one commenter pointed out that an institution could have a 50 percent FFEL Program cohort default rate if, over three consecutive fiscal years, only two borrowers entered repayment and one of those borrowers defaulted.

*Discussion:* The Secretary does not agree with the commenters that an institution with an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, that exceeds 40 percent, but a participation rate index that is equal to or less than 0.0375 has such a low percentage of borrowers that it is likely the institution is not abusing the loan programs. An institution with a large number of students and a low student loan participation rate could still have a significant number of defaulters if the participation rate index were used without the 40 percent cap. For example, an institution with 10,000 students could have a low participation rate of 7 percent, which would equal 700 students. If 50 percent of these students defaulted in a given cohort that would represent 350 students. This would result in a participation rate index of 0.035. The Secretary considers this number of students to be significant. Further, given that the lowest annual loan limit is \$2,625, 325 student defaults could represent hundreds of thousands of dollars in loss to the Federal government and U.S. taxpayers. The Secretary believes that it would represent an unreasonable risk to students and Federal taxpayers to permit such an institution to remain eligible to participate in the FFEL or Direct Loan programs.

*Changes:* The Secretary has added a provision to the final regulations in § 668.17(c)(1)(ii)(A) that prohibits an institution from appealing a loss of eligibility to participate in the FFEL or Direct Loan programs under the participation rate index criterion if that institution has an FFEL Program cohort default rate, Direct Loan Program cohort rate, or weighted average cohort rate, that exceeds 40 percent.

#### *Section 668.17(c)(1)(ii)(B)*

*Comments:* Many commenters argued that the 70 percent threshold of an institution's students coming from disadvantaged economic backgrounds is too high. Many commenters cited a study that demonstrated that only 21.6 percent of postsecondary students received Pell Grants. The commenters believed that due to such a low national