



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

**Issue Paper 5: Changes of Ownership and Change in Control
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Issue: Changes of Ownership and Change in Control
Statutory cites: §498(i) of the Higher Education Act of 1965, as amended
Regulatory cites: 34 CFR 600.2, 600.4, 600.20, 600.21, 600.31; 668.14 (see Certification Procedures issue paper); Subpart L (see Financial Responsibility issue paper)

Proposed Regulations Redline

§ 600.2 Definitions.

Additional location: A physical facility that is geographically apart/separate from the main campus of the institution and within the same ownership structure of the institution, at which the institution offers at least 50 percent of an educational program. An additional location participates in the Title IV programs only through the certification of the main campus and may qualify as a branch campus.

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Branch campus: A physical facility that is separate from ~~an additional location of an institution that is geographically apart and independent of~~ the main campus of the institution and within the same ownership structure of the institution, and that also. ~~The Secretary considers a location of an institution to be independent of the main campus if the location -~~

(1) Is approved by the Secretary as a branch campus; and

(2) Is independent from the main campus, meaning the location—

(1) Is permanent in nature;

(2) Offers courses in educational programs leading to a degree, certificate, or other recognized educational credential;

(3) Has its own faculty and administrative or supervisory organization; and

(4) Has its own budgetary and hiring authority.

* * *

Distance education:

(1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include -

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- (i) The internet;
- (ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;
- (iii) Audio conference; or
- (iv) Other media used in a course in conjunction with any of the technologies listed in paragraphs (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following

- (i) Providing direct instruction;
- (ii) Assessing or providing feedback on a student's coursework;
- (iii) Providing information or responding to questions about the content of a course or competency;
- (iv) Facilitating a group discussion regarding the content of a course or competency; or
- (v) Other instructional activities approved by the institution's or program's accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency -

- (i) Providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency; and
- (ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

(6) Except for an additional location at a correctional institution as described in the definition of an additional location in this section, For an institution that offers on-campus programs and distance education programs, the distance education programs are associated with the main campus of the institution. For an institution that only offers distance education programs, the institution is located where its administrative offices are located and approved by its accrediting agency.

* * *

Main campus: The primary physical facility at which the institution offers eligible programs, within the same ownership structure of the institution, and certified as the main campus by the Department and the institution's accrediting agency.

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Nonprofit institution: An institution that -

(1)

(i) Is owned and operated by one or more nonprofit corporations or associations and the Secretary has determined that, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); except that

(iv) When the Secretary makes the determination regarding net earnings, the Secretary considers the entirety of the relationship between the institution, nonprofit entities in its ownership structure, and other parties. By way of example, for purposes of participating in the federal student aid programs, a nonprofit institution is generally not an institution that:

(A) Is an obligor (either directly or through any entity in its ownership chain) on a debt owed to a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution; or

(B) Either directly or through any entity in its ownership chain, enters into, or maintains, a revenue-based servicing agreement with a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution; or

(2) For a foreign institution -

* * *

§ 600.4 Institution of higher education.

(a) An institution of higher education is a public or other private nonprofit educational institution that -

(1) Is in a State, or for purposes of the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, Federal Work-Study, and Federal TRIO programs may also be located in the Federated States of Micronesia or the Marshall Islands;

(2) Admits as regular students only persons who -

(i) Have a high school diploma;

(ii) Have the recognized equivalent of a high school diploma; or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is physically located;

(3) Is legally authorized to provide an educational program beyond secondary education in the State in which the institution is physically located in accordance with [§ 600.9](#);

(4)

(i) Provides an educational program -

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- (A) For which it awards an associate, baccalaureate, graduate, or professional degree;
 - (B) That is at least a two-academic-year program acceptable for full credit toward a baccalaureate degree; or
 - (C) That is at least a one academic year training program that leads to a certificate, or other nondegree recognized credential, and prepares students for gainful employment in a recognized occupation; and
- (ii) May provide a comprehensive transition and postsecondary program, as described in 34 CFR part 668, subpart O; and

(5) Is -

- (i) Accredited or preaccredited; or
 - (ii) Approved by a State agency listed in the FEDERAL REGISTER in accordance with 34 CFR part 603, if the institution is a public postsecondary vocational educational institution that seeks to participate only in Federal student assistance programs.
- (b) An institution is physically located in a State if it has a campus or other instructional site in that State.
- (c) The Secretary does not recognize the accreditation or preaccreditation of an institution unless the institution agrees to submit any dispute involving an adverse action, such as the final denial, withdrawal, or termination of accreditation, to arbitration before initiating any other legal action.

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

* * *

(g) Application for provisional extension of certification.

(1) If a private nonprofit institution, a private for-profit institution, or a public institution participating in the title IV, HEA programs undergoes a change in ownership that results in a change of control as described in 34 CFR 600.31, the Secretary may continue the institution's participation in those programs on a provisional basis, if —

(i) No later than 90 days prior to the change in ownership the institution notifies the Secretary of the proposed change on a fully completed form designated by the Secretary and supported by the state authorization and accrediting documents identified in paragraph (g)(2)(i) and (ii) of this section, and supported by copies of the financial statements identified in paragraph (g)(2)(iii) and (iv) of this section; and

(ii) If the proposed ownership structure reported to the Secretary under paragraph (g)(1)(i) of this section changes, any changes must be reported to the Secretary promptly, and the change in ownership cannot occur earlier than 90 days following the date the change is reported to the Secretary; and

(iii) The institution under the new ownership submits a “materially complete application” that is received by the Secretary no later than 10 business days after the day the change occurs.

(2) Notwithstanding the submission of the items required by paragraphs (g)(1)(i) and (ii) of this section, the Secretary may determine that the participation of the institution should not be approved/continued following the change in ownership.

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(32) For purposes of this section, a private nonprofit institution, a private for-profit institution, or a public institution submits a materially complete application if it submits a fully completed application form designated by the Secretary supported by -

(i) A recently updated copy of the institution's State license or equivalent document that - as of the day before the change in ownership - authorized or will authorize the institution to provide a program of postsecondary education in the State in which it is physically located;

(ii) A recently updated copy of the document from the institution's accrediting association that - as of the day before the change in ownership - granted or will grant the institution accreditation status, including approval of any non-degree programs it offers;

(iii) Audited financial statements of the institution's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23; ~~and~~

(iv) Audited financial statements of the institution's new owner's two most recently completed fiscal years that are prepared and audited in accordance with the requirements of 34 CFR 668.23, or equivalent information for that owner that is acceptable to the Secretary; ~~or, if at least two years of audited financial statements are not available, financial~~ surety protection in the amount of at least 25 percent of the institution's prior year volume of title IV aid, as required in 34 CFR 668.176; and

(v) If deemed necessary by the Secretary, financial surety protection in the amount of at least an additional 10 percent of the institution's prior year volume of title IV aid, or a larger amount as determined by the Secretary. If any entity in the new ownership structure holds a 50 percent or greater direct or indirect voting or equity interest in another institution or institutions, the financial protection may also include the prior year volume of Title IV aid, or a larger amount as determined by the Secretary, for all institutions under such common ownership.

(h) Terms of the extension.

(1) If the Secretary approves the institution's materially complete application, the Secretary provides the institution with a temporary provisional Program Participation Agreement (TPPPA). ~~The provisional PPA extends the terms and conditions of the program participation agreement that were in effect for the institution before its change of ownership.~~

(2) The TPPPA provisional PPA expires on the earlier of -

(i) ~~The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (h)(3) of this section apply. The date on which the Secretary signs a new provisional program participation agreement (PPPA);~~

(ii) The date on which the Secretary notifies the institution that its application is denied; or

~~(iii) The last day of the month following the month in which the change of ownership occurred, unless the provisions of paragraph (h)(3) of this section apply. The date on which the Secretary co-signs a new provisional program participation agreement (PPPA).~~

(3) If the ~~provisional~~TPPPA will expire under the provisions of paragraph (h)(2)(i) of this section, the Secretary extends the provisional TPPPA on a month-to-month basis after the expiration date described in paragraph (h)(2)(iii) of this section if, prior to that expiration date, the institution provides the Secretary with the financial information required under 34 CFR 668.176.

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~~(i) A “same day” balance sheet showing the financial position of the institution, as of the date of the ownership change, that is prepared in accordance with Generally Accepted Accounting Principles (GAAP) published by the Financial Accounting Standards Board and audited in accordance with Generally Accepted Government Auditing Standards (GAGAS) published by the U.S. General Accounting Office;~~

~~(ii) If not already provided, approval of the change of ownership from the State in which the institution is located by the agency that authorizes the institution to legally provide postsecondary education in that State;~~

~~(iii) If not already provided, approval of the change of ownership from the institution's accrediting agency; and~~

~~(iv) A default management plan unless the institution is exempt from providing that plan under 34 CFR 668.14(b)(15).~~

§ 600.21 Updating application information.

(a) Reporting requirements. Except as provided in paragraph (b) of this section, an eligible institution must report to the Secretary in a manner prescribed by the Secretary no later than 10 days after the change occurs, of any change in the following:

* * *

(6)(i) Changes in ownership. An eligible institution must report any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and subject to the requirements of § 600.20(g) and (h), whereby a natural person or entity acquires at least a 5 percent ownership interest (direct or indirect) of the institution.

(ii) Changes in control. A natural person or legal entity's ability to affect substantially the actions of the institution if that natural person or legal entity did not previously have this ability. The Secretary considers a natural person or legal entity to have this ability if ~~the person~~—

(iA) The natural person acquires, ~~holds~~ alone or together with another member or members of his or her ~~their~~ family, at least a 25 percent “ownership or voting interest” in the institution (direct or indirect) as defined in § 600.31(b);

(iB) The entity acquires, alone or together with an affiliated natural person or entity, at least a 25 percent ownership or controlling interest in the institution (direct or indirect) as defined in § 600.31(b);

(iC) The natural person or entity acquires, ~~represents or holds~~, either alone or together with another natural person or entity, under a voting trust, power of attorney, proxy, or similar agreement at least a 25 percent “ownership or controlling interest” in the institution (direct or indirect), as defined in § 600.31(b); or

(iD) The natural person becomes ~~is~~ a general partner, managing member, ~~the~~ chief executive officer, ~~or~~ chief financial officer, **director, or other officer** of the institution or of an entity which has at least a 25 percent ownership or controlling interest in the institution (direct or indirect) as defined in § 600.31(b); or

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(14E) The entity becomes a general partner or managing member of an entity which has at least a 25 percent ownership or controlling interest in the institution (direct or indirect) as defined in § 600.31(b).

* * *

(14) In addition to the reporting required by paragraphs (a)(6) and (b) of this section, any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and subject to the requirements of § 600.20(g) and (h), including the addition or elimination of any entities in the ownership structure, a change of entity from one type of business structure to another, and any excluded transactions under § 600.31(e).

(15) In addition to the reporting required by paragraphs (a)(6), (a)(14) and (b) of this section, any change in the ownership of the institution that does not result in a change of control as described in § 600.31 and subject to the requirements of § 600.20(g) and (h), whereby a natural person or entity acquires at least a 5 percent ownership interest (direct or indirect) of the institution.

§ 600.31 Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions.

(a)

(1) Except as provided in paragraph (a)(2) of this section, a private nonprofit, private for-profit, or public institution that undergoes a change in ownership that results in a change in control ceases to qualify as an eligible institution upon the change in ownership and control. A change of ownership that results in a change in control includes any change by which a person who has or thereby acquires an ownership interest in the entity that owns the institution or the parent of that entity, acquires or loses the ability to control the institution.

(2) If a private nonprofit, private for-profit, or public institution has undergone a change in ownership that results in a change in control, the Secretary may, under the provisions of § 600.20(g) and (h), continue the institution's participation in the title IV, HEA programs on a provisional basis, provided that the institution submits, under the provisions of § 600.20(g), a materially complete application -

(i) No later than 10 business days after the change occurs; or

(ii) For an institution owned by a publicly-traded corporation, no later than 10 business days after the institution knew, or should have known of the change based upon SEC filings, that the change occurred.

(3) In order to reestablish eligibility and to resume participation in the title IV, HEA programs, the institution must demonstrate to the Secretary that after the change in ownership and control -

(i) The institution satisfies all the applicable requirements contained in §§ 600.4, 600.5, and 600.6, except that if the institution is a proprietary institution of higher education or postsecondary vocational institution, it need not have been in existence for two years before seeking eligibility; and

(ii) The institution qualifies to be certified to participate under 34 CFR part 668, subpart B.

(b) Definitions. The following definitions apply to terms used in this section:

Closely-held corporation. Closely-held corporation (including the term "close corporation") means -

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(1) A corporation that qualifies under the law of the State of its incorporation or organization as a statutory close~~close~~ly held corporation; or

(2) If the State of incorporation or organization has no ~~definition of closely held corporation~~statutory close corporation provision, a corporation the stock of which -

- (i) Is held by no more than 30 persons; and
- (ii) Has not been and is not planned to be publicly offered.

Control. Control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Ownership or ownership interest.

(1) Ownership or ownership interest means a legal or beneficial interest in an institution or its corporate parent, or a right to share in the profits derived from the operation of an institution or its corporate parent.

(2) For purposes of determining whether a change in ownership has occurred, changes in the ownership of the following are not included - Ownership or ownership interest does not include an ownership interest held by-

- (i) A mutual fund that is regularly and publicly traded;
- (ii) A U.S. institutional investor, as defined in 17 CFR 240.15a-6(b)(7);
- (iii) A profit-sharing plan of the institution or its corporate parent, provided that all full-time permanent employees of the institution or its corporate parent are included in the plan; or
- (iv) An employee stock ownership plan (ESOP).

Parent. The parent or parent entity is the entity that controls the specified entity directly or indirectly through one or more intermediaries.

Person. Person includes a legal entity or a natural person.

Wholly-owned subsidiary. A wholly-owned subsidiary is one substantially all of whose outstanding voting securities are owned by its parent together with the parent's other wholly-owned subsidiaries.

(c) Standards for identifying changes of ownership and control -

(1) Closely-held corporation. A change in ownership and control occurs when -

- (i) A person acquires more than 50 percent of the total outstanding voting stock of the corporation;
- (ii) A person who holds an ownership interest in the corporation acquires control of more than 50 percent of the outstanding voting stock of the corporation; or
- (iii) A person who holds or controls 50 percent or more of the total outstanding stock of the corporation ceases to hold or control that proportion of the stock of the corporation.

(2) Publicly traded corporations required to be registered with the Securities and Exchange Commission (SEC). A change in ownership and control occurs when -

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(i) A person acquires such ownership and control of the corporation so that the corporation is required to file a Form 8K with the SEC notifying that agency of the change in control; or

(ii) (A) A person who is a controlling shareholder of the corporation ceases to be a controlling shareholder. A controlling shareholder is a shareholder who holds or controls through agreement both 25 percent or more of the total outstanding voting stock of the corporation and more shares of voting stock than any other shareholder. A controlling shareholder for this purpose does not include a shareholder whose sole stock ownership is held as a U.S. institutional investor, as defined in 17 CFR 240.15a-6(b)(7), held in mutual funds, held through a profit-sharing plan, or held in an Employee Stock Ownership Plan (ESOP).

(B) When a change of ownership occurs as a result of paragraph (c)(2)(ii)(A) of this section, the institution may submit its most recent quarterly financial statement as filed with the SEC, along with copies of all other SEC filings made after the close of the fiscal year for which a compliance audit has been submitted to the Department of Education, instead of the "same day" balance sheet.

(C) If a publicly-traded institution is provisionally certified due to a change in ownership under paragraph (c)(2)(ii) of this section, and that institution experiences another change of ownership under paragraph (c)(2)(ii) of this section, an approval of the subsequent change in ownership does not extend the original expiration date for the provisional certification provided that any current controlling shareholder was listed on the change of ownership application for which the original provisional approval was granted.

(3) Other entities.

(i) The term "other entities" means any entity which is not closely held nor required to be registered with the SEC, and includes ~~includes~~ limited liability companies, limited liability partnerships, limited partnerships, and similar types of legal entities. ~~A change in ownership and control of an entity that is neither closely held nor required to be registered with the SEC occurs when—~~

(ii) The Secretary deems the following changes to constitute a change in ownership resulting in a change of control of such an entity:

(A) A person (or combination of persons) acquires at least 50 percent of the total outstanding voting interests in the entity, or otherwise acquires 50 percent control;

(B) A person (or combination of persons) who holds less than a 50 percent voting interest in an entity acquires at least 50 percent of the outstanding voting interests in the entity, or otherwise acquires 50 percent control;

(C) A person (or combination of persons) who holds at least 50 percent of the voting interests in the entity ceases to hold at least 50 percent voting interest in the entity, or otherwise ceases to hold 50 percent control;

(D) A partner in a general partnership acquires or ceases to own at least 50 percent of the voting interests in the general partnership, or otherwise acquires or ceases to hold 50 percent control;

(E) Any change of a general partner of a limited partnership (or similar entity) if that general partner also holds an equity interest;

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(F) Any change in a managing member of a limited liability company (or similar entity) if that managing member also holds an equity interest;

(G) Notwithstanding its voting interests, a person becomes the sole member or shareholder of a limited liability company or other entity which has a ~~acquires or ceases to hold~~ a 100 percent or equivalent direct or indirect interest in the institution;

(H) Notwithstanding its voting interests, a person is replaced as the sole member or shareholder of a limited liability company or other entity which has a 100 percent or equivalent direct or indirect interest in the institution; or ~~or~~

(I) The addition or removal of any person that provides or will provide the financial statements to meet any of the requirements of § 600.20(g), (h) or ~~Subpart L of 34 CFR part 668, subpart L.~~

(iii) The Secretary deems the following interests to satisfy the 50 percent thresholds described above:

(A) A combination of persons, although each with less than 50 percent voting or controlling interest in an entity, hold a combined voting interest of at least 50 percent as a result of proxy agreements, voting agreements or other agreements ~~(whether or not the agreement is set forth in a written document)~~, or by operation of State law;

(B) A combination of persons, although each with less than 50 percent voting or controlling interest in an entity, hold a combined voting or controlling interest of at least 50 percent as a result of common management and control of that entity, either directly or indirectly; or

(C) A combination of individuals who are family members as defined in § 600.21, although each with less than 50 percent voting or controlling interest in an entity, hold a combined voting or controlling interest of at least 50 percent.

(D) Notwithstanding the foregoing-

(1) If a person who alone or in combination with other persons (as described in paragraphs (c)(3)(i)-(iii) of this section) has less than a 50 percent voting or controlling interest in an entity, the Secretary may determine that the person, either alone or in combination with other persons, has actual control over that entity and is subject to the requirements of this section.

(2) Any person who alone or in combination with other persons has the right to appoint a majority of any class of board members of an entity or an institution is deemed to have control.

~~(i) A person who has or acquires an ownership interest acquires both control of at least 25 percent of the total of outstanding voting stock of the corporation and control of the corporation; or~~

~~(ii) A person who holds both ownership or control of at least 25 percent of the total outstanding voting stock of the corporation and control of the corporation, ceases to own or control that proportion of the stock of the corporation, or to control the corporation.~~

~~(4) **General partnership or sole proprietorship.** A change in ownership and control occurs when a person who has or acquires an ownership interest acquires or loses control as described in this section.~~

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(5) Wholly owned subsidiary. An entity that is a wholly owned subsidiary changes ownership and control when its parent entity changes ownership and control as described in this section.

(6) Nonprofit institution. A nonprofit institution changes ownership and control when a change takes place that is described in paragraph (d) of this section.

(7) Public institution. The Secretary does not consider that a public institution undergoes a change in ownership that results in a change of control if there is a change in governance and the institution after the change remains a public institution, provided -

(i) The new governing authority is in the same State as included in the institution's program participation agreement; and

(ii) The new governing authority has acknowledged the public institution's continued responsibilities under its program participation agreement.

(d) Covered transactions. For the purposes of this section, a change in ownership of an institution that results in a change of control may include, but is not limited to -

(1) The sale of the institution;

(2) The transfer of the controlling interest of stock of the institution or its parent corporation;

(3) The merger of two or more eligible institutions;

(4) The division of one institution into two or more institutions;

(5) The transfer of the liabilities of an institution to its parent corporation;

(6) A transfer of assets that comprise a substantial portion of the educational business of the institution, except where the transfer consists exclusively in the granting of a security interest in those assets; or

(7) A change in status as a for-profit, nonprofit, or public institution.

(e) Excluded transactions. A change in ownership and control reported under § 600.21 and otherwise subject to this section does not include a transfer of ownership and control of all or part of an owner's equity or partnership interest in an institution, the institution's parent corporation, or other legal entity that has signed the institution's Program Participation Agreement -

(1) From an owner to a "family member" of that owner as defined in § 600.21(f); ~~or~~

(2) Upon the ~~retirement or~~ death of the owner; or

(3) Upon the resignation from the operation of the institution by an individual owner who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer, to another individual owner ~~person~~ with a direct or indirect ownership interest in the institution who has been involved in the management of the institution for at least two years preceding the transfer and who has established and retained the ownership interest for at least two years prior to the transfer.