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DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1880-AA87

Student Assistance General Provisions

AGENCY: Office of Hearings & Appeals, Office of Management, Department of Education.

ACTION: Final regulations.

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 implement the Office of Hearings & Appeals (OHA) Electronic Filing System, which provides a Web-based interface for the submission of documents in administrative litigation involving enforcement and compliance with requirements of Title IV, HEA programs. The OHA Electronic Filing System (OES) permits documents to be submitted electronically in an Adobe Portable Document Format (PDF) directly to OHA through standard Web-based screens and prompts.

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

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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: These regulations implement
changes governing filing procedures in proceedings before
the OHA. The changes allow parties participating in
administrative adjudications involving Title IV, HEA
programs to file documents electronically. The changes
include removing the requirement that evidence must be
filed at the time a postsecondary institution or third-
party servicer files a request for review of a final audit
determination or a final program review determination. The
Secretary modified this requirement by holding that
evidence filed after a request for review is filed may be
considered by the hearing official, notwithstanding the
rule codified by 34 CFR 668.116(e). See, In re Baytown
Technical School, Inc., Docket No. 91-40-SP, U.S. Dep't of
Educ. (April 12, 1994). For nearly two decades, the
Department's hearings officials have followed the

Secretary's decision. This revision brings the regulations into conformity with the Secretary's ruling.

The amended regulations also remove a requirement imposed by existing regulations mandating that certain filings be submitted by hand delivery or certified mail. The new procedures offer litigants an alternative to using current paper-based procedures for the submission of documents. The amended regulations allow any filing to be submitted to OHA electronically by use of the OES, which is a Web-based interface that is accessible 24 hours every day. The OES provides administrative litigants with an acknowledgement of receipt of filings and records at the time of submission. The OES generates email notifications when a document filed electronically has been received and has been accepted.

To use the OES, a party must notify OHA and the opposing party of its intention to submit filings electronically through OES. Each party is free to elect to use the OES filing system, and may decline to do so. The regulations require each party to deliver a copy of any filing to the opposing party. If both parties have notified OHA and each other of their intent to use the OES, the parties may satisfy both their obligation to submit a filing to OHA as well as their obligation to deliver a copy

of any filing to the opposing party simply by filing that document with OHA through the OES and obtaining confirmation of its acceptance. The OES generates notice to the opposing party that the document so filed has been accepted and is available on the OES. No further action is needed to serve a copy of that filing with the opposing party.

If, however, a party who wishes to file through the OES has not received an affirmative agreement by the opposing party to use the OES, the party that files through the OES must, as under current regulations, deliver a copy of the filing to the opposing party by mail, by facsimile transmission, or by hand-delivery. In addition, the parties are free to agree to meet their respective obligations by any other means, including transmitting the filing directly by email or other electronic means. Unless a party affirmatively notifies the opposing party that it also chooses to use the OES, the party that elects to file by means of the OES must ensure that any filing it makes through the OES is delivered to the non-electing party by mail, by facsimile transmission, or by hand-delivery, as required under existing regulations.

Furthermore, a party who chooses to file electronically through the OES may do so for some or all

filings in the matter. For those filings not made through the OES, the party must meet all requirements in current regulations for filing with OHA and delivering copies to the opposing party.

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

Under the Administrative Procedure Act (5 U.S.C. 553) (APA), the Department generally offers interested parties the opportunity to comment on proposed regulations. These regulations allow for electronic filing of documents in actions before the OHA, and they remove a deadline for filing evidence when a party requests review of a final audit determination or a final program review determination. As such, these regulations make procedural changes only and do not establish substantive policy. The revised regulations are therefore rules of agency practice and procedure, and the APA does not require notice and comment rulemaking here. See, Bachow Communications Inc. v. FCC, 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are "rules of agency organization, procedure, or practice" and exempt from the APA's notice and comment requirement); see also, Merck & Co., Inc. v. Kessler, 80 F.3d 1543, 1549 (Fed. Cir. 1996) (holding that

rules of practice are not substantive rules to which notice and comment would apply).

In addition, the Secretary has decided to waive the 30-day delay in the effective date of these regulatory changes under 5 U.S.C. 553(d)(3). It is unnecessary because here "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Mack Trucks v. EPA, 682 F.3d 87, 94 (D.C. Cir. 2012). The 30-day delay is unnecessary because we have merely broadened the way the public may file papers, adding electronic filing to the other options that already existed. This is a ministerial change that requires no change in behavior by the public. 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 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 would not unduly interfere with State, local, or 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. However, there are no identifiable or measurable costs expected. The benefit of these regulations is that parties will now have the option of filing documents electronically.

Regulatory Flexibility Act

The Secretary certifies that these regulations do not have a significant economic impact on a substantial number of small entities. The small entities that could be affected by these regulations are small postsecondary institutions. These regulations do not have a significant economic impact on these small entities because the regulations provide a voluntary, alternative means of filing documents in addition to the current methods, which remain available to all parties, including small postsecondary institutions. The amended regulations impose minimal requirements to ensure the proper expenditure of student financial assistance program funds.

Paperwork Reduction Act of 1995

Sections 668.98, 668.113, and 668.124 contain information collection requirements that have already been approved by OMB. The changes in these final regulations do

not alter those approved information collection requirements. Therefore, the Department will not need to submit a copy of those sections to OMB for its review (44 U.S.C. 3504(h)).

Intergovernmental Review

These programs are not subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

Based on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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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: August 2, 2013

Arne Duncan,
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 is revised to read as follows:

AUTHORITY:

20 U.S.C. 1001-1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, and 1099c-1, unless otherwise noted.

2. Section 668.91 is amended by:

A. Revising paragraphs (a)(1) and (4).

B. Adding paragraphs (a)(5), (a)(6), and (b)(2)(v).

The revisions and additions read as follows:

§668.91 Filing of requests for hearings and appeals; confirmation of mailing and receipt dates.

(a) * * *

(1)(i) A request by an institution or third-party servicer for a hearing or show-cause opportunity, or other material submitted by an institution or third-party servicer in response to a notice of proposed action under this subpart, must be filed with the designated department official by hand-delivery, mail, or facsimile transmission.

(ii) An appeal to the Secretary by a party must be filed with the designated department official by hand-

delivery, mail, facsimile transmission, or by use of the Office of Hearings and Appeals Electronic Filing System (OES).

* * * * *

(4)(i) A party may file an appeal to the Secretary, and any other pleading or other document submitted in a proceeding under this subpart, by use of the Office of Hearings and Appeals Electronic Filing System (OES), by hand-delivery, by mail, or by facsimile transmission.

(ii) A party must serve a copy on the other party of any pleading or other document it files, including an appeal to the Secretary, in a proceeding under this subpart. A party must do so by certified mail, return receipt requested; by hand-delivery; or, if agreed upon by the parties, service may also be made by use of the OES or any other means agreed to by the parties.

(iii) A party who agrees to receive a document by any means other than service by certified mail, return receipt requested or hand-delivery may limit that agreement to one or more particular documents.

(iv) A party who agrees to service of a document through the OES thereby agrees that the notice of such filing provided to the party by the OES suffices to meet

any obligation of the filing party under these regulations to provide a copy of that document.

(5) Documents filed using the OES must be transmitted to the designated department official identified in instructions provided by the hearing official as the individual responsible to receive them. A party filing a document using the OES must ensure that the party has received an electronic confirmation that the document was accepted and approved for filing by the OES, and may be required by the designated department official to provide a hard copy of the document.

(6) Electronic documents must be formatted in Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at www.adobe.com.

(b) * * *

(2) * * *

(v) The date a document sent electronically via the OES is recorded as received by the OES as indicated in the confirmation of receipt email for E-filing.

* * * * *

3. Section 668.98 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§668.98 Interlocutory appeals to the Secretary from
rulings of a hearing official.

* * * * *

(c) A copy of the petition must be provided to the hearing official at the time of filing with the Secretary, and a copy of a petition or any certification must be served upon the parties as provided in §668.91(a)(4). The petition or certification must reflect this service.

(d) If a party files a petition under this section, the hearing official may state to the Secretary a view as to whether review is appropriate or inappropriate by submitting a brief statement addressing the party's petition within 10 days of the receipt of that petition by the hearing official. A copy of the statement must be served on all parties in the manner provided in §668.91(a)(4)(ii).

(e) A party's response to a petition or certification for interlocutory review must be filed within 7 days after service of the petition or statement, as applicable, and may not exceed 10 pages, double-spaced, in length. The response must be filed, and a copy served on the other party, as provided in §668.91(a)(4).

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4. Section 668.113 is amended by revising paragraph (b) to read as follows:

§668.113 Request for review.

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(b) The institution or servicer must file its request for review no later than 45 days from the date that the institution or servicer receives the final audit determination or final program review determination.

* * * * *

5. Section 668.116 is amended by revising paragraphs (e)(1)(ii), (iii), (v), and (vi) to read as follows:

§668.116 Hearing.

* * * * *

(e)(1) * * *

(ii) In the case of an institution, institutional audit work papers, records, and other materials.

(iii) In the case of a third-party servicer, the servicer's audit work papers and the records and other materials of the servicer or any institution that contracts with the servicer.

* * * * *

(v) Institutional or servicer records and other materials (including records and other materials of any institution that contracts with the servicer) provided to

the Department of Education in response to a program review.

(vi) Other Department of Education records and materials.

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6. Section 668.122 is amended by revising paragraphs (a) and (c) to read as follows:

§668.122 Determination of filing, receipt, and submission dates.

(a) (1) Appeals and written submissions to a hearing official referred to in this subpart may be hand-delivered, mailed, or filed electronically by use of the Office of Hearings and Appeals Electronic Filing System (OES).

(2) (i) Service on the other party of a document required to be served on another party may be made by mail or by hand delivery, or, if agreed upon by the parties, by use of the OES or by any other means agreed to by the parties. A party who agrees to receive a document filed by another party by any means other than service by mail or hand-delivery may limit that agreement to one or more particular documents.

(ii) A party who agrees to service of a document through the OES thereby agrees that the notice of such filing provided to the party by the OES suffices to meet

any obligation of the filing party under these regulations to provide a copy of that document.

* * * * *

(c) Determination of filing, receipt, or submission dates is based on the date of hand-delivery, the date of receipt recorded by the U.S. Postal Service, the date a document sent electronically by using the OES is recorded as received as indicated in the confirmation of receipt email for E-filing, or for other means, the date on which the delivery is recorded in the medium used for delivery.

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7. Section 668.124 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§668.124 Interlocutory appeals to the Secretary from rulings of a hearing official.

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(c) A copy of the petition must be provided to the hearing official at the time of filing with the Secretary, and a copy of a petition or any certification must be served upon the parties as provided in §668.122(a)(2). The petition or certification must reflect this service.

(d) If a party files a petition under this section, the hearing official may state to the Secretary a view as to whether review is appropriate or inappropriate by

submitting a brief statement addressing the party's petition within 10 days of the receipt of that petition by the hearing official. A copy of the statement must be served on all parties in the manner provided in §668.122(a)(2).

(e) A party's response to a petition or certification for interlocutory review must be filed within 7 days after service of the petition or statement, as applicable, and may not exceed 10 pages, double-spaced, in length. A copy of the response must be served on the parties and the hearing official as provided in §668.122(a)(2).

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