



4000-01

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840-AD22

[Docket ID ED-2015-OPE-0103]

Student Assistance General Provisions

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final rule with request for comments.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations governing participation in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (title IV, HEA programs). The amended regulations update the Department's hearing procedures for actions to establish liability against an institution of higher education, and establish procedural rules governing recovery proceedings under the Department's borrower defense regulations.

DATES: Effective date: These regulations are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment due date: We will accept comments on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. We may consider the comments received and may conduct additional rulemaking based on the comments.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

If you are submitting comments electronically, we strongly encourage you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Portable Document Format (PDF), we strongly encourage you to convert the PDF to print-to-PDF format or to use some other commonly used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the U.S. Department of Education (the Department) to electronically search and copy certain portions of your submissions.

- Federal eRulemaking Portal: Go to 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 "Help."

- Postal Mail, Commercial Delivery, or Hand Delivery: The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your

comments about these regulations, address them to Jean-Didier Gaina, U.S. Department of Education, 400 Maryland Ave., SW., room 6W232B, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Annmarie Weisman, U.S. Department of Education, 400 Maryland Avenue, SW., room 6W425, Washington, DC 20202-6244. Telephone: (202) 453-6712 or by email: annmarie.weisman@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

As discussed below, these regulations do not establish substantive policy, but instead establish procedures that must be followed. As procedural regulations, there is no requirement for a comment period. Although these regulations are final regulations, we are interested in whether you think we should make any changes in these regulations and thus we are inviting

your comments. We will consider these comments in determining whether to revise the regulations. To ensure that your comments have maximum effect, we urge you to identify clearly the specific section or sections of the regulations that each of your comments addresses and to arrange your comments in the same order as the regulations. See ADDRESSES for instructions on how to submit comments.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirements of reducing regulatory burden that might result from these regulations. 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 programs and activities.

During and after the comment period, you may inspect all public comments about these regulations by accessing Regulations.gov. You may also inspect the comments in person in room 6W245, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays. If you want to schedule time to inspect comments, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply 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 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.

Background

On November 1, 2016, the Department of Education promulgated new regulations governing the William D. Ford Federal Direct Loan Program to establish a new Federal standard and a process for determining whether a borrower has a defense to repayment on a loan based on an act or omission of a school (the borrower defense regulations). If the Department determines that a borrower is eligible for relief under the borrower defense regulations, it has the authority to recover losses stemming from such borrower relief from the institution whose conduct gave rise to the borrower defense. These regulations establish the procedural rules that would govern such borrower defense and institutional recovery proceedings, and are designed to ensure that institutions are afforded a full and fair opportunity to defend themselves in such proceedings.

These regulations amend the Department's existing regulations governing proceedings to assess a fine, limitation,

suspension, or termination against an institution by adding procedures for a recovery proceeding under the borrower defense regulations. Such a proceeding may be used when pursuing an action under either the Department's new borrower defense regulation at 34 CFR 685.222 or its precursor at 34 CFR 685.206. These regulations are designed to balance important interests by ensuring that institutions are protected by due process of law prior to the imposition of any monetary liability under the borrower defense regulations, while also ensuring that determinations of the validity of borrower defense claims asserted against institutions are resolved fairly, efficiently, and expeditiously for all parties. In addition, these regulations clarify and update the procedural provisions more broadly applicable to fine, limitation, suspension, and termination proceedings.

Under the borrower defense regulations at 34 CFR 685.222, effective July 1, 2017, the applicable process for filing and reviewing claims will depend on whether a borrower's application is considered by the Department as an individual claim or if the Department identifies the application as factually similar to other applications such that the Department identifies a group of borrowers (potentially including borrowers who have not submitted applications) with similar claims. The process will also depend on whether the relevant institution is "open" or

"closed", as those terms are described in the regulations. See 34 CFR 685.222(g) through(h).

The Department has the authority to pursue claims for recovery for losses that the Department has already incurred in granting individual borrower relief, either as stand-alone actions or in combination with group proceedings where those individual claims presented the same facts and circumstances as the group claims. In those instances, the determination of the validity of the individual's discharge claim does not depend on the hearing official's decision, and the Department does not rescind a discharge already granted to an individual if the Department does not succeed in proving the validity of that claim in this proceeding.

Beginning July 1, 2017, the Department will use these procedural regulations both to determine the validity of borrower claims the Department asserts on behalf of borrowers in group claims against "open" institutions, and to hold the institutions liable for losses on those claims in accordance with 34 CFR 685.222(h). In these instances, the hearing official determines the validity of the borrower claims and, correspondingly, whether relief will be granted to these group borrowers. Borrowers may opt out of the group process. When the Department seeks to recover for losses for claims approved under current authority and before July 1, 2017, the Department

will use the procedures in these regulations to pursue recovery from the institution. As with any other proceedings to recover on claims already approved, the outcome of a proceeding brought to recover for claims already approved prior to July 1, 2017 will not affect relief already granted to borrowers, but only the accountability of the institution. At its discretion, the Department may also use these regulations to bring actions against "closed" institutions, as defined in 34 CFR 685.222(g), in order to establish an institution's liability for damages due to the Department as a result of individual or group borrower defense relief.

The Department bears the burden of proof in any recovery action against an institution for all claims the Department asserts. The Department must therefore prove the merit of the claims it asserts for members of the group. A hearing official will determine the merit of the claims, the relief for members of the group, and the liability of the institution. The Department must also prove in the hearing process the merit of claims it asserts for losses on discharges it has already approved as individual claims, although, as previously indicated, individual discharges already granted by the Department will not be affected if the Department is not successful in proving the claim in this proceeding against the institution.

These regulations are only applicable to actions initiated by the Department to fine an institution, to limit, suspend, or terminate the eligibility of an institution or servicer, or to recover from an institution for losses from borrower defense claims, and do not encompass the process by which the Department evaluates individual borrower claims or claims for which the Department does not seek to obtain a recovery. That process is set forth in the borrower defense regulations at 34 CFR 685.222(e). In addition, the Department plans to issue a borrower guide before the borrower defense regulations go into effect to ensure borrowers understand the application process and criteria for seeking debt relief.

Waiver of Proposed Rulemaking, Negotiated Rulemaking, and Delayed Effective Date

Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. These regulations only govern the procedures for initiating an action against an institution and the hearing rules applicable to such a proceeding. As such, these regulations make procedural changes only and do not establish substantive policy. The regulations are therefore rules of agency practice and procedure, and exempt from notice and comment rulemaking under 5 U.S.C. 553(b) (A). However, the Department is providing a 60-day comment period and

invites interested persons to participate in this rulemaking by submitting written comments. The Department may consider the comments received and may conduct additional rulemaking based on the comments.

The APA also generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). Again, because these final regulations are merely rules of agency practice and procedure, there is good cause to make them effective on the day they are published. For the same reasons, the Secretary has determined, under section 492(b)(2) of the HEA, 20 U.S.C. 1098a(b)(2), that these regulations should not be subject to negotiated rulemaking.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this 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 a rule 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 an "economically significant" rule);

(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 stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency-

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In

choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, 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 the Department's programs and activities. There are no costs additional to those described under Regulatory Impact Analysis in the notice of final regulations for the borrower defense regulations published in the Federal Register on November 1, 2016 (81 FR 75926). These regulations will benefit institutions by ensuring that, in any action to fine an institution, to limit, suspend, or terminate the eligibility of an institution to participate in the title IV, HEA programs, or to determine the validity of claims against the institution, there are established procedures that provide both

due process as well as an efficient process for the timely resolution of claims.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "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 regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the regulations clearly stated?
- Do the regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the 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, §668.81.)
- Could the description of the regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the regulations easier to understand? If so, how?

- What else could we do to make the regulations easier to understand?

To send any comments that concern how the Department could make these regulations easier to understand, see the instructions in the ADDRESSES section.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The small entities that are affected by these regulations are small postsecondary institutions. These regulations do not have a significant economic impact on these entities because all substantive rules that govern determinations of liability have already been established in the Department's borrower defense regulations promulgated November 1, 2016.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control number assigned to a collection of information in final regulations at the end of the affected section of the regulations.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these regulations 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.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the Federal Register, in text or PDF. To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the Federal Register by using the article search feature at: www.federalregister.gov. Specifically, through the advanced

search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Number: 84.268, Federal Direct Student Loans)

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

Dated: January 11, 2017.

John B. King, Jr.,
Secretary of Education.

For the reasons discussed, the Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

AUTHORITY: 20 U.S.C. 1001-1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c-1, 1221e-3, and 3474, unless otherwise noted.

2. Section 668.81 is amended by:

- A. Adding paragraph (a) (5).
- B. Adding paragraphs (e) through (g).
- C. Revising the authority citation.

The additions and revision read as follows:

§ 668.81 Scope and special definitions.

(a) * * *

(5) The determination of--

(i) Borrower defense to repayment claims that are brought by the Department against an institution under § 685.206 or § 685.222; and

(ii) Liability of an institution to the Secretary for losses to the Secretary arising from these claims.

* * * * *

(e) The proceedings described in this subpart provide the institution's sole opportunity for a hearing on the existence

and amount of the debt that is required by applicable law prior to the Department collecting the debt from any available funds, including but not limited to offsetting the debt or any liability against funds to be provided to an institution pursuant to any Title IV, HEA program in which that institution participates.

(f) Nothing contained in this subpart limits the right of the Department to gather information, including by subpoena, or conduct any examination, audit, program review, investigation, or other review authorized by other applicable law.

(g) Unless directed by a court of competent jurisdiction, the hearing official, or the Secretary for good cause, if a collateral attack is brought in any court concerning all or any part of any proceeding under this subpart, the challenged proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to timely act as directed in a proceeding authorized by this subpart shall be excused based on the pendency of such court proceeding.

(Authority: 20 U.S.C. 1094)

§ 668.83 [Amended]

3. In § 668.83(f)(1), remove “§ 668.90(c)” and add, in its place, “§ 668.91(c)”.

4. In § 668.84 revise paragraphs (b)(3) and (b)(4) to read as follows:

§ 668.84 Fine proceedings.

* * * * *

(b) * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b) (1) (iii) of this section, the designated department official transmits the request for hearing and response to the Office of Hearings and Appeals, which sets the date and the place. The date is at least 15 days after the designated department official receives the request.

(4) A hearing official conducts a hearing in accordance with § 668.89.

* * * * *

5. Section 668.85 is amended by:

A. In paragraph (b) (1) (iii), removing “§ 668.90(b) (2)” and adding, in its place, “§ 668.91(b) (2)”.

B. Revising paragraph (b) (3).

C. In paragraph (b) (4), removing “§ 668.88” and adding, in its place, “§ 668.89”.

The revision reads as follows:

§ 668.85 Suspension proceedings.

* * * * *

(b) * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b) (1) (iii) of this section, the

designated department official transmits the request for hearing and response to the Office of Hearings and Appeals, which sets the date and the place. The date is at least 15 days after the designated department official receives the request. The suspension does not take place until the requested hearing is held.

* * * * *

6. Section 668.86 is amended by:

A. In paragraph (a) (3), removing “§§ 668.93 and 668.94” and adding, in its place, “§§ 668.94 and 668.95”.

B. Revising paragraphs (b) (3) and (b) (4).

The revisions read as follows:

§ 668.86 Limitation or termination proceedings.

* * * * *

(b) * * *

(3) If the institution or servicer requests a hearing by the time specified in paragraph (b) (1) (iii) of this section, the designated department official transmits the request for hearing and response to the Office of Hearings and Appeals, which sets the date and place. The date is at least 15 days after the designated department official receives the request. The limitation or termination does not take place until after the requested hearing is held.

(4) A hearing official conducts a hearing in accordance with § 668.89.

* * * * *

§§ 668.87 through 668.98 [Redesignated as §§ 668.88 through 668.99]

7. Redesignate §§ 668.87 through 668.98 as §§ 668.88 through 668.99.

8. Add § 668.87 to read as follows:

§668.87 Borrower defense and recovery proceedings.

(a) Procedures. (1) A designated department official begins a borrower defense and recovery proceeding against an institution by sending the institution a notice by certified mail, return receipt requested. This notice--

(i) Informs the institution of the Secretary's intent--

(A) To determine the validity of borrower defense claims on behalf of a group under § 685.222(h), to demonstrate the validity of borrower defense claims already approved, or both, as applicable; and

(B) To recover from the institution by offset, by claim on a letter of credit or other protection provided by the institution, or otherwise, for losses on account of borrower defense claims asserted on behalf of the group and borrower defense claims already approved, as applicable;

(ii) Includes a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted within the statement, and recover for the amount of losses to the Secretary caused by the granting of such relief;

(iii) Specifies the date on which the Secretary intends to take action to recover the amount of losses arising from the granting of such relief, which date will be at least 20 days from mailing of the notice of intent and informs the institution that the Secretary will not take action to recover the amount of such loss on the date specified if the designated department official receives, by that date, a written response from the institution indicating why the Secretary should not recover. The notice shall also inform the institution that if it wishes to request a hearing pursuant to this subpart, the institution must include such a request with its written response; and

(iv) Informs the institution whether the designated Department official intends to proceed with--

(A) A single action; or

(B) An action in two phases--

(1) The determination whether the institution's act or omission gave rise to valid borrower defense claims; and

(2) The determination of the amount of borrower defense relief.

(2) Although the hearing official shall have the discretion to bifurcate proceedings with, or without, a motion of either party, any decision by the designated department official to bifurcate the proceeding in accordance with paragraph (a) (1) (iv) (B) of this section may only be modified on motion with good cause shown.

(3) A hearing official conducts a hearing in accordance with § 668.89.

(b) Effect of a response by the institution. (1) If the institution submits a written response, but does not therein request a hearing, the designated department official, after considering that material, notifies the institution whether the Secretary will take the proposed recovery action for borrower defense claims and, if so, the date of such action and the amount of losses.

(2) If the institution submits a response and requests a hearing by the time specified in the notice under paragraph (a) (1) (iii) of this section, the designated department official may, in that official's sole discretion, withdraw the notice or transmit the response and request for hearing to the Office of Hearings and Appeals, which sets the date and the place for the hearing. The date of the hearing is at least 15 days after the designated department official receives the request. No liability shall be imposed on the institution prior to the

hearing.

(c) Limitations on participation. The parties in any borrower defense and recovery proceeding are the Department and the institution(s) against which the Department seeks to recover losses caused to the Department as a result of borrower defense relief. Borrowers are not permitted to intervene or appear in this proceeding, either on their own behalf or on behalf of any purported group, except as witnesses put forth by either party. However, nothing in this section limits the rights available to borrowers under other regulations, including 34 CFR 685.206 and 685.222.

(d) Effect on the borrower. No proceeding under this subpart imposes liability on any borrower who has already obtained a discharge in an individual proceeding under 34 CFR 685.206(c) or 34 CFR 685.222(e). A borrower defense and recovery proceeding may determine whether and how much relief is due to, and whether and how much of a loan remains owing by, a borrower participating in a group process proceeding as defined in 34 CFR 685.222(f) through (h).

(Authority: 20 U.S.C. 1087a et seq., 1094)

9. Revise newly redesignated § 668.88 to read as follows:
§ 668.88 Prehearing conference and motion practice.

(a) A hearing official may convene a prehearing conference if he or she thinks that the conference would be useful, or if

the conference is requested by--

(1) The designated department official who brought a proceeding against an institution or third-party servicer under this subpart; or

(2) The institution or servicer, as applicable.

(b) The purpose of a prehearing conference is to allow the parties to settle or narrow the dispute.

(c) If the hearing official, the designated department official, and the institution, or servicer, as applicable, agree, a prehearing conference may consist of--

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

(d) A non-dispositive motion shall be made, if at all, consistent with any procedures set forth by the hearing official. In the absence of such procedures, non-dispositive motions shall be permitted, and responses to such motions shall be permitted though not required.

(e) (1) A party may make a motion for summary disposition asserting that the undisputed facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition establish that--

(i) There is no genuine issue as to any material fact; and
(ii) The moving party is entitled to a decision in its favor as a matter of law.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by evidence that the moving party contends support his or her position. The motion must be accompanied by a brief containing the points and authorities supporting the motion. Any party may oppose such a motion by filing a response setting forth those material facts as to which he or she contends a genuine dispute exists. Such response must be supported by evidence of the same type as may be submitted in support of a motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(f) A motion under consideration by the Secretary or the hearing official shall not stay proceedings before the hearing official unless the Secretary or the hearing official, as appropriate, so orders.

(Authority: 20 U.S.C. 1094)

10. Revise newly redesignated § 668.89 to read as follows:
§ 668.89 Hearing.

(a) A hearing is an orderly presentation of arguments and

evidence conducted by a hearing official. At the discretion of the hearing official, any right to a hearing may be satisfied by one or more of the following: summary disposition pursuant to § 668.88(e), with or without oral argument; an oral evidentiary hearing conducted in person, by telephone, by video conference, or any combination thereof; or a review limited to written evidence.

(b) (1) Notwithstanding any provision to the contrary, the hearing official sets the procedures to be used in the hearing, and may take steps to expedite the proceeding as appropriate.

(2) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable. However, discussions of settlement between the parties or the terms of settlement offers are not admissible to prove the validity or invalidity of any claim or defense.

(3) (i) The proponent of any factual proposition has the burden of proof with respect thereto.

(ii) The designated department official has the burden of persuasion in any fine, suspension, limitation, or termination proceeding under this subpart.

(iii) The designated department official has the burden of persuasion in a borrower defense and recovery action; however, for a borrower defense claim based on a substantial misrepresentation under § 682.222(d), the designated department

official has the burden of persuasion regarding the substantial misrepresentation, and the institution has the burden of persuasion in establishing any offsetting value of the education under § 685.222(i)(2)(i).

(4) Discovery, as provided for under the Federal Rules of Civil Procedure, is not permitted.

(5) The hearing official accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(6) The hearing official may restrict the number of witnesses or exclude witnesses to avoid undue delay or presentation of cumulative evidence. Any witness permitted to appear may do so via telephonic, video, or other means, with the approval of the hearing official.

(7) Either party may call qualified expert witnesses. Each party will be limited to calling three expert witnesses, as a matter of right, including any rebuttal or surrebuttal witnesses. Additional expert witnesses shall be allowed only by order of the hearing official, granted only upon a showing of good cause.

(i) At a date set by the hearing official, each party shall serve the other with any report prepared by each of its expert witnesses. Each party shall serve the other party with a list of any rebuttal expert witnesses and a rebuttal report

prepared by each such witness not later than 60 days after the deadline for service of expert reports, unless another date is set by the hearing official. A rebuttal report shall be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. If material outside the scope of fair rebuttal is presented, a party may file a motion not later than five days after the deadline for service of rebuttal reports, seeking appropriate relief with the hearing official, including striking all or part of the report, leave to submit a surrebuttal report by the party's own experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(ii) No party may call an expert witness at the hearing unless the party has listed the expert and has provided reports as required by this section.

(iii) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which

the witness has testified or sought to testify as an expert at trial or hearing, or by deposition, within the preceding four years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(8) (i) Except as provided in paragraph (b) (8) (ii) of this section, if an institution has been required through compulsory process under section 490A of the HEA or other applicable law to submit to the United States or to the Department material regarding an express or an implied representation, the institution cannot thereafter, in any proceeding under this subpart in which it is alleged that the representation was false, erroneous, or misleading, and for any purpose relating to the defense of such allegation, introduce into the record, either directly or indirectly through references contained in documents or oral testimony, any material of any type that was required to be but was not timely submitted in response to that compulsory process.

(ii) The hearing official shall, upon motion at any stage, exclude all material that was required to be but was not timely submitted in response to a compulsory process described in paragraph (b) (8) (i) of this section, or any reference to such material, unless the institution demonstrates, and the hearing official finds, that by the exercise of due diligence the

material could not have been timely submitted in response to the compulsory process, and the institution notified the Department or such other party that issued the order to produce, of the existence of the material immediately upon its discovery. The hearing official shall specify with particularity the evidence relied upon.

(9) When issues not raised in the notice of proposed action are tried without objection at the hearing, they will be treated in all respects as if they had been raised in the notice of proposed action, and no formal amendments are required.

(c) The hearing official makes a transcribed record of the proceeding and makes a copy of the record available to the designated Department official and to the institution or servicer.

(Authority: 20 U.S.C. 1094)

11. Newly redesignated §668.91 is amended by:

- A. Redesignating paragraph (a) (2) as paragraph (a) (2) (i).
- B. In newly redesignated paragraph (a) (2) (i) adding "or recovery" after "fine, limitation, suspension, or termination".
- C. Adding paragraph (a) (2) (ii).
- D. Removing the second sentence in paragraph (a) (4).
- E. Adding paragraph (c) (2) (x).

The additions read as follows:

§ 668.91 Initial and final decisions.

(a) * * *

(2) (i) * * *

(ii) In a borrower defense and recovery proceeding conducted in two phases under § 668.87(a)(1)(iv)(B), the hearing official's initial decision determines whether the institution is liable for the act or omission described in the notice of intent to recover, and the hearing official issues an initial decision on liability only.

* * * * *

(c) * * *

(2) * * *

(x) In a borrower defense and recovery proceeding conducted in two phases under § 668.87(a)(1)(iv)(B), if a party appeals an initial decision of the hearing official in the first phase, the Secretary may affirm, modify, or reverse the initial decision, or may remand the case to the hearing official for further proceedings consistent with the Secretary's decision.

* * * * *

§ 668.96 [Amended]

12. Newly redesignated § 668.96 is amended by:

A. In paragraph (a) removing the word "The" and adding, in its place, the words "In an action to fine an institution or servicer, or to limit, suspend, or terminate the participation of an institution or the eligibility of a servicer, the".

B. In paragraph (b), after the words "The corrective action", adding the words "under paragraph (a) of this section".

C. In paragraph (c), after the word "decision", adding the words "in any action under this subpart".

§ 668.99 [Amended]

13. In newly redesignated paragraph (c) of § 668.99, remove "§ 668.91(a)(4)" and add, in its place, "§ 668.92(a)(4)".

[FR Doc. 2017-00972 Filed: 1/18/2017 8:45 am; Publication Date: 1/19/2017]